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

SECRETARY OF LABOR, Complainant, v. SCHMITT TREE EXPERTS, Respondent.	OSHRC Docket No. 13-0696

Appearances: Wayne P. Marta, Esquire
U.S. Department of Labor, Office of the Solicitor, Cleveland, Ohio
For the Secretary

William W. Johnston, Esquire
Columbus, Ohio
For the Respondent

Before: William S. Coleman
Administrative Law Judge

DECISION AND ORDER

This matter involves an employer's alleged failure to correct a violation of the standard in 29 C.F.R. § 1910.180(d) that requires an employer to make monthly "certification records" of the inspection of certain mobile cranes and to keep such records "readily available."

In August 2012, the Occupational Safety and Health Administration (OSHA) cited the Respondent, Schmitt Tree Experts (Schmitt Tree), for violating 29 C.F.R. § 1910.180(d)(2). Schmitt Tree did not contest this citation, and it became a final order by operation of law under section 10(a) of the Occupational Safety and Health Act (Act), 29 U.S.C. § 659(a). On March 22, 2013, after having determined that Schmitt Tree had not corrected this violation, OSHA issued to Schmitt Tree a Notification of Failure to Abate (NFTA) the violation, and proposed an additional penalty of $36,000.

Schmitt Tree timely filed a notice of intention to contest the NFTA, and OSHA duly forwarded the contest to the Occupational Safety and Health Review Commission (Commission).

The undersigned conducted a hearing in Columbus, Ohio, on December 18, 2013.[1] The filing of post-hearing briefs was completed on March 5, 2014.

The issues for decision are:

1. Did the original citation describe the recordkeeping violation with sufficient particularity to inform Schmitt Tree what it was required to do to correct the violative recordkeeping condition, even though the original citation did not expressly reference the recordkeeping standard of paragraph 1910.180(d)(6)?

2. Did Schmitt Tree fail to correct the violative recordkeeping condition?

3. Is the Secretary equitably estopped from issuing the NFTA on the asserted ground that OSHA officials falsely informed Schmitt Tree that OSHA would supply Schmitt Tree with a form that it could use to correct the violation?

4. Is the proposed additional penalty of $36,000 appropriate?

As discussed below, the resolution of these issues results in the affirmance of the NFTA and an assessed penalty of $9180.

Jurisdiction and Coverage under the Act

The Commission has jurisdiction under section 10(c) of the Act, 29 U.S.C. § 659(c).

Schmitt Tree is an Ohio corporation that was formed in February 2010. (Ex. C-1). Schmitt Tree employs employees and is engaged in a tree care business that affects interstate commerce. (Schmitt Depo. pp. 10-15, 22, 23). Thus, at all times relevant to these proceedings, Schmitt Tree was an "employer" as defined by section 3(5) of the Act, 29 U.S.C. § 652(5), and was subject to the requirements that the Act imposes upon employers.

Background

On May 18, 2012, OSHA conducted an inspection of Schmitt Tree's place of business in Columbus, Ohio. As a result of that inspection, on August 28, 2012, OSHA issued to Schmitt

[1] Schmitt Tree is a corporation and appeared at the hearing only through its retained attorney; no other official or representative of Schmitt Tree was present at the hearing. *See* Commission Rule 22(a), 29 C.F.R. § 2200.22 (providing that a party "may appear in person, through an attorney, or through another representative who is not an attorney"); *cf.* Commission Rule 64(a), 29 C.F.R. § 2200.64(a) (providing that "[t]he failure of a party to appear at a hearing may result in a decision against that party"). In the discovery phase of the instant matter, the Secretary had deposed Mr. Tobias Schmitt, who is an owner and officer of Schmitt Tree. (Schmitt Depo. pp. 10-11). The deposition was received in evidence without objection and without limitation. (Tr. pp. 10, 71-72; Ex. C-8).

Tree a citation and notification of penalty (original citation) that alleged Schmitt Tree had violated 29 C.F.R. § 1910.180(d)(2), which pertains to the inspection of truck cranes (and certain other mobile cranes) that are in regular service.

Paragraph 1910.180(d)(2) by itself does not prescribe any employer duties or responsibilities, but rather is definitional in nature. It establishes two types of "regular inspections" of certain mobile cranes -- "frequent" and "periodic" – based upon the intervals at which the inspections should be performed. Paragraph 1910.180(d)(2) provides:

> (2) *Regular inspection.* Inspection procedure for cranes in regular service is divided into two general classifications based upon the intervals at which inspection should be performed. The intervals in turn are dependent upon the nature of the critical components of the crane and the degree of their exposure to wear, deterioration, or malfunction. The two general classifications are herein designated as "frequent" and "periodic", with respective intervals between inspections as defined below:
>
> (i) Frequent inspection: Daily to monthly intervals.
>
> (ii) Periodic inspection: 1- to 12- month intervals, or as specifically recommended by the manufacturer.

The original citation expressly referenced subparagraph (i), which describes the intervals for "frequent" regular inspections.

Schmitt Tree did not contest the original citation, so in September 2012 it became a final order of the Commission by operation of law under section 10(a) of the Act, 29 U.S.C. § 659(a). The original citation required Schmitt Tree to correct the violation by September 12, 2012. [2]

The original citation's description of the alleged violation of paragraph 1910.180(d)(2) stated as follows: "At the workplace . . . it was found that inspection records which include the date of inspection, the signature of the person(s) who performed the inspection and the serial number of the crane could not be produced by the employer." (Ex. C-2).

The original citation did *not* allege that Schmitt Tree had failed to perform the required

[2] In addition to a violation of paragraph 1910.180(d)(2), the original citation alleged two other violations: one violation of the "general duty clause" of the Act, 29 U.S.C. § 654(a)(1), pertaining to the condition of another of Schmitt Tree's truck cranes; and one violation of 29 C.F.R. § 1904.29(b)(3) for failing to record a recordable injury on the OSHA 300 Log. (Ex. C-2). OSHA determined that Schmitt Tree had timely abated these other two violations. (Ex. 2, pp. 7-8; Tr. 26-27; Schmitt Depo. 27-29, 36). Schmitt Tree did not contest any of the original three citation items, and it paid the total proposed penalties of $3060. (Exhibit C-7, p. 2; Tr. 62-63; Schmitt Depo. p. 30).

"frequent" regular inspections – that requirement is imposed by paragraph 1910.180(d)(3).[3] Rather, the original citation alleged that the required documentation of such frequent regular inspections "could not be produced" by Schmitt Tree. This is a requirement imposed by paragraph 1910.180(d)(6), which requires that "certification records" of inspections "be kept readily available." Paragraph 1910.180(d)(6) provides:

> (6) *Inspection records*. Certification records which include the date of inspection, the signature of the person who performed the inspection and the serial number, or other identifier, of the crane which was inspected shall be made monthly on critical items in use such as brakes, crane hooks, and ropes. This certification record shall be kept readily available.

The "certification record" requirement in current paragraph 1910.180(d)(6) was adopted in 1986. The summary for the preamble to the final rule implementing the "certification record" requirement stated the rule was intended to minimize the paperwork burdens imposed on employers:

> [OSHA] hereby revises certain recordkeeping requirements to minimize the paperwork burdens imposed on employers. This final rule eliminates certain requirements under which an employer must prepare and maintain detailed records. The revised provisions require, instead, that the employer simply prepare a certification record at the time the required work is done, which includes the date the … inspection … was performed; the signature of the person who performed the work; and the identity of the equipment or machinery that was inspected . . . .

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[3] Paragraph 1910.180(d)(3) provides as follows:

(3) *Frequent inspection.* Items such as the following shall be inspected for defects at intervals as defined in paragraph (d)(2)(i) of this section or as specifically indicated including observation during operation for any defects which might appear between regular inspections. Any deficiencies such as listed shall be carefully examined and determination made as to whether they constitute a safety hazard:

(i) All control mechanisms for maladjustment interfering with proper operation: Daily.

(ii) All control mechanisms for excessive wear of components and contamination by lubricants or other foreign matter.

(iii) All safety devices for malfunction.

(iv) Deterioration or leakage in air or hydraulic systems: Daily.

(v) Crane hooks with deformations or cracks. For hooks with cracks or having more than 15 percent in excess of normal throat opening or more than 10 deg. twist from the plane of the unbent hook.

(vi) Rope reeving for noncompliance with manufacturer's recommendations.

(vii) Electrical apparatus for malfunctioning, signs of excessive deterioration, dirt, and moisture accumulation.

Recordkeeping Requirements for Tests, Inspections, and Maintenance Checks, 51 Fed. Reg. 34552 (Sept. 29, 1986) (to be codified at 29 C.F.R. § 1910.180(d)(6)). The preamble notes "OSHA will use the term 'certification record' to distinguish this new form of documentation from the detailed records previously required." *Id.* at 34555. Because there are three items of information that must be contained in a certification record, the preamble describes it as a "contemporaneous 'three data point' certification." *Id.* at 34554.

It is readily apparent that the drafter of the original citation employed the language of paragraph 1910.180(d)(6) to describe the violation, even though the drafter expressly referenced paragraph 1910.180(d)(2). The original citation's description of the violation used language that is verbatim from paragraph 1910.180(d)(6). Thus, even though the original citation did not expressly refer to paragraph 1910.180(d)(6), its language explicitly alleged a "recordkeeping" violation.

On February 28, 2013, an OSHA compliance officer (CO) re-inspected Schmitt Tree's place of business because Schmitt Tree had not submitted documentation showing that it had corrected the recordkeeping violation. The CO determined that Schmitt Tree continued to be unable to produce documentation of required truck crane inspections occurring after the issuance of the original citation. As a result, on March 22, 2013, OSHA issued to Schmitt Tree the NFTA alleging that Schmitt Tree had not abated the recordkeeping violation, and proposing an additional penalty of $36,000. The NFTA repeated verbatim the description of the alleged violation set forth in the original citation, and thus the NFTA did not contain an express reference to paragraph 1910.180(d)(6), which creates and delimits the recordkeeping requirement.

Mr. Tobias Schmitt, who is an owner and officer of Schmitt Tree, acknowledged in his deposition testimony[4] that during the course of the original OSHA inspection in May 2012, he came to understand that Schmitt Tree was required to create and to keep documentation of required truck crane inspections. (Schmitt Depo. 32-34). Mr. Schmitt also testified that Schmitt Tree did not begin to create and to keep any crane inspection records until after the NFTA was issued on March 22, 2013. (*Id.* at 58-63). Mr. Schmitt testified that Schmitt Tree did not create inspection records between the issuance of the original citation in August 2012 and the issuance of the NFTA in March 2013 because he did not know what form to use, and that he believed that

[4] Mr. Schmitt did not testify at the hearing. *See* note 1, *supra*.

OSHA was going to provide Schmitt Tree with an official or approved form that Schmitt Tree could use to correct the recordkeeping violation. (*Id.* at 34).

Only one of the two CO's who conducted the original inspection in May 2012 testified at the hearing. This CO testified that he did not recall Tobias Schmitt or any other person associated with Schmitt Tree ask either himself or the other inspecting CO to provide a form that would meet the crane inspection recordkeeping requirement. (Tr. 46, 49-50).

Discussion

At the outset of the hearing, the undersigned noted that the language used to describe the violative condition in both the original citation and the NFTA appeared to be derived from paragraph 1910.180(d)(6), and not from the actually referenced paragraph 1910.180(d)(2). The undersigned asked counsel for the Secretary whether the Secretary had considered seeking to amend the NFTA to refer to paragraph 1910.180(d)(6) rather than paragraph 1910.180(d)(2). Counsel for the Secretary indicated that he had recognized this incongruence, but that he was uncertain whether amendment was possible since the original citation had become a final order of the Commission by operation of law under section 10(a) of the Act. (Tr. 15). Nevertheless, counsel for the Secretary indicated that the Secretary would concur in amending the NFTA accordingly. (Tr. 15-16). Counsel for Schmitt Tree stated he did not object to such an amendment. (Tr. 16). Consequently, with the expressed assent of both parties, the undersigned determined that the standard referenced in the NFTA would be amended in the alternative to paragraph 1910.180(d)(6).[5] (Tr. 16).

[5] In making this determination at the hearing, the undersigned did not identify whether the amendment extended to the original citation as well as to the NFTA. The undersigned hereby clarifies the record and states affirmatively that only the NFTA was amended in the alternative, pursuant to Rule 15, Fed. R. Civ. P., to allege an uncorrected violation of paragraph 1910.180(d)(6).

It is not necessary to amend the original citation in order to affirm the NFTA, and thus it is likewise unnecessary to determine whether the Commission has jurisdiction to amend the section 10(a) final order that provides the predicate violation for the NFTA. Nevertheless, a discussion of this jurisdictional question may be useful if any reviewing authority were to determine that amendment of the section 10(a) final order would be necessary in order to affirm the NFTA.

The decision of a Commission judge in *Arsynco, Inc.*, No. 78-1339, 1980 WL 10543 (O.S.H.R.C.A.L.J., Dec. 8, 1980) is instructive on the jurisdictional question. There, a final order of the Commission had been entered under section 12(j) of the Act as the result of a stipulated settlement following a contest of the original citation. However, due to an apparent

The abatement of a recordkeeping violation can have both retrospective and prospective dimensions. *Hercules, Inc.*, 20 BNA OSHC 2097, 2104 (No. 95-1483, 2005). Prospectively, an employer must rectify its recordkeeping so that going forward the records are properly created and maintained. *Id.* Here, the Secretary contends only that Schmitt Tree failed to correct its recordkeeping prospectively; the Secretary does not contend that Schmitt Tree failed to correct

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typographic error in the drafting of the original citation, the final order provided that the employer had violated a standard that did not actually exist in the Code of Federal Regulations. Later, the Secretary issued an NFTA that was predicated on a violation that had been established by that final order. In that NFTA proceeding, the ALJ granted the Secretary's Rule 60(a), Fed. R. Civ. P. Rule 60(a), motion to correct a clerical error in the final order so that the order would reference the true standard that had been originally violated. (Rule 60(a) provides in part that a "court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record," and that a court may do so on its own motion with or without notice.)

The situation here is different from that in *Arsynco* in two potentially significant ways. First, here the final order of the Commission arose by operation of section 10(a) of the Act, not section 12(j). While the Commission has ruled that it has jurisdiction to grant relief from a section 10(a) final order under the standards of Rule 60(b), Fed. R. Civ. P., *see Branciforte Builders, Inc.,* 9 BNA OSHC 2113 (No. 80-1920, 1981), the Commission has not similarly ruled that it has jurisdiction to correct a mistake in a section 10(a) final order under the standards of Rule 60(a), Fed. R. Civ. P.

Second, here the erroneous reference to paragraph 1910.180(d)(2) in the original citation appears to be more than a mere "clerical mistake" as in *Arsynco*, although the error might conceivably have been the result of "a mistake arising from oversight or omission" within the meaning of Rule 60(a). *See* 12 *Moore's Federal Practice* § 60.11[2][b] (3d ed. 2013).

As previously stated, the NFTA here may be affirmed without amending the final order, so it is not necessary to determine (1) whether the Commission has jurisdiction to correct the section 10(a) final order, or (2) whether the mistake that is present in the final order here is the kind of mistake that is correctable under Fed. R. Civ. P. Rule 60(a). The undersigned notes nevertheless that strong policy considerations weigh in favor of concluding that when the Commission has jurisdiction over a challenge to an NFTA that is predicated upon a section 10(a) final order, the Commission should also have jurisdiction to correct a mistake in that final order pursuant to Fed. R. Civ. P. Rule 60(a). *See Nat'l Realty & Constr. Co., Inc. v. OSHRC*, 489 F.2d 1257, 1264 (D.C. Cir. 1973) (observing that "citations under the 1970 Act are drafted by non-legal personnel, acting with necessary dispatch," and that "[e]nforcement of the Act would be crippled if the Secretary were inflexibly held to a narrow construction of citations issued by his inspectors"); *Safeway Store No. 914*, 16 BNA OSHC 1504, 1516-17 (No. 91-373, 1993) (holding that where the citation referenced a standard that required an employer to "have" certain documentation, but the gravamen of the Secretary's case focused on a different standard that required the employer to keep the document at a certain location, amending the pleadings to reflect the actual standard allegedly violated did "not alter the factual allegations set forth in the citation").

the violation by failing to create and maintain certification records retrospective to the issuance of the original citation.[6]

To establish that Schmitt Tree failed to abate the condition cited in the original citation, the Secretary must prove that (1) the original citation and finding of a violation became a final order of the Commission, and (2) the condition or hazard found upon re-inspection is the identical one for which the employer was originally cited.[7] *Hercules, Inc.*, 20 BNA OSHC at 2098.

An employer may also challenge an NFTA by claiming that the description of the original violation lacked sufficient particularity to inform the employer what action was required to correct the violation. *B.W. Harrison Lumber Co.*, 4 BNA OSHC 1091, 1092 (No. 2200, 1976), *aff'd,* 569 F.2d 1303 (5th Cir. 1978). This "particularity" requirement is consistent with the constitutional mandates of due process, and is embodied in section 9(a) of the Act, which provides that a citation "shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated." *See Alden Leeds, Inc. v. OSHRC*, 298 F.3d 256, 261 (3d Cir. 2002). Section 9(a)'s requirement that a citation include a reference to the standard violated is an aspect of its particularity requirement.

"The test of particularity is whether the citation provided fair notice of the alleged violation." *B.W. Harrison Lumber Co.*, 4 BNA OSHC at 1093. To provide fair notice, a citation "must fairly characterize the violative condition so that the citation is adequate both to inform the

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[6] It is questionable whether retrospective abatement (by creating and maintaining a non-contemporaneous certification record) is even theoretically possible, since the standard requires the monthly "certification record" to be created contemporaneously with the inspection certified. Recordkeeping Requirements for Tests, Inspections, and Maintenance Checks, 51 Fed. Reg. 34552, *supra*. Moreover, retrospective creation of accurate records of past activities may at times be impossible as a practical matter. *See Hercules*, 20 BNA OSHC at 2105 (employer not required to abate record certification violation retrospectively where doing so "was no longer practicable, if not impossible").

[7] An employer may rebut the Secretary's prima facie case (1) "by a showing of actual abatement of the hazardous condition by prevention of employee exposure or correction of the physical condition," and also (2) "by showing that the condition for which respondent was originally cited was in fact non-violative of the Act where the original citation has become a final order of the Commission by operation of law." *York Metal Finishing Co.*, 1 BNA OSHC 1655, 1656 (No. 245, 1974). The cited employer bears the burden to establish these affirmative defenses. *Id.* Schmitt Tree did not interpose or seek to establish either of these affirmative defenses.

employer of what must be changed and to allow the Commission, in a subsequent failure-to-correct action, to determine whether the condition was changed." *Hercules, Inc.*, 20 BNA OSHC at 2098-99 (internal quotes omitted), *quoting Alden Leeds, Inc.*, 298 F. 3d at 261.

The Secretary has carried his burden to establish the two elements of his prima facie case. First, it is undisputed that Schmitt Tree did not contest the original citation and that it became a final order of the Commission in September 2012 by operation of law under section 10(a) of the Act.

Second, the original citation required Schmitt Tree to abate the violation by September 12, 2012. (Ex. C-2, p. 7). The uncontroverted evidence establishes that Schmitt Tree did not create any monthly certification record of inspections or any other record of required inspections (and thus it had no such records to keep "readily available" as required by paragraph 1910.180(d)(6)) between September 12, 2012 and the issuance of the NFTA on March 22, 2013, a span of over six months. The evidence establishes that the *condition* that was found on the re-inspection was identical to the *condition* that was described in the original citation.

It is not fatal to the NFTA that the original citation referenced paragraph 1910.180(d)(2) and not paragraph 1910.180(d)(6). The description of the violation charged in the original citation, including the erroneous reference to paragraph 1910.180(d)(2), was sufficiently particular to inform Schmitt Tree of what it was required to do to correct the violation, which was to create and maintain documentation of regular inspections of its truck cranes in regular service. *Cf. Diamond Int'l Corp.*, No. 3460, 1975 WL 21862 at *7 (O.S.H.R.C.A.L.J. Feb. 18, 1975) *aff'd in relevant part, sub nom. Noblecraft Indus. v. Sec'y of Labor*, 614 F.2d 199, 206 (9th Cir. 1980) (finding that a citation that did not reference the specific paragraph of 1910.219 alleged to have been violated nevertheless provided adequate notice of the alleged violation and was sufficiently specific to meet the particularity requirement of section 9(a) of the Act). Even though the original citation did not include an express reference to paragraph 1910.180(d)(6), it employed the language of that paragraph, and expressly described the "three data points" that the paragraph requires to be included in a certification record.

Tobias Schmitt confirmed in his deposition testimony that during the course of the initial OSHA inspection in May 2012, he came to understand that Schmitt Tree was required to create and maintain documentation of regular inspections of its truck cranes. (Schmitt Depo. 33-34). *Cf. B.W. Harrison Lumber Co.*, 4 BNA OSHC at 1093 (stating that in determining whether an

original citation is sufficiently particular, "consideration may be given to factors external to the citation, such as the nature of the alleged violation, the circumstances of the inspection, and the employer's knowledge of his own business"); *Diamond Int'l Corp.* at *7 (observing that the "record clearly indicates that Respondent did receive adequate notice through the reference given" and "does not contain any indication of confusion on Respondent's part with regard to the equipment involved" or the corrective action required).

The CO who testified at the hearing stated that OSHA would have deemed the original violation to have been corrected if Schmitt Tree had begun to make and to keep readily available the detailed records of inspections that it began to make after the NFTA was issued in March 2013.[8] (Tr. 44-45; Ex. C-4). The fact that Schmitt Tree ultimately began to create and maintain documentation that met the certification record requirement provides further support for the conclusion that the description of the violative condition in the original citation was sufficiently particular.

The situation here is distinguishable from that in *Correa*, 4 BNA OSHC 1081 (No. 2272, 1976). There, a citation had become a final order of the Commission by operation of section 10(a) of the Act. In a subsequent NFTA proceeding predicated on that final order, the Commission upheld the employer's affirmative defense that the original condition was non-violative because the original citation had alleged the violation of a standard that was not applicable to the piece of machinery involved. Here, Schmitt Tree has not raised this as an affirmative defense. Moreover, there is no dispute that paragraph 1910.180(d)(2), as referenced in the original citation, *does* apply to the machinery involved (Schmitt Tree's truck crane), as does § 1910.180 as a whole.

Tobias Schmitt testified that he believed the original citation should have contained an explicit reference to an approved or official OSHA form that Schmitt Tree could use to meet the crane inspection recordkeeping requirement (in the same way that another of the other original citation items explicitly referred to an official form -- the OSHA 300 Log). (Schmitt Depo. 48).

[8] The CO's view that an employer could continue to use detailed inspection records to comply with the "certification record" requirement of paragraph 1910.180(d)(6) is consistent with the preamble to the final rule that implemented that requirement. The preamble states: "[U]nder the final rule, if employers elect to continue to maintain detailed records for their own purposes, OSHA would be satisfied if the three data elements were included in the detailed records." Recordkeeping Requirements for Tests, Inspections, and Maintenance Checks, *supra*, 51 Fed. Reg. at 34,554.

To the extent that this stated belief could be regarded as an assertion that the original citation was not sufficiently particular to inform Schmitt Tree what it needed to do to correct the violation, such an argument is rejected. Section 9(a) of the Act does not require that a citation state with particularity *how* the employer must abate a violative condition. *Del Monte Corp.*, 4 BNA OSHC 2035, 2037 (No. 11865, 1977). Moreover, as the CO testified, OSHA has not prescribed or approved any particular form to meet the recordkeeping requirement for inspections of truck cranes, so the original citation could not have referenced any such form.

Schmitt Tree argues that OSHA officials misled it into believing that OSHA would provide Schmitt Tree with an official or approved form to correct the recordkeeping violation. This argument shall be treated as raising the affirmative defense of equitable estoppel.[9]

"[I]t is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Cmty. Health Serv. of Crawford Cnty., Inc.*, 467 U.S. 51, 60 (1984). "In addition to the traditional elements of an estoppel claim, a party must show affirmative misconduct before estoppel can be applied against the government." *Fluor Daniel*, 19 BNA OSHC 1529, 1533 (No. 96-1729, 2001) (consolidated). "Estoppel additionally requires a showing that the government's wrongful act will cause serious injustice, and the public's interest will not suffer undue damage if estoppel is imposed." *Id.*

Tobias Schmitt testified during his deposition that during the original OSHA inspection in May 2012, one of the two OSHA CO's present (neither of whom he was able to identify by name) told him that OSHA would provide a form that would satisfy the recordkeeping requirement, and that thereafter OSHA failed to provide the promised form. (Schmitt Depo. 34, 47-49). He testified further that he believed that other representatives of Schmitt Tree had later made similar requests of OSHA. However, it is apparent from this testimony that Mr. Schmitt's belief that such subsequent requests had been made was grounded in speculation and supposition, not on firsthand knowledge. (Schmitt Depo. 74-83).

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[9] The estoppel argument will be addressed even though Schmitt Tree did not raise any affirmative defenses in its answer to the complaint. *Cf.* Commission Rule 34(b)(4), 29 C.F.R. § 2200.34(b)(4) (requiring generally that affirmative defenses be raised in the answer). However, this issue was tried at the hearing with the consent of the parties, and thus the answer is deemed amended to interpose equitable estoppel as an affirmative defense. *See McWilliams Forge Co., Inc.*, 11 BNA OSHC 2128, 2129-30 (No. 80-5868, 1984) (noting that a post-hearing amendment of pleadings is proper where the parties have tried the unpleaded issue and they consented to do so).

The CO who testified at the hearing had no recollection of any person associated with Schmitt Tree asking either him or the other CO involved in the original inspection to provide an inspection form. He testified further that if such a request had been made, he probably would have suggested other potential sources for locating a form. (Tr. 46, 49-50).

Schmitt Tree has not carried its burden to prove the alleged facts that support its estoppel theory of defense. The evidence is insufficiently weighty to support a finding that OSHA officials told anyone at Schmitt Tree that OSHA would provide a form that Schmitt Tree could use to correct the recordkeeping violation. Tobias Schmitt's testimony, available only in the form of a "cold" deposition transcript, is outweighed by the persuasive controverting testimony of one of the two CO's who conducted the original inspection. Moreover, even if Tobias Schmitt's deposition testimony were deemed more reliable than the CO's testimony on this issue, the circumstances that he described are insufficient to establish a prima facie defense of equitable estoppel.

Penalty Assessment

Section 17(d) of the Act, 29 U.S.C. § 666(d), provides that an employer who fails to correct a violation for which a citation has issued "may be assessed a civil penalty of not more than $7,000 for each day during which such failure or violation continues."

The Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995). In assessing a civil penalty under the Act, "the achievement of a just result in each case is the standard by which [the Commission's] deliberations must be guided." *Nacirema Operating Co., Inc.*, 1 BNA OSHC 1001, 1003 (No. 4, 1972). Section 17(j) of the Act prescribes four statutory criteria that must be considered in assessing any civil penalty under the Act, including a penalty for failure to correct a violation. *See Empire Art Prods. Co., Inc.*, 2 BNA OSHC 1230 (No. 640, 1974). Those criteria are: (1) the size of the employer's business, (1) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations.

Further, a "penalty assessed for failure to correct an admitted violation must bear a reasonable relationship to the amount of the penalty which was assessed for the existence of the violation in the first place." *Id.*, 2 BNA OSHC at 1232.

The penalty assessed (and the penalty that Schmitt Tree paid) for the original recordkeeping violation was $1020. (Ex. C-2). The additional penalty that the Secretary proposed in the NFTA was $36,000. According to the CO who testified at the hearing, while OSHA's internal protocol would permit a maximum proposed additional penalty of $210,000 for the failure to correct the violation, the OSHA area director had concluded that this amount "would be excessive for this" and arrived instead at the $36,000 figure proposed. (Tr. 40-41). There was no other evidence presented that directly tied the $36,000 proposed penalty to the statutory criteria of section 17(j).

Schmitt Tree is a relatively small employer, employing between five and 25 employees at any given time. (Schmitt Depo. 23). The Secretary is presumed to have previously accounted for Schmitt Tree's size in assessing the original penalty of $1020, in accordance with his ordinary procedures. *See* OSHA Instruction CPL-02-00-148, *Field Operations Manual* Chap. 6 (Nov. 9, 2009); *Jones*, 11 BNA OSHC 1529, 1532 (No. 77-3676, 1983) (applying presumption of regularity of administrative action). Since, under *Empire Art,* the original penalty provides a reference point for determining the additional penalty for the failure to correct the violation, no further adjustment is provided for this factor.

As far as the record shows, the only previous violations for which Schmitt Tree has been cited were set forth in the original citation, which established three violations, two of which were timely abated. Since the sole uncorrected violation serves as the predicate for the NFTA, no adjustment is made for prior history.

No adjustment is made for "good faith." Schmitt Tree knew that it had not corrected the violation, even though this failure appears to have been based at least in part on its erroneous and objectively unreasonable belief that OSHA would be supplying a form to correct the recordkeeping violation. *Cf. Monroe Drywall Constr., Inc.*, 24 BNA OSHC 1209, 1211 (No. 12-0379, 2013) (noting the Commission has "never accorded any credit for an employer's subjective belief that the OSH Act did not apply when evaluating good faith for penalty purposes").

The gravity of the violation is the most important of the four section 17(j) factors. Determination of the gravity of a particular violation requires a consideration of the number of exposed employees, the precautions taken to protect employees, the duration of employee exposure, and the probability that an accident will occur. *See J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

OSHA has described the purpose of the "certification record" required by paragraph 1910.180(d)(6) in the following terms:

> The certification record provides employers, workers, and OSHA compliance officers with assurance that critical items on cranes have been inspected, and that the equipment is in good operating condition so that the crane and rope will not fail during material handling. These records also enable OSHA to determine that an employer is complying with the Standard.

Crawler, Locomotive, and Truck Cranes Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements, 78 Fed. Reg. 33860, 33861 (June 5, 2013).

The continued failure of Schmitt Tree to make (and then to keep readily available) a monthly certification record required by paragraph 1910.180(d)(6) heightened the risk that the required inspections of critical items were not properly conducted, and consequently heightened the risk of serious injury or death to its employees from potential equipment failure. This failure to correct the violation between the date that abatement was required (September 12, 2012) through the time of the issuance of the NFTA (March 22, 2013) merits a substantial penalty. However, the penalty proposed by the Secretary of $36,000.00 would be excessive because it does not "bear a reasonable relationship to the amount of the penalty which was assessed for the existence of the violation in the first place." *Empire Art*, 2 BNA OSHC at 1232.

If Schmitt Tree had corrected the violation by September 12, 2012, as required by the original citation, it would have been required to create six or seven monthly "certification records" through the day the NFTA was issued (March 22, 2013).[10] Each of the at least six failures to create a monthly certification record constitutes a discrete failure to correct the original violation, but none of these separate failures may be deemed to "continue" beyond the time that the contemporaneous certification record was required to be made. *Cf. AKM, LLC v. Sec'y of Labor*, 675 F.3d 752, 761, n.3 (D.C. Cir. 2012) (Garland, J., concurring) (an employer's obligation to record a reportable injury "occurs at a particular time" and does not continue

[10] Paragraph 1910.180(d)(6) does not specify the length of time an employer is required to keep "readily available" a monthly certification record, but for purposes of this discussion such time shall be presumed to be at least six months. *Cf.* section 9(c) of the Act, 29 U.S.C. § 658(c) (providing that "[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation"); *AKM, LLC v. Sec'y of Labor*, 675 F.3d 752, 757 (D.C. Cir. 2012) ("The mere requirement to save a record cannot possibly impose a continuing affirmative duty to correct past failures to make the record in the first place.").

thereafter). Viewed in this manner, an appropriate penalty "for each day during which such failure or violation continues" under section 17(d) would fix the number of days that the violation "continued" to have been at least six. With the penalty for the original violation having been assessed and paid at $1020, an enhancement of 50% of the original penalty for each day the violation continued would be appropriate, or $1530 per day. Multiplying the figure of $1530 by six, an appropriate penalty for the NFTA is determined to be $9180.

Findings of Fact and Conclusions of Law

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

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that Citation 1, Item 2, alleging (as amended) a failure to abate a violation of 29 C.F.R. § 1910.180(d)(6) is AFFIRMED, and a penalty of $9180 is assessed.

/s/
WILLIAM S. COLEMAN
Administrative Law Judge

Date: May 27, 2014