UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 89-433
HERN IRON WORKS, INC.,	:	
Respondent.	:	

DECISION

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

BY THE COMMISSION:

Hern Iron Works, Inc. ("Hern") operates a cast iron foundry in Coeur d'Alene, Idaho, where it employs fifteen to twenty employees. The foundry was inspected by the Occupational Safety and Health Administration ("OSHA") in July, 1988. Based on the inspection, the Secretary issued Hern two citations alleging violations of the Secretary's recordkeeping standards. Citation no. 1 alleged ten willful violations of 29 C.F.R. § 1904.2(a),[1] for Hern's failure to record nine occupational injuries that occurred in 1987 on Form OSHA No. 200 ("the OSHA 200 log"), and for misrecording a tenth injury that

[1] Section 1904.2(a) provides that:

> (a) Each employer shall, except as provided in paragraph (b) of this section, (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred. For this purpose form OSHA No. 200 or an equivalent which is as readable and comprehensible to a person not familiar with it shall be used. The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

occurred in 1986.[2] The Secretary proposed a $10,000 penalty for each of the ten alleged willful violations of the standard.[3] Citation no. 2 alleged nine other-than-serious violations of 29 C.F.R. § 1904.4[4] for Hern's failure to record nine of the ten occupational injuries on Form OSHA No. 101, the supplementary record of workplace injuries and illnesses.[5] No penalty was proposed for the alleged other-than-serious violations.[6] During the hearing, the Secretary voluntarily withdrew willful citation item 1(i) and its concomitant other-than-serious citation item.

Hern contested both citations, and a hearing was held before Administrative Law Judge James H. Barkley. The judge affirmed five willful violations of section 1904.2(a) and four other-than-serious violations of section 1904.4. He assessed penalties of $2000 each for willful violations 1(a), 1(b), 1(e), and 1(g), $5000 for willful violation 1(j), and $200 each for the four other-than-serious violations 2(a), 2(b), 2(e), and 2(g), for a total penalty of $13,800.

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[2] The only violations considered for purposes of the citations issued in this case occurred in calendar years 1986 and 1987.

[3] At the time this case arose, penalties for willful violations were limited to $10,000 and for serious or nonserious violations to $1000. Those amounts have subsequently been raised to $70,000 and $7000, respectively. Section 17 of the Act, 29 U.S.C. § 666, *amended by* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (1990).

[4] Section 1904.4 provides that:

> In addition to the log of occupational injuries and illnesses provided for under § 1904.2, each employer shall have available for inspection at each establishment within 6 working days after receiving information that a recordable case has occurred, a supplementary record for each occupational injury or illness for that establishment. The record shall be completed in the detail prescribed in the instructions accompanying Occupational Safety and Health Administration Form OSHA No. 101. If no acceptable alternative record is maintained for other purposes, Form OSHA No. 101 shall be used or the necessary information shall be otherwise maintained.

[5] Hern used the Idaho Industrial Commission Notice of Injury and Claim for Benefits form in lieu of the OSHA 101 form, as permitted by section 1904.4.

[6] Ryan Kuehmichel, the Area Director for OSHA for the State of Idaho, testified as follows:

> The National Office decided that the two items that were cited as the 200 form and the company 101s were really pretty much of a unit, and they wanted not to double jeopardize, essentially, the company. They wanted to cite the 200 as the willful because that is what we calculated the [lost-work day injury ("LWDI") rate]. The accompanying 101 or worker [compensation] forms they decided were to be other-than-serious.

Hern filed a timely petition for discretionary review, and the Secretary filed a timely conditional cross-petition for discretionary review with respect to the alleged violation of item 1(d) that the judge had vacated.[7] The direction for review was limited to the issues of whether the judge erred in assessing separate penalties for each alleged willful violation of section 1904.2, whether the judge erred in vacating item 1(d), whether the judge erred in finding item 1(j) willful as alleged, and whether the penalty assessment for Citation 1 was appropriate.[8]

I. Issues

A. Whether the judge erred in assessing separate penalties for each violation of 29 C.F.R. § 1904.2.

1. *Whether the Commission can assess separate penalties for each failure to record.*

The Secretary argues that he interprets the penalty provisions of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), as authorizing him to propose multiple penalties for multiple violations of a single standard, and that his interpretation is consistent with the plain language of the Act and the regulations, and therefore should be upheld. He relies on *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984) and *Consumer Prod. Safety Comm. v. GTE Sylvania*, 447 U.S. 102, 108 (1980). The Secretary claims that his interpretation advances the purpose of section 1904.2, which he argues is to develop accurate and complete information for enforcement and to avoid the underreporting of injuries. The Secretary notes that the Commission supported his view of the importance of recordkeeping in *General Motors Corp., Inland Div.*, 8 BNA OSHC 2036, 2040-41, 1980 CCH OSHD ¶ 24,743, p. 30,470 (No. 76-5033, 1980) (the legislative history of the Act indicates that Congress imposed a recording obligation for each recordable injury or illness in order to foster accuracy and completeness).

The Secretary argues that a Commission decision prohibiting him from proposing multiple penalties would go beyond adjudication of a violation and impermissibly infringe

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[7] The Secretary did not appeal the judge's assessment of $13,000 for the five alleged willful violations.

[8] Review was not directed on the alleged violations of section 1904.4.

on the enforcement policy embodied in the regulation. The Secretary asserts that "[i]f Hern is potentially liable for only a single penalty of $10,000 regardless of the number of violations or the 'especially grievous' nature of its conduct, there is little incentive to fully comply with the Act, particularly after committing the first offense." The Secretary further argues that "[p]lainly, a failure to record a single recordable workplace injury is a violation of section 1904.2(a), and the failure to record a second injury arising out of different facts is a second violation."

Hern does not dispute that the Secretary may issue separate citations with proposed separate penalties for each violation of the same regulation, but it argues that the Secretary cannot assess separate penalties for a failure to complete each entry on the required OSHA 200 form. Hern claims that "any misentry (or lack of entry) on the form is only an aspect of the unitary failure to keep accurate records." Hern believes that the Secretary's citing it for multiple violations of the regulation "is analogous to a prosecutor wanting to charge a Defendant not for burglarizing a house, but for stealing a rug, a painting, a set of silverware, and a stereo receiver" which would be "properly charged as a burglary, not as a series of petite thefts." Hern argues that if the Secretary wanted to cite for each failure to record on the OSHA 200 form, then it makes redundant the requirement that additional separate forms be completed for each industrial accident on the OSHA 101 form or its equivalent.[9]

In response to Hern's argument regarding the 101 form, the Secretary contends that the 101 form provides the necessary detail for OSHA to check the accuracy of the OSHA 200 log. The Secretary acknowledges that although he might cite an employer for each alleged violation of section 1904.4 for the employer's alleged failure to record injuries on the OSHA 101 form or its equivalent, his policy is not to propose penalizing the employer for each section 1904.4 violation.

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[9] Hern also argues that the Secretary is effectively citing Hern for "repeated" violations, on the theory that each instance of the failure to record was repeated eight times. A repeat violation is a classification of a violation under section 17(a) of the Act, 29 U.S.C. § 666, premised on the existence of a previously cited violation of the same or a similar standard having become a final order against the same employer. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979). The Secretary did not classify these alleged violations as repeat violations.

Analysis

The Commission recently held that it has the authority to assess separate penalties for separate violations of a single standard or regulation. *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2172-73, 1993 CCH OSHD ¶ 29,962, pp. 41,005-06 (No. 87-0922, 1993). In *Caterpillar*, we affirmed separate violations of section 1904.2(a), the standard cited here, and assessed separate penalties for each injury or illness an employer failed to record on the OSHA 200. In determining whether separate violations exist, we stated: "The test of whether the Act and the cited regulation permits multiple or single units of prosecution is whether they prohibit individual acts, or a single course of action." *Id.*, 15 BNA OSHC at 2172, 1993 CCH OSHD at p. 41,005. Applying that test to section 1904.2(a), we concluded that the provisions of section 1904.2(a) can reasonably be read to refer to individual instances of improper recording of injuries and illnesses. Hern argues that its alleged failure to record each injury or illness to an employee is part of a general failure to maintain accurate recordkeeping. However, the violations alleged here all involved separate injuries that Hern failed to record over a period of time and can certainly be characterized as individual acts. Since the Secretary has carried his burden of proof and demonstrated each failure to record to be a separate violation, we find that it is within our authority to assess separate penalties.

2. Whether the judge erred in granting the Secretary's motion to amend his complaint alleging multiple violations rather than a single violation.

On pages 1 and 4 of citation no. 1, the Secretary specified a total penalty of $100,000 for the alleged violations of section 1904.2(a). There were ten cited instances of violations of the standard, lettered (a) through (j). However, a $10,000 penalty was not listed next to each of the ten instances. The $100,000 total penalty amount was again noted in the complaint. Sub-paragraph (f) of the complaint stated that a penalty of $100,000 had been proposed for the violations. In its answer to the complaint, Hern acknowledged that "a penalty of $100,000 had been proposed for the violations."

At the beginning of the hearing, the judge stated that he could not tell from the complaint whether the Secretary cited Hern for one willful violation and one other-than-

serious violation, or for 10 separate willful and 9 separate other-than-serious violations. The Secretary attempted to clarify his position by making a motion to amend the complaint to allege that each instance of alleged violation of the cited recordkeeping regulation (ultimately nine willful instances and eight other-than-serious instances) be considered a separate violation of the Act. Hern objected to the motion. Hern's attorney stated that he believed that there was a jurisdictional limit of $10,000 for the penalty, and that he had decided to let the Secretary "go down the primrose path" and discover at the end of the hearing that he could not have a recommended penalty of $100,000 affirmed by the judge. The attorney stated that had Hern "really truly believed as a legal issue that [it was] exposed to [a penalty of] $100,000," it would have managed the case differently.[10] In his decision, the judge granted the motion and permitted the Secretary to amend the complaint to allege each instance as a separate violation.

On review, the Secretary claims that the amendment was intended simply to conform the pleadings to the legal charge, which was that Hern had committed 10 separate willful violations of section 1904.2(a), for each of which the Secretary sought the maximum penalty available under the Act. The Secretary notes that paragraph IV of the complaint states that citation no. 1 "alleged ten separate instances of violation of 29 C.F.R. § 1904.2(a),"[11] but acknowledges that the complaint also used the singular term "violation" in paragraph V parts (e), (f), and (g). The Secretary argues that the citation as initially drafted put Hern on notice that the Secretary sought to charge each instance of a violation of section 1904.2(a) as separate because the Secretary proposed a penalty of $100,000, and

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[10] However, Hern did not explain at the hearing or in its brief how it would have managed the case differently.

[11] Paragraph IV of the complaint is as follows:

> As the result of an investigation by authorized representatives of the Secretary, Citation and Notification of Penalty Numbers One and Two, each dated January 24, 1989, were issued to the Respondent, pursuant to Section 9(a) of the Act. Citation Number One alleged ten separate instances of violation of 29 C.F.R. 1904.2(a) designated as "willful", and Citation Number Two alleged nine separate instances of violation of 29 C.F.R. 1904.4 designated as "other".

since the maximum penalty for a single willful violation is $10,000 under 29 U.S.C. § 666(a), "the citation by definition alleged ten separate willful violations of the Act."

The Secretary notes that former Commission Rule 35(f)(3) provides that Fed. R. Civ. P. 15 shall apply to Commission proceedings,[12] and that Federal Rule 15(a) provides that "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." The Secretary contends that the Ninth Circuit, in which this case arises, permits the amendment of pleadings where there is a lack of prejudice to the opposing party. He cites the following cases for support: *Donovan v. Royal Logging Co.*, 645 F.2d 822 (9th Cir. 1981)(no abuse of discretion in permitting the Secretary to amend his complaint where employer claims prejudice, but does not prove it); *Howey v. United States*, 481 F.2d 1187, 1190-92 (9th Cir. 1973)(abuse of discretion to deny a motion to amend a complaint where there is a lack of prejudice to the opposing party and amendment not frivolous or made in bad faith). The Secretary contends that Hern's claim of prejudice involves nothing more than the potential exposure to the proposed penalty of which it received actual notice in the initial citation. The Secretary argues that since the facts and the law underlying the amended charge did not change, and the amendment did not deprive Hern of any potential affirmative defenses, the Commission should affirm the judge's decision "in the absence of undue delay, bad faith, or dilatory motive." *Foman v. Davis*, 371 U.S. 178, 182 (1962). He points out that although Hern asserts a due process violation, it "never sought a continuance or demonstrated in any concrete way how the amendment prejudiced its ability to mount an effective defense."

Hern argues that the judge erred in granting complainant's motion to amend the complaint. Hern contends that the issue is not what the citation said, but what the complaint said, since under former Commission Rule of Procedure 35 the citation cannot

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[12] Former Commission Rule 35(f) provided in pertinent part:

> All other amendments of the Secretary's allegations, as well as any amendments of the employer's responses, are governed by Federal Rule of Civil Procedure 15.

The Commission's Rules of Procedure, 29 CFR Part 2200, have since been revised effective December 10, 1992. 57 Fed. Reg. 41,676 (1992).

be incorporated into the complaint. For support, Hern cites *ASARCO, El Paso Div.*, 8 BNA OSHC 2156, 2162, 1980 CCH OSHD ¶ 24,838, p. 30,619 (No. 79-6850, 1980), in which the Commission held that the primary function of the citation is to give notice to the employer of the charge and the relief requested, while the primary function of the complaint is to formulate issues to be resolved in specified allegations. Hern notes that the amendment of the complaint was requested at the hearing, over the objection of Hern, and that no offer of a continuance was made. Hern maintains that "[t]he preparation of [its] defense was completely compromised by the allowance of the amendment." It claims that "[t]o alter the defense's preparation and exposure to a $10,000 penalty and transmute it into a $100,000 penalty on the morning of trial is the highest form of prejudice."

Analysis

The issue before us is whether Hern was prejudiced by the Secretary's amendment of the complaint to clarify that he intended to separately cite Hern for each of the ten alleged failures to comply with section 1904.2(a). Although Hern claims that it would have approached the case differently had it known that it was potentially liable for a penalty of $100,000, Hern had ample notice from both the citation and the complaint that the Secretary was proposing a penalty of $100,000. In its answer, Hern acknowledged that the Secretary proposed a $100,000 penalty. Since Hern was aware of this amount, and none of the facts underlying the alleged violations changed, a claim that it was taken by surprise the morning of the hearing does not carry much weight. We also find unpersuasive Hern's claim that it was not offered a continuance when it did not request one. We therefore conclude that Hern failed to show that it was prejudiced in the preparation of its defense by the Secretary's amendment and that the judge did not err in granting the Secretary's motion to amend the complaint.

B. Whether the administrative law judge erred in vacating Citation No. 1, Item (d).

Todd Ingram was a Hern employee from December 1986 until November 1987. In June 1987, Ingram was burned when a hot mold fell against his left forearm. The burn was about 1 to 1½ inches long and ¼-inch wide, and it swelled, blistered and bled, but never impeded the full use of his arm. A Hern office secretary cleaned and dressed the burn, and

the arm was bandaged for approximately one week. Ingram did not seek professional medical treatment because he did not feel it was warranted.

The Secretary's citation alleging this violation of section 1904.2(a) appears as follows:

> (d) While at work on or about June 9, 1987, an employee suffered a second or third degree burn on his arm when a mold he was shaking out fell against it. The burn was severe enough to bleed, and left a scar approximately 1½ by ¼ inch. This injury was treated at work. This injury was not recorded on the OSHA Form 200.

Section 1904.2(a) requires that recordable occupational injuries and illnesses[13] be recorded on the OSHA 200 or an equivalent.

The judge vacated item 1(d). He found that the record failed to establish that Ingram's burn met the criteria of a reportable injury because Ingram received only one-time first aid treatment and had full use of his arm. The judge also examined Ingram's arm during the hearing, and found that the arm "showed little or no scarring, which is

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[13] Section 1904.12(c) defines recordable occupational injuries or illnesses as any occupational injuries or illnesses which result in the following:

> (1) Fatalities, regardless of the time between the injury and death, or the length of the illness; or
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> (2) Lost workday cases, other than fatalities, that result in lost workdays; or
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> (3) Nonfatal cases without lost workdays which result in transfer to another job or termination of employment, or require medical treatment (other than first aid) or involve: loss of consciousness or restriction of work or motion. This category also includes any diagnosed occupational illnesses which are reported to the employer but are not classified as fatalities or lost workday cases.

Section 1904.12(d) defines medical treatment as follows:

> (d) *Medical treatment* includes treatment administered by a physician or by registered professional personnel under the standing orders of a physician. Medical treatment does not include first aid treatment even though provided by a physician or registered professional personnel.

Section 1904.12(e) defines first aid as follows:

> (e) *First Aid* is any one-time treatment, and any followup visit for the purpose of observation, of minor scratches, cuts, burns, splinters, and so forth, which do not ordinarily require medical care. Such one-time treatment, and followup visit for the purpose of observation, is considered first aid even though provided by a physician or registered professional personnel.

inconsistent with a burn of such severity as to require medical treatment" and thus need not be reported on the OSHA 200 form.

On review, the Secretary raises an argument not made to the judge. He claims that the term "medical treatment" is clarified in the 1986 Bureau of Labor Statistics ("BLS") pamphlet, *Recordkeeping Guidelines for Occupational Injuries and Illnesses* ("the BLS Guidelines"). The Secretary argues that the BLS Guidelines are his interpretation of his own regulation, and are of controlling weight unless they are plainly erroneous or inconsistent with the regulation.

The Secretary argues that the BLS Guidelines state that burns of second degree and greater should be recorded on the OSHA 200 form. *See* BLS Guidelines at 42-43. He argues that Ingram had at a minimum a second degree burn. Although there was no direct evidence that Ingram received a second degree burn, the Secretary notes the unrebutted testimony of a former Hern employee, Herbert Lindsey,[14] who testified as to the severity of a burn to his own foot.[15] In describing the burn to his foot, Lindsey testified that a second degree burn is characterized by blistering. The Secretary notes that Ingram testified that the burn on his arm blistered.

The Secretary also asks that, under Fed. R. Evid. 201 (c) & (d),[16] the Commission take administrative notice of two medical reference works for the definition of a second

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[14] Lindsey worked at Hern from September 1986 until April 1987, and currently is employed as a deputy sheriff. Lindsey testified that he received training in first aid in the Air Force and in his current duties as a deputy sheriff, including training in the identification and classification of burn injuries.

[15] Hern's alleged failure to report Lindsey's burn was cited as Item (c). The judge vacated Item (c) because he found that Lindsey did not report his burn to any of Hern's supervisory personnel. The Secretary did not contest the judge's decision regarding Item (c), and it is not on review.

[16] Rule 201(c) provides:

> **When discretionary.** A court may take judicial notice, whether requested or not.

Rule 201(d) provides:

> **When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

degree burn should the Commission prefer not to credit former employee Lindsey's description of a second degree burn.[17]

The Secretary argues that in recording occupational injuries, the focus should not be on what type of aid was administered, but rather on what type of aid was required. He argues that the BLS Guidelines require that injuries be recorded according to their type, not necessarily because the employee actually received medical treatment. 1986 BLS Guidelines at 44, F-2, F-4 to -5. The Secretary argues that the judge improperly assumed the role of a medical expert in determining from his observation that the absence of discernable scarring was inconsistent with a recordable burn.

Hern argues that a layman is not capable of testifying about the proper classification of the burn. It claims that an expert is required to diagnose a second degree burn, and that there was no expert testimony presented on this issue. Hern asserts that the Secretary's request for the Commission to take administrative notice of the medical books deprives Hern of due process. Hern contends that it relied on the fact that the Secretary did not have any expert witnesses for the hearing, which it believes "by definition meant that there were no physicians who could testify as to the diagnosis of the burns which Hern believed to be first degree and the Government alluded to being second or third." Hern argues that the degree of a burn is not something that can be administratively noticed.

Analysis

We conclude that the evidence submitted at the hearing does not support a finding that section 1904.2(a) or the language on the OSHA 200 required the recording of Ingram's injuries. Ingram received only one-time, first aid treatment. He did not experience any of the symptoms listed in the standard or on the OSHA 200 form that make an injury recordable. Nor was there any evidence that the burn restricted Ingram's movement. Therefore, we cannot say that the judge erred in vacating that item of the citation.[18]

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[17] The Secretary cites *Ic Attorney's Textbook of Medicine* ¶ 20.21 (1982), and *Dorland's Illustrated Medical Dictionary* 244, 1832 (27th ed. 1988).

[18] The judge offered no specific support for the proposition that burns that do not produce a scar are not recordable. Although in certain circumstances the extent or absence of a scar might provide evidence of the

(continued...)

The Secretary's late reliance on the BLS Guidelines and other materials does not compel a different result. In *Caterpillar*, we specifically declined to reach the issue of whether an employer who did not have a copy of the BLS publications would still be required to follow them. We noted that "a lack of knowledge of . . . the 1986 Guidelines does not permit an employer to skirt its recordkeeping responsibilities," and we concluded that the "language of the regulation, the definitions in section 1904.12, and the instructions on the OSHA 200 itself provide sufficient information to answer most questions about what is recordable on the OSHA 200." 15 BNA OSHC at 2162 n.11, 1993 CCH OSHD at pp. 40,994-95 n.11. Here, however, we have found that Hern would not have been apprised of a duty to record employee Ingram's burn from the regulation, the definitions in section 1904.12, or the instructions on the OSHA 200. Since only the BLS Guidelines state that second degree burns are recordable and the record does not indicate whether Hern was aware of the requirements of the BLS Guidelines, we cannot conclude that compliance with section 1904.2(a) required Hern to record the burn. Because the significance of the material the Secretary asks us to administratively notice goes only to proving that the burn was a second degree burn, and we do not find that Ingram's burn was recordable even if it was a second degree burn, we need not resolve the notice issue. We therefore conclude that Hern did not violate section 1904.2(a) by failing to record the burn cited in item 1(d).

C. Whether the administrative law judge erred in finding Citation 1, Item (j) willful.

On December 11, 1986, Mark Graves, a 4-year employee of Hern Iron, injured the middle finger of his left hand helping move a sprocket off a shaker. As a result of the injury, Graves was hospitalized and had the nail bed on that finger surgically removed. Graves lost seven work days and the use of his hand was restricted for a little more than a week after his return to work. Graves' injury was recorded as an Injury Without Lost Workdays in Hern's OSHA 200 log.

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[18](...continued)
severity of an injury, we would suggest that the presence of a scar is not always a reliable indication of the nature of an injury.

The Secretary cited the injury as follows:

> (j) While at work on or about December 11, 1986, an employee suffered a hand injury when the bucket of a front end loader dropped on it. The injury resulted in partial amputation of the left middle finger, intravenous medication, prescription medication, hospitalization, and lost work days(s). This injury was recorded on the OSHA Form 200 as medical treatment only.

At the hearing, Mr. Hern testified that the company's failure to report the injury as a lost time accident was a "mistake in filling the form out." He also testified that the company would have received no benefit from concealing the fact that Graves' injury resulted in lost work days because it averaged "5 or 10" lost workdays a year anyway. Mr. Hern also stated that the company had no motive not to report the injury because OSHA would have discovered it if it had reviewed the Industrial Commission's records. Hern had recorded and filed the lost workdays on the Idaho Industrial Commission Notice of Injury and Claim for Benefits form. Mr. Hern testified that his workplace becomes subject to a full inspection by OSHA if it has "something like 1/5 of a lost workday per year or one lost workday every 5 years." Mr. Hern testified that the size of his workmen's compensation premiums depends on the prior year's injury rate.

Area Director Kuehmichel stated that Hern would not have been inspected in 1987 based on the information Hern provided for the years 1986 and 1985. However, he testified that Hern would have been inspected for the three lost workday cases it had reported on the OSHA 200 form in 1987. Kuehmichael testified that OSHA regularly inspects the worker's compensation files to see if an employer's OSHA 200 form is correct.

Past and present Hern employees also testified regarding Hern's recording practices. Former employee Todd Ingram testified that he was told to report all injuries to a foreman, but was told never to file reports indicating on-the-job injuries. Ingram testified that he could not go to a doctor without permission, and that he did not want to report his injuries for fear of losing his job. Hern Employee Robert Elliott testified that he understood that Hern's "standing" policy was to avoid involving the Idaho Industrial Commission through the filing of workmen's compensation claims, and that if employees "made waves" they would lose their jobs.

In affirming the item as willful, the judge found that "the summary was completed in a fashion deliberately designed to mislead OSHA inspectors into believing this was not a lost time accident which would trigger an inspection." "Based on Hern's demeanor, the internal inconsistency of his testimony, and contradictory evidence," the judge "reject[ed] Hern's assertion that he had no reason to misreport Graves' injury."[19] The judge found that Hern knew that one lost time injury in a business the size of Hern's would trigger an inspection. The judge noted that Graves' injury was the only injury reported in 1986, and that the proper reporting of the lost workdays it involved would have resulted in an inspection. The judge also noted that in six separate instances the severity of the injury was misreported.

The Secretary argues on review that citation item 1(j) was properly affirmed by the judge as a willful violation. He notes that Mr. Hern stated that he understood the linkage between his lost-work day injury ("LWDI") rate and OSHA's inspection policy, contradicting Hern's own earlier testimony that he would not benefit from under-reporting Graves' injury. The Secretary compared the present case with *Calang Corp.*, 14 BNA OSHC 1789, 1987-90 CCH OSHD ¶ 29,080 (No. 85-319, 1990), a case in which the Commission found a willful violation because an employer disregarded specific instructions from the compliance officer during an inspection. The Secretary argues that Hern consciously disregarded the requirements of the law, despite having previous violations called to his attention. He also contends that Hern could offer no rational explanation for its failure to record the Graves injury as a lost workday injury, nor could it have held a good faith belief that it was in compliance with the cited regulation.

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[19] In addressing item (a) of the citation, the judge made a credibility determination of Mr. Hern, which we believe carries over into the succeeding items. The judge's credibility determination is as follows:

> [H]aving observed the demeanor of Hern, heard the tone of his voice, observed his eagerness to answer at times and his hesitation at other times, this Judge concludes Hern's testimony deserves less weight than that of opposing witnesses. After considering the body of Hern's testimony, I found that portions of that testimony were implausible and internally inconsistent. I am further persuaded by the fact that Hern is a party with a substantial interest to protect while opposing witnesses, past and present employees, had nothing to gain and in fact may have faced some risk in testifying adversely to Hern.

Hern argues that it "readily admitted reportability, readily confessed to the error of failing to report, and clearly testified as to lack of motivation for not reporting this particular injury," but that the judge "nonetheless imposed upon Hern the same criteria for willfulness -- the appearance of motivation -- that informed the judge's finding with regard to the issue of multiple penalties." Hern contends that the Secretary's argument that Mr. Hern contradicted his own testimony regarding the linkage between the under-reporting of the LWDI rate and OSHA's inspection policy misrepresented the testimony of Mr. Hern. Hern asserts in its brief that OSHA frequently inspects Hern's workplace, and that Mr. Hern expected to eventually be inspected regardless of the misrecording on the 1986 OSHA 200 form.

The Secretary in response argues that "[t]he issue is not Hern's repentance, but the employer's state of mind at the time of the violation." The Secretary notes that if Mark Graves' injury was properly recorded, it would have put Hern over the LWDI inspection threshold for that year.

Analysis

To establish a willful violation, the Secretary bears the burden of proving that the violation was committed with either an intentional disregard of the requirements of the Act or plain indifference to employee safety. To meet this burden, it is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation, serious or nonserious. A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference when the employer committed the violation. *Williams Enterp.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). *See also General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991 CCH OSHD ¶ 29,240, p. 39,168 (No. 82-630, 1991). There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. A willful charge is not justified if an employer has made a good faith effort to comply with the standard, even though the employer's efforts are not entirely effective or complete. *Williams*, 13 BNA OSHC at 1257, 1987-90 CCH OSHD at p. 36,589.

The testimony of present and past employees demonstrates that Hern discouraged the recording of injuries on the OSHA 200 form. In finding Hern's failure to enter these lost workdays willful, the judge relied on this attitude toward recording, on Mr. Hern's awareness of the link between lost workdays and OSHA inspections, and on his evaluation that Mr. Hern lacked credibility. Hern's claim that the judge found the violation willful because he believed that Hern was motivated by an interest in forestalling an OSHA inspection comes to grips with only part of the judge's reasoning. It is true that the judge noted Mr. Hern's awareness of the link between the LWDI rate and OSHA inspection. More crucial, however, is the fact that the judge disbelieved Mr. Hern's testimony regarding the failure to record the lost workdays to the extent that he found that it was "deliberately designed" to mislead OSHA inspections. When such an evaluation is based on the judge's observation of a witness' demeanor and is clearly stated and explained, we generally accept that finding. *C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1297, 1977-78 CCH OSHD ¶ 22,481, p. 27,099 (No. 14249, 1978)(the Commission's policy is to ordinarily accept a judge's credibility evaluation of witnesses because he has lived with the case, heard the witnesses, and observed their demeanor). Here, the judge's finding more than meets that criterion. Moreover, Hern has not persuaded us that the finding should be reversed and our review of the record indicates that there is no basis for doing so. *United States Steel Corp.*, 9 BNA OSHC 1641, 1644, 1981 CCH OSHD ¶ 25,282, pp. 31,251-52 (No. 76-5007, 1981). We therefore defer to that finding. Based on the judge's credibility findings and the other evidence discussed above, we find that the judge correctly determined that the violation was properly characterized as willful.

D. Whether the penalty assessment for Citation 1 was appropriate.

Judge Barkley assessed a penalty of $13,000 for four failures to record injuries on the OSHA 200 and for one failure to report an injury as a lost time accident on the same form.

The Secretary proposed penalties of $10,000 per violation. The violations that the judge affirmed are as follows:[20]

> (a) While at work on or about September 21, 1987, an employee [John Hern III] suffered a laceration on his chin (lip) when an aluminum pattern blew up. The injury resulted in medical treatment with several stitches taken in the lower lip. This injury was not recorded on the OSHA Form 200.[21]
>
> Penalty assessed by the judge: $2000.
>
> (b) While at work on or about March, 1987, an employee [Robert Elliott] suffered a second or third degree burn on his left foot when molten metal ran out of a mold and into his boot. The burn resulted in a scar approximately 3/4 inch by 2 inches. This injury was not recorded on the OSHA Form 200.[22]
>
> Penalty assessed by the judge: $2000.
>
> (e) While at work on or about July, 1987, an employee [Stanley Kaminski] suffered a second or third degree burn on his left arm when the furnace blew up. The burn was treated at work. The injury resulted in the arm being bandaged for over a month, and lost work day(s). This injury was not recorded on the OSHA Form 200.[23]

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[20] The direction for review goes only to the penalty, and not the merits, of four of these items. The willfulness of item 1(j) was also directed for review.

[21] Employee Merle Black testified that John Hern III, the son of respondent's president, had packed sand around a welded sprocket pattern to form a casting mold and was trying to remove the pattern from the sand, when a loose welded portion of the pattern blew up, striking him in the lower right jaw. Black testified that two days following the incident, Hern showed him the sutures in his lip while describing the accident. Hern testified that his son had not told him of any injury at the plant but had told him that he fell while cleaning the garage. The judge, based on a credibility determination, found that John Hern III was injured at work.

[22] Employee Robert Elliott testified that he suffered a burn to his foot when hot metal poured down from a mold into his boot, burning a hole through his boot and sock. The 1" x 1½" burn was cleaned and bandaged at the office. The burn was reported to Hern, but Hern discouraged Elliott's suggestion that he see a doctor. The burn took approximately two months to heal. Elliott testified that he missed no work and suffered minimal work restrictions.

[23] Shop Foreman Stanley Kaminski was exposed to heated gas when a furnace blew up. The gas burned his right arm from above the elbow, halfway to his wrist. Kaminski had the burn wrapped in a Hern office, and kept the arm bandaged for approximately 2 to 2½ weeks. The bandages were changed and ointment applied daily. Kaminski did not miss work because his absence was previously scheduled in order to attend a wedding. The burn was a hindrance to performing his job.

Penalty assessed by the judge: $2000.

(g) While at work on or about January 13, 1987, an employee [Robert Elliott] suffered a strain in his left shoulder when the metal mold box he was pushing stopped due to stuck rollers. The injury resulted in prescription medication and lost work day(s). This injury was not recorded on the OSHA Form 200.[24]

Penalty assessed by the judge: $2000.

(j) While at work on or about December 11, 1986, an employee [Mark Graves] suffered a hand injury when the bucket of a front end loader dropped on it. The injury resulted in partial amputation of the left middle finger, intravenous medication, prescription medication, hospitalization, and lost work day(s). This injury was recorded on the OSHA Form 200 as medical treatment only.[25]

Penalty assessed by the judge: $5000.

Judge Barkley noted that in determining the penalty, section 17(j) of the Act requires the judge to give due consideration to the size of the employer, the employer's good faith, history of previous violations, and the gravity of the violation. He found that Hern employed 15 employees, had gross sales of approximately $500,000 per year and a net worth of approximately $50,000. The judge rejected Hern's contention that it had a good faith belief that the injuries were not reportable. He was "convinced [that] Hern failed to report occupational injuries, knowing they were reportable, in an effort principally to reduce his workmen's compensation premiums and, if possible, to avoid OSHA inspections." Relying on the testimony of Hern's employees, the judge found that "[t]here is ample evidence that Hern had an ongoing policy of discouraging injury reporting."

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[24] Employee Robert Elliott strained his shoulder during work. He reported the injury to John Hern, who suggested that they stretch the shoulder back into shape using a foundry crane. Elliott missed three days of work due to the shoulder pain and visited a doctor who prescribed muscle relaxants.

[25] Employee Mark Graves had the nail bed on his finger surgically removed as a result of his accident. He lost seven work days and had restricted use of his hand for a little more than a week following his return to work due to the accident.

The judge specifically rejected "the Secretary's invitation to consider Hern's demands for inspection warrants and failure to comply with those warrants as reflecting on good faith" because "Hern as a matter of right may require an inspection warrant."

The judge found that "[t]he gravity of the violations and particularly the violation alleged in item (j) is high." The judge held:

> Hern deliberately attempted to avoid OSHA inspections and isolate his employees from the Act's protection by not reporting the extent of Graves' injury. I find any attempt to isolate employees from the protections afforded by the Act, particularly when those employees work in an establishment where they are more likely to be injured, to be especially grievous.

Hern contends that in assessing the penalty, the judge did not give due consideration to its size, its history of previous violations, and the gravity of the violation, as well as its "economic ability." Hern argues that the $13,000 penalty assessment for willful citation 1 is improper because it is over one-fourth of Hern's net worth. Hern compares the amount it was fined against the amounts large corporations are fined for willful citations, and argues that "[t]hese fines, as measured against the net worth of those multi-billion dollar corporations, do not in any respect compare in severity to the fines imposed here for record-keeping violations." Hern also contends that both the Secretary and the judge have confused lack of credibility with lack of good faith, and that the lack of credibility should not serve to show bad faith. Hern claims that the "payment of the fine would render economically unfeasible Hern's compliance with the safety standards required under prior orders of the Commission." Finally, Hern argues that the recent amendments to the Act increasing the maximum allowable penalty under section 17(a) have no legal bearing on this case, and "the amendments did not abrogate the protections afforded employers by § 17(j)."

In his opening brief, the Secretary states that he has "chosen not to appeal" the judge's assessment of $13,000 in total penalties for five willful violations. He notes that the judge found that Hern's willful violations were of high gravity. The Secretary argues that the Act mandates that penalties be assessed primarily in accordance with the characterization and number of violations, rather than on "a formula of some sort based on the net worth of the employer." Citing *RSR Corp.*, 11 BNA OSHC 1163, 1181, 1983-84 CCH OSHD ¶ 26,429, pp. 33,558-9 (No. 79-3813, 1983), the Secretary contends that Congress clearly

intended that penalty assessments motivate behavior to achieve compliance with the Act.[26] The Secretary argues that "[i]n light of these considerations, Hern's prior history of violating the recordkeeping provisions, and Hern's annual gross receipts of at least $500,000 a year, a penalty assessment of $13,000 for five willful violations of the Act seems eminently reasonable."

Analysis

As the judge noted, under section 17(j) of the Act, the Commission has authority to assess civil penalties, giving due consideration to the appropriateness of the penalty 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. 29 U.S.C. § 666(j). The four criteria to be considered in assessing penalties cannot always be given equal weight, and "a particular violation may be so grave as to warrant the assessment of the maximum penalty, even though the employer may rate perfect marks on the other three criteria." *Nacirema Operating Co., Inc.*, 1 BNA OSHC 1001, 1003, 1971-73 CCH OSHD ¶ 15,032, p. 20,043 (No. 4, 1972).

The judge found the gravity of the violations high, particularly item 1(j) based on what he described as Hern's "attempt to isolate employees from the protections afforded by the Act." He found that the recordkeeping regulations served as the basis for gathering information regarding the causes and prevention of occupational injuries and illnesses and that Hern's deliberate refusal to report injuries frustrated these purposes. Neither the Secretary nor Hern made any argument regarding the judge's gravity finding. In *Caterpillar*, the Commission categorized the gravity of a recordkeeping violation as low because such a violation touches in only the most tangential way the factors that go to gravity: the number of employees exposed to the hazard, the duration of the exposure, whether any precautions

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[26] The Secretary also relies on the House Conference Report on the amendments to section 17(a) increasing the penalty amounts, which indicates that higher penalties were required to assure that "the most egregious violators are in fact fined at an effective level." (House Conf. Rep. No. 964, 101st Cong. 2d Sess. at 688-89, *reprinted in* 1990 U.S. Code Cong. & Admin. News 2393-94. We do not believe, however, that the legislative history of a provision that raises the future penalty limits under the Act sevenfold has any particular bearing on the amount of the penalties assessed under the prior version of section 17(a).

have been taken against injury, and the degree of probability that an accident would occur. *Caterpillar*, 15 BNA OSHC at 2178, 1993 CCH OSHD at p. 41,011.

Regarding citation items 1(b), 1(e), and 1(g), the judge found that Hern demonstrated less than good faith because it did not have a good faith belief that the injuries were not reportable.[27] Hern's defense to these items was that it had a good faith belief that the injuries required only first aid and were not reportable and that the judge improperly considered lack of credibility to show a lack of good faith. However, we conclude that these injuries were severe enough to support the judge's conclusion that Hern could not reasonably have concluded that the burns and shoulder injury would not require medical treatment as defined on the OSHA 200 log. We also conclude that Hern's failure to record the lost workdays that resulted from these injuries is strong evidence of a lack of good faith on Hern's part. Hern's contention that the judge confused lack of credibility with a lack of good faith is without merit. The judge found quite plausibly that Mr. Hern's testimony lacked credibility. This led him to conclude that the reasons Mr. Hern gave for not recording injuries were not believable and that therefore Hern lacked good faith.

The judge noted that Hern has a prior history of the same violation, relying on a December 7, 1982 citation for an other-than-serious violation of 29 C.F.R. § 1904.6 for failing to retain OSHA 200's and its predecessors at its workplace for five years. The record also establishes that Hern is a small employer.

Having considered the information in the record regarding the employer's small size; the low gravity of the violations; the lack of good faith of the employer; and the history of previous violations, we conclude that a further reduction of the $2000 penalties the judge imposed for items 1(a), 1(b), 1(e), and 1(g) is appropriate. We therefore assess a penalty

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[27] For citation item 1(a), John Hern testified that John Hern III's injury to his face was not recorded because it did not occur at the plant. John Hern, III did not testify at the hearing. An employee of Hern's, Merle Black, testified and described John Hern, III's injury at the plant. The judge found that John Hern's testimony was not credible, and found that John Hern, III's injury was the result of the occupational injury as described by Black.

For citation item 1(j), Hern admitted to the failure to record lost workdays for Graves' injury. The judge found that the failure to report the lost workdays was intentional both in order to avoid an OSHA inspection and to keep the workmen's compensation premiums low.

of $1000 for each of these items. For item 1(j), we find that the $5000 penalty assessed by the judge is appropriate.

IV. Order

Accordingly, we find that the judge did not err in vacating item (d) of willful citation no. 1 and did not err in finding item (j) of citation no. 1 willful as alleged. We reduce the penalties for willful items 1(a), 1(b), 1(e), and 1(g) to $1000 each and affirm the $5000 penalty for willful violation 1(j).

Donald G. Wiseman
Commissioner

Dated: April 27, 1993

FOULKE, Chairman, concurring in part and dissenting in part:

I concur with most of the majority opinion. However, I believe that the majority erred in affirming the judge's characterization of citation no. 1, item (j) as a willful violation. Accordingly, I dissent from the majority's decision regarding that item, and would instead find an other-than-serious violation of the Act.

The majority's legal test for willfulness is correct. I would only reiterate that a willful violation requires proof of a heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference. In determining this state of mind, the majority draws inferences from the testimony of past and present Hern employees. Although this testimony provides scattered impressions of a poor record keeping program, it does not support the inference that Hern's failure to properly record the lost workdays for Graves' injury on the OSHA 200 form was willful.

For example, former employee Todd Ingram testified that he was told to report all injuries to a foreman, but was told never to file reports indicating on-the-job injuries. However, no evidence exists to indicate that Hern had instructed its foremen to omit filings or do anything more than receive injury reports as part of their supervisory responsibilities. Ingram also testified that he could not go to a doctor without permission, and that he did not want to report his injuries for fear of losing his job. However, this testimony does not establish that Hern had a policy of not recording worker's injuries on the OSHA 200 form. Employee Robert Elliott testified that he understood that Hern's "standing" policy was to avoid involving the state industrial commission through the filing of workmen's compensation claims, and that if the employees "made waves," they would lose their jobs. Here, however, Hern did file a workman's compensation claim for Graves' injury, and there is no evidence that the employees' fear of being fired was for anything more than a failure to follow workplace rules. Elliott also did not testify about any policy of Hern's to not record a worker's injury. In short, the employees' testimony fails to demonstrate an intent by Hern to inadequately report or fail to report injuries on the OSHA 200 form.

In addition, there is record evidence supporting Hern's assertion that its failure to record Ingram's lost workdays on the OSHA 200 form was an accident. Hern recorded and filed the lost workdays on the Idaho Industrial Commission Notice of Injury and Claim for Benefits form. As noted in the majority decision, OSHA would have discovered the lost

workdays if it had reviewed the Industrial Commission's records. It would be incongruous for Hern to engage in a purposeful act of evasion from an OSHA inspection by failing to report Graves' lost workdays on the OSHA 200 form, only to immediately thereafter acknowledge the lost workdays on the Idaho Industrial Commission Notice of Injury and Claim for Benefits form.

I therefore conclude that the Secretary failed to prove by a preponderance of evidence that citation item 1(j) is willful in nature. I would therefore find that the violation was other-than-serious.

Edwin G. Foulke, Jr.
Chairman

Dated: April 27, 1993

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

I agree with the majority's decision, except for the penalties assessed for citation no. 1, items 1(a), 1(b), 1(e), and 1(g) involving Hern's failure to record his employees' injuries on the OSHA 200 log. The Secretary proposed penalties of $10,000 for each item, and the judge assessed $2000 for each item after finding them to be willful violations. The majority reduced these penalties from $2000 to $1000 each. I would assess a penalty of $2000 for each violation based on the penalty factors in section 17(j) of the Act. In particular, I would note that the injuries sustained by the employees were severe enough that Hern could not in good faith claim that they should not have been recorded on the OSHA 200 log.

Velma Montoya
Velma Montoya
Commissioner

Dated: April 27, 1993

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 89-433
HERN IRON WORKS, INC.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on April 27, 1993. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

April 27, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 89-433

NOTICE IS GIVEN TO THE FOLLOWING:

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April 6, 1990

IN REFERENCE TO SECRETARY OF LABOR v.

Hern Iron Works, Inc.

OSHRC DOCKET NO. 89-433

NOTICE IS GIVEN TO THOSE LISTED BELOW:

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NOTICE OF DOCKETING

Notice is given that the above case was docketed with the Commission on 4/6/90. The decision of the Judge will become a final order of the Commission on 5/7/90 unless a Commission member directs review of the decision on or before that date.

Petitions for discretionary review should be received on or before 4/26/90 in order to permit sufficient time for their review. See Commission Rule 91, 29 C.F.R. sec. 2200.91. Under Rule 91(h) petitioning corporations must also file a declaration of parents, subsidiaries, and affiliates.

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

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St., N.W., Room 401
Washington, D. C. 20006-1246

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

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. HERN IRON WORKS, INC., Respondent.	OSHRC DOCKET NO. 89-0433

APPEARANCES:

For the Complainant:
William W. Kates, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, WA

For the Respondent:
Harvey Richman, Esq., Coeur d'Alene, ID

Gary N. Herbert, Esq., Mountain States Legal Foundation, Denver, CO

DECISION AND ORDER

Barkley, Judge:

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

Respondent, Hern Iron Works, Inc., operates a cast iron foundry with a place of business in Coeur d'Alene, Idaho where it employs approximately fifteen (15) employees. Respondent (referred to variously as Hern or respondent) does not dispute

it is engaged in a business affecting commerce and is, therefore, an employer within the meaning of the Act and subject to the Act's requirements.

On July 26, 1988 the Occupational Safety and Health Administration (OSHA) conducted an inspection of respondent's workplace. On January 24, 1989 respondent was issued citations and proposed penalties pursuant to the Act (Tr. 381, 455-456). By filing a timely notice of contest respondent brought this proceeding before the Occupational Safety and Health Review Commission (Commission) contesting the citations and the proposed penalties.

Alleged Violations
Willful Citation 1

Respondent is alleged to have violated 29 C.F.R. 1904.2(a). The relevant portion of that standard states:

> Part 1904 - Recording and Reporting Occupational Injuries and Illnesses
>
> §1904.2 Log and summary of occupational injuries and illnesses.
>
> (a) Each employer shall, except as provided in paragraph (b) of this section, (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred. For this purpose form OSHA No. 200 or an equivalent which is as readable and comprehensible to a person not familiar with it shall be used. The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

Section 1904.12(c) provides:

> (c) "Recordable occupational injuries or illnesses" are any occupational injuries or illnesses which result in:
> (1) Fatalities, regardless of the time between the injury and death, or the length of the illness; or
> (2) Lost workday cases, other than fatalities, that result in lost workdays; or
> (3) Nonfatal cases without lost workdays which result in transfer to another job or termination of employment, or require medical treatment (other than first aid) or involve: loss of consciousness or restriction of work or motion. This category also includes any diagnosed occupational illnesses which are reported to the employer but are not classified as fatalities or lost workday cases.

"Medical treatment" and "first aid" are defined at 29 C.F.R. §1904.12 as follows:

> Section 1904.12 Definitions.
>
> * * * *
>
> (d) "Medical treatment" includes treatment ministered by a physician under the standing orders of a physician. Medical treatment does not include first aid treatment even though provided by a physician or registered professional personnel.
> (e) "First Aid" is any one-time treatment, and any followup visit for the purpose of observation, of minor scratches, cuts, burns, splinters, and so forth, which do not ordinarily require medical care. Such one-time treatment, and followup visit for the purpose of observation, is considered first aid even though provided by a physician or registered professional personnel.

The willful citation alleges nine (9) instances in which respondent failed to record occupational injuries on the OSHA log of occupational injuries (OSHA Form 200) and one (1) instance in which the injury was reported but its severity was underreported.

Other Than Serious Citation 2

Respondent is alleged to have violated 29 C.F.R. 1904.4. That standard provides:

1904.4 Supplementary record.

> In addition to the log of occupational injuries and illnesses provided for under §1904.2, each employer shall have available for inspection at each establishment within 6 working days after receiving information that a recordable case has occurred, a supplementary record for each occupational injury or illness for that establishment. The record shall be completed in the detail prescribed in the instructions accompanying Occupational Safety and Health Administration Form OSHA No. 101. If no acceptable alternative record is maintained for other purposes, Form OSHA No. 101 shall be used or the necessary information shall be otherwise maintained.

The citation alleges that for each of the nine instances where respondent failed to report an injury on the summary log (OSHA 200) respondent also failed to keep a supplementary record of the injury on the OSHA Form 101 or the equivalent.

At the hearing, the Secretary moved to amend Willful citation 1 to allege 10 separate violations of the cited standard, rather than 10 instances of the same violation and Other than serious citation 2 to allege 9 violations of §1904.4 rather than 9 instances of the same violation (Tr. 22). Ruling was reserved. Having considered the arguments, the motion is granted. The amendment does not change the facts, the legal theory, the characterization of the violation or the proposed penalty and does not prejudice respondent. The amendment effectuates the original intent to allege ten (10) separate

violations as evidenced by the penalty of $100,000 which is ten times that provided for a single willful violation.

The Secretary then moved and was granted leave to withdraw item (i) of both the Willful and the Other than serious citations (Tr. 405).

Facts

An employer is selected for an inspection based on its history of occupational injuries (Tr. 311). If upon reviewing the employer's occupational injury records the employer has lost work days or restricted occupational activity due to injuries (LWDI) above the national average, the employer is inspected (Tr. 368).[1] Hern's injury reports i.e., the OSHA Form 101 and Form 200 for the year 1986 would not have triggered an inspection (Tr. 372). Had one lost workday case been recorded by Hern in 1986, it would have triggered an OSHA inspection of Hern's entire facility (Tr. 353), a fact of which Hern was aware (Tr. 419).

Hern received a previous citation in 1982 for failure to maintain OSHA Forms 101 and 200 and for failing to retain such forms for the preceding five years (Ex. C-11). The citation was informally settled (Ex. C-13). As part of the settlement Hern submitted injury reports for 1980 and 1981 and OSHA reduced the penalty to $50.00. The penalty remains unpaid (Tr.

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[1] If the employer's LWDI falls below the national average an employee complaint will trigger an inspection only of the complaint items rather than a "wall-to-wall" inspection (Tr. 368).

323). Hern understood the recordkeeping requirements of the Act (Tr. 439).

Item (a)

Item (a) alleges:

> (a) While at work on or about September 21, 1987, an employee suffered a laceration on his chin (lip) when an aluminum pattern blew up. The injury resulted in medical treatment with several stitches taken in the lower lip. This injury was not recorded on the OSHA Form 200.

At the hearing, Merle Black, a millwright and machinist for Hern between 1981 and 1987 (Tr. 31), testified regarding an injury to another employee, John Hern III, the son of John Hern, respondent's president (Tr. 51, 95). Black had not seen the accident which resulted in the injury but had been in the area when it happened, heard the incident and had seen the resultant injury (Tr. 32, 48).

Black was told by John Hern III, that Hern had packed sand around a welded sprocket pattern to form a casting mold and was trying to remove the pattern from the sand. The pattern became stuck and Hern attempted to remove it by applying air pressure between the pattern and the mold. A loose welded portion of the pattern was blown up into the face of Hern, striking him in the lower right jaw (Tr. 35-36,42). Two days following the incident, Hern showed Black sutures in his lip while describing how the accident had happened (Tr. 36, 42).

John Hern testified that his son had not told him of any injury at the plant but had told him that he "fell" while cleaning the garage (Tr. 421, 450).

Discussion and Conclusions

Placement of sutures is medical treatment. A cut requiring sutures is reportable if the cut resulted from an occupational injury. Black testified the cut was the result of an occupational injury. Hern testified his son "fell" while he was cleaning a garage and therefore the cut was the result of a non-occupational injury. John Hern III did not testify. Thus it becomes necessary to weigh the credibility of the witnesses.

Black's testimony was not only convincing in its detail but was coherent, facially plausible, uncontradicted by extrinsic evidence and internally consistent. See, Anderson v. Bessemer City North Carolina 470 U.S. 564 (1984). Moreover, having observed his demeanor, I am convinced of Black's candor and veracity.

On the other hand, having observed the demeanor of Hern, heard the tone of his voice, observed his eagerness to answer at times and his hesitation at other times, this Judge concludes Hern's testimony deserves less weight than that of opposing witnesses. After considering the body of Hern's testimony, I found that portions of that testimony were implausible and internally inconsistent. I am further persuaded by the fact that Hern is a party with a substantial interest to protect while opposing witnesses, past and present employees, had nothing to gain and in fact may have faced some risk in testifying adversely to Hern.

Having determined that Hern's testimony is not credible, it is appropriate to determine what, if any, inferences may be drawn from his testimony. The fact finder is free on the basis of an incredible witness's demeanor to assume the truth of what the witness denies, although such inference standing alone cannot support a finding. U.S. v Marchand, 564 F.2d 983 (2nd Cir. 1977) cert. denied 98 S.Ct. 73. In this case it is appropriate to do so.

For the reasons set forth above, I find incredible the conclusionary and implausible assertion by Hern that his son cut his lip in a fall while cleaning the garage. I find, rather, that the cut of John Hern III was the result of the occupational injury described by Black. Accordingly, I find respondent violated 29 C.F.R. §1904(a) as alleged in item 1(a).

The Secretary has alleged the violation to be a willful violation. In Williams Enterprises, Inc., 13 BNA OSHC 1249, 1256 (No. 85-355, 1987) the Review Commission held that:

> 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." (citations omitted)

Hern argues he had no reason to omit a reportable injury since the injuries he did report were sufficient to trigger an OSHA inspection and that his failure to report the cited injuries resulted from his good faith belief that the cited injuries did not meet the definition of a reportable injury. This argument is contradicted by both the facts and Hern's later testimony. I am convinced Hern failed to report occupa-

tional injuries, knowing they were reportable, in an effort principally to reduce his workmen's compensation premiums and, if possible, to avoid OSHA inspections.

In lieu of completing an OSHA Form 101 (the individual report of injury) an employer is permitted by the regulation to use an equivalent form. Hern used the Idaho Industrial Commission Notice of Injury and Claim for Benefits in lieu of the OSHA Form 101 (Tr. 449; Ex. C-8). These forms, signed by the employee, served the dual purpose of initiating a state claim for benefits and substituting for the OSHA Forms 101 which are summarized in the OSHA Form 200 log of injuries (Tr. 449). Failure to notify the Industrial Commission of an injury and to claim benefits would simultaneously result in a failure to notify OSHA of a reportable injury, while failure to notify OSHA of an injury served to conceal the injury from the Industrial Commission.

There is ample evidence that Hern had an ongoing policy of discouraging injury reporting. Employee Merle Black testified that on hiring he was told to report all injuries to the foreman, never to file any reports claiming on-the-job injuries and to obtain permission before going to see a doctor (Tr. 94). Ingram, items (d) and (h) below, testified that he was told to report all injuries to a foreman, but that he was never to file reports indicating on-the-job injuries and that he could not go to a doctor without permission (Tr. 94). He did not want to report his injuries to the State Industrial Commission

for fear of losing his job (Tr. 101,120,137). Elliott, a current employee (Tr. 151) items (b) and (g) below, testified that he understood from other employees, including his supervisor, that Hern's "standing" policy was to avoid involving the State Industrial Commission through the filing of workmen's compensation claims. If employees "made waves" they would lose their jobs (Tr. 160-162,165,184).

Hern's premiums for workmen's compensation were based in part on his injury rate (See Hern's testimony (Tr. 448) contradicting his earlier assertion that OSHA forms did not determine his premiums (Tr. 419)). The more injuries Hern's employees reported, the higher Hern's premiums. Moreover, if no injuries were reported, as in 1986 (discussed under item j) Hern could also avoid an OSHA inspection.

This Judge finds Hern's assertion that he had no motivation in not reporting injuries to be contradicted by his own later testimony, established fact, and the testimony of his own employees. Hern had a substantial financial interest in not reporting occupational injuries which he knew to be reportable.

Specifically, I find that Hern purposely failed to record the injury cited here. At the time of his injury John Hern III was 19 years old and lived at home with his father. His father had ample opportunity to know the cause and extent of his son's injury (Tr. 449). By this time the elder Hern had received a prior citation for recordkeeping, had negotiated and entered into a settlement agreement, and had provided corrected copies

of the OSHA From 200 to settle the prior citation. As Hern testified he was well conversant with the recordkeeping requirements of the Act (Tr. 439). The prior citation not only served to educate Hern in the Act's recordkeeping requirements but also served to warn him that his past recordkeeping practices were unacceptable.

Based on Hern's knowledge of the Act's recordkeeping requirements, his prior citation, his knowledge of the cause and severity of his son's on-the-job injury, and given his practice of discouraging the filing of accident reports, I find that Hern's failure to report the injury was willful.

Item 1(a) of Willful citation 1 is affirmed as a willful violation.

Item (b)

Item (b) alleges:

> (b) While at work on or about March, 1987, an employee suffered a second or third degree burn on his left foot when molten metal ran out of a mold and into his boot. The burn resulted in a scar approximately 3/4 inch by 2 inches. This injury was not recorded on the OSHA Form 200.

Robert Elliott, employed with Hern Iron from September 1986 to March 1987 (Tr. 150), testified that around the first of March 1987, he suffered a burn to his foot when a mold let loose and hot metal poured down into his boot, burning a hole through his boot and sock (Tr. 157). The 1"x 1-1/2" burn was cleaned and bandaged with a salve at the office (Tr. 157). The burn was reported to Hern. Hern discouraged Elliott's suggestion that he see a doctor (Tr. 157). The burn took

approximately two months to heal (Tr. 158). Elliott testified that he missed no work and suffered no work restrictions because of it (Tr. 168), though he was a "little bit slower on some things, like walking and running (Tr. 182).

Discussion and Conclusions

A burn caused by molten metal that burns through a boot and sock, measures 1 inch by 1-1/2 inches, takes two months to heal and causes some restriction in walking and running is a reportable injury due to the resultant restriction in Elliott's movement. There is further evidence Elliott would have visited a doctor had he not been discouraged by Hern. Had Elliott visited the doctor the severity of the injury would likely have resulted in medical treatment.

Hern had contemporaneous knowledge of the injury and its extent. Failure to report the injury is a violation of 29 C.F.R. §1904.2(a).

The Secretary alleged the violation to be willful. Hern again claims that he had a good faith belief the injury was not reportable and that the violation therefore cannot be willful, citing C. N. Flagg & Co., 2 BNA OSHC 1539 (No. 1409, 1975). However, for an employer to take advantage of the "good faith" defense, the employer must in fact believe his actions meet the regulation's requirements, and such belief must be reasonable. Western Waterproofing Co. v Marshall, 576 F.2d 139 (8th Cir. 1978).

Hern testified he believed Elliott's burn would require only first aid treatment and therefore was not reportable.

Given the size of the burn; the fact that it was caused by molten metal burning through a boot; that the employee requested medical treatment; that the appearance of the burn was necessarily consistent with the appearance of a burn that would require two (2) months to heal, I find Hern could not reasonably conclude the burn would not require medical treatment. Based on the above facts, Hern's lack of credibility, the prior citation, Hern's knowledge of the recordkeeping requirements and on his policy of underreporting injuries, discussed above, I specifically reject Hern's assertion that he had a good faith belief the burn was not reportable. Hern's failure to report this injury is a willful violation.

Item (b) of Willful citation 1 for failure to report an occupational injury is affirmed as a willful violation of 29 C.F.R. §1904.2(a).

Item (c)

Item (c) alleges:

> (c) While at work on or about April, 1987, an employee suffered a second or third degree burn on his right foot when molten metal burned through his boot. The burn left a scar approximately 1/4 inch in diameter. This injury was not recorded on the OSHA Form 200.

Herbert J. Lindsey testified that during his employment at Hern's workplace, between September 1986 and April 1987 (Tr. 64-65), he received a burn approximately the size of a dime on his right foot when molten metal burned through his boot during

a pour (Tr. 65-66,71). Mr. Lindsey, a trained emergency medical technician, did not seek medical treatment for the burn, but dressed the burn himself (Tr. 72-73). The burn blistered and eventually scabbed over (Tr. 72). Lindsey did not report the burn to anyone at Hern (Tr. 66). He testified that he "probably" mentioned it to his foreman, Mr. Hoppi Moffitt, because they were close friends (Tr. 67, 78).

Discussion and Conclusions

In Astra Pharmaceutical Products, Inc., 9 BNA OSHC 2126 (No. 78-6247, 1981), the Commission set out generally the Secretary's burdens.

> In order to prove a violation of section 5(a)(2) of the Act, 29 U.S.C. §654(a)(2), the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence.

In Continental Electric Company, 13 BNA OSHC 2153 (No. 83-921, 1989), the Commission discussed in greater detail the fourth burden. In note 4 the Commission stated that ". . . knowledge of conditions that fail to comply with a standard is a necessary prerequisite to finding an employer in violation of the Act, regardless of the characterization of the violation . . . ." .

Lindsey did not report the burn which is the subject of this item. Hern cannot be held accountable for failure to report an injury of which it had no knowledge. Lindsey's testimony that he "probably" "mentioned" the burn to Hoppi, a

friend and his foreman is insufficient to carry the Secretary's burden on this element.

Item (c) of Willful citation 1 is hereby vacated.

Item (d)

Item (d) alleges:

> (d) While at work on or about June 9, 1987, an employee suffered a second or third degree burn on his arm when a mold he was shaking out fell against it. The burn was severe enough to bleed, and left a scar approximately 1-1/2 by 1/4 inch. This injury was treated at work. This injury was not recorded on the OSHA Form 200.

Todd Ingram, a Hern employee from December 1985 to November 1986 (Tr. 90), testified that around June 1987 he received a burn when a hot mold fell against his left forearm (Tr. 104-105). The burn was about 1 to 1-1/2 inches long and 1/4 inch wide and was swelling, blistering and bleeding (Tr. 105).

The burn was cleaned and dressed by the secretary in the office (Tr. 105). Mr. Ingram's wound was bandaged about a week. He did not seek medical treatment because he did not feel it was warranted (Tr. 105). Ingram stated that he had full use of his arm immediately after the burn (Tr. 106).

Discussion and Conclusions

The record contains no evidence that establishes this burn meets the criteria of a reportable injury. Ingram received one-time first aid treatment and thereafter had full use of his arm. The arm, observed by this Judge, showed little or no scarring, which is inconsistent with a burn of such severity

as to require medical treatment. The injury was not reportable.

Item (d) of Willful citation 1 is hereby vacated.

Item (e)

Item (e) alleges:

> (e) While at work on or about July, 1987, an employee suffered a second or third degree burn on his left arm when the furnace blew up. The burn was treated at work. The injury resulted in the arm being bandaged for over a month, and lost work day(s). This injury was not recorded on the OSHA Form 200.

Stanley Kaminski was employed as a shop foreman with Hern from April 1987 to August 1989 (Tr. 189). In July, 1987 Kaminski allowed excess pressure to build up in a furnace. The furnace blew up and released heated gas which burned his right arm from above the elbow, halfway to his wrist (Tr. 190-191, 194). Kaminski had the burn salved and wrapped in the Hern office (Tr. 191). He kept the arm bandaged for approximately 2 to 2-1/2 weeks (Tr. 192). (See also, testimony of Black, pp. 42-47; Ingram, pp. 107-108). The bandages were changed and ointment applied daily (Tr. 193).

Kaminski testified that although he was out of work following the injury, his absence was previously scheduled in order for him to attend a wedding and was not due to his injury (Tr. 196-197). The burn was some hindrance to performing his job (Tr. 192-3

Discussion and Conclusions

A burn that requires a daily change of bandages and the application of ointment to prevent infection for over two weeks and restricts the employee's movement, even moderately, is a reportable injury. The record amply establishes that Kaminski's injury was common knowledge throughout the plant. Hern's failure to report the burn is a violation of 29 C.F.R. §1904.2(a).

The violation was alleged to be a willful violation. Hern again asserts he believed the burn was one that required first aid only and therefore was no reportable. For the reasons set forth earlier I do not accept the credibility of this statement. Given the extent of this burn, Hern's knowledge of both the burn and of the reporting requirements, the warning imparted by the prior citation, and Hern's established practice of discouraging the reporting and medical treatment of injuries, I find this violation to be willful.

Item (e) of Willful citation 1 is affirmed as a willful violation.

Item (f)

Item (f) alleges:

> (f) While at work on or about June 8, 1987, an employee suffered a foot injury when he dropped a forty (40) pound flange on it. The injury resulted in prescription medication, recommendation not to work for 4 or 5 days and the employee was fired. This injury was not recorded on the OSHA Form 200.

On June 24, 1987, Clarence Moffitt filed a Notice of Injury and Claim for Benefits with the State of Idaho

Industrial Commission (Ex. C-10). In the Notice, Moffitt stated that on June 8, 1987 a 40 pound flange was dropped on his right foot, resulting in bruising and a spit (sic) nerve. The Notice also states that the employer learned of the injury on June 17, 1987 and that Mr. Moffitt was fired because of it. Moffitt did not testify. A copy of Moffitt's report to the Industrial Commission (Ex. C-10) was the Secretary's only evidence for this injury.

I find that the Industrial Commission Report, a one page questionnaire completed by an employee for the purpose of obtaining workmen's compensation benefits, contains insufficient information to carry the Secretary's burden on all elements of this alleged violation by a preponderance of the evidence. Neither lost/restricted time, nor medical treatment required, if any, are established by the form.

Item (f) of Willful citation 1 is hereby vacated

Item (g)

Item (g) alleges:

> While at work on or about January 13, 1987, an employee suffered a strain in his left shoulder when the metal mold box he was pushing stopped due to stuck rollers. The injury resulted in prescription medication and lost work day(s). This injury was not recorded on the OSHA form 200.

Robert Elliott testified that in January 1987 he strained his shoulder pushing 3'x 4' flats down a roller (Tr. 151-152). Elliott stated that he reported the injury to John Hern, who suggested that they stretch the shoulder back into place using

a foundry crane (Tr. 152, 172-173). Mr. Elliott held on to a crane, while Mr. Hern lifted him into the air (Tr. 153).

Elliott testified that he worked the remainder of that day and the entire day following, however, the shoulder remained sore and he missed the next three (3) days of work (Tr. 153, 175). Elliott visited a Dr. Riggs, recommended by the secretary in Hern's office, on the day following the injury (Tr. 153-154, 176-178; Ex. C-8). Muscle relaxants were prescribed for the injury (Tr. 177).

Elliott stated that his supervisor was aware of the reason for his absence (Tr. 170). John Hern testified that Elliott punched a time card for every day around the date of the alleged injury except January 13 (Tr. 428, 442), however, the time cards were not produced by Hern even though he testified he reviewed them the morning of the hearing (Tr. 442).

Discussion and Conclusions

Elliott's injury clearly was an occupational injury. Hern implies that Elliott did not in fact suffer any lost time and therefore the injury is not reportable. Hern's assertion is based on an alleged review of Elliott's time cards for several days surrounding the injury (Tr. 442). Because Hern failed to produce the time cards, clearly important evidence which was in Hern's possession the morning he testified, and for reasons previously explained I find Hern's testimony not to be credible. I find, as Elliott testified, he missed three days as a

result of the injury. Accordingly, the injury was reportable. The failure to do so was a violation of 29 C.F.R. §1904.2(a).

The Secretary alleges the violation to be willful. Again Hern contends he reasonably believed the injury required nothing more than first aid and was therefore not reportable. For the reasons discussed under the preceding sections, I cannot conclude Hern had either a good faith or reasonable belief that Elliott's injury was not reportable.

Item (g) of Willful citation 1 is affirmed as a willful violation.

Item (h)

Item (h) alleges:

> (h) While at work on or about May 11, 1987, an employee suffered a back injury when the bucket loader he was operating hit a bump causing him to fall on the back of the seat. The employee received treatment from a chiropractor on several occasions for this injury. This injury was not recorded on the OSHA Form 200.

Todd Ingram, a Hern employee from December 1985 to November 1986 (Tr. 90), testified that on May 11, 1987 he was operating a bucket loader, dumping sand (Tr. 99). As he moved the loader downhill backwards, it went over some bumps, and threw him up in the seat (Tr. 99). Mr. Ingram stated that the incident injured his back (Tr. 99).

Ingram missed no work due to the incident (Tr. 116-117). The following week Ingram visited a chiropractor, a Dr. Schwartz, who took x-rays. Dr. Schwartz performed some "adjustments" on Ingram's back, and recommended that he take hot

showers and refrain from sitting (Tr. 100-101, 117). Dr. Schwartz also recommended that Ingram take some time off work and return for further treatment (Tr. 101). Ingram stated that he visited Dr. Schwartz a few more times (Tr. 102).

Ingram testified he reported the injury to his foreman, Stanley Kaminski, as he had been instructed by Hern at hiring (Tr. 94, 100, 116, 199). Kaminski testified that he felt Ingram had mentioned the incident merely in passing and was not registering a "formal" complaint (Tr. 198-199). Ingram did not file an injury report until the following November (Tr. 102).

Kaminski was aware Ingram visited a chiropractor, but believed that those visits were related to a previous work-related injury (Tr. 139, 201). Ingram had back problems prior to working at Hern Iron (Tr. 122-123). OSHA's Area Director testified that reasonable minds could disagree over whether this injury was reportable (Tr. 385).

Discussion and Conclusions

The testimony of Ingram is at times unclear and contradictory. Moreover, OSHA's Area Director admitted that the injury was not clearly recordable. I cannot conclude that the Secretary proved by a preponderance of the evidence that; Ingram's back injury resulted from his employment with Hern rather than a pre-existing injury; that Ingram's discussion of the injury with Kaminski was sufficient to provide respondent with the requisite knowledge; or that chiropractic treatment is the

equivalent to medical treatment under the regulation.

Item (h) of Willful citation 1 is hereby vacated.

Item (j)

Item (j) alleges:

> (j) While at work on or about December 11, 1986, an employee suffered a hand injury when the bucket of a front end loader dropped on it. The injury resulted in partial amputation of the left middle finger, intravenous medication, prescription medication, hospitalization, and lost work days(s). This injury was recorded on the OSHA Form 200 as medical treatment only.

On December 11, 1986, Mark Graves, a 4 year employee of Hern Iron, injured the middle finger of his left hand helping move a sprocket off a shaker (Tr. 142). As a result of the injury Graves was hospitalized and had the nail bed on that finger surgically removed (Tr. 143-144). Graves lost seven (7) work days and had restricted use of his hand for a little more than a week following his return to work due to the accident (Tr. 143, 148).

Graves' injury was recorded as an Injury Without Lost Workdays in respondent's log of occupational injuries and illnesses (Tr. 233; Ex. C-4). Respondent concedes its failure to report the injury as a lost time accident was a violation of the recordkeeping requirements (Tr. 77) and I so find.

The violation was alleged to be a willful violation. Hern asserts that had OSHA reviewed the State Industrial Commission's records it would have discovered the injury and hence Hern had no motive not to report the injury. I am convinced otherwise. This was a serious occupational injury that resul-

ted in seven lost workdays and a severely disfigured finger. The injury was noted in the 1986 Summary of Occupational Injuries, OSHA Form 200, but no reference is made to the fact that the employee suffered lost workdays (Ex. C-4). Hern asserts this was simple negligence. It appears to this Judge the summary was completed in a fashion deliberately designed to mislead OSHA inspectors into believing this was not a lost time accident which would trigger an inspection. Hern's response to the request for a description of the injury is unresponsive, providing instead the cause of the injury. In each of four separate columns relating to lost days or restricted activity injuries Hern indicated there were no lost days or restricted activity. Again, in another entry, column (6), Hern consistently with the prior entries, but in a different manner, confirmed this was an injury without lost workdays. In six separate instances on this single document the true severity of the injury was misreported. This document, as completed by Hern, would lead an inspector to believe that as of November 14, 1986, Hern had experienced only one injury which, though reportable, was not of sufficient magnitude to trigger an OSHA inspection. As Hern knew and as confirmed by the agency, the reporting of one lost time injury in a business the size of Hern's would trigger an inspection (Hern, Tr. 419; Kuehmichel, Tr. 370). Since the injury to Graves was the only injury reported in 1986 (See Ex. C-4), had it been properly reported

on the OSHA 200 an inspection would have resulted. As reported by Hern no inspection would have resulted.

Based on Hern's demeanor, the internal inconsistency of his testimony, and contradictory extrinsic evidence, I reject Hern's assertion that he had no reason to misreport Graves' injury. I find Hern knew the injury was a reportable lost day injury and failed to report it in an effort to avoid OSHA inspections.

Item (j) of Willful citation 1 is affirmed as a willful violation.

Other than serious citation

The requirement to record an injury on an OSHA Form 101 or its equivalent is governed by the same criteria that requires an injury to be recorded on the OSHA 200. Accordingly, the above findings and conclusions with respect to each item of the willful citation are equally applicable to each item of the Other than serious citation, other than those relating to characterization of the violations. I accept the OSHA Area Director's testimony these were other than serious violations (Tr. 364). Based on the above findings and conclusions:

Item (a) of Other citation 2 is affirmed as an other than serious violation.

Item (b) of Other citation 2 is affirmed as an other than serious violation.

Item (c) of Other citation 2 is vacated.

Item (d) of Other citation 2 is vacated.

Item (e) of Other citation 2 is affirmed as an other than serious violation.

Item (f) of Other Citation 2 is vacated.

Item (g) of Other citation 2 is affirmed as an other than serious violation.

Item (h) of Other citation 2 is vacated.

Timeliness

Respondent raises the issue that the citations were not issued within the six-month period required by section 9(c) of the Act. Hern asserts the records which revealed the violations were delivered to OSHA on July 22, 1988. Hern relied solely on his memory to support this contention (Tr. 459). Based on dates recorded in the case file OSHA asserts the date Hern's records were provided was July 26, 1988. The amended citation is dated January 24, 1989.

The Secretary argued the violations are continuing in nature and the limitation period does not commence until the violative acts cease. In the alternative the Secretary argues that the citation was issued within six months of receipt of the records.

Without ruling on the Secretary's more expansive view of the limitation period, I find the records were delivered to OSHA on July 26, 1988, as established by the testimony of the Compliance Officer (Tr. 251-259). Having previously ruled on Hern's creditability, I specifically reject his assertion that

the documents were delivered to OSHA on July 22, 1989. Accordingly, the citations were issued in a timely fashion.

Penalty

The determination of what constitutes an appropriate penalty is within the discretion of the Review Commission. Long Manufacturing Co. v OSHRC, 554 F.2d 902 (8th Cir. 1977). In determining the penalty the Commission is required to give due consideration to the size of the employer, the employer's good faith, history of previous violations and the gravity of the violation.

The gravity of the offense is the principal factor to be considered. Nacirema Operating Co., 1 BNA OSHC 1001, (No. 4, 1972). The Commission has stated that the elements to be considered in determining the gravity are: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury; if any, and (4) the degree of probability of occurrence of injury. Secretary v National Realty and Construction Co., 1 BNA OSHC 1049 (No. 85, 1971).

Hern employed 15 employees, has gross sales of approximately $500,000 per year (Tr. 451) and a net worth of approximately $50,000 (Tr. 451). Hern has a prior history of this same violation (Ex. C-11).

I find Hern demonstrated less than good faith. The violations were not affirmed on the basis of constructive knowledge but on Hern's actual knowledge of each injury, its extent and

its reportability. I again specifically reject Hern's contention that he had a good faith belief that the injuries were not reportable. I am convinced Hern refused to report these injuries in an effort to reduce his workmen's compensation premiums and avoid OSHA inspections. In considering Hern's good faith, or lack thereof, however, I reject the Secretary's invitation to consider Hern's demands for inspection warrants and failure to comply with those warrants as reflecting on Hern's good faith. Hern as a matter of right may require an inspection warrant. Hern's refusal to comply with such warrants until a ruling on their validity was obtained from the Ninth Circuit will not be considered as adversely affecting Hern's good faith.

The gravity of the violations and particularly the violation alleged in item (j) is high. Recordkeeping is required inter alia to develop ". . . information regarding the causes and prevention of occupational accidents and illnesses, and for maintaining a program of collection, compilation and analysis of occupational safety and health statistics." 29 C.F.R. 1904.1. Deliberate refusal to report injuries undermines these endeavors. Reports of injuries are used to select employers for inspection whose employees are most likely to be injured (Tr. 311). Based on its LWDI and employee testimony, Hern was such a place (Tr. 146). By not reporting the extent of Graves' injury in 1986 (Ex. C-4) the effect would have been to avoid OSHA inspections that would have been based on Hern's 1986

illness and injury records. Hern deliberately attempted to avoid OSHA inspections and isolate his employees from the Act's protection by not reporting the extent of Graves' injury. I find any attempt to isolate employees from the protections afforded by the Act, particularly when those employees work in an establishment where they are more likely to be injured, to be especially grievous.

For the reasons set forth above and in weighing the statutory penalty criteria, I find the penalties set forth in the order to be appropriate under Section 17(j) of the Act (29 U.S.C. Section 666(j).

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above.

ORDER

1. Willful Citation 1 item (a) is AFFIRMED as a willful violation a penalty of $2,000.00 is hereby ASSESSED.
2. Willful Citation 2 item (b) is AFFIRMED as a willful violation a penalty of $2,000.00 is hereby ASSESSED.
3. Willful Citation 1 item (c) is hereby VACATED.
4. Willful Citation 1 item (d) is hereby VACATED.
5. Willful Citation 1 item (e) is AFFIRMED as a willful violation and a penalty of $2,000.00 is hereby ASSESSED.
6. Willful Citation 1 item (f) is hereby VACATED.

7. Willful Citation 1 item (g) is AFFIRMED as a willful violation and a penalty of $2,000.00 is hereby ASSESSED.

8. Willful Citation 1 item (h) is hereby VACATED.

9. Willful Citation 1 item (j) is AFFIRMED as a willful violation and a penalty of $5,000.00 is hereby ASSESSED.

10. Other Citation 2 item (a) is AFFIRMED as an other violation and a penalty of $200.00 is hereby ASSESSED.

11. Other Citation 2 item (b) is AFFIRMED as a other violation and a penalty of $200.00 is hereby ASSESSED.

12. Other Citation 2 item (c) is hereby VACATED.

13. Other Citation 2 item (d) is hereby VACATED.

14. Other Citation 2 item (e) is AFFIRMED as a other violation and a penalty of $200.00 is hereby ASSESSED.

15. Other Citation 2 item (f) is hereby VACATED.

16. Other Citation 2 item (g) is AFFIRMED as a other violation and a penalty of $200.00 is hereby ASSESSED.

17. Other Citation 2 item (h) is hereby VACATED.

James H. Barkley
Judge, OSHRC

Dated: March 30, 1990