SECRETARY OF LABOR, Complainant, v. NORDAM GROUP, Respondent.	OSHRC Docket No. 99-0954

DECISION

Before: ROGERS, Chairman; EISENBREY, Commissioner.

BY THE COMMISSION:

NORDAM Group ("NORDAM") is an aerospace repair and manufacturing company with approximately 2,300 employees worldwide. NORDAM's main facility is in Tulsa, Oklahoma. In response to an employee complaint that fiberglass dust was entering an accounting office from an adjacent space referred to as the "interior finish-out area," the Occupational Safety and Health Administration ("OSHA") inspected NORDAM's Tulsa facility on March 25, 1999. This inspection was conducted by Industrial Hygienist ("IH") Tori Felicia Kay Contreras. During part of her inspection, Contreras was accompanied by Reasha Saltsman, an employee of Sherwill Environmental Health and Safety Consultants ("Sherwill"), a company hired by NORDAM to administer its safety programs. Sherwill is owned and managed by Robert Sherwin Jr. As a result of Contreras's inspection, the Secretary issued one citation with two items. Item 1, the only item at issue on review, alleges that NORDAM violated 29 C.F.R. § 1910.133(a)(1)[1] by failing to provide side shields and/or

[1]29 C.F.R. § 1910.133 provides, in pertinent part:

> **§ 1910.133 Eye and face protection**
>
> (a) General Requirements. (1) The employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation.

goggles to employees who were sanding and grinding fiberglass parts. The citation states:

> Protective eye equipment was not required where there was a reasonable probability of injury that could be prevented by such equipment:
>
> > In the finish layout department,[2] the employer did not provide side shields and/or goggles to employees engaged in sanding and grinding of fiberglass parts. This hazard exposes employees to eye irritation and corneal abrasions.

Administrative Law Judge Stephen Simko Jr. affirmed the citation for a violation of § 1910.133(a)(1). Judge Simko did not address whether NORDAM failed to provide employees with side shields or goggles. Rather, he found that a number of employees wore no form of eye protection, and that NORDAM violated the standard because it did not enforce written rules which require that employees wear eye protection in the interior finish-out area. Judge Simko classified the violation of § 1910.133(a)(1) as serious, and assessed a penalty of $1,875.

I. Amendment

A. Background

> (2) The employer shall ensure that each affected employee uses eye protection that provides side protection when there is a hazard from flying objects. Detachable side protectors (e.g. clip-on or slide-on side shields) meeting the pertinent requirements of this section are acceptable.

[2]At the end of the hearing, the Secretary moved to amend citation 1, items 1 and 2 to state that the location of the violations was the interior finish-out department, not the finish layout department. Despite NORDAM's objection, Judge Simko granted this motion in his Decision and Order, finding that Saltsman, who represented NORDAM during the inspection and testified at the hearing, "clearly understood that the location of the alleged violations was the interior finish-out area of the second floor of its facility." On review, NORDAM has not objected to this ruling, and we do not address it.

After this case was directed for review, the Secretary filed a "Motion to Amend and Memorandum in Support." In her memorandum, the Secretary argues that the Commission should amend citation 1, item 1 to "add a violation actually tried by the parties and found by the judge, namely, the failure of respondent to ensure the wearing of eye protection by eight of respondent's employees on March 25, 1999." The Secretary claims that "although Judge Simko did not expressly state that he was amending the . . . citation to add an allegation of violation based on the failure of several employees to wear any form of eye protection while exposed to airborne fiberglass, [he] implicitly did so by affirming the citation based on precisely that factual finding."

Thereafter, NORDAM filed an "Objection to Secretary's Motion to Amend," arguing that it did not know it was trying the unpleaded issue of whether it failed to ensure that employees used eye protection. NORDAM argues that, although certain witnesses "made references in their testimony to the number of people wearing safety glasses," these references were "[d]iscussions in the course of testimony concerning certain background facts" and were "a far cry from . . . an effort to establish those facts in defense against a specific, well-pleaded allegation." NORDAM also claims that it would be prejudiced by amendment of the citation. Had it known it was trying the issue of whether it ensured that employees used eye protection, NORDAM argues, "it might have been able to produce other witnesses present during [the] inspection that would have refuted such an allegation and submitted evidence concerning NORDAM's enforcement policy."

B. Discussion

Federal Rule of Civil Procedure 15(b) governs amendment of pleadings in Commission proceedings.[3] As the Commission noted in *McWilliams Forge Co.*, 11 BNA

[3]Rule 15(b) provides:

(b) *Amendments to Conform to the Evidence.*

[1] When issues not raised by the pleadings are tried by express or implied consent of

OSHC 2128, 2129, 1984-85 CCH OSHD ¶ 26,979, p. 34,669 (No. 80-5868, 1984), "amendment under the first half of Rule 15(b) is proper only if two findings can be made – that the parties *tried* an unpleaded issue and that they *consented* to do so." (Emphasis in original). Consent will be found only when the parties "squarely recognized" that they were trying an unpleaded issue. *See, e.g., Armour Food Co.*, 14 BNA OSHC 1817, 1824, 1987-90 CCH OSHD ¶ 29,088, p. 38,885 (No. 86-247, 1990). Consent is not implied by a party's failure to object to evidence that is relevant to both pleaded and unpleaded issues, at least in the absence of some obvious attempt to raise the unpleaded issue. *McWilliams Forge Co.,* 11 BNA OSHC at 2130, 1984-85 CCH OSHD at p. 34,669.

Even if a party objects to the use of evidence in support of an unpleaded charge, the pleadings may be amended under the second half of Rule 15(b) if the objecting party does not suffer prejudice. *See Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1993-95 CCH OSHD ¶ 30,048, p. 41,269-70 (No. 88-572, 1993)(post-hearing sua sponte amendment by the judge upheld where no prejudice shown). "To determine whether a party has suffered prejudice, it is proper to look at whether the party had a fair opportunity

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the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

[2] If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(Bracketed numbers added).

to defend and whether it could have offered any additional evidence if the case were retried." *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1822, 1991-93 CCH OSHD ¶ 29,808, p. 40,592 (No. 88-2572, 1992).

In this case, we find that NORDAM "squarely recognized" and consented to trying the unpleaded issue of whether it ensured that employees used eye protection. NORDAM's attorney questioned witnesses repeatedly regarding the company's eye protection policies and its enforcement of these policies. Contrary to NORDAM's assertion, much of the testimony elicited did not concern mere "background facts." For example, Sherwin was asked several questions related to whether safety glasses are required in the interior finish-out area, and whether employees comply with this requirement. These questions, and other questions to the same effect, were not followed by any questions related to whether NORDAM provides side shields or goggles. NORDAM also introduced into evidence personnel files and an office memo in an attempt to show that it enforces safety rules.[4] In addition, the Secretary's attorney asked numerous questions regarding the enforcement of eye protection rules, questions to which NORDAM did not object. Because NORDAM "squarely recognized" that it was trying the issue of whether it ensured that employees used eye protection, and in fact introduced fairly extensive testimony and documentary evidence on this issue, we grant the Secretary's motion to amend the citation.[5]

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[4]NORDAM's attorney stated that he was introducing the personnel files, which included records of disciplinary actions, to show that "we have a rule and regulation, and we expect it to be enforced."

[5]Based on our finding that NORDAM consented to trial of the unpleaded issue, we need not consider whether it would be prejudiced by amendment of the complaint. In any event, it does not appear that NORDAM would be prejudiced by amendment. As noted above, NORDAM's attorney elicited a significant amount of testimony related to the enforcement of safety rules, including testimony related to the enforcement of eye protection rules. NORDAM also introduced documentary evidence related to the enforcement of such rules. Although NORDAM claims that it would be prejudiced by amendment because it could have produced other witnesses to refute Contreras's testimony, it does not identify these witnesses

II. Did NORDAM Ensure that Employees Used Eye Protection?

A. Background

IH Contreras testified that during her inspection of the interior finish-out area, and in the presence of Saltsman, she observed several employees grinding fiberglass parts. These employees were "very close down to the product[,] and there was a lot of fiberglass coming off of the parts themselves." Contreras said that, as she watched the employees grinding, "[n]one of the ones that I observed doing this process were wearing safety glasses, or side shields, or goggles." Contreras further testified that, of the eight to ten employees she observed in the interior finish-out area, two were wearing safety glasses and the others were not wearing any form of eye protection.[6] Saltsman, on the other hand, testified that she did not see any employee in the interior finish-out area who was not wearing safety glasses. Saltsman indicated that, in any event, NORDAM employees are not required to wear safety glasses as long as they stay within aisle ways marked by yellow lines on the floor. Finally, Saltsman testified that, during the exit conference at the end of the inspection, Contreras did not mention that she had seen employees without safety glasses. Instead, Contreras mentioned only that she had seen employees without side shields or goggles.

Judge Simko relied on Contreras's testimony in finding that NORDAM violated § 1910.133(a)(1). In particular, he relied on Contreras's statement that, other than the two employees she observed in the interior finish-out area wearing safety glasses, no employees were wearing any form of eye protection. Judge Simko found that Contreras's testimony on this issue was more credible than that of Saltsman. Judge Simko stated that he based his

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and does not explain how their testimony would differ from that of Saltsman and Sherwin, which addressed NORDAM's enforcement of safety rules.

[6]Contreras was unsure of the total number of employees in the interior finish-out area, stating: "It was maybe ten; eight to ten."

credibility finding on the behavior and demeanor of the witnesses at the hearing, and also on testimony from Sherwin that, to some extent, corroborated Contreras's testimony. Sherwin testified on cross-examination that, although NORDAM supervisors enforce eye protection rules, "from time to time . . . there are people left that don't adhere to the rules."

B. Discussion

To establish a violation of an occupational safety or health standard, the Secretary must show: (1) the applicability of the cited standard, (2) the employer's noncompliance with the standard's terms, (3) employee access to the violative conditions, and (4) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138, 1993-95 CCH OSHD ¶ 30,636, p. 42,452 (No. 90-1747, 1994).

Applicability and Exposure. By its terms, § 1910.133(a)(1) applies when an employee is "exposed to eye or face hazards from flying particles." IH Contreras testified that during her inspection she observed employees grinding fiberglass parts without eye protection. Contreras said that these employees "were very close down to the product, and there was a lot of fiberglass coming off of the parts themselves." Although NORDAM introduced evidence to rebut Contreras's testimony that certain employees were not using eye protection, it did not introduce any evidence to rebut her statement that she observed employees grinding fiberglass parts. Because NORDAM also does not dispute Contreras's statements that the grinding produced flying particles in the form of fiberglass dust and that employees were working "very close down to the product," we find both that § 1910.133(a)(1) applies to the work in the interior finish-out area and that certain employees were exposed to the hazard contemplated by the standard. NORDAM's policy exempting employees located within marked aisle ways from wearing eye protection is not relevant to our determination that employees engaged in grinding -- wherever located -- were exposed to the cited hazard.

Noncompliance. To establish noncompliance, the Secretary must show that NORDAM failed to ensure that exposed employees used appropriate eye or face protection. Contreras testified that she observed two employees in the interior finish-out area wearing safety glasses, and that the several other employees in that area who she observed grinding, wore no eye protection at all. The only evidence NORDAM offered to rebut these statements was Saltsman's testimony that she did not see any employee who was not wearing safety glasses. However, Judge Simko rejected Saltsman's testimony when he credited that of Contreras. Judge Simko based his credibility finding on several factors, including his observation of the behavior and demeanor of the witnesses, as well as on corroborating testimony from Sherwin. The Commission will ordinarily accept a credibility finding when it is based on the judge's observation of a witness's demeanor and is clearly explained. *C. Kaufman, Inc.,* 6 BNA OSHC 1295, 1297, 1977-78 CCH OSHD ¶ 22,481, p. 27,099 (No. 14249, 1978). Although NORDAM argues that Contreras was "not at all certain about what she observed," its only support for this argument is that Contreras qualified her testimony by stating "I *think* only two employees had their glasses on." (Emphasis added). There was no uncertainty, however, about Contreras's testimony that there were employees who were not wearing any form of eye protection while exposed to flying particles. This establishes the violation. NORDAM has failed to persuade us that the judge's credibility finding should be reversed, and we accept that finding. As a result, we find that there is no credible evidence to rebut Contreras's statement that several employees were grinding without eye protection, and conclude that NORDAM failed to comply with § 1910.133(a)(1) by allowing employees to work without such protection when they were exposed to the hazard of flying particles.

Knowledge. Contreras testified that OSHA inspected NORDAM's facility because of an employee complaint that fiberglass dust was entering an accounting office from the adjacent interior finish-out area. According to Contreras, the dust entered the accounting office from the interior finish-out area because "supervisors were going in and out of [a] door" between the two areas. Contreras also testified that during her inspection, Jesse Evans, the supervisor

in the interior finish-out area, was "in and out of the area." She said that Evans, who had an office in the interior finish-out area, "came in and out just to talk to employees and to interact with people in the area." These statements, particularly Contreras's statements regarding Evans's continuing presence in the interior finish-out area, support a finding that the employees grinding without eye protection were in plain view of supervisors. Accordingly, we find that NORDAM had at least constructive knowledge of the violative conditions. *See, e.g., A.L. Baumgartner Construction, Inc.*, 16 BNA OSHC 1995, 1998, 1993-95 CCH OSHD ¶ 30,554, p. 42,273 (No. 92-1022, 1994)(constructive knowledge found where violative conditions in plain view).

Given these findings, we conclude that the Secretary has established a violation of § 1910.133(a)(1) based on NORDAM's failure to ensure that employees in the interior finish-out area used eye protection while exposed to the hazard of flying particles.[7]

III. Classification and Penalty

Judge Simko classified the violation of § 1910.133(a)(1) as serious and assessed a penalty of $1,875. On review, neither party contests the classification or amount of the penalty. Because there is a substantial probability that employees struck in the eye by flying fiberglass particles would have suffered serious physical harm, we affirm the judge's classification of the violation. *See Stearns-Roger, Inc.*, 7 BNA OSHC 1919, 1921, 1979 CCH OSHD ¶ 24,008, p. 29,156 (No. 76-2326, 1979)("the eye is an especially delicate organ and . . . any foreign material in the eye presents the potential for injury"). We also affirm the

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[7]NORDAM twice stated, in response to the Secretary's objections, that it was not attempting to establish an unpreventable employee misconduct defense to the charge that it violated § 1910.133(a)(1). Thus, we need not address this defense.

judge's penalty assessment of $1,875 based on consideration of the factors in Section 17(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 666(j).

IV. ORDER

We grant the Secretary's motion to amend the citation, and affirm the judge's finding that NORDAM violated 29 C.F.R. § 1910.133(a)(1). We assess a penalty of $1,875 for the violation.[8]

/s/
Thomasina V. Rogers
Chairman

/s/
Ross Eisenbrey
Commissioner

Date: May 18, 2001

[8]Given our finding that NORDAM violated 29 C.F.R. § 1910.133(a)(1) by failing to ensure that employees used eye protection when exposed to the hazard of flying particles, we will not address whether NORDAM violated this same standard by failing to provide employees with side shields and/or goggles.

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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Secretary of Labor,
Complainant,

v. OSHRC Docket No. 99-0954

Nordam Group,
Respondent.

Appearances:

Connie M. Ackerman, Esquire
Mr Richard M Munoz
Office of the Solicitor
U.S. Department of Labor
Atlanta, Georgia
For Complainant

Stephen L. Andrew, Esquire
Tulsa, Oklahoma
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Nordam Group (Nordam) is engaged in the aerospace repair and manufacturing business

with facilities in Tulsa, Oklahoma; San Antonio, Texas; Fort Worth, Texas; and Singapore. It employs approximately 2,200 to 2,300 employees worldwide. The Occupational Safety and Health

Administration (OSHA) conducted an inspection of respondent's workplace in Tulsa on March 2 5, 1 999. As a result of this inspection, respondent was issued a citation. Respondent filed a timely notice contesting the alleged violations and proposed penalties. A hearing was held in Tulsa, Oklahoma, on September 20, 1 999. For the reasons that follow, Citation No. I, item I, is affirmed and a penalty of $ 1,875 is assessed; Citation No. I, item 2, is vacated.

Background

Tori Contreras, an industrial hygienist with OSHA, conducted an inspection of Nordam's facility in response to an employee complaint that fiberglass dust was coming into the accounting off~office from the interior finish-out area, an adjacent area where workers sanded interior panels used in business aircraft. Both work locations were on the second floor. Ms. Contreras also observed the layout area and the G4/GS

departments on the first floor. The inspection focused on the second floor since this was a complaint-based inspection. The employee complaint concerned conditions in the accounting off~office and the adjacent work area. Nordam hired Sherwill Environmental Health and Safety Consultants (Sherwill) to administer its safety programs. Ms. Reasha Saltsman, an employee of Sherwill, represented Nordam during the OSHA inspection.

Motion to Amend Citation

At the conclusion of the hearing, the Secretary moved to amend Citation No. I, items I and 2, to reflect the location of the alleged violations as the interior finish-out department. Respondent opposed this motion on due process grounds. After reviewing the transcript and briefs, in addition to observing the testimony and demeanor of the witnesses, I conclude that respondent, through its representative, Ms. Saltsman, clearly understood that the location of the alleged violations was the interior finish-out area on the second floor of its facility. The Secretary's motion to amend is granted.

Discussion

The Secretary has the burden of proving the violation:

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (I) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation, (i *e.,* the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Citation No. 1. Item I

Alleged Serious Violation of 29 C.F.R. § 1910.133(a)(1)

In Citation No. I, item I, the Secretary alleges that:

> Protective eye equipment was not required where there was a reasonable probability of injury that could be prevented by such equipment:
>
> > In the finish layout department, the employer did not provide side shields and or goggles to employees engaged in sanding and grinding fiberglass parts. This hazard exposes employees to eye irritation and corneal abrasions.

The standard at 29 C.F.R. § 1910.133(a), in pertinent part, provides:

(A) *General requirements. (1)* The employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation.

(2) The employer shall ensure that each affected employee uses eye protection that provides side protection when there is a hazard from flying objects. Detachable side protectors *(e.g.,* clip-on or slide-on side shields) meeting the pertinent requirements of this section are acceptable.

The standard at 29 C.F.R. § 1910.133(a)(1) is clearly applicable to working conditions in respondent's interior finish-out area. Respondent does not argue that the standard does not apply, that its employees in this area without eye protection would not be exposed to hazards from flying pa particles, or that it did not know of these hazardous conditions. Respondent's protective eyewear policy was developed by Sherwill after conducting a personal protective equipment hazard assessment. Mr. Sherwin, a consultant with Sherwill, testified that employees in the interior finish-out area are required to wear safety glasses.

Remaining at issue is whether respondent complied with the terms of the standard by ensuring that its employees in this area used appropriate eye protection at the time of the inspection. Testimony on this issue is conflicting and, therefore, credibility must be determined. Ms. Saltsman, with Sherwill, testified that Nordam requires and provides safety glasses with side shields, and that she saw no employees in this area during the inspection without safety glasses. She clearly understood that the location in question was the interior finish-out area. She also testified that employees wear wrap-around safety glasses.

Ms. Contreras, the OSHA compliance officer, testified that eight of the ten employees wore no safety glasses while working in this area. She stated that two employees were observed wearing safety glasses of the type described by Ms. Saltsman.

On at least two occasions during inspection of this area, Ms. Saltsman was outside the presence of the compliance officer while Ms. Contreras observed work of employees. Mr. Sherwin, Sherwill's president, asserted that his supervisors enforce the safety glass requirement, Respondent presented no evidence, however, to support this bare assertion. Mr. Sherwin admitted that some employees do not adhere to the rules. No evidence was presented to indicate that respondent took any action to ensure compliance when employees failed to use their eye protection.

After considering all testimony and other evidence offered at the hearing, and having observed the behavior and demeanor of all witnesses at the hearing, I accept the testimony of Ms. Contreras as more credible and convincing that eight of the ten employees in the area wore no form of eye protection. I conclude that while respondent may have had written rules requiring employees to wear eye protection in this area, it took no action to enforce those rules or ensure that these employees actually used such eye protection. Respondent failed to comply with the terms of the standard. Failure to ensure the use of safety glasses could result in serious physical eye injury. Respondent violated 29 C.F.R. § 1910 133(a)(1). The violation is serious.

Citation No. 1. Item 2

AllegedViolationof29C.F.R. § 1910.151

In Citation No. I, item 2, the Secretary alleges that:

> Where employees were exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body were not provided within the

work area for immediate emergency use:

In the interior layout department, the employer did not provide an eye wash facility for employees engaged in sanding and grinding fiberglass parts. This hazard exposes employees to eye irritation and corneal abrasions.

The standard at 29 C.F.R. § 1910.151 (c) provides:

Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

This standard is applicable to working conditions where a person may be exposed to injurious corrosive materials. [29 C.F.R. § 1910.151(c)]. The threshold question is whether the fiberglass dust and particles are "injurious corrosive materials."

The term "corrosive" is not defined in 29 C.F.R. § 1910.151. It is, however, defined in 29 C.F.R. § 1910.1200, Appendix A, as follows:

Corrosive: A chemical that causes visible destruction of, or irreversible alterations in, living tissue by chemical action at the site of contact. For example, a chemical is considered to be corrosive if, when tested on the intact skin or albino rabbits by the method described by the U. S. Department of Transportation in appendix A to 49 CFR part 173, it destroys or changes irreversibly the structure of the tissue at the site of contact following an exposure period of four hours. This term shall not refer to action on inanimate surfaces.

Consistent with this definition, *Dorlands Medical Diaionary,* 27th Edition, 1988, defines "corrosive" as follows:

Corrosive I. Destructive to the texture or substance of the tissues. 2. a substance that destroys the texture or substance of the tissues.

Section 1910.1200, Appendix A, defines an "irritant" as follows:

Irritant: A chemical, which is not corrosive, but which causes a reversible hiflainmatory effect on living tissue by chemical action at the site of contact. A chemical is a skin irritant it when tested on the intact skin of albino rabbits by the methods of 16 CFR 1500.41 for four hours exposure or by other appropriate techniques, it results in an empirical score of five or more. A chemical is an eye irritant if so determined under the procedure listed in 16 CFR 1500.42 or other appropriate techniques.

The hazard communication provisions contained in 29 C.F.R. § 1910.1200require chemical manufacturers and importers to assess the hazards of such chemicals and require employers to provide employees information about hazardous chemicals to which they are exposed. One means of such hazard communication is a material safety data sheet (MSDS). An MSDS must be maintained by employers for each chemical or group of chemicals present in the workplace where employees may be exposed (See 29

C.F.R. § 1910.1200(b) and (g)). Employers may rely on the evaluation of chemicals by the manufacturer (See 29 C.F.R. § 1910.1200(d) and Appendix E).

Respondent maintained the MSDS for fiberglass used by employees in the interior finish out area. That MSDS, prepared by Owens-Corning pursuant to the requirements of the hazard communication standard at 29 C.F.R. § 1200, described the potential health effects of fibrous glass as follows:

Potential Health Effects:

> **ACUTE (short term):** Fiber glass continuous filament is a mechanical irritant. Breathing dusts and fibers may cause short term irritation of the mouth, nose and throat. Skin contact with dust and fibers may cause itching and short term irritation. Eye contact with dust and fibers may cause short term mechanical irritation. Ingestion may cause short term mechanical irritation of the stomach and intestines. See Section 8 for exposure controls.
>
> **CHRONIC (long term):** There is no known health effects connected with long term use or contact with this product. See Section 11 of MSDS for more toxicological data. (Exh. C-2)

The manufacturer evaluated fiberglass continuous f lament as a mechanical irritant, not as a corrosive. The Secretary, in her standard at 29 C.F.R. § 1910.1200, allows an employer to rely on the MSDS prepared by the manufacturer. The first aid measure for eye contact in that MSDS is to "flush eyes with running water for at least 15 minutes" (Exh. C-2). While this constitutes advisable first aid for eye contact, it cannot be interpreted as a requirement for an eyewash facility where employees are exposed to injurious corrosive materials.

The Secretary has failed to prove that the fiberglass dust and particles produced by sanding in the interior finish-out area are injurious corrosive materials. Since these materials have not been shown to be corrosive, the standard at 29 C.F.R. § 1910.151 © is not applicable.

Having determined that the cited standard does not apply, it is unnecessary to discuss the other elements of the Secretary's burden. The alleged violation of 29 C.F.R. § 1910.151(c) is vacated.

Penalty

Under § 1 7(j) of the Act, in determining the appropriate penalty, the Commission must give due consideration to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations.

At the time of the inspection, approximately ten employees were working in the interior finish-out area, eight of whom were working without safety glasses. Respondent is a large employer with 2,200 to 2,300 employees worldwide. The compliance off~officer determined that the company had no serious violations within the past three years. She also reviewed the OSHA 200 forms and found several cases where employees had foreign bodies in their eyes. Respondent had a written program addressing eye protection, but did not effectively enforce it. Upon due consideration of these factors, a penalty of $1,875 for Citation No. I, item I, is appropriate.

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 decision, it is ORDERED:

1. Citation No. I, item I, is affirmed as a serious violation and a penalty of $1,875 is assessed.

2. Citation No. 1, item 2, is vacated.

/s/
STEPHEN J. SIMKO, JR.

Judge

Date: January 3, 2000