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

SECRETARY OF LABOR
Complainant,
v.
ANCHOR HOCKING GLASS CO.
Respondent.

Phone: (202) 606-5100
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OSHRC DOCKET
NO. 94-0178

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 January 19, 1996. The decision of the Judge will become a final order of the Commission on February 20, 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 February 8, 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
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Petitioning parties shall also mail a copy to:

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200 Constitution Avenue, N.W.
Washington, D.C. 20210

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. /SKA

Date: January 19, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 94-0178

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SECRETARY OF LABOR, Complainant, v. ANCHOR HOCKING GLASS COMPANY, INC., Respondent.	DOCKET NO. 94-0178

Appearances: Kenneth Walton, Esq.
Office of the Solicitor
United States Department of Labor
For Complainant

Thomas V. Williams, Esq.
and
William W. Ford, III, Esq.
Frost and Jacobs
For Respondent

BEFORE: MICHAEL H. SCHOENFELD,
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

Having had its worksite inspected by a Compliance Officer of the Occupational Safety and Health Administration, Anchor Hocking Glass Company, ("Respondent" or "Anchor") was issued one citation alleging three serious violations of the Act. A civil penalty of $7,000 for each of the alleged violations was proposed.

Respondent timely contested. Following the filing of a complaint and answer and pursuant to a notice of hearing, the case came on to be heard on August 15 and 16, 1995. No affected employees sought to assert party status. Both parties have filed post-hearing briefs.

Jurisdiction

Complainant alleges and Respondent does not deny that it is an employer engaged in the manufacture of consumer glassware. It is undisputed that at the time of this inspection Respondent was engaged in such manufacturing activities at a plant in Lancaster, Ohio, which is the subject of the inspection in this matter. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. (Complaint and answer.) I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of § 3(5) of the Act.[1] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Statement of Facts

At its production facility in Lancaster, Ohio, Anchor manufactures a variety of consumer glassware. The facility consists of an area for receiving raw materials, mixing the materials and melting them down into molten glass. The liquid glass flows and slowly cools into "globs" of malleable material which is dropped into molds to form each individual piece of glassware. The

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[1] Title 29 U.S.C. § 652(5).

molds, on a continuous conveyor ("lehr"), pass through ovens which change the consistency of the molded materials to the desired shape and form. There is a cooling down process after which the glassware continues moving on the lehr to the pack and ship department where the glassware is removed from the lehr, packed and placed on wooden skids for further movement to wrapping then to shipment or storage. (Tr. 191-195)[2] There are as many as 14 separate production lines feeding into the pack and ship department. The last stage of each production line is not necessarily configured in the same manner. Different types of tables, roller conveyors or work surfaces and areas might be used depending upon the particular type of product being produced on a particular line at a given time. The configuration of the production lines can change as frequently as twice per shift. (Tr. 185, 206).

As the finished glassware is removed from a line it is packed with the packages then being stacked on wooden pallets which measure either 48" x 40" or 54" x 60", depending on the nature of the product. (Tr. 83, 211, 306). Each completed pallet is checked by a "checker", a process generally completed before a forklift operator picks up the pallet from the end of the production line (lehr). (Tr 241). Up to 4,000 pallets, 1,200 of finished goods and the remainder "auxiliary materials," are moved daily during the busy months. (Tr. 201). Each shift has one full time regular checker. (Tr. 256). During a shift each forklift operator is assigned to specific production lines (lehrs) from which he is to remove completed pallets and to whom he is to supply empty pallets (Tr. 204). Every completed pallet is moved by forklift to a shrink wrapping machine immediately adjacent to an elevator which moves the wrapped pallets to a basement area for storage or shipment. (Tr. 198). During its busy time of year (the second half of each calendar year) some pallets must be "staged" temporarily to be checked before they are wrapped. (Tr. 202, 207-08, 252, 268.). The area used for such staging is located adjacent to the shrink wrap machine, directly across the main aisle from the employee brake room. (Tr. 209-10, R-5 [marked with an "x"]). The same area has consistently been used for staging. (Tr. 87, 235).

The pack and ship department is essentially a very large open room something on the order

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[2] References to the record of testimony in this case are as follows: Transcript of proceedings, Tr. __. References to Complainant's, Respondent's or Administrative Law Judge's exhibits are as fillows: CX __, RX__ and JX__, respectively.

of 200' in width by approximately 300' in length interspaced with columns (J-1). The lehrs extend into the room along one of the longer walls (J-1; R-5). Each lehr extends a somewhat different length into the department depending upon the type of glassware being produced on that line and the nature of the finishing process and packing process needed for that ware. Production lines, regardless of configuration, did not extend into the main aisle. (Tr. 227). The "main aisle" for forklift traffic extends almost the entire length of the department (Tr. 171, 283, R-5) near the side of the room opposite the side where the lehrs enter the department. The width of the main aisle (between columns) was 18'4" (Tr. 83, 305). An employee "brake room" and bathrooms were located in a cinder block structure contained within the department. A pedestrian walkway, approximately 3' in width, had been painted along the side of the brake room structure along the main aisle (where the bulletin board was located) and the side adjacent (perpendicular) to it which adjoined the main aisle directly across from the shrink-wrap machine and elevator. (Tr. 155-57, 226-27, J-1, C-6 and R-5). The pedestrian walkway did not extend much beyond the ends of the brake rooms structure itself.

As a result of a reported fatality, OSHA Compliance Officer Rex Blevins conducted a safety inspection of the pack and ship department. He set up a stationery video camera which recorded the activities near the staging area. He taped the activities for about four hours covering the later part of the second shift and beginning of the third shift. (Tr. 58). In preparation for the hearing, the Compliance Officer "edited" the tape to a length of approximately 24 minutes. During the hearing, he played the tape and gave a description of the activities of the four forklifts shown. His descriptions included several instances of pallets being left in the aisles, employees conversing in the middle of an aisleway, forklift operators entering a "blind" intersection without slowing down and several instances of employees walking in the aisles. (Tr 29 - 41) OSHA, based on Blevins' inspection, issued the citations to Anchor which are in issue in this matter.[3]

Item 1(a)

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[3] One item of the citation, alleging a violation of the standard at 29 C.F.R. § 1910.178(l), was dismissed during the course of the hearing. (Tr. 128 - 41).

29 C.F.R. § 1910.176(a)[4]

This item of the citation charged that Anchor failed to comply with the cited standard in that;

> the employer did not ensure that the aisles...were kept clear in that pallets of ware were left in the aisle where two way forklift traffic and pedestrians were present at the same time.

The Compliance Officer pointed to several scenes during the video tape playback in which a pallet was left in the aisle. On one occasion two pallets were protruding into the aisle. He was of the opinion that the hazard of placing pallets in the aisle was that forklift operators had to operate in closer proximity to one another and had less room to maneuver and that the view of a forklift operator could be obstructed by the pallet of ware. (Tr. 43).

The Secretary acknowledges that aisles need not be completely free of objects but that an employer cannot obstruct aisles in such a manner as to create a hazard. *Hughes Tool Co.,* 6 BNA OSHC 1366 (No. 15086, 1978). Under the circumstances in this location, a high traffic area, the hazards created, according to the Secretary, were the impossibility of two forklifts passing through the area at the same time while simultaneously leaving enough room for a pedestrian to travel in the pedestrian walkway and the problem of a checker, checking the pallet while standing in the aisle as "other traffic goes by."

Respondent argues that even though pallets may have been temporarily staged in such a manner as to protrude into an aisle, there was no violation of the cited standard because no hazard existed. (R. Brief, p. 9). Citing an unreviewed judge's decision in *General Motors Corp., Packard Electric Div.,* 7 BNA OSHC 1205 (No. 78-1368)(ALJ)(Digest), Respondent maintains that in order to show a violation of this standard the Secretary must demonstrate that aisles were obstructed in such a manner as to create a hazardous condition.

According to Respondent, the fact that greater clearances (in inches) existed at Anchor due

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[4] The standard provides, in pertinent part;

> Aisles and passageways shall be kept clear and in good repair, with no obstruction across or in aisles that could create a hazard. Permanent aisles and passageway shall be appropriately marked.

to its "mammoth" main aisle, than were present at General Motors, there was no hazard. Respondent also claims that the staging of ware in the aisles was not unexpected thus was not a hindrance or surprise to operators. Respondent notes that the forklifts were not, as the Compliance Officer thought, traveling randomly in the department. They were assigned specific lehrs to service and each had its own established traffic pattern to follow. (Tr. 50, 204). In addition, Respondent maintains that its training program taught its operators to be "aware, courteous and cautious." Finally, Respondent looks to the opinion offered by its expert witness [5]regarding his conclusion that the conditions created by the staging of pallets in the aisles did not create a hazard under the cited standard.

The parties agree on the correct interpretation of the standard. It does not forbid all obstructions in aisles, but only those which create a hazard. Compliance Officer Blevins opined that the manner in which the pallets were obstructing the aisle created a hazard. Mr. Vaughan opined just the opposite. I find that the greater weight of credible evidence demonstrates that there was no particular hazard created by the placement of pallets in the aisles as shown on the video tape and as described by the Compliance Officer. In reaching this conclusion I accord more probative weight to the opinion of Mr. Vaughan than that of Compliance Officer Begins. Mr. Vaughan's experience is far greater. He was specifically qualified as an expert witness. Mr. Vaughan carefully approached the question, he seemed to know far more about Anchor's operations generally and, more importantly, was more familiar with the operations in the pack and ship department. He was careful in taking measurements of the conditions at the department and comparing them to dimensions discussed in other cases. He also had more thoroughly reviewed the video tapes. In addition he more fully explained and justified his conclusions. Moreover, the Compliance Officer clearly relied on some erroneous assumptions such as an asserted lack of planned traffic routes. Complainant's argument that Mr. Vaughan's opinion is to be rejected because he did not consider certain factors[6]

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[5] Respondent identified and proffered Mr. Williams as an expert. At the hearing, he was found to be qualified as an expert. (Tr. 300-01). While Compliance Officer Blevins was not so proffered, he also offered opinion testimony of a type usually reserved for experts.

[6] Secretary's brief, n.3 at p. 6.

is rejected. Most importantly, Mr. Vaughan did consider pedestrian traffic. Secondly, he never said, nor was he cross examined as to whether he failed to take into account the number of forklifts and pallets involved. Indeed, Mr. Vaughan reviewed the same videotape as that relied upon by the Compliance Officer. It must be assumed that the same number of forklifts and pallets appear in each copy of the tape. In light of these factors, I find that the Secretary failed to show that the obstructions in the aisles created hazards. Item 1(a) is VACATED.

Item 1(b)
29 C.F.R. § 1910.176(a)

The Secretary alleged that "aisles and passageways, used by the employee pedestrians as a means of egress and a passageway to the break area were [not] properly marked" as required by the standard. See, footnote 4, *supra.*

The Compliance Officer took the position that marked pedestrian walkways were required throughout the department "wherever pedestrians may be walking." (Tr. 113). The Secretary correctly points out that specific pedestrian walkways were marked only in the area next to the brake room and bathroom. He recounts an instance in which a forklift drove into an area reserved for employee foot traffic[7]. He then relies on the Compliance Officer's opinion that the failure to mark pedestrian walkways in other areas presented "a hazard" and the fact that the incident which precipitated the inspection apparently occurred in an area without a marked pedestrian walkway. (Sec. brief, p. 6).

Respondent argues that the standard does not apply because it is designed to protect forklift operators not pedestrians. It also relies on its expert's opinion that the standard does not require pedestrian walkways (Tr. 311). Respondent points out that the materials handling standard cited makes no mention of pedestrians at all, that aisles for forklift operation through out the pack and ship department were, in fact, marked by paint (Tr. 108-09) and, perhaps, by columns. (Resp. brief, n.12, at pl. 14).

Respondent's argument that employees other than forklift operators are not sought to be

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[7] Nobody was in the marked area at the time.

protected by the cited standard is rejected. Where, as here, operation of machinery or equipment could endanger employees in the vicinity as well as the persons operating the equipment, it would make little or no sense to interpret the standard so as to deny protection to one group and not the other. Respondent's reliance on the Commission decision in *Love Box Company,* 4 BNA OSHC 1138 (No. 6286, 1976) is not persuasive on this point. That decision merely states the proposition that the standard cited there, 29 C.F.R. § 1910.22(b)(1), was not applicable to pedestrians. It provides neither binding precedent for interpretations of other standards nor does it provide reasoning of any kind.[8]

Having conceded that forklift aisles were marked by yellow paint along the edges (Tr. 108-09) is fatal to Complainant's case. The standard makes no distinction between aisles for forklifts and walkways for pedestrians. The Compliance Officer's interpretation of the standard, while perhaps laudatory in its intent, is not supported by the plain wording of the standard. The standard nowhere defines the "aisles" and "passageways" to which it refers nor did the Secretary provide any definition or specific rationale for his Compliance Officer's broader interpretation. Finally, even if the standard were held to require the marking of pedestrian walking areas as well as forklift operating aisles, the unrebutted and credible evidence specific to this case as to the almost constantly changing configuration of the lehrs (Tr. 221-23) would have to be taken into account by the Secretary in identifying those "permanent" pedestrian aisles and pedestrian passageways which should have been marked. No such attempt was made by the Compliance Officer. Accordingly, item 1(b) is VACATED.

Item 3
29 C.F.R. § 1910.178(n)(4)

The cited standard requires that forklift operators "shall be required to slow down and sound the horn at cross aisles and other locations where vision is obstructed."

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[8] The point was mentioned and specifically adhered to in *Gulf Oil Corporation,* 11 BNA OSHC 1476, n.4 at 1478 (No.76-5014, 1983).

The Compliance Officer agreed that "there must be a blind intersection or an obstructed view of the intersection" in order to initiate the slow down and horn blowing requirements. (Tr. 96). He proceeded to try to demonstrate that the intersection of the main aisle and secondary aisle nearest the corner of the brake room/bathroom structure immediately opposite to the shrink wrap machine, was such an intersection (Tr. 105-06) and that operators, in fact, failed to slow down and sound their horns when approaching or entering the particular intersection. The Compliance Officer alleged the violation occurred only at the intersection immediately adjacent to which the forklift operators placed the pallets of glassware to be shrink wrapped and put on the elevator. (Tr. 103-05).

Ms. Homer, Superintendent of the department at the time of the inspection, testified that because of the mirrors people could see (traffic in the main aisle) (Tr. 223-26).

Complainant acknowledges the lack of a specific definition of "obstructed" in the standard but argues that it must be read to mean that "a view is obstructed when the obstruction makes it reasonably foreseeable that nearby workers might be hit." (Sec. brief, p. 7) He cites the Commission decision in *Georgia-Pacific Corp.,* 16 BNA OSHC 1171 (No. 89-2806, 1993). In that decision, the Commission, was called upon to resolve Respondent's claim that the standard under which it had been cited[9] was unconstitutionally vague. The Commission defined obstructed view as a condition in which something "blocks the operator's view such that it is reasonably foreseeable that the forklift operator could not see and could therefore hit employees working in the area, thus endangering employees that the standard seeks to protect." *Georgia-Pacific Corp., supra,* 16 BNA OSHC at 1175. Complainant maintains that Respondent "does not seriously dispute that the operators did not slow down and sound their horns...." (Sec. brief, Pp. 8-9). The Secretary argues that Respondent's reliance on the presence of a mirror at the cross aisles is misplaced because the presence of a mirror does not eliminate the obstruction. The Secretary implies that Respondent's reliance on its employees use of the mirror has been ineffective noting the Compliance Officer's testimony that the video tape shows that the operators did not, in fact, look at the overhead mirror upon entering the intersection. He maintains that the standard requires that Respondent ensure that

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[9] Georgia-Pacific Corp. had been cited under another sentence in 29 C.F.R. § 1910.178(n)(4) which provides: "If the load being carried obstructs forward view, the driver shall be required to travel with the load trailing."

its drivers slow down and sound their horns.

Respondent argues that it was in compliance with the standard. It also focuses solely on forklift operators approaching the shrink wrap and elevator area from the aisle perpendicular to the main aisle. First, Respondent argues that there was no obstructed vision at the intersection. Anchor maintains that the "half-globe" mirror on the ceiling above the intersection, which was installed at the request of the forklift operators, supplied sufficient unobstructed vision so as to meet the requirements of the standard. Anchor also claims that the Compliance Officer conceded that the one four-foot high load of ware on a pallet shown in the videotape was not an obstruction and that without any evidence or support at all he claimed that pallets of greater height were somewhere in a position so as to obstruct vision of the intersection. Respondent also argues that the Compliance Officer failed to consider that any operator entering this intersection had three choices. He could turn 90 degrees to either his right or left or he could go 22' straight ahead across the main aisle to the shrink wrap machine where he would have to stop. Respondent argues that in any of those events a driver would be forced to slow down through the intersection. Moreover, argues Respondent, the Secretary presented no evidence whatsoever about the actual speed of the forklifts other than the "vague assertions of the Compliance Officer" that travel was too fast.

The intersection under consideration was in a "T" shape. It is clear that forklift drivers approaching the intersection from either "arm" of the "T" had a clear view of conditions ahead. Respondent ignores the fact that a driver in such a position would have difficulty seeing forklifts or pedestrians approaching from the "base" of the "T" if materials were stacked near the corners of the intersection and if there were no overhead mirror. Respondent's position that there was no obstruction to vision is rejected. As a standard designed to protect all employees working in the area, whether they were on foot or driving another forklift, "obstruction" must be read to include pallets of material four feet high which could partially block an operator's view of a person walking, standing, working or bending down behind the pallet.[10] The degree of "obstruction" required to trigger the actions sought by the standard are also to be measured against the degree of difficulty in

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[10] Given the duties of checkers, it is not unreasonable to believe that an employee might be in such a position in the performance of job duties.

compliance. In this case, it is a relatively simple matter to instruct and enforce a slow down and sound the horn requirement at the one intersection specified by the Secretary. Thus, even accepting Respondent's argument that there were no pallets of sufficient height to totally obscure the vision of the forklift operators at the intersection, the presence of the four foot high pallets constituted vision obstructions sufficient to trigger the required actions....slowing down and sounding the horn. The fact that an overhead mirror was installed reduces but does not obviate the obstructed vision. It lowers the degree of hazard but does not eliminate it. Respondent's conclusion that its forklift drivers traveled through the intersection "at reasonable, safe speeds" (Resp. brief, p. 17) is just as speculative as the Compliance Officer's asserted statement that they were traveling "too fast." What does matter is that the video tape confirms the charge that the operators did not slow down and sound their horns upon approaching or entering the intersection.

Respondent claims, as a matter of affirmative defense that if horns were used at that intersection safety would decrease not increase. (Resp. brief, p. 17). Respondent's position amounts to a claim that requiring the use of forklift horns at the specified intersection would create a greater hazard.

In order to establish the "greater hazard" affirmative defense, an employer must demonstrate by a preponderance of the evidence that (1) the hazards of compliance are greater than the hazards of non-compliance, (2) alternative means of protection are unavailable, and (3) a variance was unavailable or inappropriate. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020 (No. 86-521, 1991). In the absence of any claim or showing that a variance was unavailable or inappropriate, the defense is rejected. Anchor takes the position that requiring the horns to be used at that intersection would result in such frequent horn soundings that the intended warning effect would be eliminated. Respondent's argument amounts to challenging the requirement that the horn be used which is specifically imposed by the standard. The "wisdom" of the requirement is not subject to such challenge in an enforcement proceeding.

Respondent was thus in violation of the cited standard. Item 3 is AFFIRMED.

The violation is serious as alleged. The results of an employee being hit by a forklift, whether loaded or unloaded, even if traveling at a slow speed, clearly would likely be serious injury or death. The penalty proposed by the Secretary, $7,000, which is the maximum allowable under

the Act, is not appropriate in this case.[11] Respondent is a large employer. The gravity of the violation is moderate in that the hazardous condition frequently recurs during the course of a day since the cited intersection is often used and there is a significant possibility that if an accident occurs, it would result in severe injury or death. There is no evidence calling into question Respondent's good faith. It has a well developed safety program and it has apparently been fully cooperative in the inspection. While there is a history of a fatal accident, there is, on this record, no history of any prior violations under the Act. Considering the above factors, a penalty of $2,100 (33% of the maximum allowable amount) is appropriate.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant 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.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was not in violation of the standard at 29 C.F.R. § § 1910.176(a) as alleged in item 1.

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[11] It is noted that no rationale whatsoever is even offered for the Area Director's increasing the proposed penalty for each of the three serious items from $5,000 to $7,000.

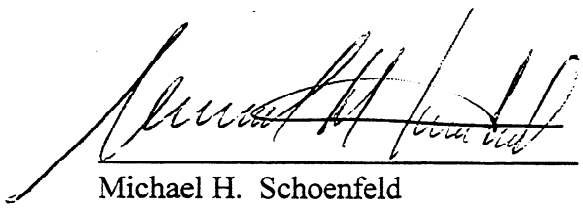
4. Respondent was in violation of the standard at 29 C.F.R. § 1910.178(n)(4) as alleged in item 3.

5. Respondent's violation of the standard at 29 C.F.R. § 1910.178(n)(4) is a serious violation of § 5(a)(2) of the Act for which a civil penalty of $2,100 is appropriate.

ORDER

1. Items 1(a) and 1(b) of the citation issued to Respondent on or about December 17, 1993 are VACATED.

2. Item 3 of the citation issued to Respondent on or about December 17, 1993 is AFFIRMED. A civil penalty of $2,100 is assessed therefor.



Michael H. Schoenfeld
Judge, OSHRC

Dated: January 16, 1996
Washington, D.C.