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. QUICK-CAST LIMITED, Respondent.	Docket No. 91-0902

ORDER

This matter is before the Commission on a direction for review entered by Chairman Edwin G. Foulke, Jr. on March 1, 1993. The parties have now filed a stipulation and settlement agreement.

Having reviewed the record, and based upon the representations appearing in the stipulation and settlement agreement, we conclude that this case raises no matters warranting further review by the Commission. The terms of the stipulation and settlement agreement do not appear to be contrary to the Occupational Safety and Health Act and are in compliance with the Commission's Rules of Procedure.

Accordingly, we incorporate the terms of the stipulation and settlement agreement into this order, and we set aside the Administrative Law Judge's decision and order to the extent that it is inconsistent with the stipulation and settlement agreement. This is the final order of the Commission in this case. See 29 U.S.C. §§ 659(c), 660(a), and (b).

Edwin G. Foulke, Jr.
Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Velma Montoya
Commissioner

Dated June 15, 1993

NOTICE OF ORDER

The attached Order by the Occupational Safety and Health Review Commission was issued and served on the following on June 15, 1993.

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, USDOL
200 Constitution Ave., N.W. Room S4004
Washington, D.C. 20210

Patricia Rodenhausen, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
201 Varick St., Room 707
New York, NY 10014

Lloyd A. Archer, President
Quick-Cast Limited
31 Charlotte Street
Post Office Box 1055
Plattsburgh, NY 12901

Richard Gordon
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 420
McCormack Post Office and Courthouse
Boston, MA 02109-4501

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ROBERT B. REICH SECRETARY OF LABOR, Complainant, v. QUICK-CAST LIMITED, Respondent.	OSHRC Docket No. 91-0902

STIPULATION AND SETTLEMENT AGREEMENT

In full settlement and disposition of the issues in this proceeding, it is hereby stipulated and agreed by and between the Complainant, Secretary of Labor, and the Respondent, Quick-Cast Limited, that:

1. This case is before the Commission upon the granting of the Secretary's Petition for Discretionary Review seeking review of the judge's decision in order that the case did not become a final order prior to the parties executing a settlement agreement disposing of all matters raised by respondent's notice of contest.

2. Respondent hereby withdraws its Notice of Contest to Serious Citation 1, Items 1, 2, 3, 4, 5, 7 and 8 and to the notification of proposed penalties thereto and agrees that the violations have been abated.

3. Respondent agrees to pay the sum of $675.00 in full settlement of Serious Citation 1, Items 1, 2, 3, 4, 5, 7 and 8 by forwarding said amount to the OSHA Area Office in Albany, New York, 401 New Karner Road, Suite 300, Albany, New York, 12205.

4. Respondent certifies that a copy of this Stipulation and Settlement Agreement was posted at the workplace on the 2nd day of June 1993, in accordance with Rules 7 and 100 of the Commission's Rules of Procedure. There are no authorized representatives of affected employees and no employee has elected party status.

5. Complainant and Respondent will bear their own litigation costs and expenses.

FOR THE SECRETARY:

5/27/93
Antony F. Gil (Date)
Attorney for the
Secretary of Labor

U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., N.W.
Room S-4004
Washington, D.C. 20210
(202)219-9454

FOR RESPONDENT:

Lloyd A. Archer 6/9/93
Lloyd A. Archer (Date)
President, for Respondent
(Quick-Cast Limited)

Quick-Cast Limited
31 Charlotte Street
Plattsburgh, New York
(518)563-2340

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET NW
4TH FLOOR
WASHINGTON, DC 20006-1246

FAX:
COM (202) 634-4008
FTS (202) 634-4008

SECRETARY OF LABOR Complainant, v. QUICK CAST LTD. Respondent.	OSHRC DOCKET NO. 91-0902

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 29, 1993. The decision of the Judge will become a final order of the Commission on March 1, 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 February 18, 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
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: January 29, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-0902

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Patricia Rodenhausen, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
201 Varick, Room 707
New York, NY 10014

Lloyd A. Archer, President
Quick-cast Limited
Post Office Box 1055
Plattsburgh, NY 12901

Richard W. Gordon
Administrative Law Judge
Occupational Safety and Health
Review Commission
McCormack Post Office and
Courthouse, Room 420
Boston, MA 02109 4501

00113928766:02

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
JOHN W. McCORMACK POST OFFICE AND COURTHOUSE
ROOM 420
BOSTON, MASSACHUSETTS 02109-4501
(617) 223-9746

SECRETARY OF LABOR, Complainant, v. QUICK-CAST LIMITED, Respondent.	OSHRC Docket No. 91-0902

Appearances:

Luis Micheli, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Lloyd A. Archer, *Pro Se*
Quick-Cast Limited
Plattsburgh, New York
For Respondent

Before: Administrative Law Judge Richard W. Gordon

DECISION AND ORDER

This proceeding arises under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.*, ("Act") to review citations issued by the Secretary for serious and other than serious violations pursuant to § 9(a) of the Act and proposed assessments of penalties thereon issued pursuant to § 10(a) of the Act.

SUMMARY AND EVALUATION OF THE EVIDENCE

Respondent is engaged in aluminum casting and engraving at its place of business in Plattsburgh, New York. As a result of an inspection by a Compliance Officer ("CO") of the Occupational Safety and Health Administration ("OSHA") at Respondent's work site on February 27, 1991, OSHA issued one serious and one other than serious citation alleging a total of twelve violations of the Act, with a total proposed penalty of $3,230.

Respondent filed a timely notice of contest thereby instituting this proceeding before the Occupational Safety and Health Review Commission ("Commission"). The hearing in this matter was held on August 11, 1992 in Plattsburgh, New York. The parties have submitted their briefs and this matter is now ready for decision.[1]

At the commencement of the hearing the Secretary stated that Serious Citation No. 1, item nos. 2a, 6 and 9 had been withdrawn and item nos. 2b and 2c had been combined.[2] The Secretary also withdrew Other Than Serious Citation No. 2, item no. 1. What follows is a discussion of the contested items:

A. Serious Citation No. 1, item no. 1 (§ 1910.157(c)(1))

This item alleges that a portable fire extinguisher at the west wall of the shipping-receiving room was mounted above stored containers of oxygen and acetylene thereby subjecting employees to possible injury. This item assesses a penalty of $640.

During the walk around inspection, CO Ronald Carbery observed a fire extinguisher mounted at a 4½ to 5 feet height on the west wall of the shipping-receiving room. The fire extinguisher was mounted to the left of the loading door that Respondent's employees frequently used to bring in and take out materials. (Tr. 19, 29, 38). CO Carbery stated that the fire extinguisher was not readily accessible to employees because there was a full oxygen cylinder and a full acetylene cylinder stored beneath the fire extinguisher. (Tr. 20, 27; Exhibit C-1). The cylinders were not secured to prevent them from being knocked over. (Tr. 27, 28).

Respondent stated that it had 29 fire extinguisher in the shop, with fire extinguishers located on both sides of all doorways. Respondent further stated that an employee would not reach across a burning fire to get a fire extinguisher when there is another one less than 6 feet away.

Respondent feels that it is being penalized for having extra fire extinguishers. CO Carbery explained that in the case of a fire localized in the vicinity of a fire extinguisher, an

---

[1] On October 1, 1992, Respondent submitted photographs and a videotape to the undersigned in an attempt to illustrate the working conditions at Quick-Cast Limited. The Secretary objected to this post hearing submission of evidence. I have not reviewed any of the material forwarded by Respondent and base my decision solely on the evidence entered into the record at the hearing.

[2] However, the proposed penalty for combined item nos. 2b and 2c remains $350., notwithstanding the withdrawal of item no. 2a.

employee's logical move would be to use the fire extinguisher closest to the source of the fire. (Tr. 54). CO Carbery opined that there was a strong probability that the person running to get to the fire extinguisher could knock over one or both of the unsecured cylinders. If either of the cylinders ruptured, it would be devastating to the situation. (Tr. 27).

Although I believe that the Secretary has proved a *serious* violation, the extent of the hazard is based, in substantial part, on speculation. CO Carbery states that in the case of a localized fire an employee's logical move would be to use a fire extinguisher closest to the source of the fire. In this case the fire extinguisher above the cylinders. However, Respondent's argument that an employee would not reach across a burning fire to get an extinguisher when there is another one less than 6 feet away is just as plausible. While I will affirm this item, I am reducing the penalty to $300.

B. Serious Citation No. 1, item no. 2 (§ 1910.157(e)(3))

This item comprises combined item nos. 2b and 2c and alleges that Respondent did not subject portable fire extinguishers on the west wall of the shipping-receiving room to an annual maintenance check. The item further alleges that Respondent did not record the date of the annual maintenance check for any of the portable fire extinguisher on the job site. This item assesses a combined penalty of $700.

Respondent admitted the factual allegations but contests the penalty of $700. The hazard here is that if fire extinguishers are not regularly inspected they may not operate properly in an emergency. If the date of the annual maintenance inspection is not recorded one has no way of knowing if or when an inspection took place. Respondent stated that he always visually checks the fire extinguisher to make sure that the needle is in the operating range and, in fact, all of the fire extinguisher had their needles in the green operating range on the day of the inspection. Nothing in the record contradicts this statement. Respondent has abated this problem and now makes and records regular maintenance inspections. Based on a fair review of this item, I am reducing the degree of this violation from *serious* to *other than serious* and reducing the penalty to $200.

C. Serious Citation No. 1, item no. 3 (§ 1910.215(a)(4))

This item alleges that the work rest on the grinder room bench grinder, Packwood Precision Model #BG-8R, was adjusted one inch from the wheel. The standard requires that the work rest be adjusted closely to the wheel with a maximum opening of one-eighth inch. This item assesses a penalty of $200.

Respondent admitted the factual allegations but contests the penalty of $200. The hazard here is grinder wheel breakage or explosion and its resultant injury to employees. Respondent asserts that there is no hazard because if a piece jams between the wheel and the rest the motor will come to a complete stop, with no injury to the operator. Respondent also asserts that some jobs cannot be sharpened with the removable guard as close as required by the standard, but that after these "special jobs", the employees are returning the rests to one eighth inch maximum. Since there is no legally sufficient reason to reduce this penalty assessment, Serious Citation No. 1, item no. 3 is affirmed and a penalty of $200. is assessed

D. Serious Citation No. 1, item no. 4 (§ 1910.215(b)(1))

This item alleges that a bench grinder in the tool room had no guarding. It specifically alleges that the cup wheel of the grinder was not protected by a guard. This item assesses a penalty of $300.

CO Carbery testified that he has received training on grinding machines and grinding wheels. (Tr. 52). He observed a grinder on the work table in the machine area whose abrasive wheel had no guarding. (Tr. 23, 32; Exhibit C-3). The grinder which was approximately 20 years old. It was occasionally used to grind five inch electrode tips by Respondent's employee Stephen Brunelle. (Tr. 34, 96). CO Carbery estimated that 270 degrees of the grinder wheel were unguarded. (Tr. 33, 57). He further stated that the hazards posed by the unguarded grinder wheel were that the operator's clothing or hair could get wrapped around the wheel (Tr. 33) or that if the operator tried to grind a tool, the tool could readily tip up and get caught and possibly cause the grinder wheel to explode. (Tr. 34, 60).

Respondent stated that the machine in question does not have a cup wheel, but instead has a resin bonded wheel. Respondent's employee, Stephen Brunelle, testified that he had worked for Respondent for approximately 10 years as a CAD operator and

machinist. He testified that the grinder in the welding department had a slow moving wheel and was only used to grind electrodes that are used in welding. (Tr. 73, 74). Mr. Brunelle stated that the electrodes are the size of the lead in a pencil. The electrodes are sharpened by placing the tips on the side of the grinding wheel with a very slight touch. (Tr. 74). Mr. Brunelle opined that there was no way that an operator could get his arm or tie caught in the grinding wheel. He further stated that if someone tried to grind a tool and put pressure on the wheel, the wheel would stop before it would blow up. (Tr. 75, 76).

The Secretary has not met her burden of proof on this item. First, there is the issue of whether the grinding wheel is a cup wheel. The CO who has limited experience in this area says that it is. Respondent's employee, Mr. Stephen Brunelle, says that it is not a cup wheel.[3] If the grinding wheel is not a cup wheel the cited regulation does not apply. However, I need not decide that issue since I find that the Secretary has not established a substantial probability that death or serious physical harm could result from Respondent's use of the tool room bench grinder. Accordingly, Serious Citation No. 1, item no. 4 is vacated.

E. Serious Citation No. 1, item no. 5 (§ 1910.253(b)(4)(iii))

This item alleges that a cylinder of acetylene was stored next to a cylinder of oxygen in the shipping-receiving room. This item assesses a penalty of $640.

CO Carbery testified that he observed cylinders of oxygen and acetylene standing next to each other with the oxygen tank directly under a fire extinguisher. The cylinders were full but not in use. Storage caps were on both tanks and there was no metering, gauging or hosing attached. (Tr. 36,37; Exhibits C-1 and C-4). CO Carbery stated that a fire hazard was the main problem. He testified that should the cylinders be knocked over accidently

[3] Mr. Brunelle has training and significant experience in the area of grinding machines. While Mr. Brunelle has not been qualified as an expert witness, I am considering his testimony as opinion testimony by a lay witness since it is helpful to me in the resolution of a material issue. *See* Fed. R. Evid. 701.

and they should rupture or leak the acetylene and oxygen could mix resulting in a fire with explosive consequences. (Tr. 37).

The standard expressly requires that oxygen cylinders in storage be separated from fuel-gas cylinders or combustible materials a minimum distance of 20 feet or by a non-combustible barrier at least 5 feet high having a fire resistance rating of at least one-half hour. Respondent does not contest the factual basis of this violation, but instead believes that the cited regulation "makes absolutely no sense" because cylinders are transported side by side with protective caps over the valves. However, Respondent's personal belief as to the reasonableness of a regulation is not a defense. The regulation is reasonable on its face as it seeks to prevent serious physical harm or death that could result from the violation.

Accordingly, Serious Citation No. 1, item no. 5 is affirmed. However, I am reducing the penalty assessment for this item to $100. because the factual basis for this violation is so intertwined with the factual basis for Serious Citation No. 1, item no. 1 for which I have already assessed a penalty of $300.

F. Serious Citation No. 1, item no. 7 (§ 1910.305(g)(1)(iii))

This item alleges that Respondent improperly used flexible cords and cables creating an electric shock hazard. This item assesses a penalty of $250.

CO Carbery testified that he observed at the South wall of the production room, directly above the work bench, an outlet strip permanently affixed to the wall which was improperly wired with a flexible cord as a substitute for the fixed wiring of the building. (Tr. 39; Exhibit C-5). Adjacent to the outlet strip was a tool rack with various tools such as a hammer and a pry bar. (Tr. 65-67; Exhibit C-5). CO Carbery further testified that the

hazard involved here was the potential of falling tools damaging the flexible cord and causing an electrical shock or fire. Upon my questioning, Respondent admitted the presence of the hazard. (Tr. 67-68). It is clear that serious injury could result from fire or electric shock and Respondent knew or should have known of the condition. Accordingly, Serious Citation No. 1, item no. 7 is affirmed and a penalty of $250. is assessed.

G. Serious Citation No. 1, item no. 8 (§ 1910.1200(e)(1))

The final contested item alleges that Respondent had not developed or implemented an appropriate written hazard communication program. This item assesses a penalty of $300.

The record reveals that Respondent's operations include the use of Nalco 2560 acid cleaner (20-40% HCL), NA Clear 7766 flocculent (ethoxylated octylphenol 1-5% CAS 9002-93-1), oxygen and acetylene, and that Respondent has no written hazard communication program. Respondent sates that it does have a written hazard communication program now, but admits the factual allegations of this item, contesting only the assessment of a penalty. The Secretary has proposed a penalty in the amount of $300. and I believe that this amount is appropriate. Serious Citation No. 1, item no. 8 is affirmed.

Section 17(j) of the Act requires the Commission to 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 in determining the assessment of an appropriate penalty. Upon consideration of these factors, particularly Respondent's good faith, I have determined that a total penalty of $1,350. is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of fact and conclusions of law relevant and necessary to a determination of the contested 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.

ORDER

1. Serious Citation No. 1, item no. 1 is **AFFIRMED** and a penalty of $300. is **ASSESSED.**

2. Serious Citation No. 1, item no. 2 is **REDUCED** to Other Than Serious and a penalty of $200. is **ASSESSED.**

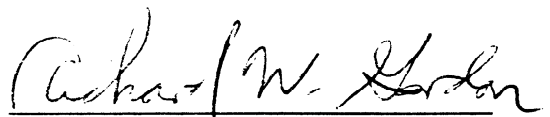
3. Serious Citation No. 1, item no. 3 is **AFFIRMED** and a penalty of $200. is **ASSESSED.**

4. Serious Citation No. 1, item no. 4 is **VACATED.**

5. Serious Citation No. 1, item no. 5 is **AFFIRMED** and a penalty of $100. is **ASSESSED.**

6. Serious Citation No. 1, item no. 7 is **AFFIRMED** and a penalty of $250. is **ASSESSED.**

7. Serious Citation No. 1, item no. 8 is **AFFIRMED** and a penalty of $300. is **ASSESSED.**



RICHARD W. GORDON
Judge

Dated: January 11, 1993
Boston, Massachusetts

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
JOHN W. McCORMACK POST OFFICE AND COURTHOUSE
ROOM 420
BOSTON, MASSACHUSETTS 02109-4501

PHONE:
COM (617) 223-9746
FTS 223-9746

FAX:
COM (617) 223-4004
FTS 223-4004

NOTICE OF DECISION

IN REFERENCE TO:

Secretary of Labor v. QUICK-CAST LIMITED
OSHRC DOCKET NO. 91-0902

1. Enclosed is a copy of my decision. It will be submitted to the Commission's Executive Secretary on January 11, 1993.
The decision will become the final order of the Commission at the expiration of thirty (30) days from the date of docketing by the Executive Secretary, unless within that time a Member of the Commission directs that it be reviewed. All parties will be notified by the Executive Secretary of the date of docketing.

2. Any party adversely affected or aggrieved by the decision may file a petition for discretionary review by the Review Commission. A petition may be filed with this Judge within twenty (20) days from the date of this notice. Thereafter, any petition must be filed with the Review Commission's Executive Secretary within twenty (20) days from the date of the Executive Secretary's notice of docketing. See paragraph No. 1. The Executive Secretary's address is as follows:

Executive Secretary
Occupational Safety and Health Review Commission
1825 K Street, N.W., Room 401
Washington, D.C. 20006

3. The full text of the rule governing the filing of a petition for discretionary review is 29 C.F.R. § 2200.91. (Part of Rule 91 is attached hereto).

RICHARD W. GORDON
Judge, OSHRC

Dated: December 18, 1992
Boston, Massachusetts

Employer

Llyod A. Archer, President
Quick-Cast Limited
PO Box 1055
Plattsburgh, NY 12901

FOR THE EMPLOYEES

I hereby certify that a copy of the decision in this case has been served by First Class Government Mail to the parties whose names and addresses appear on this notice.

Boston, Linda M. Quinn
December 18, 1992 (date)

Regional Solicitor

Patricia M. Rodenhausen, Esq.
Regional Solicitor
U.S. Department of Labor
201 Varick Street, Room 707
New York, New York 10014
Attn: Luis Micheli, Esq.

Daniel J. Mick, Esq.
Counsel for Regional Litigation
Office of the Solicitor - U.S. Dept. of Labor
200 Constitution Avenue, N.W., Room S. 4014
Washington, D.C. 20210