UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. CATERPILLAR, INC., Respondent INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, Authorized Employee Representative	OSHRC DOCKET NO. 94-345

January 26, 1996

DECISION AND ORDER

BEFORE: WEISBERG, Chairman; and MONTOYA, Commissioner.

BY THE COMMISSION:

At issue here is whether Caterpillar, Inc., violated the provisions of 29 C.F.R. § 1910.20 that require employers to provide employees with timely access to their requested medical and exposure records, and ask of requesting employees only information needed to locate and identify the records. Based on the present record, we would find that Caterpillar did violate these provisions. However, in the interests of fairness, we remand this case to the judge for further proceedings.

In August of 1993, Caterpillar received about 150 requests from employees at its Mossville, Illinois, plant seeking access to their medical and exposure records submitted on forms provided by the authorized employee representative.[1] Each requesting employee completed the form by

[1] The authorized employee representative is the party that petitioned for review. We reject Caterpillar's argument that the Secretary's declining to petition for review should be considered an unreviewable withdrawal of the citation. S*ee Oil, Chemical & Atomic Workers International Union v. OSHRC*, 671 F.2d 643, 650-51 (D.C.Cir.1982), *cert. denied*, 459 U.S. 905 (1982) (union may appeal employer-initiated proceeding unless Secretary indicates he will not prosecute case regardless of outcome); Commission Rules of Procedure at 29 C.F.R. §§ 2200.91(b) and 92(a). Moreover, in the cases upon which Caterpillar relies, the Secretary expressly withdrew (or moved

supplying his or her name and badge number and checked the boxes for "personal medical records" and "any exposure records." Caterpillar did not give the employees access to the requested records within fifteen working days.[2] Instead, it explained to the employees that their requests would not be processed until they were made on Caterpillar's own records access form, which requires each requesting employee to state his or her name, title, social security number, the records to which the employee seeks access, and "[t]he purpose for my request," and to sign the form under a clause that states:

> I also understand that the granting of access to records is not to be construed as being an agreement, or admission, express or implied, that exposure to any toxic substance or harmful physical agent has in fact or probably occurred, or that such exposures as may have occurred were at toxic or harmful concentrations or durations.

As a result, the Secretary issued an other-than-serious citation to Caterpillar for violating 29 C.F.R. § 1910.20(e)(1)(i),[3] and, after amendment of the citation at the hearing, 29 C.F.R. § 1910.20(e)(1)(ii).[4]

At the close of the hearing, Administrative Law Judge James H. Barkley issued his decision from the bench, vacating both items. He rejected the Secretary's arguments that by requiring employees to give the purpose of their request and sign below the disclaimer clause, Caterpillar violated section 1910.20(e)(1)(ii). He found that, based on the number of employees, the length of

---

to vacate) his citation, which is not the case here. Contrary to Caterpillar's suggestion, such a withdrawal cannot be implied.

[2] In early October of 1993, after negotiations with the authorized employee representative, Caterpillar agreed to deal with the August requests by accepting requests resubmitted on the form supplied by the authorized employee representative.

[3] Section 1910.20(e)(1)(i) reads:

> Whenever an employee or designated representative requests access to a record, the employer shall assure that access is provided in a reasonable time, place, and manner. If the employer cannot reasonably provide access to the record within fifteen (15) working days, the employer shall within the fifteen (15) working days apprise the employee or designated representative requesting the record of the reason for the delay and the earliest date when the record can be made available.

[4] Section 1910.20(e)(1)(ii) provides:

> The employer may require of the requester only such information as should be readily known to the requester and which may be necessary to locate or identify the records being requested (e.g. dates and locations where the employee worked during the time period in question).

time that records must be kept, the complexity of the exposure records, and the fact that the requestor may be a layman, the "purpose" requirement is an "entirely reasonable" way for Caterpillar to narrow the search. The judge determined that the disclaimer clause was not restrictive because "it does not pose any requirements on the employee or limit his access to records." He also concluded that Caterpillar did not violate section 1910.20(e)(1)(i) by requiring that its own form be used before access would be provided because the form was not overly restrictive or otherwise contrary to the regulations.

On this record, we would disagree with the judge. Under section 1910.20(e)(1)(ii), an employer may require of a requesting employee "*only* such information ... which may be necessary to locate or identify the records." (emphasis added). Caterpillar did not establish that it needs to know the purpose of the request in order to locate or identify the records.[5] Although Jay R. Alexander, Industrial Hygienist in Caterpillar's safety department, testified that there are "thousands" of medical and exposure records for the more than 5000 present employees at the plant, as well as for former employees, he did not suggest that knowing the purpose of the request would help locate or identify the records. We would therefore find that, based on the record here, requiring a statement of purpose for the request violates section 1910.20(e)(1)(ii).[6]

We would also find on this record that Caterpillar failed to comply with section 1910.20(e)(1)(i) by not providing access to the records or a reasonable explanation for not providing access. The reason that Caterpillar gave the employees for not providing access to the requested records is that they were not on its own form, which we have found, on its face and based on this record, to contain language that violates section 1910.20(e)(1)(ii). However, having found that this record would support a finding that Caterpillar violated the cited regulations does

---

[5] We note that, as Exhibit R-1 and the testimony in the record show, since the employees filed their requests here, Caterpillar revised its request form by deleting the requirement that the employee state the purpose of the request.

[6] Chairman Weisberg would also find a violation of this regulation based on the disclaimer clause. He would note that, while the disclaimer clause is of dubious legal value, it contains language that could be misconstrued and could deter employees from signing the form, and thus from exercising their rights to request access. See generally Access to Employee Exposure and Medical Records: Final Rule, 53 Fed. Reg. 38,140, 38,155 (1988) (preamble provides that employers may not use request questions to restrict or prevent access). At the very least, such a legally innocuous clause should be in the form of a company policy statement, not as an implied "non-admissions" clause requiring employee assent.

not entirely resolve this matter. The section 1910.20(e)(1)(ii) allegation, upon which this case primarily turns, was not raised until the close of the hearing, when the Secretary moved to amend the citation (to conform to the evidence) to include this regulation. After offering Caterpillar further opportunity to introduce evidence, the judge announced at the hearing that "even if [Caterpillar's counsel] does not put on evidence, I'm going to rule that [Caterpillar's form is] not overly restrictive." Caterpillar then declined to introduce additional evidence. A party should never rely on a judge's statement to prevent it from putting on its case. It is well established that, regardless of any comments that may be made by the judge, it is incumbent upon a party to put into the record all evidence relevant to its case or to place an objection on the record if prevented from doing so. However, the Commission may, in the interests of fairness and at its discretion, grant some relief where, as here, a party is "in a difficult position so far as determining whether it needed to present evidence on the merits" apparently based in part on statements by the judge at the hearing. *GEM Industrial, Inc.*, 17 BNA OSHC 1184, 1188, 1995 CCH OSHD ¶ 30,762, p. 42,749 (No. 93-1122, 1995). Accordingly, in light of all the circumstances, we remand this case for the judge to reopen the record to give Caterpillar the opportunity to present additional evidence solely for the purpose of rebutting the Secretary's prima facie case of noncompliance.

It is so ordered.

Stuart E. Weisberg
Chairman
Velma Montoya
Commissioner
January 26, 1996

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. CATERPILLAR, INC., Respondent INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, Authorized Employee Representative	OSHRC DOCKET NO. 94-345

FINAL ORDER DATE: April 13, 1995

Appearances:
For the Complainant:
Steven Walanka, Esq. Office of the Solicitor,
U.S. Department of Labor, Chicago, IL

For the Respondent:
Robert E. Mann, Esq. Chicago, IL
For the Employee:
Jerome Schur, Esq. Eric Mennel, Esq. Chicago, IL

DECISION AND ORDER

Barkley, Judge:

Respondent was issued citations and proposed penalties pursuant to the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651, et seq. hereinafter referred to as the Act.) By filing a timely notice of contest, Respondent brought this matter before the Occupational Safety and Health Review Commission where Respondent admitted it was subject to the Act and its requirements. A hearing was held on November 9, 1994 wherein findings of fact and conclusions of law were entered on the record. In accordance with those findings of fact and conclusions of law, it is:

ORDERED,

1. Item 1 of Citation 1 and the proposed penalty are hereby vacated.

James H. Barkley
Judge, OSHRC
Dated: March 3, 1995