



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
CATERPILLAR, INC.
Respondent.

OSHRC DOCKET
NO. 93-3255

**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 May 25, 1995. The decision of the Judge will become a final order of the Commission on June 26, 1995 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 June 13, 1995 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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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

A handwritten signature in cursive script that reads "Ray H. Darling, Jr." followed by a flourish.

Ray H. Darling, Jr.
Executive Secretary

Date: May 25, 1995

DOCKET NO. 93-3255

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,
Complainant

v.

CATERPILLAR, INC.,
Respondent

and

INTERNATIONAL UNION, UAW,
Authorized Employee
Representative

Docket 93-3255

Appearances

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BEFORE: JOHN H FRYE, III, Judge, OSHRC

DECISION AND ORDER

INTRODUCTION

On August 18, 1993, OSHA Industrial Hygiene Compliance Officer Ronald Smay initiated an inspection of the Caterpillar, Inc., facility in York, Pennsylvania. The inspection came as the result of OSHA's receipt of formal employee complaints concerning conditions at this facility. These included noise conditions in a particular area, lack of demarcation of and warning signs concerning an area of high cadmium exposures as well as failure to furnish protective clothing to workers in that area, incompatible chemicals being used in Department 117, and motorized carts driving through the plant too fast and not complying with the §1910.178 standard. (Tr. pp. 5, 7 and 8) On August 18, Mr. Smay met with Company officials Doug Therrien, Safety and Health Director, his assistant Esteline Templin, and Harold Bowze, Personnel Director. The employees were represented by Bo Stauffer Union Safety and Health Committee Chairman and Safety Representative on day shift.

Mr. Smay returned to the Caterpillar plant on August 30, 1993, to conduct a walk around inspection of the plant after having found that date to be available on both his and Mr. Therrien's schedules. On that date he met with Doug Therrien and Esteline Templin for management and with Dave Meyers, a Union

Safety and Health Committeeman Chairperson representing employees. The inspection party visited the oil cooler assembly area and a location at the rear of Motor No. 18M4224 in Cell 621. (Tr. pp. 12, 13, 21)

As a result of this inspection, on October 27, 1993, the Harrisburg Area Office of OSHA issued to Caterpillar Serious and Other Citations and a proposed penalty of \$11,625.00. At hearing on October 3, 1994, Complainant's motion to vacate Serious Citation No. 1, Item 2, an alleged violation of 29 C.F.R. §1910.95(i)(2)(i) and the \$2,125.00 proposed for it was granted. (Tr. p. 5)

As a result, the contested violations left for trial were:

Serious Citation No. 1, Item 1, an alleged violation of 29 C.F.R. §1910.22(c) issued for failure to cover a floor opening with a proposed penalty of \$1,275.00;

Serious Citation No. 1, Item 3a, an alleged violation of 29 C.F.R. §1910.178(l) issued for failure to train operators of motorized carts in their safe operation, item 3b, an alleged violation of 29 C.F.R. §1910.178(n)(4) for failure to require operators of motorized carts to slow down and sound horns at cross aisles and wherever vision was obstructed, item 3c, an alleged violation of 29 C.F.R. §1910.178(q)(7) for failure to

have a functioning horn on a motorized cart in Department 117 on or about August 30, 1993, with a proposed penalty of \$1,700.00;

Serious Citation No. 1, Item 4, an alleged violation of 29 C.F.R. §1910.212(a)(3)(ii) issued for failure to guard the point of operation of Machine M4484 in Department 117 on or about August 30, 1993 with a proposed penalty in the sum of \$2,125.00;

Serious Citation No. 1, Item 5a, an alleged violation of 29 C.F.R. §1910.1027(e)(2) issued for failure to demarcate a regulated area in the oil cooler assembly area for exposure to cadmium, item 5b, an alleged violation of 29 C.F.R.

§1910.1027(m)(2)(I) for failure to post warning signs to warn employees of the hazards of cadmium with a proposed penalty in the sum of \$1,275.00;

Serious Citation No. 1, Item 6, an alleged violation of 29 C.F.R. §1910.1027(i)(3)(i) issued for failure to provide employees exposed to cadmium with protective clothing with a proposed penalty in the sum of \$2,125.00; and

Other Citation No. 2, Item 1, alleged violations of 29 C.F.R. §1904.2(a) with regard to record keeping with a proposed penalty in the sum of \$1,275.00.

FINDINGS OF FACT AND DISCUSSION

Serious Citation No. 1, Item 1

Cell 621 is a series of machines, tied together by computer and conveyors, which are used sequentially to cut bar stock to length, and then machine, drill, heat treat, grind, coat and finish, and stack for shipment the lengths of bar stock (Tr. 247-48). The entire line of machines stretches along the west wall of Building B from the north side of the building to the south side, approximately 500-600 feet overall (Tr. 131, 248).

The inspection party walked down an aisle way on the west wall of Cell 621. This "aisle" is a space between the machines of Cell 621 and the wall of the building. It is unmarked and provides access to the rear of the machines in the cell. It varies from 8 feet to 2 feet in width, depending on the width of each machine (Tr. 250, 288). The marked aisle ways are located on the other side of the machines (Tr. 249-251). No employees would be required or need to use the space between the plant wall and the rear of the machines except to access the rear of the machines for maintenance purposes (Tr. 117-19, 252-53). There is a trough which runs the length of cell 621 along this aisle (Tr. 116). It is covered by 3' x 5' steel plates (Tr. 81). The apparent purpose of the trough is to carry away excess oil from

the machines. (Tr. 23.)

Inspector Smay observed that a steel plate covering the trough behind Motor No. 18M4224 had been moved out of position, thus creating an opening that provided access for a pump.¹ The opening was 14 to 18 inches wide at the aisle and extended about three feet away from the aisle to a point about 8 inches in width at the back of the machine. At the opening, the trough was about 25 ½ inches deep. The bottom of the trough was covered by about two inches of oil. (Tr. pp. 21-23, 117) There was nothing present at the opening which would prevent someone from accidentally stepping into the open trough and suffering contusions to the leg and/or a sprained ankle. (Tr. pp. 21-23, 56)

The Secretary cited Caterpillar for a serious violation of § 1910.22(c), which provides

Covers and/or guardrails shall be provided to protect personnel from the hazards of open pits, tanks, vats, ditches, etc.

Mr. Smay testified that he regarded the injuries which could result from an employee stepping into the opening to be

¹Although it is not certain how long the trough had been open, the pumping operation takes place approximately once a month and generally lasts about three hours. (Tr. p. 23)

contusions and a possible sprained ankle. He considered both the severity of the potential injuries and the probability that an accident might occur to be low. He calculated a gravity-based penalty of \$1500 which he reduced by 15% for good faith, resulting in a recommended penalty of \$1275. (Tr.56-57.)

Caterpillar argues first, that the possible harm which could result did not rise to the level of serious; second, that its employees did not have access to this condition; and third, that it corrected the situation immediately and there was no showing that it had prior knowledge that the situation existed. Caterpillar's third argument must be rejected because its representatives informed Mr. Smay that the operation necessitating the moving of the cover to provide access for the pump occurred monthly and required about three hours. (Tr. 23.) Thus Caterpillar must have been aware that the cover would be ajar. Its second argument fails because the testimony of Mr. Meyers (Tr. 117-18) and Mr. Cross (Tr. 250) indicates that it was necessary for employees to have access to the area in order to perform maintenance.

However, Caterpillar's first argument has merit. The injuries which might result from an employee stepping into the opening do not appear to be serious. Cf. *Secretary v.*

Hackney/Brighton Corp., 15 BNA OSHC 1884, 1886-87 (Rev. Com. 1992), where the Commission found that the Compliance Officer's testimony that there was a low probability that an employee might suffer severe bruises and/or broken bones as a result of a hurried exit through a door to a landing four feet below did not establish a substantial probability of death or serious physical injury. I find that the Secretary has established an other-than-serious violation of the Act and assess no penalty.

Serious Citation No. 1, Items 3a, 3b and 3c²

Item 3a charges that Caterpillar violated 29 CFR 1910.178(1) by failing to train operators in the safe operation of motorized carts as it did forklift operators. Item 3b, reciting an instance of a motorized cart found with a nonfunctional horn on August 30, 1993, charges that Caterpillar violated 29 CFR 1910.178(n)(4) by not requiring its motorized cart drivers to slow down and sound the horn at cross aisles and wherever vision was obstructed. Item 3c, reciting the same instance, charges

²In his complaint, the Secretary amended these items to include as allegation that, in the alternative, Caterpillar violated § 5(a)(1) of the Act. In his post-trial brief, the Secretary did not address the question of whether a violation of § 5(a)(1) of the Act was established. Therefore, I have not further considered that issue.

that Caterpillar violated 29 CFR 1910.178(q)(7) by failing to examine powered motorized carts which were used on an around the clock basis for defects after each shift.³

The issue underlying this item concerns whether motorized carts used to transport personnel are industrial trucks and therefore included within the material handling provisions of the industrial safety standards set out in 29 CFR Part 1910, Subpart N.⁴ If so, Caterpillar was required to comply with the specific standards cited.

The Secretary correctly points out that § 1910.178(a)(1), "General Requirements," defines the types of industrial trucks which are covered by the standard:

³The evidence shows that the motorized cart which is referred to in items 3b and 3c was similar if not identical to the personnel cart depicted in RX-2. The evidence on this point was given by OSHA witness Mr. Meyers who agreed that the cart with the inoperable horn cited in items 3b and 3c was similar to the cart depicted in RX-2 (Tr. 139). Mr. Meyers was the Union's representative during that part of the inspection conducted by Inspector Smay (Tr. 13, lines 5-6).

⁴Mr. Smay made it clear that the main purpose of the carts in question was to transport personnel.

Q And did you observe who or what was carried on these carts?

A Yes. It could be anything from personnel only to personnel with boxes, being transported from one department to another, as well as maintenance personnel towing tool boxes, like a small trailer.

Tr. 25.

This section contains safety requirements relating to fire protection, design, maintenance , and use of fork trucks, tractors, platform lift trucks, motorized hand trucks, and *other specialized industrial trucks* powered by electric motors or internal combustion engines.... (emphasis added)

The Secretary maintains that Caterpillar's motorized personnel carts are specialized industrial trucks within the meaning of § 1910.178(a)(1). He asserts that to exclude these vehicles and the workers who drive and ride on them, or who are at risk from their movement through the plant, from the many protective provisions of the standard would be inappropriate and contrary to the spirit of the Act. He argues that the language of the standard is inclusive with respect to the motorized carts, while its exclusionary terms do not apply to them.

The Secretary points out that § 1910.178(a)(1) is derived from the NFPA standard which sets forth the scope of its coverage in Paragraph 101, page 505-2, in practically identical terms.⁵ He maintains that the NFPA standard and the comparable ANSI standard supports his position that personnel carts are within the scope of § 1910.178(a)(1).

⁵The NFPA standard applies to "other specialized industrial trucks powered by electric motors or internal combustion engines" and excludes "compressed air or nonflammable compressed gas-operated industrial trucks, ...farm vehicles, [and] ...automotive vehicles for highway use." See GX 2, p. 505-2.

Caterpillar agrees that the applicability of the cited standard is governed by 1910.178(a)(1), and points out that the standard does not further identify what is contemplated by the term, "other specialized industrial vehicles." Caterpillar correctly argues that the term "truck" is inapplicable to personnel carts, noting that the dictionary defines a "truck" as a wheeled vehicle for moving heavy articles.⁶ Moreover, the term "truck", or "powered industrial truck", is defined within the ANSI source standard as:

POWERED INDUSTRIAL TRUCK: A mobile, power-driven vehicle used to carry, push, pull, lift, stack, or tier material. (Exhibit G-3, p. 48.)

In addition to the definition of "truck" given in the ANSI standard and adopted by OSHA for purposes of 1910.178, the ANSI standard in Appendix A depicts the Types of Trucks covered by its terms (Ex. G-3, pp, 49-52). The vehicle depicted in Respondent's Ex. 2 clearly bears no resemblance to those depicted in the ANSI Appendix. In short, the standard does not apply to the personnel carts because they are not powered industrial trucks.

OSHA seeks to avoid the fact that § 1910.178 as adopted from the source standards plainly did not encompass the kind of

⁶ *Webster's Collegiate Dictionary*, 12th Edition at p. 1267.

personnel cart which was cited in this case by maintaining that the source standard harbored a latent standard which later evolved into an ANSI standards in its own right. This is ANSI B56.8-1988, Ex. G-5. This standard applies to personnel and burden carriers, as opposed to industrial trucks, thus recognizing that the term "truck" is not properly applied to a vehicle which carries personnel.⁷ In short, on its face the standard does not apply to the vehicles contemplated by the Citation⁸ because they are not trucks. Items 3a, 3b, and 3c of Citation 1 are vacated.

⁷The glossary to this ANSI standard contains the following definition:

personnel and burden carrier -- a mobile power driven machine which is not self-loading, used for transporting material *and/or personnel* on indoor or outdoor improved surfaces, but not for use on public highways. (Exhibit G-5, p. 17, emphasis supplied.)

⁸While the Secretary introduced evidence that some personnel carriers had been converted into material carriers, he did not connect any of such vehicles to drivers who were not trained to operate them or to defective equipment.

Serious Citation No. 1, Item 4

This item charges that

Machine Number M4484, The Roll Marker used to mark hose couplers, exposed the operator to the point of operation hazard due to the by-passing the two (2) hand activating control by placing a weight on an activating button
....

This machine was brought to Inspector Smay's attention by a maintenance man named Zeke while Smay, Therrien, and Meyers were passing through Department 117. Zeke brought them over to view a machine where, he said, employees were always by-passing a safety switch. The machine was unattended. One palm button was weighted down in the closed position. (Tr. pp. 29-31, 125, 126, 376)

On inquiry by Mr. Smay, Mr. Therrien identified the machine as the roll marker, machine No. M4484. The roll marker was cycling and an associated press was energized but not in operation. (Tr. 30.) Mr. Smay testified as follows concerning the operation of the roll marker and the hazard he cited.

... The machine does two operations. There's a press portion which is operated by the two-hand switch, and then there is the roll marker portion, which is used to mark the parts after the press assembles them.

* * *

Q ... All right. So there are really are two sets of --

two hand controls?

A I can't say -- I think the roll marker was just operated -- you turned it on, and it cycled. There was not a separate two-hand control for the roll marker portion of the machine.

Q Right. What I'm trying to get at, Mr. Smay, where was the hazard in this particular case?

A Point of operation of the press portion of the roll marker machine. (Tr. 87-88.)

Caterpillar regards the press and roll marker as separate machines, and has assigned the press a separate number. (Tr. 219.) Caterpillar indicates that each machine originally had two-handed palm buttons. (Tr. 221.) The two machines were wired together, so that both would function when the press controls were activated. However, the press would not function unless one of the roll marker's palm buttons was also depressed. To accomplish this, a weight was placed on one of the roll marker's palm buttons. Mr. Cross, Caterpillar's safety and health manager, described the situation as follows.

So what we did is wire it up so that if you hit both palm buttons on the press, the roll marker would index at the same time. So you didn't have to sit here, you didn't have four hands to hit here and hit here at the same time, so you hit here with the two hand palm buttons on the press, and then index the roll marker simultaneously. * * * But when they wired it together, it did not work right. That's when they put this weighted object on one of the push buttons on the -- palm button the roll marker, so that when you hit these two buttons -- * * * -- everything indexes

simultaneously. (Tr. 221. See also Tr. 295-96.)

Moreover, Mr. Kindig, Caterpillar's first shift operational supervisor with responsibility for these machines, unequivocally testified that on the date of the walk-around, it was not possible to defeat one of the palm buttons on the press by weighting it. (Tr. 302-03.)

From the above, it is evident that there are two principal difficulties with the Secretary's case. First, the Secretary cited the roll marker when he intended to cite the press. Second, the existence of the hazard that prompted the citation is questionable. The first difficulty is understandable, given that the two machines were wired so as to operate together and were identified as the roll marker. However, the description in the citation does not refer to the hazard to which Mr. Smay referred, the point of operation of the press, but refers to "... The Roll Marker used to mark hose couplers, [which] exposed the operator to the point of operation hazard" This description leads one to assume that the hazardous point of operation involves the marking of the hose couplers, not their assembly in the press. Even under the assumption that the two machines were collectively known as the roll marker, the description of the supposed hazard should have identified the press portion as its source.

The second difficulty is fundamental. Mr. Kindig's Secretary testimony that the hazard did not exist is unequivocal and uncontradicted. The conflict in the testimony concerns whether there were two or four palm buttons in existence at the time of the walk-around, and what the buttons controlled. Mr. Smay stated initially that he couldn't say whether there were four, and later that he only noted two. (Tr. 88, 372.) While Mr. Meyers stated that he did not see any other buttons besides these two (Tr. 376), he does not work in that area and thus lacks the intimate familiarity with these machines that Mr. Kindig may be presumed to have.

But regardless of the number of palm buttons observed, the Secretary asks that I assume that the weight on one of them permitted access to the point of operation of the press despite the fact that Mr. Smay did not observe the press in operation. While such an assumption might well be justified if there were no other evidence on the question, it is not justified in the face of Mr. Cross' and Mr. Kindig's uncontradicted testimony concerning the situation. In these circumstances, I am compelled to conclude that the Secretary has failed to carry his burden of proof on the issue. Citation 1, item 4, is vacated.

Serious Citation No. 1, Items 5a, 5b and 6

Caterpillar disclosed that it had conducted monitoring for employee exposure to cadmium on June 16, 1993, and had determined that an employee working at Machine 4008-Induction that day was exposed to cadmium at a level of 12 micrograms per meter cubed (12 ug/m3).⁹ That exposure exceeded the permissible exposure limit for cadmium which is 5 micrograms per meter cubed (5 ug/m3). (Tr. pp. 8-10, 183; Government Exhibit G-1)

⁹The work stations within the oil cooler department were sampled for levels of airborne contaminants, including Cadmium, on June 10, 1993 (Respondent's Ex. 9, Tr.238). No levels at or above the action levels were found at any of the tested stations, which were: the Shell Braze Unit No. M1848 (employee Weekley); the Test and Patch station number 125 (employee Leathery); the Quartz Brazing machine no. M2738 (employee Williams); and the Test and Patch station number 123 (employee Dean). See Respondent Ex. 9 and explanation of the data on that document at Tr. 238. These results were communicated to Caterpillar on July 9, 1993 (Tr. 238).

Two additional samples were taken on June 16, 1993 (Ex. G-1). One of these samples was taken at the Test and Patch Station located next to Induction Brazing Machine No. M4008 (it is not clear from the record which of the Test and Patch Stations this would be, cf. Tr. 345). In any event, that test showed a level of Cadmium exposure at only 1/5 of the new PEL, or less than 1/2 of the new action limit (Respondent Ex.10, employee Leathery). The other station tested on June 16, 1993 was the Patch and Test Station at TK125, the station shown by Respondent Ex. 2 (Respondent Ex. 10, employee Glassmyer). That test showed no detectable sign of particulate, silver, lead, copper or tin, a level of zinc oxide that was less than one percent of the PEL for that substance, but a Cadmium level that was over two times the new Cadmium PEL (Respondent Ex. 10).

Machine No. M4008 is part of the assembly line for oil coolers. Oil coolers are used in equipment manufactured by Caterpillar to cool lubricating and other oil. The oil coolers in question are manufactured by placing a bundle of brass straw-like tubes between two cast iron exterior end pieces. When in use, heat from the oil on the outside of the tubes is transferred to a coolant on the inside through the tube walls. Because it is important that there be no interchange between the oil and the coolant, there must be a seal at the juncture of the brass tubes and the cast iron end pieces. To accomplish this, cadmium containing rings and shims are placed on either end. These are melted by the induction process within Machine 4008 to provide the seal. On completion of the brazing process, the oil coolers are tested for leaks by pressurizing and immersing them in a green liquid. Patching of any leaks is done by hand with a patching rod. Until they were replaced by cadmium free rods, the patching rods served as a source of cadmium. (Tr. pp. 13-15, 328-41; RX 1, 16A, 16B, 17, 18.) Because the brazing process accomplished by machine 4008 is contained, it does not serve as a source of cadmium. (Tr. 363.)

The location of Machine No. M4008 had not been demarcated as a regulated area, nor had warning signs been posted in the area.

Protective clothing had not been provided to employees working at Machine No. 4008. (Tr. pp. 11, 12; See also Tr. pp. 20, 21)

Prior to July 8, 1993, employees performing the patching work used silver brazing rods which contained 18% Cadmium (Tr. 338). See Respondent Ex 18. On or about that date Caterpillar replaced the Cadmium-containing brazing rods with Cadmium-free rods (Tr. 343; Respondent Ex. 15).¹⁰

The decision to use the Cadmium-free rods was made during the period February-March, 1993, following the reduction of the OSHA PEL from 100ug/M to 5ug/M, but could not be implemented until receipt of the Cadmium-free rods from the supplier (Tr. 339, 337). The Cadmium-containing rods in use or available for use were gathered up at that time and placed by the management of the department under lock and key separate from the place where the new rods were stored and dispensed, and were returned to the supplier in late August (Tr. 341, 352, 355-360, 363-64, 366).

This test result was received by Caterpillar on July 15, 1993 (Respondent Ex. 1, Tr. 240). However, because Cadmium-free brazing rods had been put into service as of July 8, 1993, the

¹⁰Cadmium containing rods remained available for use by workers for producing certain experimental oil coolers. These were kept under lock by Mr. Tilton who tightly controlled their use. (Tr. p. 341-343, 352-55, 380-87; Respondent's Exhibit 15.)

principal source of Cadmium fumes at the location where the over-PEL result was found had been eliminated prior to the receipt of the test results. Although Cadmium remained a constituent part of the shims and rings melted in Machine 4008, it does not constitute a hazard in the brazing operation because it is depleted in the induction process which takes place in Machine 4008. (Tr. p. 351.)

Another series of tests were made of the oil cooler department workstations on July 15, 1993. The tests resulted in findings of no detectable Cadmium levels at the Shell Induction Machine No. M1849 (Weekley); at the Quartz Lamp Brazing Machine No. M4151 (Williams); at the Patch and Test Stations 122 and 123 (Dean); and at the Induction Brazing Machine M4008 (Glassmyer). A detectable, but sub-PEL level of Cadmium, was found at the Patch and Test stations 116 and 125 (Leathery) (Respondent Ex. 11). The results were reported on September 8, 1993.

The Secretary contends that the single instance of an overexposure triggered an obligation on the part of Caterpillar to establish a regulated area, post warning signs, and furnish protective clothing. For its part, Caterpillar takes the position that the Secretary has failed to demonstrate that the standards pertaining to cadmium are applicable. Caterpillar is

correct. The removal of the cadmium containing rods sufficed to remove the source of cadmium and insure compliance with the cadmium PEL. This method of addressing the hazard is specifically contemplated by the cadmium standard. Section 1910.1027(f)(1)(i) entitled "Compliance hierarchy" states, subject to certain exceptions which do not appear to be applicable, that

[T]he employer shall implement engineering and work practice controls to reduce and maintain employee exposure to cadmium at or below the PEL....

When it introduced the cadmium-free brazing rods, Caterpillar implemented an engineering control to maintain employee exposure below the PEL. The Secretary has not shown that this engineering control was ineffective in maintaining exposures below the PEL. He cannot now be heard to complain that Caterpillar did not take other, additional measures based upon a single isolated instance of overexposure which took place shortly before the engineering control was put in place. Citation 1, Items 5a, 5b, and 6, are vacated.

Other Citation No. 2, Item 1a

The Secretary cited Caterpillar under OSHA Regulation 29 CFR § 1904.2(a) because, allegedly:

[Caterpillar] had three (3) injuries which occurred during the time frame of July 19-July 30, 1993. These injuries were not recorded on the OSHA 200 Log until after August 4, 1993. These injuries were not recorded within the six (6) day time limit, on or about August 18, 1993.

The six-day time limit to which the Citation refers is provided for by § 1904.2(a):

Each employer shall . . . (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred.

On August 18, 1993, IH Smay discussed with Company representatives Therrien, Templin and Bowze and Union representative Bo Stauffer the issue of Company's practice of recording injuries and illnesses that occurred during the plant's annual shut-down period. Company representatives Therrien and Bowze stated that injuries and illnesses that occurred during that period, which ran from July 19 to July 30, were not recorded until after the end of the shut down period. The reason given was that there was nobody available to make entries during the shut-down period. (Tr. 42, 43)

Nonetheless, people were working at the plant during the

shut-down period. Following the shut-down period, on August 2, 1993, Dave Meyers checked the July OSHA 200 Log and observed that there were only three (3) entries listed. He returned on August 4, 1993 with Bo Stauffer and there were still only three entries on the plant's July 1993 OSHA 200 log. After that date nine (9) additional entries were added. One of those entries was lined out, leaving eight. (Tr. pp. 44, 45, 113, 114; Government Exhibit 6) The Secretary maintains that these eight entries were not entered in a timely fashion, in violation of § 1904.2(a). Mr. Smay computed the six-day time period from the date of the injury, rather than the date Caterpillar received information concerning it. (Tr. 45.)

Caterpillar maintains that the foregoing evidence is not sufficient to show a violation because it does not show the date on which Caterpillar "receive[d] information that a recordable injury or illness had occurred." (§ 1904.2a(2).) Caterpillar notes that it established: 1) that July 19 - 30 was the annual shutdown period; 2) that less than a regular compliment of medical staff were on duty; and 3) that employees are treated elsewhere when staff is not available (Tr. 235-36). Caterpillar further notes that the Secretary did not show where the later-recorded cases were treated, or by whom, or when Caterpillar

received sufficient information to make a record keeping decision.

Caterpillar correctly asserts that, because the Secretary has not proven that Caterpillar failed to record any injury within six working days after it received the necessary information, he has not proven the second element necessary to establish a violation. Had the plant been in operation, the Secretary would have been correct in regarding the date of injury also to constitute the date of notification. However, the plant was shut down. It is entirely possible that information concerning an injury may have been received by Caterpillar sometime after the date of the injury. Thus the fact that more than six days elapsed between the time of injury and the entry on the log does not dictate the conclusion that the entry was made more than six days after the time information concerning it was received.¹¹ Citation 2, item 1a is vacated.

¹¹In the alternative, Caterpillar asserts that, even if the time of injury commenced running of the six-day period, the delay here was minor, and was of no practical effect so far as safety and health are concerned (Tr. 72). Caterpillar is correct. Any delay was clearly *de minimis*.

Other Citation No. 2, Item 1b

Three employees, Steven Baker, Jim Walker, and Howard Miller, operated grinders or lathes in Department 121 during the period May through July, 1993. During that period, each of these employees suffered symptoms of eye irritation that they reported to the Medical Department and to Mr. Meyers.¹² (Tr. 47-49.)

The eye irritation they suffered was apparently caused by an irritating ammonia-like odor emanating from coolant storage vats located under their machines. (Tr. pp. 48, 49, 160-62) Mr. Meyers checked the OSHA 200 Logs in August to see if their

¹²In May and June of 1993, Steve Baker noted a mist or cloud in his working area which caused eye and throat irritation. He suffered a burning sensation in his eyes, which caused his eyes to tear, and, on occasion, a burning sensation in his throat as well. (Tr. pp. 158-162) Baker visited the nurse's station on more than one occasion to receive treatment for his eyes or throat. He was treated with an eyewash for his eyes. No treatment was offered for his irritated throat. (Tr. 162, 163)

Jim Walker noted an ammonia smell and mists on the shaft line during the summer of 1993 (Tr. 169, 170) which caused his eyes to burn and tear, and become red, irritated, and scratchy. He visited the Medical Department six or seven times, where the nurse would flush his eye out and treat it with drops. On one occasion he left work early when he found conditions at work intolerable and no one in the Medical Department. The nurse referred him to an eye doctor. (Tr. pp. 170-175)

During the summer of 1993, Howard Miller experienced problems due to the atmosphere in the workplace. He noted an ammonia smell on the line. His eyes were irritated, scratchy and sore. (Tr. 177-79.) He visited the nurse on June 17, who washed out his eyes and administered eye drops. (Tr. pp. 179-81)

illnesses had been recorded (Tr. 109-12), but found that they were not. (Tr. 50-52, Government Exhibits 6, 7 & 8)

The OSHA 200 log and the "Blue Book," *Record keeping Guidelines for Occupational Injuries and Illnesses*, define an occupational illness as a work-related abnormal condition or disorder (other than an occupational injury). The Secretary maintains that the eye irritation suffered by these three employees meets that definition and should have been recorded on the log.

Caterpillar defends on the basis that these alleged illnesses were not diagnosed. It points out that the Blue Book states that "[o]ccupational illnesses must be diagnosed to be recordable." (GX-9, p. 39 [first sentence of the third paragraph].) Mr. Smay admitted that the guidelines require diagnosis as a condition of recordability, but that he had made no determination on the issue of diagnosis (Tr. 73).

Caterpillar argues that the Commission cited the Blue Book guidance with approval in *Johnson Controls, Inc.*, 15 BNA OSHC 2132, 2136 (1993), and in *Amoco Chemicals Corp.*, 12 BNA OSHC 1849, 1854-5 (1986), rejected the idea that an undiagnosed

condition, however "abnormal," would be considered recordable.¹³

Caterpillar asserts that OSHA did not rely on or offer a diagnosis of the conditions presented by these employees. It argues that the decision made by Nurse Wright, the record keeper, not to record was based on the absence of a diagnosis (Tr. 234). It also asserts that the record furnishes no evidence of a diagnosis.

Caterpillar overlooks the fact that a diagnosis is not necessarily something which rises to the level of a formal pronouncement of a medical practitioner. The Blue Book notes that a diagnosis

may be made by a physician, registered nurse, or a person who by training or experience is capable to make such a determination. Employers, employees, and others may be able to detect some illnesses, such as skin diseases or disorders, without the benefit of specialized medical training.

Blue Book, p.39.

Here, there is no reason to believe that the individual employees were not competent to diagnosis their condition as eye irritation. Moreover, eye irritation appears to be that sort of

¹³Recognizing that the two opinions seem to have reached differing results, Caterpillar argues that *Johnson Controls* opinion did not overrule *Amoco Chemicals*, but found it distinguishable.

abnormal condition that falls within the scope of recordable illness as defined in the Blue Book and in *Johnson Controls*.

Mr. Smay recommended a \$1000 penalty for items 1A and 1B on the ground that the OSHA Field Operations Manual permitted him no discretion in the matter. (Tr. 61.) Chapter VI, ¶ B.16.c.(1) of the Manual provides that the failure to maintain an OSHA-200 log requires a \$1000 penalty, and notes that a log with significant deficiencies shall be considered as not maintained. The deficiencies identified by Mr. Smay fall far short of being sufficiently significant as to require a finding that the Log was not maintained. Citation 2, item 1B, is affirmed as an other-than-serious violation with no monetary penalty.

Conclusions of Law

1. Respondent is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. § 652(5) ("the Act").

2. Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act, 29 U.S.C. § 659(c).

Citation 1, Item 1

3. Respondent was in other-than-serious violation of the standard set out at 29 C.F.R. § 1910.22(c). A penalty of \$00 is appropriate.

Citation 1, Item 3a, 3b, and 3c

4. Respondent was not in serious violation of the standards set out at 29 C.F.R. §§ 1910.178(l), 1910.178(n)(4), and 1910.178(q)(7).

Citation 1, Item 4

5. Respondent was not in serious violation of the standard set out at 29 C.F.R. § 1910.212(a)(3)(ii).

Citation 1, Item 5a and 5b

6. Respondent was not in serious violation of the standards set out at 29 C.F.R. §§ 1926.1027(e)(2) and 1910.1027(m)(2)(I).

Citation 1, Item 6

7. Respondent was in not serious violation of the standard set out at 29 C.F.R. § 1926.1027(I)(3)(I).

Citation 2, Item 1a

8. Respondent was not in other-than-serious violation of the standard set out at 29 C.F.R. § 1904.2(a).