UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036–3419

FAX:
COM (202) 606–5050
FTS (202) 606–5050

SECRETARY OF LABOR
Complainant,
v.
OTIS ELEVATOR
Respondent.

OSHRC DOCKET
NO. 92-3756

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 October 28, 1993. The decision of the Judge will become a final order of the Commission on November 29, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before November 17, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
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.

Date: October 28, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-3756

NOTICE IS GIVEN TO THE FOLLOWING:

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Michael H. Schoenfeld
Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
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SECRETARY OF LABOR,	
Complainant,	
v.	OSHRC Docket No. 93-3756
OTIS ELEVATOR COMPANY,	
Respondent.	

Appearances:

John M. Strawn, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

W. Scott Railton, Esq.
Reed, Smith, Shaw & McClay
McLean, Virginia
For Respondent

Before: Administrative Law Judge Michael H. Schoenfeld

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, Otis Elevator Company ("Respondent") was issued one citation alleging other-than-serious violations of two safety and health standards for which no penalty was proposed. Respondent timely contested. Following the filing of a complaint and answer the parties filed a joint motion to permit the parties to submit cross motions for summary

judgment in lieu of a hearing. The motion was granted and a briefing schedule established. Both parties have filed motions for summary judgment with supporting memoranda, affidavits and proposed findings of fact and conclusions of law. No affected employees sought to assert party status. Pursuant to Commission Rules 2(b), 40 and 61[1] and Rule 56 of the Federal Rules of Civil Procedure, the following decision and order is issued without a hearing.[2]

Jurisdiction

Complainant alleges and Respondent does not deny that it is an employer engaged in construction activities. It is undisputed that at the time of this inspection Respondent was engaged in the installation of three elevators as the elevator subcontractor. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

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

Discussion

Respondent had two employees, Mr. Bender, a mechanic, and Mr. Stadler, his helper, working at the construction site at the time of the OSHA inspection. There is no dispute that upon the request of the OSHA inspector, Mr. Mindish, Mr. Bender was not able to produce a copy of the safety and health regulation which appears at 29 C.F.R. § 1910.20. Mr. Bender did provide three sets of Material Safety Data Sheets, one for each of the three

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[1] Title 29 C.F.R. § § 2200.2(b), 2200.40 and 2200.56 (1992), respectively.

[2] Complainant's Motion to Admit Evidence Into the Record of July 22, 1993, is granted. The record in this case thus consists of the declarations of Richard A. Mindish and Anthony S. Rizzo, Respondent's Answers to Interrogatories and Respondent's Response to Request for Production of Documents as well as the affidavits of Stephen Seifert and Paul Bender. References to various pleadings in the case may also be made.

[3] Title 29 U.S.C. § 652(5).

elevators scheduled to be installed at that work site. Moreover, there is no dispute that the MSDS sheets were maintained at the worksite and that Respondent's personnel were aware of the presence and location of the folders which contained the MSDS sheets.

Respondent produces no toxic exposure monitoring data on its employees nor does it generate or posses medical records of any kind for its employees.

The Secretary withdrew one of the two alleged violations (Item 1a) leaving only the allegation (Item 1b) that Respondent failed to comply with the standard at 29 C.F.R. § 1910.20(g)(2) (1992) in that,

> [t]he employer did not keep a copy of 29 CFR 1910.20 and its appendices at the workplace, or, upon request, make copies readily available.

The cited standard provides, in pertinent part;

> Each employer shall keep a copy of this section and its appendices and make copies readily available upon request, to employees.

There is no doubt that a copy of 29 C.F.R. § 1910.20 and its appendices was not produced at Respondent's work site when requested by the Compliance Officer. Respondent argues that it is unnecessary for an employer to inform its employees of the existence of a standard providing for their right to access medical and exposure records where, as here, the employer neither creates nor maintains any medical or exposure records for them to access. In sum, Respondent maintains that it would be a useless act to inform employees of their right to access medical and exposure records where no such records exist. Indeed, such a notification to employees would be "counterproductive" according to Respondent because it could mislead employees. Respondent argues that in the absence of any such medical records the cited standard is not reasonably necessary to provide a safe or healthful workplace.

Complainant simply quotes the standard's requirement that copies be kept "readily available." The Secretary argues that the gravamen of this violation lies in the failure to provide information to employees. The Secretary makes no claim or assertion that Respondent has any medical records covered by § 1910.20. Indeed, in its motion for summary judgment Complainant states "[t]he [alleged] violation is not for record keeping or

for preventing access, rather it is for failure to inform employees of what they can ask for under § 1910.20." Complainant, relying on the opinion of Administrative Law Judge Sparks in *Hardin Construction Group*, 14 BNA OSHC 1365 (No. 89-0579, 1989) (digest), maintains that the standard "enables employees, their representatives and OSHA to detect and address occupational disease." (Citations omitted.)

Under the particular facts of this case, both parties are correct in their analysis.

The clear mandate of the standard requires that Respondent maintain on the premises a copy of § 1910.20 and its appendices which, under the circumstances of this case, is a useless act. If no medical records of any kind are made, collected or maintained by Respondent informing its employees of their right to access medical records and of the types of records available to them if Respondent had them is meaningless. There is simply no way that assuring that employees have readily available to them a copy of this standard would "enable employees, their representatives and OSHA to detect and address occupational disease" as Complainant explains is the importance of the standard. It is not however, the duty of an Administrative Law Judge to re-write a standard which is clear on its face even where its application in some circumstances might be useless. Such a failure to comply is *de minimis*.

A *de minimis* violation is one having no direct or immediate relationship to employee safety or health, where "the hazard is so trifling that an abatement order would not significantly promote the objectives of the Act." *Dover Elevator Co.*, 15 BNA OSHC 1378, 1382 (No. 88-2642, 1991). Here there is no hazard nor is would there be any gain in health protection for employees if a copy of the standard and its appendices were present at the site.

Accordingly, I conclude that Respondent's failure to maintain a copy of § 1910.20 and its appendices at the work site was a *de minimis* violation for which a notice in lieu of a citation under section 9(c) of the Act[4] should have been issued.

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[4] 29 U.S.C. 658(c).

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 in violation of the Act in that it failed to comply with the standard at 29 C.F.R. § 1910.20(g)(2).

4. Respondent's violation of the Act was *de minimis* for which an abatement order shall not issue.

5. Respondent's *de minimis* violation of the Act does not warrant the assessment of any monetary penalty.

MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: OCT 27 1993
Washington, D.C.