SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 93-577
REGIONAL SCAFFOLDING & HOISTING CO., INC.,	:	
Respondent.	:	

DECISION

Before: WEISBERG, Chairman; MONTOYA, and GUTTMAN, Commissioners.

BY THE COMMISSION:

The Occupational Safety and Health Administration ("OSHA") issued citations alleging that Regional Scaffolding & Hoisting Co., Inc. ("Regional") violated three OSHA safety standards. Regional contested the citations, and a hearing was held before Chief Administrative Law Judge Irving Sommer, who vacated one of the items and affirmed the others as serious violations.

Regional argued before the judge that the manner in which the inspection was conducted violated both the Fourth Amendment of the Constitution of the United States and section 8(a) of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. § 657(a). The judge rejected these arguments, and Regional sought review of those rulings. The merits of the violations alleged are not before us; the only issues on review involve the propriety of the inspection. Oral argument was held on whether the compliance officer's actions contravened the requirements of the Fourth Amendment or section 8(a).[1] For the reasons below, we affirm the judge.

Background.

[1]Because of the similarity of the issues presented, the Commission heard oral argument in this case and in *L.R. Willson and Sons, Inc.*, No. 94-1546, on the same day.

Regional was a subcontractor on a project that involved extensive renovations to the facade of the New York City Municipal Building. Because the building remained fully occupied by city employees, the workmen could not gain access to their work areas by the inside elevators. Regional therefore erected a hoist tower on the north face of the building, connected to the building by structural steel. The hoist had two cars to carry workmen and supplies to levels where they were to work. Work on the north side of the building had been completed, and Regional was in the process of dismantling the hoist when the area director of OSHA's New York office noticed employees on top of the cars of the hoist with no visible fall protection.

Upon his return to his office, the area director instructed an OSHA compliance officer to inspect the worksite. The compliance officer arrived the next morning prior to 8:00 a.m., before work had begun. When work commenced, the compliance officer was approximately 75-100 yards away from the hoist on a ramp to a federal building, across the public plaza from the Municipal Building. From that vantage point, which was a public area, he observed two individuals climbing across the roof of one of the hoist cars, a part of the car that was not protected by guardrails

At this point the compliance officer believed that the activities he had observed violated various OSHA standards, and he videotaped the activity of the employees on the top of the hoist car. While he videotaped, he saw employees climb from one of the hoist cars, across the hoist tower, and onto the other car. One car rose to the twenty-fifth floor of the Municipal Building with employees on the roof, and an employee walked from the hoist 10 feet across an unguarded 16-inch-wide "pick" to the window of the building, entered the building, detached the hoist tower from the building, and returned across the pick to the hoist car. Because there was no fall protection, the employee faced the possibility of falling twenty-five stories. The compliance officer's view of the hoist was partially obscured, however, and he could not discern exactly what was taking place. He went next door to the federal courthouse, where it took him about half an hour to get permission to go on the roof.

From the roof of the courthouse, the compliance officer got a closer look at the activities in question and further videotaped the activities. The compliance officer completed his videotaping and went to the worksite, where he presented his credentials to Regional's foreman. He determined that the individuals he had observed were employees of Regional, interviewed one of the employees, and left the premises. The compliance officer subsequently returned to the worksite to interview additional Regional employees, but they were not at the site. He obtained their names and addresses from Regional's office and interviewed them away from the worksite. Based on his observations and interviews, OSHA cited Regional for two serious violations and one repeated violation.[2]

The compliance officer did not give Regional any notice that he was observing and videotaping the activities of its employees before he entered the worksite to speak to the foreman. Regional complains that this observation of its worksite without notice violated both the Fourth Amendment and sections 8(a) and 8(e) of the Act.

[2]The citations alleged a serious violation of 29 C.F.R. § 1926.21(b)(2), which requires employers to familiarize their employees with applicable OSHA standards and to train them to recognize and avoid hazards, a serious violation of 29 C.F.R. § 1926.1051(a) for not providing a ladder for employees to get off the roof of the hoist, and a repeated violation of 29 C.F.R. § 1926.500(d)(2), which requires guardrails on runways.

The Fourth Amendment.

The administrative law judge rejected Regional's argument that the compliance officer's actions violated the Fourth Amendment because he found that the observations were made from areas accessible to the public. He stated, "If OSHA's observations are made from an area easily accessible or visible to the general public, Fourth Amendment protections do not apply." Regional has argued that the converse of that statement is also true: "If such observations are not made from an area that is easily accessible or visible to the general public, *Fourth Amendment protections do apply*." (emphasis in original). Regional contends that, because the compliance officer's observations were made from the roof of a federal courthouse, a location not open to the public at large, they should be suppressed.

The Supreme Court has held that the Fourth Amendment to the Constitution[3] requires the Secretary to obtain a warrant in order to conduct an inspection of a workplace without the consent of the employer. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). However, "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967). "What is observable by the public is observable without a warrant by the Government inspector as well." *Marshall v. Barlow's, Inc.*, 436 U.S. at 315. That precept governs the facts here: Regional's work was performed out in the open, exposed to public view. Regional is asserting a desire to be free of observation by the government, but this expectation of privacy is not reasonable under the Fourth Amendment where its activities were open to public view.

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[3]The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Nor is a reasonable expectation of privacy necessarily determined, as Regional asserts, by the location from which the observations are made. For example, police observations of a drug transaction taking place on a public sidewalk, made from private property, are permissible because the participants in the transaction can have no reasonable expectation of privacy for their conduct in such a location. *United States v. Green*, 670 F.2d 1148 (D.C. Cir. 1981) (observations with binoculars from undisclosed surveillance location of activities occurring in the public view gave police probable cause to arrest). The same principle controls the situation in this case. Although some of the compliance officer's observations may have been made from a location that was not accessible to the general public, the worksite was open to public view.[4] Regional was working on the exterior of the New York City Municipal Building, which housed 5,000 employees, many of whom could look out the windows of the building and see the activities covered by the citation. In addition, everyone on the side of the federal courthouse facing the Municipal Building could observe Regional's activities, as well as passersby on the sidewalks and the occupants of other high-rise buildings within eyeshot. Regional cannot, therefore, claim that it had a "'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740 (1979). We therefore find that the compliance officer's observations did not constitute an "unreasonable search" within the prohibition of the Fourth Amendment.

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[4]The judge correctly held that the "plain view" doctrine set out in *Coolidge v. New Hampshire*, 403 U. S. 443 (1971), does not apply to the facts of this case. That doctrine applies to situations where the government officer is legally on premises for another purpose and unexpectedly sees evidence of a crime unrelated to the purpose that took him onto the premises. *Arizona v. Hicks*, 480 U.S. 321, 324-27 (1987).

Section 8(a) of the Act.

The parties dispute whether section 8(a) of the Act prohibits the kind of conduct involved here, extended observations made from a location removed from the worksite. Section 8(a) provides:

> In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge is authorized--
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> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace, or environment where work is performed by an employee of an employer; and
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> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

As we have held today in *L.R. Willson and Sons, Inc.*, No. 94-1546, section 8(a) applies only to physical inspections conducted on the worksite. Regional's arguments must therefore be rejected because the conduct of which it complains took place entirely off-site. We agree with Regional that workplace hazards observed by OSHA compliance personnel should be brought to the attention of employers with all reasonable speed so that they can be abated, and the length of time that elapsed here is worrisome. As we have stated in *L.R. Willson and Sons, Inc.*, we question the wisdom of the compliance officer's continuing at length to allow employees to be exposed to a potentially fatal hazard for the sake of further documenting a violation. We believe that such conduct is contrary to the purposes of the Act, and we urge the Secretary to take measures to discourage it.

Having found that there was no violation of either the Fourth Amendment or section 8(a) of the Act, we need not determine whether it is appropriate to require an employer to show actual prejudice before a remedy will be afforded, or to decide what remedy would be appropriate for an intentional violation of section 8(a).

Section 8(e) of the Act.

Congress enacted section 8(e) of the Act to permit the employer and employees to accompany the compliance officer in order for them to be of assistance to him or her in performing the inspection.[5] *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 9 (1980). Having held that section 8(a) applies only to on-site inspections of a worksite, we also hold that section 8(e)'s provisions similarly apply only to on-site inspections. In this case, as soon as the compliance officer made a physical entry onto the worksite, he presented his credentials to Regional's foreman and afforded Regional its right to accompany him on a walk-around inspection, which is all that section 8(e) requires.

Degree of violation and penalty.

The administrative law judge found that Regional had committed two serious violations and assessed penalties of $1,500 and $3,500 respectively. On review, neither party has challenged either the characterization of the violations as serious or the appropriateness of the penalties assessed. Accordingly, we find no reason to disturb the

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[5]Section 8(e), 29 U.S.C. § 657(e), provides:

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* * *

(e) Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

judge's determination that the violations were serious and that penalties of $1,500 and $3,500 are appropriate.

Order.

For the reasons above, we affirm the decision of the administrative law judge rejecting Regional's arguments based on the Fourth Amendment to the Constitution and on sections 8(a) and 8(e) of the Act. We further affirm his finding that the two violations were serious and that penalties of $1,500 and $3,500 are appropriate.

/s/
Stuart E. Weisberg
Chairman

/s/
Daniel Guttman
Commissioner

Dated: March 11, 1997

MONTOYA, Commissioner, concurring:

As I have said today in *L.R. Willson and Sons*, No. 94-1546, the majority has now cleared the way for OSHA to conduct its inspections by stakeout. I concur with their conclusion that, like L.R. Willson and Sons, Inc. ("Willson"), Regional Scaffolding & Hoisting Co. ("Regional") has no interest in privacy that is protected under current Fourth Amendment law. I strongly disagree, however, with their conclusion that the kind of surveillance activity engaged in by the compliance officer here is permissible under sections 8(a) and 8(e) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 657(a) and (e). On the authority of these sections, I would suppress the evidence this compliance officer gained through covert surveillance of Regional's worksite from the roof of the U.S. Federal Court House. However, I consider the compliance officer's initial observations from the public plaza between the Municipal Building and Court House, and the testimony from Regional's employees, sufficient to support both the violations found by the majority and their penalty assessments. I therefore agree with their ultimate decision to affirm Judge Sommer's disposition of this citation.

Because the Fourth Amendment provides no remedy for the covert surveillance the compliance officer conducted of Regional's worksite, then any remedy available to Regional must lie in section 8 of the OSH Act. The Secretary has argued that the provisions of section 8 are coextensive with those of the Fourth Amendment -- that section 8 provides no remedies beyond those recognized under the Fourth Amendment. Though the majority has rightly rejected that view, I do not agree with their rationale. Indeed, I consider the majority's conclusion that section 8 protections are at once "broader" than those of the Fourth Amendment, yet "narrower" for the single purpose of exempting off-site inspections, to be a result-driven "gerrymander" of the most obvious sort. In my opinion, Congress intended that these protections should be broader than those of the Fourth Amendment for *all* purposes.

The Commission has already determined that section 8(a)(1) guarantees employers that inspections will be conducted at "reasonable times, and within reasonable limits, and in

a reasonable manner." When OSHA deliberately violates these guarantees, then the Commission can apply an appropriate sanction. *See Hamilton Fixture*, 16 BNA OSHC 1073, 1078, 1993 CCH OSHD ¶ 30,034, p. 41,173 (No. 88-1720, 1993), *aff'd without published opinion*, 28 F.3d 1213 (6th Cir. 1994). It is only reasonable, then, that an equivalent sanction is available when OSHA deliberately violates the rights guaranteed in sections 8(a) and 8(e). Therefore, if an OSHA compliance officer enters a worksite and deliberately conducts an inspection without first "presenting appropriate credentials to the owner, operator, or agent in charge," as required by section 8(a), some remedy must be available to an employer. Also, some remedy must be available if "a representative of the employer and a representative authorized by his employees" is not "given an opportunity to accompany" the OSHA compliance officials, as required by 8(e)(known generally as "walkaround rights").

In my opinion, the compliance officer here intentionally violated both of these provisions when he began his inspection by conducting surveillance of the worksite from the roof of the U.S. Court House. As the Supreme Court has recognized in the Fourth Amendment context, a search does not necessarily involve "a physical intrusion into any given enclosure." *Katz v. United States*, 389 U.S. 347 353 (1967). *See also United States v. Knotts*, 460 U.S. 276 (1983) (approving surveillance of driver of automobile by police using beepers, automobiles and helicopter); and *United States v. Conner*, 478 F.2d 1320 (7th Cir. 1973) (approving observations made by police from end of alley through open garage door into automobile repair shop). In *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), the Supreme Court analyzed the inspection provisions in section 114(a) of the Clean Air Act, 42 U.S.C. § 7414(a), and explicitly held that "the use of aerial observation and photography is within EPA's statutory authority." 476 U.S. at 232. For the Court to have made this holding, it must have considered that the Environmental Protection Agency was engaged in an inspection when it photographed Dow's plant from a remote location.[6] Since

[6]As with the compliance officer in this case, the Environmental Protection (continued...)

the operative provisions of section 114 of the Clean Air Act read much like those of section 8 of the OSH Act, I can only conclude that this compliance officer was likewise engaged in an inspection when he gathered evidence from the roof of the hotel. This inspection was commenced in deliberate violation of the requirements of sections 8(a) and 8(e).

This does not mean that all observations made by compliance officers before they present credentials or provide walkaround rights are subject to sanction. As the Commission has recently recognized, incidental observations made while a compliance officer is approaching a worksite do not offend the provisions of section 8 of the Act. *See GEM Indus., Inc.*, 17 BNA OSHC 1184, 1186-87, 1993-95 CCH OSHD ¶ 30,762, pp. 42,746-47 (No. 93-1122, 1995). Therefore, the observations made by the compliance officer upon his arrival in the public plaza between the Municipal Building and Court House are admissible. However, the compliance officer then concealed himself at a remote location in order to further document this violative conduct, rather than presenting his credentials and providing walkaround rights as required by sections 8(a) and 8(e). Again, such surveillance can only be considered part of an inspection within the meaning of section 8. And, since this part of the inspection was deliberately conducted prior to the presentation of credentials as required by section 8(a), with no opportunity for Regional or its employees to exercise walkaround rights provided in section 8(e), some sanction must be applied.

The majority could have decided this case on the initial observations the compliance officer made from the public plaza and the testimony of Regional's employees without

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[6](...continued)
Administration officials in *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986) presented no credentials before beginning a remote surveillance. Unlike this case, however, *Dow* was decided on Fourth Amendment grounds alone. The majority's reading of *Dow* notwithstanding, the Court offered no opinion as to whether the inspection provisions of section 114(a), 42 U.S.C. § 7414(a), provide protections beyond those of the Fourth Amendment.

reaching any of these section 8 issues. Nonetheless, as in *L.R. Willson and Sons*, they have gratuitously concluded that the protections provided by section 8 are generally broader than those of the Fourth Amendment. In doing so, however, they have conveniently found a narrowing of section 8 regarding off-site inspections, thereby denying employers any remedy when OSHA conducts off-site surveillance such as here. Though they claim to find this narrowing in the language of section 8 itself, the courts have found no such limitation in the Fourth Amendment, nor in the closely-related inspection provisions of the Clean Air Act. Indeed, section 8(b) gives OSHA the authority to subpoena witnesses in the furtherance of an inspection. By enacting this provision, Congress clearly intended that section 8 would apply to inspection activity that would occur off-site. Having now eliminated the only basis on which an employer can seek relief from a covert inspection, there is little solace to employers in the majority's criticism of OSHA's inspection policy. Congress did not give the Commission oversight authority to affect OSHA's internal policies, but rather "intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a *court* . . . ." (emphasis in original). *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 154 (1991).

The Commission has determined that the exclusionary rule applies to its proceedings. *Sanders Lead Co.*, 15 BNA OSHC 1640,1651, 1991-93 CCH OSHD ¶ 29,690, p. 40,270 (No. 87-0260,1992). While the Circuit Courts have agreed, they have also said that the good faith exception should be liberally applied when considering orders of abatement. *Trinity Industries v. OSHRC*, 16 F.3d 1455, 1462 (6th Cir. 1994); *Smith Steel Casting v. Brock,* 800 F.2d 1329, 1334 (5th Cir. 1896). Given the compliance officer's deliberate violation of section 8, I can see no reason to give the Secretary the benefit of the good faith exception here. I would therefore apply the sanction of suppression to all evidence gathered by the compliance officer as a result of his surveillance from the roof of the U.S. Court House across the plaza from the worksite. However, the observations the compliance officer made

from the public plaza when he first arrived are sufficient to support both these citations and the majority's penalty assessment.

The Secretary argues that *Chevron,* U.S.A.*, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) and *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991) require the Commission to give deference to his reading of section 8. It is true that the Supreme Court has said that when the Commission finds an OSHA standard to be ambiguous, then it, like all reviewing courts, must give deference to the Secretary's reasonable interpretation of that standard. However, the *CF&I Steel* Court was careful to explain that "[b]ecause applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policy making prerogatives, the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Id.* at 151. This reasoning certainly applies when the Commission is confronted with an ambiguity in a standard promulgated by the Secretary. But that is not the case here. What we are now asked to determine is what -- if any -- legal remedy should be afforded to an employer when OSHA intentionally violates section 8 of the OSH Act. Like OSHA, the Commission is itself an agency established under the OSH Act. Repeating the words of *CF&I Steel,* "Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a *court* . . . ." *CF&I Steel*, 499 at 154 (emphasis in original). The issue here -- whether the exclusionary rule and its suppression remedy apply when the Secretary intentionally violates section 8 of the OSH Act -- must be decided in accordance with rules of evidence created by the courts. As the Commission is the agency with the "adjudicatory powers typically exercised by a court," then the most logical application of *Chevron* and *CF&I Steel* would be to give deference to the Commission, not the Secretary, on such a purely legal decision as this.

The Secretary has cited a number of cases under section 8 for the proposition that the employer must show actual prejudice in order for section 8 sanctions to apply. All of those cases, however, involve unintended "technical violations" of section 8 by OSHA personnel.

Here the compliance officer deliberately avoided his statutory duty to present his credentials and to allow the employer and the employees to participate in the inspection. In a case such as this, it can easily be said that the employer was prejudiced *per se*, and it is hardly appropriate to require the employer to show actual prejudice for a sanction to apply. The Secretary's unsupported representation at oral argument that she now has administrative controls in place to prevent the improper conduct of inspections provides little reassurance. Particularly considering that the Secretary has refused to acknowledge that the OSH Act places any limitations on her inspection authority, the license the majority now has given her to support citations with evidence gathered secretly from off-site is cause for concern.

Conclusion.

For the reasons stated, I concur in the result reached by the majority, although I arrive at this result by a different course of reasoning.

/s/
Velma Montoya
Commissioner

Dated: March 11, 1997