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SECRETARY OF LABOR, Complainant, v. JEANETTE M. GOULD, d/b/a GOULD PUBLICATIONS, Respondent.	OSHRC Docket No. 89-2033

DECISION

BEFORE: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

At issue in this case is whether Jeanette M. Gould, d/b/a Gould Publications ("Gould"), which publishes law books at its facility in Binghamton, New York, failed to comply with two means of egress standards and an OSHA poster regulation promulgated by the Occupational Safety and Health Administration ("OSHA"), under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Administrative Law Judge Richard W. Gordon vacated citation items involving the three conditions at issue. For the reasons that follow, we reverse the judge and affirm the means of egress items, and we affirm the judge's vacating of the poster item.[1]

[1]Both parties filed petitions for discretionary review, but review was directed, and briefs were requested, only as to the citation items that the judge vacated. *E.g. Bay State Ref. Co.*, 15 BNA OSHC 1471, 1476, 1992 CCH OSHD ¶ 29,579, p. 40,025 (No. 88-1731, 1992) (the Commission need not address issues not actually directed for review or specified in the briefing notice). This was reiterated in our July 20, 1993, order to the parties.

I. *Alleged Serious Violation of 29 C.F.R. § 1910.36(b)(4)*

In citation no. 1, item 1, OSHA charged that by locking an unmarked door along the west wall of its basement pressroom during working hours Gould violated 29 C.F.R. § 1910.36(b)(4),[2] which sets out general requirements for means of egress. The cited door is an operable door that leads directly to the sidewalk outside. At the time of the inspection, the small knob on the door's dead bolt lock had been turned to the locked position.

Under Commission precedent and the language of the standard, to prove that a locked door violates section 1910.36(b)(4), the Secretary must show that the locked door (1) is an "exit" and that it (2) deprives employees of unobstructed egress from the areas in which they work. *See Spot-Bilt, Inc.*, 11 BNA OSHC 1998, 2000-01, 1984-85 CCH OSHD ¶ 26,944, p. 34,552 (No. 79-5328, 1984).

To be an "exit" a door must meet the definition at 29 C.F.R. § 1910.35(c), which provides that an:

> [e]xit is that portion of a means of egress which is separated from all other spaces of the building or structure by construction or equipment as required in this subpart [Subpart E--Means of Egress] to provide a protected way of travel to the exit discharge.

The evidence in this case indicates that the locked door is an exit within the meaning of section 1910.35(c) because it is separated from all other spaces of the building and provides a protected way of travel. The evidence also establishes that this door is intended to be an

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[2]The standard provides:

> 1910.36 **General requirements.**
>
> . . . .
>
> (b) *Fundamental requirements.*
>
> . . . .
>
> (4) In every building or structure exits shall be so arranged and maintained as to provide free and unobstructed egress from all parts of the building or structure at all times when it is occupied. No lock or fastening to prevent free escape from the inside of any building shall be installed except in mental, penal, or corrective institutions where supervisory personnel [are] continually on duty and effective provisions are made to remove occupants in case of fire or other emergency.

exit. *See generally Hackney/Brighton Corp.* ("*Hackney*"), 15 BNA OSHC 1884, 1886, 1991-93 CCH OSHD ¶ 29,815, p. 40,617 (No. 88-610, 1992) (door was a means of egress under 29 C.F.R. § 1910.37(j) because it could be opened from inside and was intended to be a means of egress). Gould's managers testified that this door is not an exit or a "fire door." However, this case is unlike *Spot-Bilt*, 11 BNA OSHC at 2001, 1984-85 CCH OSHD at p. 34,552, in which the Commission found no violations of 29 C.F.R. §§ 1910.37(k)(2) and 1910.37(q), which concern maintenance and marking of exits, because the cited door's identity as an exit was eliminated. Here the door was clearly intended to be an exit. Along with the other west wall door, it was unlocked at the start of every workday, locked at night, and left open in warm weather. Also, the door has a doorknob and can be opened from the inside when not locked. Access to the door is not blocked, and even Gould's owner admitted that the door is "access[i]ble to everybody."

We also find that the record shows that the locked door deprived Gould's employees of free and unobstructed egress. We do not base our finding merely on the fact that the door was locked. Section 1910.36(b)(4)'s requirement that free and unobstructed egress be provided does not require that all doors be unlocked so long as there is otherwise free and unobstructed egress from all parts of the building at all times when it is occupied. *Spot-Bilt*, 11 BNA OSHC at 2001, 1984-85 CCH OSHC at p. 34,552 (Secretary had not proven, and Commission could not envision, any type of emergency in which door cited there posed a hazard in light of the five other doors available).[3]

We base our finding on the evidence here, which shows that the approximately 60 feet by 60 feet room contained a large quantity of printing paper, ink, and several flammable

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[3]In Commissioner Foulke's view, the clear purpose of the standards found in section 1910.36(b)(4) is "to assure that workplaces have adequate exits in the event of a fire or other emergency." *Spot-Bilt*, 11 BNA OSHC at 2000, 1984-85 CCH OSHD at p. 34,551. Therefore, to establish a violation of section 1910.36(b)(4) the Secretary must "prove that the locked door deprives employees of free and unobstructed egress from the areas of the building or structure in which they work." *Id.* at 2001, 1984-85 CCH OSHD at p. 34,552. He also emphasizes that, while the standard clearly "precludes an employer from locking all of the doors leading to the outside of a building, . . . it does not logically follow that the standard precludes the locking a single door when other means of egress are readily available." *Id.*

cleaners. The evidence also indicates that in the event of a fire, the locked dead bolt on the cited door could prevent the quick escape of any of the four employees who regularly work in the room and would be accustomed to the door being unlocked. Although there were other routes to the outside (a west wall door about 30 feet away and, on the other side of the room, a stairway to the first floor), we find that the evidence does not establish that their presence eliminated the hazard posed by the locked door. *See Hackney*, 15 BNA OSHC at 1886, 1991-93 CCH OSHD at p. 40,617 (29 C.F.R. § 1910.37(j) violation despite presence of several other doors); *see also Hamilton Fixture*, 16 BNA OSHC 1073, 1094, 1993 CCH OSHD ¶ 30,034, p. 41,190 (No. 88-1720, 1993), *aff'd on other grounds*, No. 93-3615 (6th Cir. July 1, 1994) (not recommended for publication) (hazard of blocked fire door (29 C.F.R. § 1910.37(k)(2) citation) not diminished by existence of other door).

We therefore conclude that the Secretary has established a violation of section 1910.36(b)(4).[4] We also find that the violation is serious, as alleged, under section 17(k) of the Act of 1970, 29 U.S.C. § 666(k), based on the compliance officer's unrebutted testimony that death or serious physical harm could result from delays in exiting during an emergency due to the locked door.

Section 17(j) of the Act, 29 U.S.C. § 666(j), provides that in assessing penalties the Commission should give due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the "history of previous violations." OSHA proposed a penalty of $420. Gould has less than 50 employees, and a good history. In determining the gravity of a violation, we consider the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the degree of probability that any injury would occur. *E.g., J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993). We conclude that the gravity in this case was low to moderate based on the facts that four employees were exposed to the hazard, other means of exit were present, and the probability of injury was not insignificant.

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[4]Chairman Weisberg does not rely on *Spot-Bilt* in agreeing with his colleagues that the standard was violated.

We extend some credit for good faith in light of Gould's immediate abatement of the violation. Based on the factors above, we assess a penalty of $420.

II. *Alleged Serious Violation of 29 C.F.R. § 1910.37(f)(2)*

OSHA charged in citation no. 1, item 2, that the two west wall doors in the pressroom, one of which, as discussed above, was locked, while the other was unlocked, are in violation of 29 C.F.R. § 1910.37(f)(2),[5] because they do not swing in the direction of exit travel. It is undisputed that the doors swing inward, which is not the direction of exit travel. Although the judge affirmed the item as to the unlocked door, he halved the penalty based on his finding that the locked door was not an "exit," in effect vacating that portion of the item.

We find, however, that a violation was established as to the locked door. In deciding the section 1910.36(b)(4) item above, we found that this same locked door, which provides a protected way of travel leading directly to the sidewalk on the outside of the building, is an "exit" under section 1910.35(c). Under the terms of section 1910.37(f)(2), we find that the locked door can also be considered a "door from a room to an exit." Because it does not swing in the direction of exit travel, we conclude that Gould violated section 1910.37(f)(2) as to the locked door, as well as the unlocked door.

Although review was directed only on the issue of whether the judge erred in reducing the penalty by half and thereby vacating the item as to the locked door, Gould argues that the room was not proven to be a "high hazard" area as required by the standard. Having reviewed the record, we adopt the judge's finding that the room was a "high hazard"

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[5]The standard provides:

> 1910.37 **Means of egress, general.**
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> . . . .
>
> (f) *Access to exits.*
>
> . . . .
>
> (2) A door from a room to an exit or to a way of exit access shall be of the side-hinged, swinging type. It shall swing with exit travel when the room is occupied by more than 50 persons or used for a high hazard occupancy.

area due to the presence of flammable liquids and large quantities of paper.[6] We also find that the violation is serious, as alleged, in light of the compliance officer's testimony that the doors opening inward would pose an impediment to quick escape in the event of fire or other emergency and thus could cause serious injury.

The Secretary proposed a combined penalty of $640 for the two items. Based on the penalty factors in section 17(j) of the Act noted above, especially the considerable gravity of the violation because the doors not swinging in the direction of travel could delay employees trying to escape in the event of fire or other emergency, and there being no evidence of good faith regarding this item, we assess a penalty of $320 for the violation at the locked door. Adding this to the judge's assessment of $320 for the violation at the unlocked door (not on review) yields a combined penalty of $640 for this item.

III. *Alleged Violation of 29 C.F.R. § 1903.2(a)(1)*

In citation no. 2, item 1, OSHA alleged that Gould violated 29 C.F.R. § 1903.2(a)(1), which requires:

> Each employer shall post and keep posted a notice or notices, *to be furnished* by the Occupational Safety and Health Administration, U.S. Department of Labor, informing employees of the protections and obligations provided for in the Act . . . Such notice or notices shall be posted by the employer in each establishment in a conspicuous place or places where notices to employees are customarily posted. . . .

(Emphasis added). OSHA characterized the violation as other-than-serious and proposed that no penalty be assessed.

The *only* evidence concerning this citation is the testimony of the compliance officer that, when he asked Gould management if he could see the OSHA poster, which informs employees of their rights and obligations under the Act, he was taken to an employee bulletin board where there was no OSHA notice. Gould does not dispute that it did not post the OSHA notice, but it argued in its post-hearing brief, for the first time in this case,

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[6]In its brief on review, Gould argues that if the two doors were to swing outward, in the direction of travel, (1) an employee could fall while exiting through the door because of the immediate step outside the door, and (2) because the doors open over the sidewalk, people walking along the sidewalk would be in danger of being hit by an opening door. However, Gould did not establish by the evidence that these circumstances posed a greater hazard to its employees than a delay in exiting during a fire or other emergency.

that no citation should have been issued because OSHA had not provided it with a copy of the OSHA notice. The judge agreed and vacated the item, citing *Anderson Excavating and Wrecking Co.,* 11 BNA OSHC 1837, 1839, 1983-84 CCH OSHD ¶ 26,806, p. 34,286 (No. 81-1271, 1984). On review, the Secretary concedes that he did not prove that OSHA furnished a poster to Gould. He contends that, contrary to the judge's decision, such proof is not necessary in light of the presumption of regularity of administrative action, citing *Clarence M. Jones*, 11 BNA OSHC 1529, 1532, 1983-84 CCH OSHD ¶ 26,516, p. 33,750 (No. 77-3676, 1983).

We conclude that the Secretary failed to prove a violation of section 1903.2(a)(1). Under the language of the standard, to prove a violation of section 1903.2(a)(1), the Secretary must prove that he "furnishes" OSHA posters to employers, but in this case he argues that such "furnishing" must be presumed. The Secretary has not introduced any evidence of an administrative procedure to provide posters to employers. We cannot presume the regularity of an administrative plan that we have no evidence exists. Therefore, we cannot find that the Secretary has established a prima facie case of a violation of this standard.[7]

IV. *Order*

For the reasons stated above, we affirm item 1 of serious citation no. 1 and assess a $420 penalty for that violation of section 1910.36(b)(4). We affirm the half of item 2 of serious citation no. 1 that alleges a serious violation of section 1910.37(f)(2) at the locked door, and assess a penalty of $320 therefor, resulting in a total penalty of $640 for item 2.

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[7]Chairman Weisberg observes that had the Secretary here asserted that by "furnish" he means making posters available and that he has a procedure for doing so, the Commission would consider deferring to that interpretation and adopting a rebuttable presumption of that procedure's regularity. Similarly, had the Secretary contended that furnished means affirmatively provide and introduced evidence of a plan he follows for providing OSHA posters to employers, or asked the Commission to take administrative notice of such a plan, its regularity might be presumed. In the absence of such contentions, and even assuming that deferral is appropriate in this context, the Chairman would find that the Commission cannot defer to an interpretation of "furnish" which the Secretary has not articulated or presume the regularity of an administrative plan absent evidence of such a plan. Accordingly, he agrees with his colleagues that the Secretary has not established a prima facie case of a violation of this standard.

We vacate citation no. 2, item 1, which alleges a violation of the poster regulation at section 1903.2(a)(1).

It is so ordered.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Velma Montoya
Commissioner

Dated: July 19, 1994

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SECRETARY OF LABOR, Complainant, v. JEANETTE M. GOULD, d/b/a GOULD PUBLICATIONS, Respondent.	:	Docket No. 89-2033

NOTICE OF COMMISSION DECISION

The attached decision order by the Occupational Safety and Health Review Commission was issued on July 19, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

July 19, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 89-2033

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SECRETARY OF LABOR
Complainant,
v.
GOULD PUBLICATIONS
Respondent.

OSHRC DOCKET
NO. 89-2033

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 July 23, 1992. The decision of the Judge will become a final order of the Commission on August 24, 1992 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 August 12, 1992 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:

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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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: July 23, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 89-2033

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SECRETARY OF LABOR,

Complainant

v.

JEANETTE M. GOULD,
d/b/a GOULD PUBLICATIONS

Respondent.

OSHRC Docket No. 89-2033

Appearances:

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U.S. Department of Labor
For Complainant

Philip J. Kramer, Esq.
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Binghamton, New York
For Respondent

Before: 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 pursuant to § 9(a) of the Act and a proposed assessment of penalty thereon issued pursuant to § 10(a) of the Act.

On June 9, 1989, the Secretary issued two citations alleging a total of eight separate violations to Jeanette Gould, d/b/a Gould Publications of Binghamton, New York ("Gould"), following an inspection of Gould's worksite at 300 State Street, Binghamton, New York, on May 1, 1989. Gould maintains its principal office and place of business at the State Street site, and is engaged in the publication of law books and related activities. The first citation consists of seven items, all alleged as serious violations within the meaning of § 17(k) of the

Act, and an aggregate penalty of $4,010 was proposed. The second citation contains one alleged other than serious violation within the meaning of § 17(c) of the Act, and no penalty was proposed.

Gould was and is engaged in a business affecting commerce within the meaning of § 3(3) and § 3(5) of the Act, and is an employer within the meaning of § 3(5) of the Act.

Responding to a complaint submitted to the Syracuse, New York Area Office of OSHA by a Gould employee on February 7, 1989, Compliance and Safety and Health Officer ("CO") Michael Casler attempted to inspect the Gould plant on February 24, 1989. He was denied entry by Gould management on the grounds that CO Casler refused to reveal the name of the complainant to them. Casler retreated, but returned to the Gould premises on May 1, 1989 with a warrant issued by a Federal District Court Judge authorizing inspection. After apparently meeting further resistance by Gould to his planned inspection, Casler was ultimately "allowed" to undertake a "limited" inspection on that date, restricted to a survey of those items manifest in the complaint and with the stipulation that he not talk to any Gould employees. The employee complaint alleged a fire door stuck in the closed position, chained exit doors, lack of ventilation around a binding machine where a chemical glue was used, and absence of exit signs where mandated. (Tr. 263-4, Exhibit C-1). The inspection of May 1, 1989 resulted in the issuance of the above citations.

Gould filed a timely notice of contest on June 13, 1989, contesting all items and the notification of penalties. A formal complaint and answer were submitted to the Commission, while ancillary litigation ensued in the Federal Courts resulting from Gould's attempt to quash the inspection warrant. The effort proved fruitless[1] and the case came before this Judge for hearing on the merits on November 6 and 7, 1991.

SUMMARY AND EVALUATION OF THE EVIDENCE

Serious Citation No. 1, item no. 1

[1]Former Review Commission Judge Delbert R. Terrill, Jr. issued an order on February 27, 1991, upholding the District Court's decision to issue a warrant in the case. On subsequent review, the Commission denied Gould's Application for Interlocutory Review on April 8, 1991. The Court of Appeals also declined review. See *Gould Co. v U.S.A.*, No. 90-1686, slip op. 1429 (2d. Cir. June 3, 1991).

§ 1910.36(b)(4) reads in full as follows:

> In every building or structure exits shall be so arranged and maintained as to provide free and unobstructed egress from all parts of the building or structure at all times it is occupied. No lock or fastening to prevent free escape from the inside of any building shall be installed except in mental, penal or corrective institutions where supervisory personnel is continually on duty and effective provisions are made to remove occupants in case of fire or other emergency.

The Secretary asserts a violation existed in the basement pressroom of the Gould plant, where one of two exit doors located on the west wall at that level was locked by deadbolt during work hours. The Secretary contends that since both doors are the only "direct" means of egress from the building at the basement level,[2] a violation existed where one of the doors was locked, and that door should have been designated an "exit" for those purposes. There is testimony to the effect that the unlocked west-wall door was marked as an exit, and that a stairway on the opposite side of the pressroom served as "exit access" up to the first floor, and the outside of the building. (Tr. 332, 352-3).

Although this stairway might not meet the OHSA standard for "exit" under § 1910.35(c)[3], and apparently the local fire code demands the existence of at least two exits from the workroom, there is no evidence in the record to suggest that the definition of the term "exit" for both OSHA and local fire code purposes are one and the same, or that OSHA regulations incorporate local fire codes. OSHA regulations usually speak of "means of egress" rather than "exits" as such, consisting of three distinct elements of exit access,

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[2]See Secretary's brief at p. 15. This argument infers a requirement of two "direct" means of egress from all levels of a workplace. The Secretary's interpretation of the pertinent regulations (§ 1910.36(b)(3), (4), and (8)) omits any reference to a reasonableness standard which allows for some employer flexibility in providing fundamental safe emergency egress from a building. Additionally, OSHA regulations do not incorporate by reference any local fire codes.

[3] See Secretary's brief at p. 15. Section 1910.35(c) defines "exit" as "...that portion of a means of egress which is separated from all other spaces of the building or structure by construction or equipment as required in this subpart to provide a protected way of travel to the exit discharge." However, under 35(b), the stairwell could operate as an "exit access" ("...that portion of a means of egress which leads to an entrance to an exit.").

exits, and exit discharges.[4] Where the OSHA laws specifically use the term "exit" (meaning protected access to a public way or street), § 1910.36(a)(3) notes that: "...every building...shall be provided with exits of kinds, numbers, location, and capacity appropriate to the individual building...with due regard to the character of the occupancy." § 1910.36(a)(8) adds further context: "every building...of such arrangement...that the reasonable safety of numbers of occupants may be endangered by the blocking of any single means of egress due to fire or smoke, shall have at least two means of egress remote from each other as to minimize any possibility that both may be blocked by any one fire or other emergency conditions."

The building level referred to here could be termed a "semi-basement" since it is the lowest level of the building, and apparently accesses a public way only on the west side (the side of the building facing east at this level is totally underground). A "normal" workroom basement might not have any "exits" (direct access to the street) at all, and still be within OSHA guidelines if dual "means of egress" exist. A protected stairwell[5] leading to an exit on an upper floor would constitute exit access for purposes of maintaining an OSHA means of egress. In effect, the minimum OSHA standard for basements where the reasonable safety of numbers of occupants can be protected is dual means of egress, not dual exits. The architectural configuration and circumstances of the building in question here requires that this minimum standard apply. The "outside" doors were both located on the same wall and one door was clearly marked as an exit. The remote stairway qualifies as a means of egress, and there is testimony that the stairwell was marked with exit signs. (Tr. 129). While the locked door on the west wall should probably have been marked "Not An Exit" (see § 1910.37(q)(2)), Gould was not cited for such a violation, and due to a dearth of relevant evidence in the record, this matter will not be addressed here.

I find that, under the circumstances and context of the semi-basement location, no reasonable escape hazard existed in the pressroom. Accordingly, Serious Citation No. 1, item no. 1 is vacated.

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[4] See § 1910.35(a), (b), and (d).

[5] See § 1910.35(a).

Serious Citation No. 1, item no. 2

§ 1910.37(f)(2) notes that:

> A door from a room to an exit or to a way of exit access shall be of the side-hinged, swing-type. It shall swing with exit travel when the room is occupied by more than 50 persons or used for a high-hazard occupancy.

Both of the west side exit doors in the pressroom discussed above opened against the direction of exit (inward). (Tr. 280). The presence of large quantities of paper (Tr. 57) and certain combustible or flammable liquids (Tr. 57-8) were sufficient to designate the area as one of "high hazard". The doors were not side-hinged, and were locked by deadbolts, making emergency egress difficult at best.

I find that Gould should reasonably have been aware of these hazards, and therefore affirm the citation. However, since only one of the doors in question has been determined to have been an exit or way of exit access, the penalty of $640 should be reduced accordingly, as only a single violation exists. Accordingly, I reduce the penalty to $320.

Serious Citation No. 1, item no. 3

§ 1910.37(f)(6) simply states:

> The minimum width of any way of exit access shall in no case be less than 28 inches.

The Secretary contends that a third floor workbench partially obstructed an aisleway that served as an exit access (the minimum measured width was 26 inches). (Tr. 67, 298-9). Respondent immediately abated the violation. Since there were two exits from the room, the 28 inch minimum standard applies for width of exit accesses (a stricter standard exists for single exit access rooms[6]). It is undisputed that the aisleway was an exit access. (Tr. 298). Further, there was testimony to the effect that the work area in question was not heavily utilized by Gould employees, nor was it an area where hazardous chemicals were in use. (Tr. 294). Whether the blockage constituted a serious impediment to escape, and thus

[6] Section 1910.37(f)(6) goes on to note: "Where a single way of exit access leads to an exit, its capacity in terms of width shall be at least equal to the required capacity of the exit to which it leads."

posed a serious threat to employee safety in the event of an emergency evacuation, was strongly disputed by Gould.[7] I find that although the violation was obvious and uncontested in substance, any serious threat to worker safety was minimal. For that reason, although the violation is affirmed, the penalty should be reduced to $100.

Serious Citation No. 1, item no. 4

§ 1910.132(a), pertaining to the employer's provision of personal protective equipment (PPE), reads in full:

> Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shield and barriers, shall be provided, used and maintained...whenever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation, or physical contact.

The Secretary added §.132(a) by amendment to the original citation in her complaint, as per Rule 35(f) of the OSHRC Rules of Procedure. The original citation, citing § 1910.133(a)(1), was limited to violations of eye and face protection standards, and was thus inapplicable to instances of violations pertaining to extremity (hands and feet) protections. §.133(a)(1) reads as follows:

> Protective eye and face equipment shall be required where there is a reasonable probability of injury that can be prevented by such equipment...No unprotected person shall knowingly be subjected to a hazardous environmental condition. Suitable eye protectors shall be provided where machines or operations present the hazards of flying objects, glare, liquids, injurious radiation, or a combination of these hazards.

This particular instance of violation involved the transfer of Powertype Developer 811 from a larger to a smaller storage container found in the second floor typesetting area. This chemical, and one other identified as Power Flow Fixer (Tr. 75-6 and 360), were apparently

[7] See Respondent's brief at p. 8.

the only ones not stored in the basement pressroom. The CO requested the MSDS for the developer at the site during the inspection, and an outdated MSDS was provided (see Exhibit C-8) which required gloves and recommended eye protection (goggles) when using the chemical (the MSDS in effect on May 1, 1989 requires both eye protection and chemically-resistant gloves; see Exhibit C-11). Prior to receiving the outdated MSDS, CO Casler questioned Bruce Gould as to the need for PPE when transferring the corrosive chemical. Mr. Gould acknowledged the need for PPE, but was unable to produce either gloves or goggles (see Tr. 76 and 360-363) at the site, despite his claim that both articles were kept in a cabinet nearby. (Tr. 76, 309-11, 321-2). Additionally, several of the Secretary's witnesses testified that they were not aware of any available PPE in the plant, nor were they told of the existence of such equipment. (Tr. 163, 181, 208-9, 221). In all, a total of 13 chemicals used at Gould required the use of PPE (see Exhibit C-11).

Although the testimony is somewhat confusing with regard to this violation, two things are clear: CO Casler requested to see the PPE available, and he never received the requested paraphernalia. Also, Mr. Gould, in his testimony, evinced a paucity of knowledge as to which chemicals used in the workplace were hazardous to employees. The test for an employer in regard to the need for PPE in the workplace is that of a reasonable person familiar with the workplace conditions. *American Airlines, Inc. v. Secretary of Labor*, 578 F.2d 38, 41 (2d Cir. 1978). In the immediate situation, the presence of numerous hazardous chemicals would mandate an employer to provide PPE. The CO had a duty to request to see any necessary PPE in the performance of a proper inspection. For whatever reason, the CO was not provided with this most necessary information. Accordingly, this citation is affirmed and a penalty of $420 is assessed.

Serious Citation No. 1, item no. 5

The citation alleges that Gould had neither developed nor implemented a written hazard communication program (HAZCOM) according to the guidelines set forth in § 1910.1200(e)(1). Which include the criteria generated in §.1200(f), (g), and (h). These include descriptions on how mandatory labeling strictures should be met, how MSDS's are to be developed and utilized, how employees are to be trained in the use of dangerous or hazardous chemicals, the methods used to inform employees of the hazard incurred in the

performance of non-routine tasks, and the adoption of a master list for all hazardous chemicals present in the workplace. In short, a proper HAZCOM should contain a w ..ten, comprehensive on-site program for dealing with hazardous chemicals.

There was testimony to the effect that the CO requested on at least three occasions during the inspection to see Gould's HAZCOM program, only to be rebuffed each time. (Tr. 87, 302-5). If hazardous chemicals exist in the workplace, the employer must implement a HAZCOM program, and provide access to it to employees, their designated representatives, OSHA, and NIOSH in accordance with the access to records provisions in § 1910.20(e). Accordingly, existing written HAZCOM's may be used without modification if they contain:

1.) a list of all hazardous chemicals
2.) methods of informing workers of the hazards of non-routine tasks
3.) methods of informing and protecting employees of outside contractors who may be exposed to the hazardous chemicals

Gould must acknowledge that certain chemicals used, including Developer 811, Rapid Fix, Powertype, and SA 27 Developer, inter alia, are of the type considered hazardous under OSHA standards.[8] Thus, a HAZCOM program is needed for compliance in this instance. The program obtained from Gould through discovery, and seemingly unavailable on the inspection date, is inadequate to satisfy the standard set forth in § 1200(e)(1). Testimony by Mr. Gould (Tr. 304) fails to rebut the charge that Gould failed to produce the HAZCOM program when requested to at the time of the inspection by OSHA, that such a program had actually been implemented by that date, and indeed even if such a program had actually been implemented, that it would have met neither the OSHA requirements of a written hazard instruction section for non-routine tasks, nor written training procedures. I find the respondent in clear violation of §.1200(e)(1), and affirm the penalty of $810.

Serious Citation No. 1, item no. 6

29 C.F.R. § 1910.1200(g)(1) requires Material Safety Date Sheets (MSDS's) for all hazardous chemicals used in the workplace, and they must be readily accessible, upon

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[8] Compare Exhibit C-11 chemical ingredients with § 1910.1000 (Table Z-1) of *Employment Safety and Health Guide: Hazard Communication*, Number 762, ¶118 (CCH-1985).

request, to designated representatives of the Secretary (CO's) according to the rules set forth in § 1910.20(e). Gould was specifically cited for failing to produce for inspection MSDS's for Hot Melt Glue #553 and Phenoid Type Cleaner, among others. The record discloses that the CO asked for all MSDS's on the inspection date, and received only the aforementioned sheets for the Fixer and Developer, and a label for the Hot Melt Glue (actually photocopies of each). (Tr. 78-9, 304). Mr. Gould, in his testimony, does not dispute that the requests were made, although he claims that Mr. Casler exited the premises before he could properly prepare the required material. Although the evidence relating to these matters is somewhat vague and controverted, what is apparent is that the MSDS's were not readily accessible during the inspection. Mr. Casler specifically requested the MSDS for the glue while inspecting that work area, but they were not forthcoming at that point in time. (Tr. 90). The weight of the credible evidence on this violation supports the Secretary's contention; therefore the violation and full penalty of $490 is affirmed.

Serious Citation No. 1, item no. 7

The final violation of the first citation concerns an alleged breach of § 1910.1200(h)(1) and (2) by Gould, in short, that Gould did not provide information and training to employees on hazardous chemicals in their work areas at the time of the employee's initial assignments, and thereafter whenever a new chemical hazard was introduced. Minimum training demands the explanation of methods used to detect the presence or release of hazardous chemicals, the particular health hazard present and the antidote or protective measures employed to counter such a hazard (specific procedures and PPE), and the details of the HAZCOM program including an explanation of the labeling system and MSDS's.[9]

Although CO Casler was not permitted to interview Gould employees at the time of his inspection, he surmised that employees were not provided with this information due to the unavailability of the HAZCOM program on the date of inspection, which would detail those required methods of counteracting chemical hazards and the measures that affected employees could take to alleviate such hazards and to further protect themselves. Mr.

[9] See § 1910.1200(h)(1) and (2) for full text.

Gould testified that he and his mother trained all new employees, identifying potentially harmful or hazardous substances to them at the inception of their employment. As already noted, however, Mr. Gould's interpretation of which chemicals were hazardous was far more lenient that the Secretary's. (Tr. 282, 307-8). The particular employees instructed by Gould ("just the people working with chemicals"(Tr. 307)) did not conform to the broad OSHA standard which was unambiguously predicated on the location of chemicals in the work area as opposed to employees actually hired to handle or manipulate the hazardous chemicals. In addition, many employees were not relegated to specific work areas, and worked freely throughout the plant, having received little or no training on the possible dangers inherent with the use of such chemicals in those areas. Mr. Gould's testimony was controverted by the four former employee witnesses[10], Jenks, Lavarnway, Malinak, and Benninger. All of them detailed an almost complete lack of formal training regarding chemicals in the workplace. The overwhelming weight of evidence favors the Secretary's contention that workers were improperly or inappropriately trained in the possible hazards caused by the chemicals used in the Gould workplace. I therefore affirm the violation of §.1200(h)(1) and (2) and assess a penalty of $810.

Other than Serious Citation No. 2, item no. 1

The second citation alleges a violation of 29 C.F.R. § 1903.2(a) which obligates the employer to post an OSHA-supplied notice explaining the rights and duties of employees and employers under the Act in a conspicuous location in the workplace. Although Mr. Casler claims he specifically asked to see the poster, no poster was seen by him on the employee bulletin board (see Tr. 94-5) (nor was this testimony rebutted by any witness for the Respondent). When such a claim is alleged, the Secretary bears the burden of showing that such a poster was provided by OSHA. *Anderson Excavating & Wrecking Co.,* 11 BNA OSHC 1837, 1839, 1983-84 CCH OSHD ¶ 26,806 (1984). There is no testimony to the effect that Gould was sent or received an OSHA poster. This citation must therefore be vacated. No penalty is assessed.

SUMMARY

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[10] Note especially the testimony of Jenks at Tr. 161-3.

The inexplicable actions of both parties complicated this otherwise routine case. The OSHA inspector, armed with a warrant issued by a U. S. District Court Judge, was obviously unaware of the powers and privileges provided for in that document, and allowed the opportunity for a full and effective inspection to be compromised by an ill-advised negotiation with the Respondent. Although the early years of OSHA proved a battleground for issues relating to inspections, especially the viability of administrative warrants and due process and privacy problems, the law in this area is fairly well-settled today. The CO should have been fully aware of the nuances of the law regarding his inspection rights, and perhaps sounder training in those aspects of the CO function should be stressed in the future. The Secretary has an obligation to use her resources wisely and efficiently in order to provide a reasonable standard of safety for the American worker, and that obligation is ill-served by the conducting of a "limited" inspection at the behest of an obstructionist employer.

Gould, in its fervor to protect its "rights", was misguided and obstreperous in restricting the inspection of CO Casler. That Gould would attack in its brief the credibility of the CO as a "man on a mission" is not only irrelevant to the citations at issue, but betrayed by Gould's inability to present unbiased employee witnesses to buttress the self-serving statements of Gould management. Had such witnesses been available, the testimony of the four ex-employees, especially as to Serious Citation No. 1, items nos. 4 through 7, might have been effectively neutralized. The short span of the witnesses employment, their job descriptions and circumstances surrounding their departure do not impart absolute credibility to their largely unopposed testimony.[11] The pursuit of a just disposition based on the merits of the case and the applicable standards set up under law hardly seemed a priority in the terse arguments of Gould. Their cause is advanced little by their contentiousness.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[11] Other than Jenks, who worked at the Gould Co. for almost a year (Tr. 160), the three other witnesses for the Secretary worked on average only four or five weeks at the Gould plant (Tr. 176, 209, 217). Also, two of the witnesses worked as maintenance persons (Benninger and Lavarnway), and had little personal contact with printing chemicals being used.

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 VACATED.

2. Serious Citation No. 1, item no. 2 is AFFIRMED and the penalty is REDUCED to $320.

3. Serious Citation No. 1, item no. 3 is AFFIRMED and the penalty is REDUCED to $100.

4. Serious Citation No. 1, item no. 4 is AFFIRMED and a penalty of $420 is ASSESSED.

5. Serious Citation No. 1, item no. 5 is AFFIRMED and a penalty of $810 is ASSESSED.

6. Serious Citation No. 1, item no. 6 is AFFIRMED and a penalty of $490 is ASSESSED.

7. Serious Citation No. 1, item no. 7 is AFFIRMED and a penalty of $810 is ASSESSED.

8. Other than Serious Citation No. 2, item no. 1 is VACATED.

RICHARD W. GORDON
Judge

Dated: July 17, 1992
Boston, Massachusetts