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

SECRETARY OF LABOR,

Complainant,

v.

SOUTH DAKOTA BEVERLY ENTERPRISES, INC. d/b/a/ BEVERLY HEALTH CARE BELLA VISTA NURSING HOME,

and

COMMERCIAL MANAGEMENT, INC. d/b/a/ BEVERLY HEALTH CARE - IPSWICH,

Respondents.

OSHRC Docket Nos. 01-202 & 01-427

DECISION

Before: RAILTON, Chairman; ROGERS and STEPHENS, Commissioners.

BY THE COMMISSION:

After the Occupational Safety and Health Administration ("OSHA") inspected the two nursing homes in these cases, the Secretary of Labor issued each nursing home a citation alleging that it had violated one of OSHA's machine-guarding standards promulgated under the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. §§ 651-677. Both nursing homes contested the citations, and a consolidated hearing was held before Administrative Law Judge Robert A. Yetman, who affirmed both citations. His decision is

before us on review pursuant to section 12(j) of the Act, 29 U.S.C. § 661(j). For the reasons below, we reverse the judge and vacate both citations.

Background

The two nursing homes in question are separately incorporated, wholly-owned subsidiaries of Beverly Enterprises, which operates nursing homes nationwide. OSHA inspected Beverly Healthcare Bella Vista Nursing Home in Rapid City, South Dakota, ("Bella Vista") on December 5, 2000, and Beverly Health Care-Ipswich in Ipswich, S.D. ("Ipswich") the next day. Each facility was cited for a serious violation of 29 C.F.R. § 1910.212(a)(1),[1] based on its failure to guard the rotating parts of Hobart A-200 food mixers used by employees in the kitchen of each facility.

The A-200 is a 20-quart capacity vertical food mixer manufactured by the Hobart Corporation. Unlike electric "eggbeater" mixers manufactured for home use, the A-200 has only one agitator, a paddle-like metal blade. Although it is similar in design to a home mixer, the A-200 is larger, and the agitator shaft rotates on its axis in a "planetary" or orbiting motion in addition to spinning. Both the Secretary's expert and Beverly's expert, the manager of product design for Hobart, testified that the point of operation of the A-200 mixer is the rotating agitator, which comes close to the side of the mixer bowl about 4 inches down inside the bowl, creating a "nip point." According to Hobart's product design manager, the opening between the lip of the bowl and the housing of the mixer is approximately 5 inches.

Originally manufactured in 1935, the A-200's basic design has remained unchanged. In 1995, Hobart began to equip its A-200 mixers with a cage-like bowl guard as standard equipment. At that time, Hobart also made a bowl guard kit available to owners of pre-1995 machines.

The A-200 mixers at the Beverly facilities are used about three times a week for 10 to 15 minutes in order to mix food items such as meat loaf, instant potatoes, and puddings. It is

[1]The standard provides in pertinent part:

> (a) *Machine guarding* -- (1) *Types of guarding*. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks.

undisputed that there have been no injuries resulting from the use of the unguarded A-200 mixers at either of the cited nursing homes.

Discussion

In affirming the machine guarding violations alleged in each case, the judge reasoned that because Hobart had begun manufacturing the A-200 mixer with a guard, it recognized that the unguarded mixer was hazardous. The judge also concluded that Beverly's employees were "exposed to serious injuries" based on testimony from Hobart's product design manager that Hobart had received about a dozen reports of injuries resulting from the use of its unguarded mixers. The judge made no explicit findings of exposure relating specifically to how the A-200 mixer functions and how it is operated by Beverly's employees. Beverly argues on review that the judge's failure to do so was contrary to Commission precedent.[2] We agree.

Under section 1910.212(a)(1), the Secretary is required "to prove that a hazard within the meaning of the standard exists in the employer's workplace." *ConAgra Flour Milling Co.*, 16 BNA OSHC 1137, 1147, 1993-95 CCH OSHD ¶ 30,045, p. 41,241-42 (No. 88-1250, 1993), *rev'd on other grounds*, 25 F.3d 653 (8th Cir. 1994), citing *Armour Food Co.*, 14 BNA OSHC 1817, 1821, 1987-90 CCH OSHD ¶ 29,088, p. 38,883 (No. 86-247, 1990). Specifically, the Secretary "must show that employees are in fact exposed to a hazard as a result of the manner in which the machine functions and is operated." *Id.*, citing *Jefferson Smurfit Corp.*, 15 BNA OSHC 1419, 1421, 1991-93 CCH OSHD ¶ 29,551, p. 39,953 (No. 89-553, 1991). The mere fact that it is not impossible for an employee to come into contact

[2]Beverly also argues that the judge erred in finding that section 1910.212(a)(1), the cited general machine-guarding standard, was not preempted by the more specific requirements of section 1910.263(e)(2), which governs vertical mixers and does not include a guarding requirement. The judge rejected Beverly's contention based on a 1978 notice in the Federal Register in which the Secretary declared that the hazards presented by moving parts of vertical mixers were covered by section 1910.212. *See* 43 Fed. Reg. 49,726, 49,757 (Oct. 24, 1978). Further, as the judge noted, this statement is consistent with OSHA's 1999 compliance memorandum from Richard Fairfax, Director of Compliance Programs, to all Regional Administrators addressing guarding requirements for vertical food mixers. Accordingly, we find that the record supports the judge's finding that section 1910.212(a)(1) applied to the Hobart A-200 mixers cited here.

with the moving parts of a particular machine does not, by itself, prove that the employee is exposed to a hazard. *Armour Food*, 14 BNA OSHC at 1821, 1987-90 CCH OSHD at p. 38,883.

The judge based his conclusions regarding exposure on findings that have no support in the record. The record does not support the conclusion that Hobart's decision to manufacture the A-200 mixer with a guard was based on its belief that the unguarded mixer posed a hazard. As the judge himself acknowledged, the expert testimony of Hobart's product design manager was that the unguarded mixer presents no hazard to operators. The record also lacks relevant details about the dozen or so injuries reported to Hobart. Without any information as to the type of operations involved when these injuries occurred or the specific circumstances under which the injured individuals came into contact with the unguarded mixer, it would be imprudent to rely on these reports in reaching any conclusions about the exposure of Beverly's employees at the cited nursing homes.

We further find that the evidence presented by the Secretary to support her burden of proof as set forth in our precedent falls short of establishing exposure. Neither compliance officer took any measurements during their inspections that would relate to the exposure of Beverly's employees to the unguarded mixer, such as how close the rotating paddle comes to the side of the bowl or how close employees come to the paddle when it is rotating. Both nursing home inspections appear to have been cursory, at best. Indeed, the compliance officer who inspected Bella Vista never saw the A-200 mixer operated by any of Beverly's employees, and the compliance officer who inspected Ipswich witnessed only a demonstration of the mixer's use.

In arguing that exposure has been established here, the Secretary makes no claim that inadvertent contact with the rotating agitator could be made by Beverly's employees during normal use of the unguarded A-200 mixer. In addition, all three of the Secretary's witnesses conceded that there was no operational reason for Beverly's employees to place their hands inside the mixer's bowl while the agitator was rotating. The record shows that with one exception, employees were instructed to turn the mixer off whenever ingredients were added to the bowl. Only when liquid ingredients were poured into the bowl from a gallon pitcher

during the preparation of meat loaf would employees keep the mixer on. The Secretary, however, has failed to explain how, on these occasions, Beverly's employees could have come into contact with the nip point located four inches down inside the mixer bowl with a gallon-size pitcher positioned between their hand, and the five-inch opening between the housing and rim of the bowl.

Likewise, there is no evidence in the record to support the Secretary's claim that Beverly's employees "rest their hands on the rims" of the A-200 mixer's bowl while the mixer is on. None of the photographs in evidence or the videotapes taken by the compliance officers depict employees placing their hands on the rim of the bowl while the mixer is operating.[3] We also find the Secretary's suggestion that employees are exposed to the mixer's point of operation while turning the mixer on or off to be without merit. One of the compliance officers estimated that the switch was located ten inches from the top of the mixer bowl, which means that the point of operation was at least 14 inches from the switch. The Secretary has not shown how at this distance, Beverly's employees could have come in contact with the nip point down inside the bowl. *Cf. Jefferson Smurfit*, 15 BNA OSHC at 1422, 1991-93 CCH OSHD at p. 39,954 (no exposure to gluing machine's inrunning nip point located 16 inches from power switch).

Finally, we note that the absence of injuries on the Hobart A-200 mixer at either of the cited nursing homes serves as further evidence that exposure to a hazard requiring the use of a guard has not been established here. *See Armour Food*, 14 BNA OSHC at 1822, 1987-90 CCH OSHD at p. 38,883 (occurrence of injury not necessary to prove violation; absence of injuries supports finding that there was no hazard).

For these reasons, we find that the Secretary has failed to establish that Beverly's employees were exposed to a hazard when operating the unguarded A-200 mixer.[4]

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[3]Although one photograph taken from the inspection videotape depicting the demonstration shows a Beverly employee's fingers resting on the outer part of the mixer bowl, the record establishes that the mixer was off at that time.

[4] Commissioner Rogers notes that even under the Commission's more recent formulation of the exposure test in *Fabricated Metal Prod.*, 18 BNA OSHC 1072, 1998 CCH OSHD ¶ 31,463 (No. 93-1853, 1997), the Secretary has failed to show exposure. That is, the

Accordingly, we reverse the judge and vacate the citations in both cases.

SO ORDERED.

/s/

W. Scott Railton
Chairman

/s/

James M. Stephens
Commissioner

/s/

Thomasina V. Rogers
Commissioner

Dated: March 15, 2005

Secretary has failed to show that it is "reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Id.* at 1074, 1998 CCH OSHD at p. 44,506-7.

SECRETARY OF LABOR, Complainant, v. SOUTH DAKOTA BEVERLY ENTERPRISES INC. *d/b/a* BEVERLY HEALTH CARE BELLA VISTA NURSING HOME, and COMMERCIAL MANAGEMENT, INC. dlb/a BEVERLY HEALTH CARE IPSWICH, Respondents.	OSHRC DOCKET NO. 01-0202 OSHRC DOCKET NO. 01-0427

APPEARANCES:

For the Complainant:
Susan J. Wilier, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:
Gregory S. Narsh, Esq., Pepper Hamilton, LLP, Harrisburg, Pennsylvania
Gary M Glass, Esq., Thompson Hine, LLP, Cincinnati, Ohio

Before: Administrative Law Judge: Robert A. Yetman

DECISION AND ORDER

This proceeding arises under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §65 1, *et seq*. (the Act) to review citations issued by the Secretary of Labor pursuant to §9(a) of the Act and a purposed assessment of penalty therein issued pursuant to § 10(a) of the Act. Jurisdiction is not contested by either party.

On December 5, 2000, representatives of the Occupational Safety and Health Administration (OSHA) inspected the worksite of Respondent, Commercial Management, Inc. d/b/al Beverly Health Care, Ipswich (Ipswich) located at Ipswich, South Dakota. On December 6, 2000, OSHA inspectors inspected the worksite of South Dakota Beverly Enterprises, Inc., d/b/a Beverly Healthcare Bella Vista Nursing Home (Bella Vista) located at Rapid City, South Dakota. In each instance, OSHA issued a serious citation alleging one violation of the standard

set forth at 29 CFR 1910.212(a)(1). Timely notices of contest were filed followed by complaints and answers. By motion dated August 6, 2001, Respondents' sought summary judgement in their favor for both alleged violations. Complainant responded to the motion on August 17, 2001. The motion was held in abeyance pending a consolidated hearing on the merits held on August 22 and 23, 2001 at Rapid City, South Dakota. For the reasons set forth below, Respondents' motion for summary judgement in both cases is DENIED.

Background

Respondents, Ipswich and Bella Vista, are engaged in providing nursing home services at their respective worksites. The citations issued in both cases involved a Hobart model A-200 vertical mixing machine in their respective food preparation areas. The machines are used to mix various food items such as meat loaf, instant potatoes, puddings and similar food preparations. Complainant alleges that employees using the mixer are exposed to the hazard of unguarded moving parts. Respondents' assert that no hazard exists nor is it reasonably predictable that employees are exposed to a significant risk of injury while operating the mixers. According to Respondents, the moving parts of the machine (the shaft and beater) are guarded by the mixing bowl. In addition, Respondents argue that the standard cited, the general machine guarding standard set forth at 29 CFR 1910.212, is preempted by a specific standard (29 CFR 1910.263 (e)(2)) which does not require guarding for vertical mixers as demanded by the Secretary. Finally, Respondents' assert that OSHA's regulatory scheme is arbitrary and capricious because of inadequate notice regarding the guarding requirements for the Hobart 200 mixer.

The Hobart 200 is an industrial vertical "planetary" mixer with a 20 quart capacity mixing bowl. The mixer is similar in design to the familiar home mixer except that it is larger and the agitator shaft rotates on its axis in a "planetary" motion in addition to the agitator or beater rotation. The machine is a table model originally manufactured during 1935 and the basic design has remained unchanged to the present time. Approximately 250,000 machines have been manufactured between 1935 and 1990 without any guard around the mixing bowl (Tr. 263); however, as of 1995, each new mixer manufactured by Hobart has been equipped with a bowl guard as standard equipment. The manufacture also makes available to customers owning older machines a retrofit kit containing a guard for those machines. There is no evidence, however, of

any employee injuries resulting from the operation of the Hobart 200 at either of Respondents' worksites.

Discussion

The citations issued to both Respondents are identical and read as follows:
29 CFR 1910.212(a)(l) Machine guarding was not provided to protect operator(s) and other employees from hazard(s) created by rotating parts:

> (a) In the kitchen area, for employees who operate the Hobart A-200 mixer which did not have a guard over the rotating parts.

The standard set forth at 29 CFR 1910. 212(a)(1) reads as follows:

> (a) *Machine guarding--(1) Types of guarding.* One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, plying chips and sparks. Examples of guarding methods are--barrier guards, two-hand tripping devices, electronic safety devices, etc.

To establish a violation of a specific standard, the Secretary must prove that the standard applies, the employer violated the terms of the standard, its employees had access to the violative condition, and the employer had actual or constructive knowledge of the violative condition. *E.G., Hamilton Fixture,* 16 BNA OSHC 1073, 1082, 1993-95 CCH OSHD ¶ 30,034, p. 41,178 (No. 88-1720, 1993), *aff'd without published opinion,* 28 F.3d 1213 (6th Cir. 1994). She must prove each element of her case by a preponderance of the evidence. *E.g., Astra Pharmaceutical Products, Inc., 9* BNA OSHC 2126, 2131 &nn.16& 17, 1981 CCH OSHD ¶ 25,578, p. 31,901 &nn.16 & 17 (No. 78-6247, 1981), *aff'd in pertinent part,* 681 F.2d 69(1st Cir. 1982).

Respondent strongly argues that a specific bakery equipment standard for vertical mixers applies to the Hobart 200 Machine. That standard, set fort at 29 CFR 19 10.263 (e)(2), specifically relates to vertical mixers and is silent regarding the requirement to provide guarding

around the moving agitator parts. Respondents point to the standard relating to horizontal mixers set forth at 29 CFR 19 10.263 (e)(1)(viii) which requires a full enclosure over the mixing bowl. The standard relating to vertical mixers (263(e)(2)) states that vertical mixers must "comply with paragraphs (e)(1)(i), (iii), (ix), of this section". Therefor, argue Respondents, since the machine in question is a vertical mixer and in view of the fact that the standard relating to vertical mixers does not incorporate the guarding requirements for horizontal mixers or indeed, any guarding requirement at all, vertical mixers are exempt from guarding requirements. Moreover, since the standard set forth at section 263 (e)(2) relates specifically to vertical mixers, the Secretary may not cite the general machine guarding standard. Respondents point to 29 CFR §1910.5(c)(1) which provides in pertinent part:

> If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process.

Thus, argue Respondents, Complainant may not cite a general guarding standard when a specific standard relating to vertical mixers does not require a bowl guard. Respondent also relies upon a letter dated July 23, 2001 issued by the OSHA area director to the Beverly Health Care facility located at Hillsdale, Pennsylvania wherein it is stated, regarding an unguarded Hobart 200 mixer, "[s]ince no OSHA standard applies and it is not considered appropriate at this time to invoke Section 5(a)(1), the general duty clause of the Occupational Safety and Health Act, no citation will be issued for those hazards" (Ex. R-1).

The precise argument raised by Respondents with respect to the applicability of the general guarding standard to vertical mixers was addressed and rejected by the Commission in *Top Taste Bakeries, Inc., etal.,* 14 BNA OSHC 1675, 1990 CCH OSHD ¶ 28,962 (1990). On relevant facts essentially identical to the instant matter, the Commission concluded that the Secretary specifically revoked the guarding requirement for vertical mixers under section 1910.263 because hazards presented by moving parts of vertical mixers were and are covered by the standards set forth at 1910.212 *see:* Federal Register dated October 24, 1978, 43 FR 4975.7. The same rationale applies here. Thus, in the absence of a specific standard addressing the

hazards presented by moving parts of vertical mixers, the general machine guarding standard set forth at 1910.212 must apply to those hazardous conditions. *L.R. Willson and Sons, Inc. v. Donovan* 685 F.2d 664; *Secretary of Labor v. Blue Ridge Farms, Inc.* 913 NA OSHC 1276 (1981). Moreover, Respondents' argument that they were without notice as to the guarding requirements for vertical mixers is also without merit. It is well established that publication in the Federal Register is adequate notice to bind Respondents by constructive notice. *Federal Corp. Ins. Corp. v Merrill* 332 U.S. 380 (1947). Furthermore, Respondents' reliance upon the letter dated July 23, 2001 is similarly misplaced since it was promulgated after the inspections which resulted in this proceeding. Moreover, the evidence establishes that the position of the Secretary regarding the guarding requirements for vertical mixers is set for in the compliance directive dated February 26, 1999 (Ex. C-6). That directive clearly states that hazards presented by moving parts of vertical mixers are covered by the general machine guarding standard set forth at 1910.212.

The remaining issue presented by the evidence in this case is whether employees operating the Hobart 200 mixers are exposed to hazards that require guarding to protect those employees from injury. As Respondents correctly point out, the Secretary must establish that a significant risk of harm exists to employees operating the Hobart mixer. *See: Fabricated Metals Products, Inc.* 1997 CCH OSHD ¶ 31,463; *Pratt and Whitney Aircraft Div. v. Sec. of Labor* 649 F2d 96(2nd cir 1981). In *Fabricated Metals*, the Commission stated:

> ". . . in order for the Secretary to establish employee exposure to a hazard she must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger. We emphasize that, . . . the inquiry is not simply into whether exposure is theoretically possible. Rather, the question is whether employee entry into the danger zone is reasonably predictable" *supra* at 1074.

To carry out her burden, the Secretary presented the compliance officer who conducted the inspection at each facility. At the Bella Vista location, the compliance officer observed an employee who demonstrated the manner in which the mixer was operated at the facility (Tr. 27, 35). He stated that he observed the employee exposed to unguarded rotating parts while mixing ingredients to make a cake (Tr. 27, 30, 36). The compliance officer stated that the employee, in the event that she contacted the rotating beater and shaft, could sustain an injury to her hands and

fingers ranging from abrasions, cuts, dislocated and fractured bones (Tr. 32). The beater rotated approximately one inch from the inside wall of the mixing bowl (Tr. 34). However, there has been no history of injuries at the Bella Vista location resulting from the operation of the Hobart 200 machine.

With respect to the Ipswich location, the compliance officer observed the Hobart 200 in the kitchen area; however, at no time during the inspection did he observe any employees operating the mixer. He interviewed an employee who stated that the mixer was used to prepare various food products such as puddings, dough and similar food items (Tr. 80). The employee stated that ingredients were added to the mixing bowl only during the mixing operation for the preparation of meat loaf. For all other food preparation the mixer was turned off before adding ingredients to the mix. The mixer is operated for 15-20 minutes approximately four times a week. Although the compliance officer believed that employees were exposed to moving parts of the mixer, there is no evidence that any injuries were sustained by the use of the mixer. Both compliance officers testified that the probability of an injury to employees operating the mixer is low.

On these facts, Respondents vigorously assert that the Secretary has failed to establish that the Hobart 200 mixer creates a significant hazarded of injury to employees. In support of their argument, Respondent's point to two Review Commission ALJ decisions wherein it was concluded, on facts similar to the instant matter, that employees using vertical mixers were not exposed to a significant risk of injury. *See: Secretary of Labor v. Station 104, Inc.* 1990 CCH OSHD ¶ 28,920 (1990); *Secretary of Labor v Top Taste Bakeries, Inc. and Have Bakery and Coffee Shop* 1990 CCII OSHD 28,962. In both cases, it was concluded that the so called pinch points presented by the rotating parts of the mixers were inside the mixing bowl and effectively guarded from employee contact by the bowl. Respondents correctly argue that the mixers in this case are smaller in capacity, are used less often and the pinch point is further into the mixing bowl than the mixers in the aforesaid cases. Thus, argues Respondents, the smaller capacity, more distant point of operation and low frequency of use of the Hobart 200 provides minimal access to the "zone of danger" (Respondents brief pg. 19) with no significant risk of harm to Respondents' employees.

The arguments raised by Respondents would be more compelling in the absence of the Hobart Corporation's decision to manufacture and sell the Hobart 200 mixers with a mandatory guard around the mixing bowl as of *1995.* Moreover, the company offers a retrofit guarding kit to customers owning older models of the mixer (Tr. 265). According to the testimony of a Hobart employee, Hobart, since 1995, refuses to sell a Hobart 200 mixer without a guard (Tr. 268). The witness testified that loose clothing and jewelry could be caught by the rotating agitator (Tr. 278). A corporate decision was made to place a guard on the mixer to prevent access to the rotating parts because of reports of injuries resulting from the use of the mixer (Tr. *285).* The nature of the injuries were lacerations and fractured fingers and hands (Tr. *285).* In addition, the company was aware or anticipated that European countries and Canada required or soon would require that the moving parts of the mixer be guarded (Tr. 282, 283). Moreover, Hobart received requests from customers for additional guarding (Tr. 284). Thus, from 1995 to the present, all Hobart 200 mixers have been manufactured and sold with a guard as standard equipment to prevent access to the rotating parts.

From the foregoing, it is clear that the manufacturer of the Hobart 200 mixer has recognized the hazardous nature of the machine and has provided a guard to eliminate those hazards. Although a design engineer employed by Hobart testified that, in his opinion, the unguarded mixer presents no hazard to users of the machine, I place no weight to that testimony in light of the corporate decision to provide a mandatory guard for the rotating parts of the machine and to offer guards for older mixers. Accordingly, it is concluded that the Secretary has sustained her burden of proof that Respondents' employees were exposed to injury while operating the Hobart 200 mixer. In view of the manufactures' finding that users of the machine had sustained lacerations and fractures of the hand and fingers, it is concluded that Respondents' employees were exposed to serious injuries. Thus, the violations, as alleged, are affirmed.

With respect to the penalty, the Secretary asserts that the gravity of the violation is low, that is, the probability and the severity of an injury is low and a low penalty assessment is warranted (Secretary's brief pg. 29). Both companies are of medium size and neither firm has a prior history of being cited. In addition, the Secretary allowed a reduction of the proposed penalty for good faith. Based upon the foregoing, the penalty proposed by the Secretary in the amount of $1,275 for each violation is assessed as to each Respondent.

Findings of Fact

All finding of fact relevant and necessary to a determination of all issues have been made above. Fed. R. Civ. P. 52(a). All proposed finding of fact inconsistent with this decision are hereby denied.

Conclusion of Law

1. Both Respondents are engaged in a business affecting commerce and have employees within the meaning of Section 3(5) of the Act.
2. Respondents, at all times material to this proceeding, were subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and of the subject matter of this proceeding.
3. At the time and place alleged, Respondent South Dakota Beverly Enterprises, Inc., d/b/a Beverly Health Care, Bella Vista Nursing Home violated the provision of 29 FR 1910.212(a)(1) and said violation was serious within the meaning of the Act.
4. At the time and place alleged, Respondent Commercial Management, Inc., d/b/a Beverly Health Care - Ipswich violated the provisions of 29 CFR 1910.212(a)(1) and said violation was serious within the meaning of the Act.

ORDER

Serious citation 1, item number 1 as to both Respondents is AFFIRMED and a penalty in the amount of $1,275 is assessed as to each violation.

/s/
Robert A. Yetman
Judge, OSHRC

Dated: February 25, 2002