UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR Complainant, v. NEW ENGLAND INDUSTRIES, INC., Respondent.	OSHRC DOCKET NOS. 92-1100 92-1101

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on June 23, 1993. The decision of the Judge will become a final order of the Commission on July 23, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before July 13, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. /BKW

Date: June 23, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NOS. 92-1100 & 92-1101

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,		
Complainant,		
v.	OSHRC Docket Nos.	92-1100 92-1101
NEW ENGLAND INDUSTRIES, INC.		
Respondent.		

Appearances:

Christine T. Eskilson, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Rosemary Healey, Esq.
Edwards & Angell
Providence, Rhode Island
For Respondent

Before: Administrative Law Judge Richard W. Gordon

DECISION AND ORDER

This proceeding arises under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C., *et. seq.*, ("Act"), to review citations issued by the Secretary pursuant to § 9(a) of the Act and a proposed assessment of penalty thereon issued pursuant to § 10(c) of the Act.

BACKGROUND

On January 23, 1992, Safety Engineer Robert Sestito and Industrial Hygienist Mary Ann Medeiros conducted follow-up safety and health inspections, respectively, of New England Industries ("NEI"), a jewelry parts manufacturer located in Providence, Rhode Island (Tr. 12-15, 50). In 1991, NEI was the subject of both a safety inspection and a health inspection and was issued two citations at that time for several safety and health violations

(Exhibits C-3, C-4 & C-6).[1] When NEI failed to provide information to OSHA indicating that it had corrected the cited conditions by the abatement dates agreed upon, the follow-up inspections were initiated (Tr. 12-13, 50; Exhibits C-3 & C-6).

As a result of these follow-up inspections, NEI was issued two failure to abate notifications and two repeat citations on February 13, 1992. On January 11, 1993, I granted partial summary judgment in favor of the Secretary with regard to the following items: Docket No. 92-1100 (Inspection No. 18146050) - Failure to Abate Notification, Items 1-4a and 1-4b, Repeat Citation No. 1, Item 1; and Docket No. 92-1101 (Inspection No. 18146043) - Failure to Abate Notification, Items 1-3 and 1-4, Repeat Citation No. 1, Item 1. Thus, three items remain at issue here: under Docket No. 92-1100, Repeat Citation No. 1, Items 2 and 3 with proposed penalties of $200.00 and $1600.00 respectively; and under Docket No. 92-1101, Failure to Abate Notification, Item 1-5 with a proposed penalty of $8000.00.

NEI filed a timely notice of contest and a hearing was held in Boston, Massachusetts on January 20, 1993. Both parties have filed post-hearing briefs and this matter is now ready for decision.

DISCUSSION

I. DOCKET NO. 92-1100

A. Repeat Citation No. 1, Item 2

This item alleges a violation of 29 C.F.R. § 1910.37(g)(2) which requires that the exterior ways of exit access have smooth, solid floors and be substantially level. Mr. Sestito testified that as he was entering the NEI facility on January 23, 1992, he noticed that the paved walkway and stairs from the building to the parking lot were damaged (Tr. 19). Specifically, the threshold at the building's doorway was missing a large piece of concrete, the top step at the upper landing had broken pieces of concrete at its edge, and an unpaved portion of concrete at the bottom of the stairs was not level with the parking lot; according to Mr. Sestito, all three of these conditions created a tripping hazard for NEI employees

[1] The violations alleged in these citations - the safety citation issued on June 11, 1991 and the health citation issued on June 19, 1991 - became final orders of the Review Commission when NEI settled them with the Occupational Safety and Health Administration ("OSHA") on July 2, 1991 (Exhibits C-3 thru C-7).

entering or exiting the building from the parking lot (Exhibits C-1a, C-1b, & C-1c; Tr. 21-23).[2]

The Secretary has characterized this alleged violation as a repeat violation on the basis of the final order which exists with regard to the safety citation issued to NEI on June 11, 1991 and includes a violation of the same standard cited here for essentially the same hazardous conditions at the building's exit to the parking lot (Exhibit C-3). NEI challenges the repeat classification of this violation on two grounds. First, NEI suggests that since the original citation did not specifically mention any damage to the area at the bottom of the exit's steps, as the current citation does, the Secretary is precluded from citing this alleged violation as a repeat violation. However, in order to allege a repeat violation, the Secretary need only show that a Commission final order exists against the same employer for a substantially similar violation. *Edward Joy Co.*, 15 BNA OSHC 2091, 2092 (No. 91-1710, 1993); *Kulka Constr. Management Corp.*, 15 BNA OSHC 1870, 1874, 1992 CCH OSHD ¶ 29,820 (No. 88-1167, 1992); *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294 (No. 16183, 1979). If the violations involve specific standards, then the Secretary establishes a prima facie case of similarity by showing that the standards violated are identical; if general standards are involved, then the Secretary carries the burden of proving that the violations are substantially similar in nature. *Edward Joy Co.* at 2092. Here, not only are the standards allegedly violated the same, but the violations themselves are sufficiently similar in that they both involve the same hazardous condition in the same area of NEI's workplace, i.e. damage to the building's exit; it irrelevant that the *type* of damage alleged is not precisely the same. In this respect, therefore, the Secretary was entitled to classify this violation as a repeat violation.

NEI also argues that neither of the items cited under Docket No. 91-1100 can be considered repeat violations because Mr. Sestito did not perform the original 1991 inspection

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[2] As I indicated at the hearing, by itself, the photograph of the exit's top step does not clearly demonstrate the damage alleged by Mr. Sestito (Exhibit C-1b; Tr. 21-22). His testimony, however, sufficiently describes this condition as he observed it and was not rebutted by NEI. In fact, James Massarone, NEI's maintenance employee and only witness at the hearing, conceded that the top step was missing pieces of concrete at the time of the second inspection (Tr. 74-75, 86, 105-06).

and did not have copies of the prior citations with him at the time of the 1992 inspection. It has never been required, though, by either OSHA or the Review Commission that the same compliance officer perform both inspections before a repeat violation can be alleged. Indeed, to enact such a requirement would be to expect OSHA to direct its inspection resources such that each employer could only be inspected by one particular compliance officer over any given three-year period during which repeat violations may be issued. Furthermore, it is immaterial that Mr. Sestito did not carry copies of the prior citations with him as he inspected NEI. A compliance officer need not know ahead of time that an employer's citation history supports the finding of a repeat violation; in fact, such a consideration does not even become necessary until the compliance officer discovers a hazardous condition for which the employer may be cited. As a result, the Secretary's repeat classification of this alleged violation stands.

NEI does not dispute the existence of the damage alleged here, but maintains that it did not pose a hazard to NEI employees. I disagree; all three conditions, particularly the threshold damage, clearly increase an employee's chances of tripping or stumbling as he enters or exits NEI's facility. The potential for injury exists regardless of the fact that some employees "might", as NEI suggests, step over the damaged threshold or walk around the uneven area at the bottom of the steps. I also agree with Mr. Sestito that this type of hazard does not pose the threat of serious physical harm or death to employees and therefore, the violation was properly characterized as other-than-serious (Tr. 24).

Mr. Sestito testified that when he pointed out these damaged areas at the follow-up inspection to Paul Callenda, NEI's owner and president, Mr. Callenda admitted he was aware of the problem from the previous inspection in 1991 and indicated that he was planning to fill in the damaged areas with asphalt (Tr. 23-24). As noted, Mr. Massarone testified that the damage to the exit's top step was filled in with cement at one point after the 1991 inspection, but the cement had broken out again by the time of the follow-up inspection (Tr. 86-88, 105-06). Mr. Massarone also admitted that the hole in the doorway's threshold existed at the time of the 1991 inspection and was not fixed until after the second, 1992 inspection (Tr. 103-04). In light of this testimony, as well as the documentary evidence submitted in connection with this item, I find that the Secretary has clearly established a

violation of § 1910.37(g)(2). Accordingly, the alleged citation is affirmed as an other-than-serious, repeat violation and the proposed penalty of $200.00 is found to be reasonable and appropriate under the circumstances.

B. Repeat Citation No. 1, Item 3

This item alleges a violation of § 1910.219(e)(1)(i) which provides in relevant part: "where both runs of a horizontal belt are 42 inches or less from the floor, the belt shall be fully enclosed...." According to Mr. Sestito, the horizontal belts and pulleys on two spin casting machines at the NEI facility were not adequately guarded, exposing employees to the danger of fingers or clothes being caught by the belts (Tr. 24-25, 28-29; Exhibits C-2b & C-2c).[3] Mr. Massarone conceded at the hearing that the belts were not fully enclosed and as a result, an employee could insert his or her hand into the side of the machine (Tr. 97-98).[4]

NEI contends, however, that it reasonably relied on the safety citation it was issued on June 11, 1991 which alleged a violation of the same standard cited here, but specifically identified only two spin casting machines out of nine as being in violation (Exhibit C-4; Tr. 77, 80-81). Since the two spin casting machines cited here were not the ones singled out the year before as inadequately guarded, NEI argues that it was justified in believing that these machines were in compliance with the standard. A prior inspection, however, does not excuse an employer from ensuring continued compliance with OSHA standards and regulations in its workplace. *See Lukens Steel Co.*, 1981 CCH OSHD ¶ 25,742, p. 32,122 (No. 76-1053, 1981) ("...because compliance with the Act is a continuing obligation, an employer cannot deny the existence of or its knowledge of a cited hazard by relying on the Secretary's earlier failure to cite the condition"). *See also Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1224, 1991 CCH OSHD ¶ 29,442 (No. 88-821, 1991) ("*Seibel*"). NEI cannot assume that the other seven spin casters were in compliance with the cited standard simply because OSHA did not include them in the original citation, particularly where there is no indication that the first compliance officer ever actually assured NEI that

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[3] Spin casters are used to mold or cast jewelry findings out of molten metal (Tr. 25, 79-80; Exhibit C-2a).

[4] NEI also does not dispute that the horizontal belts are 42 inches or less from the floor (NEI Post-Hearing Brief at 5; Tr. 25).

this was the case.[5] Indeed, "the mere fact of prior inspections does not give rise to an inference that OSHA made an earlier decision that there was no hazard, and does not preclude the Secretary from pursuing a later citation." *Seibel* at 1224. NEI cannot even claim that it lacked notice of this hazardous condition for the prior citation should have alerted NEI to the fact that failing to fully guard the horizontal belts of a spin caster not only poses a hazard to the employee using the machine, but also violates OSHA standards.[6]

NEI also argues that the violation alleged here cannot be characterized as a repeat violation because different machines were cited in each instance. As the Secretary accurately notes, however, this argument fails to recognize the distinction between a failure to abate situation and a repeated violation. Had Mr. Sestito found that the same machines originally cited in 1991 were still not guarded as required by the cited standard, a failure to abate notification would have been issued. Since, however, Mr. Sestito discovered the same hazardous condition, i.e horizontal belts which were not fully enclosed, which violates the same standard previously violated, the current violation was properly categorized as a repeat violation. *See supra*, *Edward Joy Co.* at 2092; *Kulka Constr. Co.* at 1874; *Potlatch Corp.* at 1063.

Finally, NEI challenges the Secretary's classification of this violation as serious on the grounds that the likelihood of serious injury here is minimal since it would be difficult for an employee to come into contact with a belt that is only about 21 inches from the ground. It is not the *likelihood* of injury, however, that determines whether a violation is serious, but the *extent* of the injury that an employee might sustain. See § 17(k) of the Act ("a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result..."); *Dravo Corp.*, 7 BNA OSHC

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[5] I am not convinced that Mr. Massarone's question to the compliance officer at the time of the inspection ("Are you sure that's all that has to be done, just the guard?") and her apparent response ("Yes, on those machines.") provides NEI with an adequate basis for its belief that the seven machines not cited in 1991 were in compliance with OSHA standards (Tr. 81). Indeed, Mr. Massarone's question as posed would seem to require a response that refers to the hazard to be corrected, not to any specific machine.

[6] NEI also cannot rely on the representations of the machines' manufacturer that they are "OSHA approved" or "meet OSHA standards". Employers are ultimately responsible for the safety of their employees and this responsibility cannot be avoided by blaming the manufacturer of the unsafe equipment particularly where the hazard involved is one which the employer could have easily abated himself (Tr. 98-99).

2095, 2101, 1980 CCH OSHD ¶ 24,158 (No. 16317, 1980), *petition for review denied*, 639 F.2d 772 (3d Cir. 1980) ("For a violation to be serious within the meaning of the Act...the probability of the accident occurring is irrelevant"). While it may be rare for an employee to come near this unguarded area, it is certainly *possible* to come into contact with a belt that is exposed in this manner; should that occur, I agree with Mr. Sestito that it is likely the employee would suffer serious physical harm. This violation, therefore, was properly characterized as serious.[7]

In sum, the Secretary has established a repeated, serious violation of § 1910.219(e)(1)(i). Accordingly, the alleged citation is affirmed and the proposed penalty of $1600.00 is found to be reasonable and appropriate under the circumstances.

II. DOCKET NO. 91-1101

A. Notification of Failure to Abate, Item 1-5

It is undisputed that NEI employees work with white metal when casting jewelry findings in the spin casting machines (Tr. 55-56, 76-79, 94-95). Ms. Medeiros testified that this white metal consists of tin, lead, cadmium and antimony, all elements which, if handled improperly, can pose serious health risks to the employees exposed to them (Tr. 55-56). As a result, NEI must comply with the requirements of OSHA's hazard communication standard, § 1910.1200(h), which states:

> Employers shall provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area.

The final order pertaining to the June 19, 1991 health citation includes a violation of this standard and NEI apparently never submitted abatement information to OSHA to indicate that it had corrected this omission (Exhibits C-6 & C-7; Tr. 50). Because, according to Ms.

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[7] It should be noted, however, that NEI's concern regarding the *probability* of an accident or injury occurring as a result of the cited condition has been reflected in OSHA's calculation of the proposed penalty. As Mr. Sestito testified, part of the penalty determination process includes classifying a violation as either "greater...or lesser probability of an accident occurring" and Mr. Sestito indicated that he characterized this particular violation as a *lesser* probability (Tr. 30-31).

Medeiros, NEI was still not in compliance with the standard at the time of the follow-up inspection, NEI was cited for a failure to abate violation (Tr. 50, 52-56).

Ms. Medeiros testified that during the follow-up inspection, Mr. Callenda informed her that he had assigned responsibility for abating the hazard communication violation to Mr. Massarone, but nothing had been done yet (Tr. 54, 93). Indeed, Mr. Massarone admitted at the hearing that it was not until after the follow-up inspection that he developed a written hazard communication program (Tr. 91-92). He also acknowledged that hazardous chemical training had not yet been provided to employees regarding the safe and proper use of this material, but explained that such training was unnecessary since the employees assigned to the spin casters were required by NEI to have "years" of casting experience and therefore, already understood the dangers of working with such substances (Tr. 75-78, 92-95).

In order to prove a failure to abate violation, the Secretary must show that: "(1) the original citation has become a final order of the Commission, and (2) the condition or hazard found upon reinspection is the identical one for which respondent was originally cited." *Braswell Motor Freight Lines, Inc.*, 5 BNA OSHC 1469, 1470, 1977-78 CCH OSHD ¶ 21,881 (No. 9480, 1977). The Secretary has established both of these elements and the record clearly indicates that at the time of the follow-up inspection, NEI had failed to take any action to abate the hazard communication violation it was cited for in June of 1991. This inaction is not somehow justified by NEI's avowed reliance on its employees' spin casting experience. The extent of an employee's work experience has no bearing on an employer's obligation under the hazard communication standard to ensure that the employee understands the health risks involved if the hazardous chemicals with which he works are not utilized in a safe and proper manner. *See Art Work Dental Laboratories Inc.*, 14 BNA OSHC 2095, 2096 (No. 89-1584, 1991) (employer's argument that hazard communication training was unnecessary because employees were experienced is rejected). Even Mr. Massarone conceded that the employees may know how to cast yet still be unaware of the hazards these materials can pose (Tr. 94-95).

Finally, NEI maintains that it is entitled to a partial abatement of this violation for three reasons: that material safety data sheets ("MSDSs") for these chemicals were available to employees; that safety equipment such as gloves and goggles was provided to employees;

and that the hazards of handling the white metal were obvious to employees by virtue of the high temperatures to which they were heated (Tr. 76-78, 88, 106-07).[8] Ms. Medeiros confirmed that NEI had maintained MSDSs on the premises and had made the appropriate safety equipment available to employees (Tr. 64). However, neither of these efforts constitute the provision of "information and training on hazardous chemicals" to employees as required by the cited standard. In order to prove partial abatement under this standard, NEI would have had to introduce some evidence that it was training employees regarding the proper use of the white metal or was informing employees that the MSDSs, as well as a written hazard communication program, were available for their use. No such evidence has been submitted here. Furthermore, while the high temperature of the metal may make the danger of being burnt obvious to NEI employees, it tells them nothing about the potential health problems that the metal's components can cause internally if utilized improperly. Thus, NEI has failed to establish that the violation was partially abated.

Accordingly, the failure to abate violation of § 1910.1200(h) is affirmed and the proposed penalty of $8000.00 is found to be reasonable and appropriate under the circumstances.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

ORDER

Docket No. 91-1100

1. Repeat citation 1, item 2, alleging a violation of 29 C.F.R. § 1910.37(g)(2) is AFFIRMED and a penalty of $200.00 is ASSESSED.

2. Repeat citation 1, item 3, alleging a violation of 29 C.F.R. § 1910.219(e)(1)(i) is AFFIRMED and a penalty of $1600.00 is ASSESSED.

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[8] As noted at the hearing, if it is found that a violation has been partially abated, then the penalty proposed for the failure to abate violation may be reduced by a certain percentage; the violation itself, however, remains unaffected by such a determination (Tr. 64, 67-68).

1. Notification of failure to abate, Item 1-5, alleging a violation of 29 C.F.R. § 1910.1200(h) is AFFIRMED and a penalty of $8000.00 is ASSESSED.

RICHARD W. GORDON
Judge, OSHRC

Dated: June 18, 1993
Boston, Massachusetts