United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
AERO TEC LABORATORIES, INC.
Respondent.

OSHRC DOCKET
NO. 94-0055

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 August 19, 1996. The decision of the Judge will become a final order of the Commission on September 18, 1996 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 September 9, 1996 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
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Review Commission
1120 20th St. N.W., Suite 980
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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.

Date: August 19, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 94-0055

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC
	:	Docket No. 94-0055
AERO TEC LABORATORIES, INC.,	:	
Respondent.	:	
	:	

Appearances:

Steven Riskin, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Peter J. Regna, President, *Pro Se*
Aero Tec Laboratories, Inc.
Ramsey, New Jersey
For Respondent

Before: Administrative Law Judge Richard DeBenedetto:

DECISION AND ORDER

Aero Tec Laboratories, Inc. (ATL), was cited on December 6, 1993, for both serious and nonserious violations of various safety standards and for failing to maintain a log of occupational injuries and illnesses. The Secretary has proposed penalties totaling $15,050. ATL contested the matters.

ATL is a developer and manufacturer of impact-resistant fuel tanks, containment vessels for flammable and hazardous materials and other specialty products along the line of containment vessels (Tr. 771-75). The OSHA inspection which resulted in the citations involved ATL's main manufacturing facility in Ramsey, New Jersey.

THE INSPECTION

ATL contends that the inspection was invalid because of OSHA's failure to conform with two conditions which were indispensable to ATL's consent to the search, namely, that no fines or penalties would be imposed if the hazardous conditions were timely corrected, and that only the alleged hazardous conditions listed in the written complaint would be investigated. ATL's posthearing brief. It is claimed that OSHA agreed to these conditions during a September 14, 1993, telephone conference between the lead compliance officer and ATL's president at which time the latter gave his consent to the warrantless search.

A written complaint was filed with OSHA alleging six hazardous conditions existed "plantwide:"

1. Inadequate personal protective equipment for employees working with harmful solvents.
2. Exposure to radio frequency waves and failure to have appropriate warning signs.
3. Incomplete material safety data sheets.
4. Lack of training in chemical hazards.
5. Improper handling and storage of flammables.
6. No emergency evacuation plan.

(Exh. R-2)

On September 14, 1993, two OSHA compliance officers visited ATL's facility to investigate the alleged hazardous conditions. On arrival at the plant, compliance officers Skowronski and Anderson were met by ATL's vice president of operations (D'Amico) and vice president of research and development (Barris) who informed the compliance officers that they could not allow them to conduct an inspection without permission from ATL's president (Regna). Although he was out of the office at the time, D'Amico succeeded in reaching Regna by telephone at which point compliance officer Skowronski spoke to Regna in the presence of both D'Amico and compliance officer Anderson (Tr. 25, 540-41, 578).

On direct examination, Skowronski described the telephone conversation he had with Regna: the six hazardous conditions listed in the complaint were read to Regna; when informed that Skowronski was prepared to conduct tests in analyzing air samples for air contaminants, Regna

refused to permit such testing but otherwise allowed the inspection to proceed; Regna expected to be at the plant soon and they would meet during the course of the inspection (Tr. 25).

Although his testimony on cross-examination was vague and uncertain at times as to whether the question of penalties (or fines) was discussed with Regna during their telephone conversation, Skowronski was unequivocal and unshaken in denying that he agreed to waive any penalty if a hazardous condition was corrected within a certain time period (Tr. 51-54. 58-59).

The waiver-of-penalty issue was raised by ATL in its notice of contest and answer to the complaint. Regna testified as follows regarding his September 14 telephone conversation with Skowronski (Tr. 777-78):

> Mr. Skowronski identified himself as an OHSA inspector, and he told me that he was responding to a complaint against Aero Tec, and he and I discussed my right to refuse his entry, if I so sought, and I was aware of that right.
>
> I'm also aware, and I was at the time, that he has the then right to get a warrant to enter my premises. We, or he talked about the complaint and indicated that there were six items in this complaint, but he would not tell me where the complaint came from. He went over the list of six items, and I asked him if it was possible to reschedule the appointment, and that I would perhaps allow entry, but I would like an opportunity to look over the list and consider his request for entry and could he come back in a few days. He said, no, that that was not possible, that I needed to make a decision to either allow his entry or not. I said: "Well in that case, would there be any fines involved if you found anything on your list that you felt was a violation?"
>
> And he said: "There's a time period for correcting fine [sic], for correcting violations, and if you correct the violation within the given time period, that there would be no fine for that situation."
>
> I said: "Well, if that's the case, and if we have the six items that you have recited, then I will permit entry. Let me talk to Mr. D'Amico, and I will give him my authorization because he doesn't have the authorization to, to give you directly," which he already knew.
>
> Mr. D'Amico got on the telephone, and I told him that I had made the arrangement with Mr. Skowronski that there would not be fines as long as anything he found, we were able to correct within a given time period.
>
> And I told Mr. D'Amico to be cooperative with Mr.

> Skowronski and that I would be on my way down to Aero Tec shortly, and I would meet up with them when I arrived. That's the gist of the conversation.

Regna produced a note which he stated was written by him during his conversation with Skowronski. The note reflects four topics listed singly, one below the other: Matt Skowronski; "6 complaint[s]; time period; no fine" (Tr. 776, Exh. R-5).

The record as a whole does not support Regna's version of the telephone conversation with Skowronski. There is no dispute that both compliance officer Anderson and D'Amico were with Skowronski during the telephone conversation. Anderson testified that he was "listening attentively" to the conversation because of his concern over the possible need to obtain a search warrant, and that Skowronski's statements over the telephone were limited to the six-item complaint without reference to penalties (Tr. 540-41, 549-51).

It is of compelling significance that ATL called D'Amico (its vice president of operations) to testify about virtually the entire range of issues in this case, including the matter of the telephone conversation between Regna and Skowronski. Here, in pertinent part, is D'Amico's testimony when questioned by Regna on direct examination (Tr. 578-79):

> Q Did Mr. Skowronski, do you recall, recite the six alleged violations over the phone?
> A Yes, I believe he read the -- he read the complaint to you.
> Q And do you recall whether he mentioned anything about doing air monitoring?
> A I do not recall if during the conversation there was any discussion of air monitoring.
> Q Okay.
> Do you know if there was any discussion of investigating ATL on a plantwide basis?
> A No, there was no discussion of a plantwide basis. My understanding, when they came to the window and presented the list of complaints, was that they were there to inspect for those specific complaints.
> Q When Mr. Skowronski got off the phone, did I speak with you and give my permission to allow entry to Aerotec?
> A Yes, you did.
> Q Okay.
> Did I at that time tell you to cooperate fully with Mr. Skowronski?
> A. Yes, you did.

> Q Did you have any discussions or did Mr. Skowronski or Mr. Anderson mention to you that there would be any peripheral inspection or anything other than six items? For example, fire extinguishers, machine shop equipment, molding equipment, anything of that sort?
> A No. We had no discussion beyond the contents of the list.
> Q Did they present you with any other documents that indicated that there would be penalties assessed for alleged violations?
> A No, they did not.

It is remarkable that Regna would fail to interrogate D'Amico about the alleged statement made by Regna to D'Amico during the phone conversation when Skowronski turned the phone over to D'Amico at which point Regna purportedly told D'Amico "there would not be fines as long as anything that he found, we were able to correct within a given time period." The failure to elicit such corroborating testimony cannot reasonably be attributed to carelessness or neglect, particularly in view of Regna's persistent arguments on the issue made throughout the course of the hearing.

It is also noteworthy that when Skowronski concluded his seven-day inspection, he held a closing conference on November 30, 1993, with Regna, D'Amico and Barris. Regna left the meeting at about the time Skowronski finished covering the "observed violations." The meeting continued with D'Amico and Barris who, in accordance with routine procedure, were informed about such subjects as abatement methods and dates, possible penalties, and contest rights (Tr. 27, 412-13).

When questioned as to whether he was present during the entire closing conference, Regna testified, in part, as follows (Tr. 790):

> A I was not. I'm told that the closing conference went on even after I left, and I'm told that Mr. Skowronski, after I left, then brought up, once it was a fait accompli, at the closing, after all the inspection had been done, I am told, or I understand from his testimony, that he suggested to Mr. D'Amico and Mr. Barris that there could be fines for these items, which is somewhat inconsistent with what he actually did because there are two items that he brought up to us that he did not write up citations for and did not fine us on....

This testimony may fairly be described as ambiguous and self-contradictory.

Appraising Skowronski's testimony by his demeanor and by the manner in which it hangs together with other evidence, it is concluded that Skowronski's statements regarding the penalty

discussions are credible.

It is also contended that the inspection was invalid because the compliance officers went beyond the scope of ATL's consent, which was limited to the six-item complaint. The Secretary correctly points to a number of factors that are clearly established by undisputed testimony: at least some of the citation items were in plain view during the time the compliance officers were inspecting the six-item complaint; when the compliance officers began their physical inspection, Barris and D'Amico were given a copy of the complaint and they thereupon led the compliance officers to the locations where the subjects of the complaint could be observed; at least one and sometimes both ATL's vice presidents accompanied the compliance officers throughout the physical inspection,[1] and Regna himself acknowledged that he was present at the plant "most of the time" during the seven separate occasions that the compliance officers returned to the facility to continue with their investigation, and that Regna did not express an objection at any time regarding the presence or conduct of the compliance officers (Tr. 67).

ATL's consent argument was squarely met and disposed of in *Kropp Forge Co. v. Secretary of Labor,* 657 F.2d 119 (7th Cir. 1981). There the written complaint leading to the inspection alleged a carbon monoxide hazard. During the initial inspection, the OSHA compliance officer felt that the noise in the plant might exceed the permissible level of the standard. The compliance officer returned to test the noise level. The court ruled that the noise inspection was proper:

> The record shows, however, that at all times on December 13, the compliance officer was accompanied by Kropp's Safety Director and that on December 19, she and a second compliance officer were accompanied by the Safety Director and Kropp's General Manager. Both men had been informed that noise sampling would be conducted, and they raised no objections to the approximately five hours of sampling conducted on each day.... Since Kropp's representatives were present at all times during these inspections and did not raise any objections when informed of the intended sampling, any Fourth Amendment objection to these surveys was waived.

Id. at 121-22. See also *Stevenson Enterprises, Inc. v. Marshall*, 578 F.2d 1021, 1023-4 (5th Cir.

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[1]When asked on direct examination as to whether he cooperated with the compliance officers during their inspection, D'Amico stated: "I believe we cooperated fully with them. We took them wherever they wanted to go and allowed them to, you know, see the entire plant" (Tr. 581).

1978) (company consented to walk-through inspection when its representative accompanied the inspector and failed to raise any objections).

In its posthearing brief, ATL presents the following catchall argument for invalidating the inspection:

> Mr. Skowronski entered the premises upon false, misleading and illegal pretexts. He further extended his investigation "plant wide" without notice of potential jeopardy to ATL and totally without warrant, cause or authority. He used his position and false statements as a confidence scheme to entrap and intimidate ATL employees and to "fabricate" a list of purported hazards.

All three of ATL's officers who dealt with the compliance officers throughout the period of the inspection (which extended from the initial visit on September 14, 1993, until the closing conference on November 30, 1993) were well aware of their right to refuse a warrantless inspection. It is also clear that the entire inspection was conducted openly and with the full knowledge of ATL. It should also be noted that the challenge to the inspection was not raised as an issue by ATL in either its notice of contest or its answer to the complaint. In fact, it was first mentioned by ATL during a telephone conference held by the judge with the parties shortly before the hearing. Nor should we overlook the fact that the language used in ATL's catchall argument is strikingly at odds with the conciliatory tone expressed in its notice of contest:

> We have received your recent notification, and ATL requests an informal conference as you have offered.
>
> In particular, we wish to contest the suggested penalties since we were assured that fines are levied only if conditions are not corrected. Additionally, ATL contests several of OSHA's technical findings, and we wish to reserve a formal hearing if this is necessary.
> Many of the items have already been addressed, and ATL will be proceeding with other safety modifications even before the conference.
>
> May I say that we appreciate Mr. Skowronski's explanatory meeting and the literature he provided. Kindly have him call us to arrange the conference at a mutually convenient time.

There is nothing in the record to support the allegation that the compliance officers practiced some form of deceit or trickery regarding their mission at ATL's plant.

ATL also contends that the six-item complaint was nothing more than "a 'vendetta' list of a disgruntled employee with no basis in fact." ATL fails to point to any evidence that suggests OSHA had no reasonable grounds to believe that the alleged violations or dangers described in the employee complaint existed, and we are unable to find any evidence to support such a notion.

ATL further contends that the Secretary failed to comply with the procedures regarding discovery (interrogatories were not answered until the judge issued an order to compel response) and prehearing disclosure (witness list and photo exhibits not provided within 10 days before hearing as required by prehearing order). These matters were discussed during the early stage of the first day of hearing. ATL was informed that the sanction of dismissal could not be imposed unless it could demonstrate that it was prejudiced in preparing its defense to the Secretary's charges due to failure of the Secretary to comply with procedural rules or the prehearing disclosure order. See *Natl. Indus. Constructors v. OSHRC*, 583 F.2d 1048, 1053-54 (Th Cir. 1978). No claim of prejudice has been made by ATL.

ATL further contends, in effect, Skowronski's testimony which "included hearsay reports of workers' remarks without the workers' presence in court" should be stricken because ATL was deprived of its right to cross-examine those workers. This argument, which was also made during the hearing, relates to the compliance officer's testimony concerning statements of certain named ATL employees made to the compliance officer in the course of the physical inspection of the plant. Federal Rule of Evidence 801(d)(2)(D) provides:

> A statement is not hearsay if - ...
> The statement is offered against a party and is...
> (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.

If ATL had reason to believe that the employee statements (which were offered by the Secretary as admissions by ATL under the federal rule of evidence) were not accurate, ATL was free to arrange for those named employees to appear as rebuttal witnesses at the hearing; the Secretary had no obligation to call them as his witnesses because their out-of-court statements are not subject to exclusion under the prohibition against hearsay.

THE FALL-PROTECTION STANDARD AT § 1910.23(c)(1)

The 23(c)(1) standard requires every platform 4 feet or more above lower levels to be guarded by a standard railing (or equivalent) on all open sides except where there is an entrance to a ramp, stairway, or fixed ladder. The locus of the alleged violation involved the roof of a room inside the main manufacturing facility. The roof, which was 9 feet high and flat, was used to store materials, and was open on two sides.

The Secretary contends that although a forklift was used to raise and lower materials, employees also used "a stairway on roller" to climb to the roof and walk on the surface in order to handle the materials (Tr. 36). There was no railing along the open sides. The compliance officer testified that although he did not observe any employee on the roof; he was informed by both vice president D'Amico and another employee, Paul Sheridan, that employees walked on the roof to handle the materials being stored. He actually observed the rolling stairway in the plant, and stated that the materials were stored in such a position that they could not have been placed there simply by a forklift (Tr. 81-82).

ATL claims that the roof in question was nothing more than a storage shelf and not a work place. ATL's answer to complaint. D'Amico flatly denied telling compliance officer Skowronski that work was performed on the surface of the roof. He maintained that there was no means of access to the roof area, that it was "a dead storage area" for materials no longer used, and that the stored materials were placed on pallets and moved by forklift (Tr. 588-89).

D'Amico's testimony was in direct conflict with Skowronski's; however, the assertions of Skowronski are credible for the following reasons: he gave positive testimony that he saw the materials stored on the roof in a manner that could not have been effected had the materials been handled exclusively by mechanical equipment such as a forklift, as ATL claims. He also saw certain materials on the floor of the plant apparently in preparation for use in making flexible tanks, which materials were previously observed by him when they were stored on the roof (Tr. 33). This testimony was not undermined in any way.

As previously discussed, ATL repeatedly took issue with the compliance officer's testimony regarding statements said to have been made by employees to the compliance officer during the

inspection. ATL argues that it was deprived of the opportunity to cross-examine those employees because they were not present at the hearing. On several occasions during the hearing, the hearsay rule and legal nature and effect of out-of-court statements that qualify as admissions were explained to ATL's representative who apparently understood the import of the admissibility of the employees' statements as admissions of the employer (Tr. 32, 317-18). It is noteworthy that while ATL produced D'Amico as a witness to refute much of the testimony of the compliance officer, it did not bother to call its other employee, Paul Sheridan, whose statements to compliance officer Skowronski were in direct conflict with D'Amico's testimony.[2]

Based upon the foregoing considerations, it is concluded that the events and circumstances recounted by compliance office Skowronski are credible, consequently item 1 of citation number 1 is sustained as a serious violation in view of the 9-foot fall hazard stemming from the unguarded open sides of the roof/platform area traversed by ATL's employees. The $700 penalty proposed by the Secretary, being consistent with the statutory penalty criteria of section 17(j) of the OSH Act,[3] is assessed.

THE STANDARD § 1910.106(d)(4)(i) FOR CONSTRUCTING INSIDE STORAGE ROOMS FOR FLAMMABLE LIQUIDS

The second item of the citation charges that ATL failed to provide its inside storage room opening with noncombustible liquid-tight raised sills or ramps at least 4 inches in height, in accordance with the 106(d)(4)(i) standard.[4]

Compliance officer Skowronski testified that ATL's storage room was structured so that the back half of the 30-by-15 foot room, where 55-gallon drums of flammable liquids were placed, was

[2]ATL offered no explanation for the failure to call Sheridan whom one would expect to be produced by ATL if the facts known by Sheridan were favorable to ATL.

[3]Section 17((j), 29 U.S.C. § 666(j), provides that the Commission shall assess an appropriate penalty for each violation, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations.

[4]The standard provides two permissible alternates to the sill or ramp: where the floor in the storage area is at least 4 inches below the surrounding floor, or where there is an open-grated trench inside the room which drains to a safe location. These two options were not in issue.

divided by a berm made of vinyl or rubber material covering wooden planks. According to Skowronski, there were three major flaws in the room's set-up: there was no raised sill, ramp or berm at the opening of the room; the berm was not made out of noncombustible materials;.part of the berm was moved whenever the drums were moved in and out of the storage area (Tr. 100-03). Skowronski explained that the purpose of the standard is to contain spills and leaks of flammable liquids within the fire-resistive storage room; otherwise, the spill could flow under the door and into adjacent work areas where there were many ignition sources (Tr. 103-07).

D'Amico's testimony regarding the combustibility of the berm cover, suffers from internal contradictions: on direct examination, he stated that the material covering the berm consisted of "a secondary containment liner" (one of ATL's own product lines), that the material was liquid-tight, solvent resistant, and accepted by the local fire department, thus suggesting that the covering was noncombustible (Tr. 600-02). On redirect examination, D'Amico testified that shortly after the citations were issued, both ATL and officials of the local OSHA area office met to discuss the citations and it was agreed than an acceptable method of correcting the sill violation would be simply to cover the interior wooden sill with noncombustible material, which ATL then proceeded to do (Tr. 756-58). The Secretary did not dispute the witness's testimony on this point, which was elicited during a debate between the parties as to the infeasibility of installing a sill at the opening of the storage room, as the standard requires, rather then being located along the room's interior midway point (Tr. 744-58).

Although the issue of infeasibility was not raised by ATL as an affirmative defense in the pleadings, there is no reason to disturb the agreement of the parties when the record provides satisfactory evidence that the issue was examined and resolved upon thoughtful consideration by both parties.

Because ATL failed to provide a raised sill of noncombustible material, the citation item is affirmed as a serious violation; the $875 penalty proposed by the Secretary is modified to $500.

THE STANDARD § 1910.106(d)(7)(i)(a) FOR MAINTAINING FIRE EXTINGUISHERS WHERE FLAMMABLE LIQUIDS ARE STORED

The third item alleges that ATL failed to provide a portable fire extinguisher located outside

of, but not more than 10 feet from, the flammable liquid storage room door opening. There is no real dispute regarding the violation of this standard. Skowronski testified that while a fire extinguisher was placed inside the storage room itself, the nearest one outside the room was located some 30 feet from the door opening (Tr. 28). According to D'Amico, the distance between the exterior of the door opening and the nearest fire extinguisher was more like 15 to 20 feet (Tr. 604).

Inasmuch as the standard requires maximum distance of 10 feet, it is immaterial whether the fire extinguisher was actually located 15 feet or 30 feet from the storage room door opening. However, the Secretary alleges that the distance violation was serious, but there is nothing in the record to explain why the 20-foot difference was of such consequence that it would warrant a serious classification within the meaning of the OSH Act. This item is affirmed as a nonserious violation and penalty of $100 is assessed instead of the $700 proposed by the Secretary.

CONTROL OF HAZARDOUS ENERGY UNDER § 1910.147

In items 4, 5 and 6 of the citation, the Secretary contends that ATL violated three energy control standards, including the failure to establish an energy control (or lockout/tagout) program pursuant to § 1910.147(c)(1), failure to provide protective materials and hardware for securing machines or equipment from the energy source as required by § 1910.147(c)(5)(i), and failure to provide certification of employee training in accordance with § 1910.147(c)(7)(iv).

The compliance officer testified that ATL used a variety of machines requiring a lockout/tagout program, including metalworking and woodworking equipment, heat sealing machines and a large, complex piece of equipment called a "roto molder" (Tr. 130-31). Upon interviewing several employees, including vice presidents D'Amico and Barris, the compliance officer was informed that servicing and maintenance of the machines and equipment were performed by the employees, and that ATL did not have a lockout/tagout program or established procedures in accordance with the cited standards (Tr. 141, 143, 147). During the course of the hearing, ATL's representative acknowledged that the requirements of the three cited energy control standards had not been complied with (Tr. 623), and no serious defense regarding these matters was presented. The three items are affirmed as serious violations and a penalty of $1225 is assessed for each, as proposed by the Secretary.

EDUCATIONAL PROGRAM FOR USE OF FIRE EXTINGUISHERS UNDER § 1910.157(g)(1)

The standard requires that where the employer has provided portable fire extinguishers for employee use, the employer shall also provide an educational program in their use and the recognition of the hazards involved with incipient stage fire fighting. During the inspection, the compliance officer noted the presence of a number of fire extinguishers placed in various locations in the shop. On questioning D'Amico, the compliance officer testified that he was informed employees were expected to use the fire extinguishers, but were not provided with training for their use (Tr. 146).

D'Amico's testimony conflicts with that of the compliance officer. D'Amico denied that employees were required to use fire extinguishers. He stated that ATL operated under an emergency response plan which required employees to evacuate the plant in the event of a fire and to call on the fire department and emergency response team to deal with the problem.

D'Amico's testimony is seriously undermined by two factors: ATL's emergency response plan ("ERP") called for employee use of "personal protection [sic] equipment" in situations involving "minor incident or in imminent danger of life and health." The plan specified that the "[e]quipment available shall include fire extinguishers, goggles, gloves and absorbent" (Emphasis added.) "All other emergencies [were to be] handled by evacuation and deferral to professional teams."[5] ATL's ERP, ¶ M.

The second countervailing factor is the previously discussed § 1910.106(d)(7)(i)(a) standard which requires that a portable fire extinguisher be provided outside of the liquid storage room door opening. The fire extinguisher's use would clearly fall within the ambit of ATL's emergency response plan as "safety equipment to be used [by employees] in minor incident or in imminent danger."

The Secretary having sustained his burden of proof, item 7 of the citation is affirmed as a serious violation, and a penalty of $1225 is assessed, as proposed by the Secretary.

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[5]This matter was raised during the hearing by the Secretary's counsel who indicated that a copy of the plan was obtained by the compliance officer during the inspection. A copy of the plan was submitted by ATL as part of its posthearing brief (Tr. 641-42, 647-48).

PROTECTING BATTERY CHARGING APPARATUS: § 1910.178(g)(2)

One of the safety requirements relating to industrial trucks powered by electric motor is protecting the charging apparatus from damage by trucks pursuant to § 1910.178(g)(2). ATL maintained a battery charger on the floor near a wall of the plant (Tr. 149-50; Exh. C-1). The compliance officer testified that the charger was exposed to danger of being struck by a forklift truck when the operator approached the installation to energize the battery. According to the compliance officer, such a collision exposed the forklift operator to either an electrocution or a fire hazard (Tr. 151, 431). Thus, the situation called for either a barrier guard or raising the installation several feet above floor level (Tr. 152).

While acknowledging that a hazard existed had the battery charger been struck by the forklift truck even if the charger were deenergizied at the time (Tr. 665), ATL steadfastly maintained that because of the procedure used by the operator in approaching the apparatus before the electric power is turned on, the condition should be classified as nonserious instead of serious (Tr. 652-53, 659-61, 665). ATL's argument has merit. Item 8 of the citation is affirmed as a nonserious violation, and the $700 penalty proposed by the Secretary is reduced to $350.

Items 9 and 10 of citation number 1, dealing with machine guarding, were withdrawn by the Secretary during the hearing (Tr. 154).

SAFETY REQUIREMENTS FOR WOODWORKING MACHINERY: § 1910.213

According to the citation, items 11a and 11b, which involve the same radial saw, "have been grouped because they involve similar or related hazards that may increase the potential for injury." Item 11a alleges violation of § 1910.213(b)(3) which calls for a power control to prevent a machine from automatically restarting upon restoration of power after power failure or other interruption of power. Item 11b concerns the woodworking standard at § 1910.213(h)(4) which requires the radial saw to be installed in such a manner that the front end of the unit will be slightly higher than the rear so as to cause the cutting head to return gently to the starting position when released by the operator.

During the inspection, the compliance officer noticed the radial saw just outside ATL's office

area. In testing the saw for presence of a power control switch, the compliance officer requested that the saw's power supply be "unplugged" and then reconnected, upon which the saw started up, indicating that there was no power control or "restart" switch (154-55).

On cross-examination, the compliance officer was questioned as to whether the power control requirement under § 1910.213(b)(3) was duplicative of the requirements of the lockout/tagout regulations which are the subject of items 4, 5, and 6 previously discussed. The compliance officer correctly explained that the former addresses power control of the saw during production while the § 1910.147 lockout/tagout standard deals with the control of energy during service and maintenance (Tr. 442).

When the compliance officer tested the installation of the saw by pulling the cutting head forward and releasing it, the cutting head did not return to the starting position (Tr. 157, 161).

D'Amico testified that the saw was used only on rare occasions and not on a regular production basis (Tr. 669). His testimony was not challenged by the Secretary. Although the potential hazard was serious in nature, the overall gravity of the violation was such that a penalty of $350 is assessed instead of the $700 proposed by the Secretary.

GUARDING OF PULLEYS AND BELTS:
§§ 1910.219(d)(1) and 219(e)(1)(i)

ATL's milling machine is the subject of two violations which have also been grouped because they both involve power-transmission apparatus: item 12a relates to pulleys which require guards when they are seven feet or less from the floor (§ 1910.219(d)(1)); item 12b concerns horizontal belts which also require guards when seven feet or less from the floor (§1910.219(e)(1)(i)).

The compliance officer testified that the milling machine had two sets of pulleys and one belt located six feet above the floor level and they were not guarded. The compliance officer acknowledged that the machine was located in a "laboratory room" and was not used in regular production (Tr. 163-68, 445). D'Amico testified that the milling machine was equipped with a single guarding device that safeguarded both the pulleys and belt, but the guard was on the floor nearby at the time of the OSHA inspection, where it had been placed to change the belt setting.

D'Amico noted that the machine was not being used when the compliance officer observed the machine (Tr. 677-82).

D'Amico's testimony is at odds with ATL's answer to the complaint which contained the following relevant comments:

> [Items] 12a.) Milling machine is used for plastic and hard rubber. Safety glasses and gloves are provided. Guard prevents odd shaped pieces from being machined.
> 12b.) Guard installed as suggested.

D'Amico' s testimony regarding the guarding of the milling machine lacks credibility. Operation of the machine without appropriate safeguards created a potentially serious risk of injury should an accident have occurred. Based upon the compliance officer's own testimony concerning modification of the recommended penalty for the grouped violations based upon infrequent use, a penalty of $575 is assessed in lieu of the original proposed penalty of $700.

GUARDING OF SPROCKET WHEELS AND CHAINS: § 1910.219(f)(3)

The § 1910.219(f)(3) standard requires all sprocket wheels and chains to be enclosed unless they are more than seven feet above the floor. Item 13 of the citation concerns a revolving drum mixing machine equipped with sprocket wheels and chains which were partly guarded on one side and completely unguarded on the other (Tr. 170-74; Exh. C-3).

The only issue raised by ATL is the Secretary's classification of the violation as serious. Based upon D'Amico's testimony, ATL claims that the violation should be classified as nonserious because of the remoteness of the probability of an injury occurring due to the location of the wheels and chains, and because of the relatively low one-half horsepower of the motor which would have likely caused the motor to stall before anyone sustained serious injury (Tr. 687-89). The Secretary did not present any evidence to rebut D'Amico's testimony. Accordingly, this item is sustained as a nonserious violation, and a penalty of $350 is assessed in lieu of the $700 proposed by the Secretary.

LABELING CONTAINERS OF HAZARDOUS CHEMICALS: §§ 1910.1200(f)(5)(i) and 1200 (f)(5)(ii)

Grouped items 14a and 14b of the citation allege that ATL utilized numerous one-gallon cans of adhesives and solvents of a hazardous nature which were not labeled with the identity of the hazardous chemicals contained therein, nor with the appropriate hazard warnings in accordance with § § 1910.1200(f)(5)(i) and (f)(5)(ii), respectively.

ATL's Technician's Information Sheet contains a list of six solvents that were used in the manufacturing process, including acetone and methanol. The information sheet states that all six chemicals (or solvents) " are considered hazardous," are highly flammable, and are productive of irritation in the eyes, the gastrointestinal system, and the skin (Exh. R-1).

It is undisputed that the 55-gallon drums of solvents kept in the storage room were properly labeled (Tr. 182). The solvents were used as additives in the adhesives to achieve the proper viscosity. This procedure was accomplished by first transferring the solvents into one-gallon containers and then mixing them with adhesives (Tr. 729). During the course of the hearing ATL argued that the one-gallon containers were intended for "immediate use, " therefore, it was not required to label or mark such containers, according to OSHA regulations (Tr. 501-02).[6] This argument is effectively undercut by the compliance officer's credible testimony and corroborating photographic evidence which clearly demonstrate that the containers of chemicals were not in the process of being used but, in fact, were stored on worktables and available to any employee who might have a need to use the material. The controlled conditions that would qualify for the labeling exemption did not exist at ATL's plant. ATL's witness, D'Amico, admitted as much in his testimony (Tr. 177-83, 738; Exhs. C-4, C-5).

ATL, in effect, also advanced the argument that because the compliance officer failed to test the adhesive-solvent mixture, no proper evaluation was made to determine the hazardous effects of

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[6]29 C.F.R. § 1910.1200(f)(7) provides, in relevant part:

> The employer is not required to label portable containers into which hazardous chemicals are transferred from labeled containers, and which are intended only for the immediate use of the employee who performs the transfer....

the mixture, therefore, the Secretary failed to prove the existence of a hazard of either a serious or nonserious nature (Tr. 461-96, 692-96, 729-31).

The Secretary meets this argument by calling our attention to the testimony of D'Amico who stated that the concentration of solvents in the mixtures was in the range of "maybe 10 or 15 percent" or "maybe 15 or 20 percent" (Tr. 731). The Secretary correctly points out that reducing the concentration of hazardous chemicals by mixing them with other chemicals does not exempt the resulting mixtures form the labeling requirements of the hazard communication regulations. Secretary's brief at 27.

Employers who mix chemicals for use in the workplace are required to determine the hazards of the mixtures by either testing the mixture as a whole, the results of which are to be used to determine whether the mixture is hazardous or, where, as here, a mixture has not been tested as a whole to determine whether the mixture is a health hazard, "the mixture shall be assumed to present the same health hazards as do the components which comprise one percent (by weight or volume) or greater of the mixture." 29 C.F.R. § 1910.1200(d)(5)(i) and (ii).

There is ample evidence in the record to support the Secretary's case as to items 14a and 14b; they are affirmed as serious violations and the proposed penalty of $1,225 is assessed.

EMPLOYEE TRAINING ON HAZARDOUS CHEMICALS: § 1910.1200(h)(3)(iv)

Item 15, the last item in citation number 1, alleges serious violation of the standard at "§ 1910.1200(h)(2)(iv)" in that:

> Employee training did not include the details of the hazard communication program developed by the employer, including an explanation of the labeling system and the material safety data sheet, and how employees can obtain and use appropriate hazard information.

This language appears at § 1910.1200(h)(3)(iv) and not at 1200(h)(2)(iv) as described in both the citation and the complaint. Because the record is clear that the actual issue tried by the parties related to the 1200(h)(3)(iv) training standard, the harmless error is corrected pursuant to Fed. R. Civ. P. 15(b).

The compliance officer testified that during the course of his inspection he interviewed a

number of production employees, including a Paul Sheridan and a David White, who were questioned about the hazard communication program. According to the compliance officer, the employees displayed a lack of knowledge and training regarding material safety data sheets and the hazard communication program in general (Tr. 186-89).

When questioned on cross-examination concerning certain records signed by employees indicating they had read ATL's hazard communication program and "worker right-to-know manual", the compliance officer stated that he was informed by the employees that "they were told to sign this when they started and that was it. They said they did not receive any training" (Tr. 505).

The substance of ATL's defense is revealed in the following exchange on direct examination of D'Amico (Tr. 709-10):

> **Q** And do you know personally of anyone in the ATL plant who is oblivious to the MSDS program and who doesn't know what a sheet is or would know where to find it?
> **A** I can't imagine that there is because, as I mentioned before, there's several signs around the shop about worker right to know and what an MSDS sheet is.
>
> There's specific instructions right in the front of the shop on what an MSDS sheet is.
>
> The books are right there, in a bright yellow folder, black label says MSDS sheets on the front.
>
> I mean, its attached with a chain to the shop manager's office so it can't be removed.
>
> I mean, its -- I mean, I can't imagine that there's anyone in the plant who is oblivious to the fact of what an MSDS sheet is and where they are and how to get the information off it.
> **Q** Is it not --
> **A** And they're certainly made aware of it when they start. And they're certainly available for anyone who wants them on a day-to-day basis. We don't have them locked away in safe. We don't have them in the back room. We don't have them in the office. They're right there at the front of the shop for any employee to look at any time he wants to look up and open the book.
> **Q** Isn't that true ---
> **A** I don't think we can do much more than to make them available and try to tell them what's there. I don't think we have to spoon feed the information to each employee from every sheet.

What is noticeably missing from D'Amico's testimony is the notion that training consists in some

form of instruction by telling and showing what the employees are to know based on clearly defined objectives consistent with the employee training standard. The Secretary is correct in faulting ATL's system of simply providing a written hazard communication program and posting notices to inform employees of the location and availability of that hazard communication program.

Item 15 is affirmed as a serious violation and the proposed penalty of $1,225 is assessed.

LOG OF OCCUPATIONAL INJURIES AND ILLNESSES: § 1904.2(a)

The first item of citation number 2 alleges nonserious violation of the recordkeeping regulation at § 1904.2(a). It is undisputed that for the years 1992 and 1993, ATL did not maintain in its workplace a log and summary of all recordable work injuries and illnesses for that establishment, as required by the regulation. The compliance officer was informed by ATL that since 1992 all its payroll, accounting records and the OSHA logs and summaries of injuries and illnesses were maintained by an outside firm which it engaged to handle those matters (Tr. 191-92).

ATL not having presented any serious defense to this first item of the nonserious citation, it is affirmed and no monetary penalty is assessed, as recommended by the Secretary.

The second item of the citation was withdrawn by the Secretary at hearing (Tr. 192).

MAINTENANCE OF PORTABLE FIRE EXTINGUISHERS: § 1910.157(e)(3)

The standard cited in the third item of the citation requires the employer to assure portable fire extinguishers undergo an annual maintenance check. Of the four extinguishers inspected by the compliance officer, one did not have a current inspection tag (Tr. 193).

No defense to this item was made by ATL. Item 3 is affirmed and no monetary penalty is assessed in accordance with the Secretary's recommendation.

ANCHORING MACHINERY: § 1910.212(b)

The fourth and last item of citation number 2 alleges that a drill press located near the assembly area "was not anchored to the floor." The 212(b) standard provides that "[m]achines designed for a fixed location shall be securely anchored to prevent walking or moving."

The compliance officer testified that the drill press, a pedestal type, was mounted on a 1½-foot base with holes in each corner of the base for inserting bolts to secure the machine. The

machine was used on a periodic basis and was not secured or anchored in any way (Tr. 194). While the compliance officer acknowledged that he did not test the machine for stability, he was unwavering in his assurance that he had experience in working with the same type of drill press and was knowledgeable about the hazard posed by the unsecured machine (Tr. 286-87).

The only points made by ATL during the hearing were its concern over the $350 penalty proposed by the Secretary and its assertion that the company never had a safety problem with the press during a period of 15 years (Tr. 288-89)).

The fact that no injury resulted from the cited condition is neither a defense to the merits of the Secretary's case nor a reason to modify or annul the penalty where, as here, the $350 proposed by the Secretary is substantially less than the maximum $7,000 penalty allowed by the OSH Act for both serious and nonserious violations 29 U.S.C. § 666(b)and (c). The amount proposed by the Secretary is obviously scaled to reflect the low gravity of the violative condition, which is consistent with the penalty assessment criteria of 29 U.S.C. § 666(j). Therefore, the fourth item of the nonserious citation is affirmed and a $350 penalty is assessed.

Based upon the foregoing findings and conclusions, it is

ORDERED that item 1 of citation number 1 relating to the fall-protection standard at § 1910.23(c)(1) is affirmed, and a penalty of $700 is assessed. It is further

ORDERED that item 2 of citation number 1 relating to construction of flammable liquid storage room under § 1910.106(d)(4)(i) is affirmed, and a $500 penalty is assessed. It is further

ORDERED that item 3 of citation number 1 relating to fire extinguisher near storage room door under § 1910.106(d)(7)(i)(a) is affirmed, as a nonserious in lieu of a serious violation, and a $100 penalty is assessed. It is further

ORDERED that items 4, 5 and 6 of citation number 1 relating to control of hazardous energy under § 1910.147 are affirmed, and a penalty of $1,225 is assessed for each of the three items. It is further

ORDERED that item 7 of citation number 1 relating to educational program for use of fire extinguishers under § 1910.157(g)(1) is affirmed, and a penalty of $1,225 is assessed. It is further

ORDERED that item 8 of citation number 1 relating to protection of battery charging apparatus under § 1910.178(g)(2) is affirmed as a nonserious in lieu of a serious violation, and a penalty of $350 is assessed. It is further

ORDERED that items 9 and 10 of citation number 1, having been withdrawn by the Secretary, are vacated. It is further

ORDERED that grouped items 11a and 11b of citation number 1 relating to safeguards for a woodworking machine under § 1910.213 are affirmed, and a penalty of $350 is assessed. It is further

ORDERED that grouped items 12a and 12b of citation number 1 relating to guarding pulleys and belts under § 1910.219 are affirmed, and a penalty of $575 is assessed. It is further

ORDERED that item 13 of citation number 1 relating to guarding sprocket wheels and chains under § 1910.219(f)(3) is affirmed as a nonserious in lieu of a serious violation, and a penalty of $350 is assessed. It is further

ORDERED that grouped items 14a and 14b of citation number 1 relating to labeling containers of hazardous chemicals under § 1910.1200(f)(5) are affirmed, and a penalty of $1,225 is assessed. It is further

ORDERED that item 15 of citation number 1 relating to training for hazardous chemicals under § 1910.1200(h)(3)(iv) is affirmed, as amended, and a penalty of $1,225 is assessed. It is further

ORDERED that item 1 of citation number 2 relating to occupational injury log under § 1904.2(a) is affirmed, and no monetary penalty is assessed. It is further

ORDERED that item 2 of citation number 2, having been withdrawn by the Secretary, is vacated. It is further

ORDERED that item 3 of citation number 2 relating to fire extinguisher maintenance under § 1910.157(e)(3) is affirmed, and no monetary penalty is assessed. It is further

ORDERED that item 4 of citation number 2 relating to anchoring machinery under § 1910.212(b) is affirmed, and a penalty of $350 is assessed.

RICHARD DeBENEDETTO
Judge, OSHRC

Dated: **August 6, 1996**
Boston, MA