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
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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 91-2986
BERKMAN BROTHERS, INC.,	:	
Respondent.	:	

ORDER

This matter is before the Commission on a direction for review entered by Commissioner Velma Montoya on April 2, 1992. 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.
Chairman

Donald G. Wiseman
Commissioner

Velma Montoya
Commissioner

Dated: March 3, 1993

NOTICE OF ORDER

The attached Order by the Occupational Safety and Health Review Commission was issued and served on the following on March 3, 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

Gerald R. Berkman
Berkman Bros., Inc.
55 Eckford Street
Brooklyn, NY 11222

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ROBERT REICH, SECRETARY OF LABOR, Complainant, v. BERKMAN BROTHERS, INC., Respondent.	:	OSHRC Docket No. 91-2986

STIPULATION AND SETTLEMENT AGREEMENT

I

The parties have reached agreement on a full and complete settlement and disposition of the issues in this proceeding which is currently pending before the Commission.

II

It is hereby stipulated and agreed by between the Complainant, Secretary of Labor, and the Respondent, Berkman Brothers, Inc. that:

1. Respondent represents that the alleged violation of 29 C.F.R. 1910.23(c)(3) (Serious Citation 1, item 1) for which it has been cited shall be abated within 45 days of the execution of this agreement and shall remain abated.

2. Respondent hereby withdraws its notice of contest previously filed in this case.

3. The parties agree that respondent shall protect its employees working adjacent to electroplating tanks in the copper and nickel plating areas of its workplace from falls into the tanks, and/or accidental contact with the chemicals therein, by means of a personal fall arrest system as defined in Appendix C to 29 C.F.R. § 1910.66. Respondent represents that the fall arrest system utilized will be designed in a manner which prevents employee contact with corrosive plating chemicals in the event of a fall. This shall include locating the anchor point of the fall arrest system at a point directly above the employee's work area in order to minimize employee free falling, including swing falling. Respondent further agrees to provide employees with a personal fall arrest system that meets or exceeds the design for system components and system performance criteria of paragraphs (c) and (d), respectively, of Mandatory Section I of Appendix C to 1910.66.

4. Respondent hereby agrees to pay a penalty in the amount of $280 by submitting its check, made payable to "U.S. Department of Labor - OSHA" to the OSHA Area Office within 45 days from the date of this agreement.

5. Each party agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding.

6. No authorized employee representative elected party status in this case.

7. The parties agree that this Stipulation and Settlement Agreement is effective upon execution.

8. Respondent hereby certifies that on February 22nd, 1993, a copy of this Stipulation and Settelement Agreement was served on the authorized employee representative by pre-paid first class mail or by personal delivery in accordance with Commission Rule 7(c). Respondent further certifies that a copy of this Stipulation and Settlement Agreement was posted on the 22nd day of February, 1993, pursuant to Commission Rules 7 and 100, and will remain posted for a period of ten days.

Dated this 22nd day of February, 1993.

JUDITH E. KRAMER
Deputy Solicitor

JOSEPH M. WOODWARD
Associate Solicitor for
Occupational Safety and Health

DONALD G. SHALHOUB
Deputy Associate Solicitor for
Occupational Safety and Health

DANIEL J. MICK
Counsel for Regional
Trial Litigation

GERALD R. BERKMAN
President
Berkman Brothers, Inc.

ORLANDO J. PANNOCCHIA
Attorney for the
Secretary of Labor

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SECRETARY OF LABOR
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Respondent.

OSHRC DOCKET
NO. 91-2986

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 March 25, 1992. The decision of the Judge will become a final order of the Commission on April 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 April 14, 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:

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: March 25, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-2986

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
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Howard G. Estock, Esquire
Clifton, Budd & DeMaria,
420 Lexington Avenue
New York, NY 10170 0089

Gerald R. Berkman, President
Berkman Bros., Inc.
55 Eckford Street
Brooklyn, NY 11222

Irving Sommer
Chief Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 417/A
1825 K Street, N.W.
Washington, DC 20006 1246

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 91-2986
BERKMAN BROS., INC.	:	
Respondent.	:	

APPEARANCES:

WILLIAM G. STATON, ESQ.
U.S. Department of Labor
201 Varick Street
New York, New York

For Complainant

HOWARD G. ESTOCK, ESQ.
Clifton, Budd & DeMaria, Esqs.
420 Lexington Avenue
New York, New York

For Respondent

Before: Administrative Law Judge Irving Sommer

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq., hereafter called the "Act").

Following an inspection by the Occupational Safety and Health Administration (OSHA) between August 1990-January 1991 Respondent Berkman Bros. Inc. ("Berkman") was issued a serious citation containing 23 alleged violations, and an other than serious citation alleging 2 violations. All of the items in both citations were settled except for item 1 of serious citation no. 1, which alleged a violation of 29 CFR 1910.23 (c)(3), which is at

issue herein. The trial of this case was held on December 20, 1991, in New York, New York. All parties were represented and filed post-hearing briefs. No jurisdictional issues are in dispute.

BACKGROUND

Berkman is a New York corporation with its principal place of business at 55 Eckford Street, Brooklyn, New York. It is engaged in electroplating and related activities. Specifically, it puts a metal coating on various items for "decorative and corrosion purposes" with its primary source of business being the " lamp and lighting industry, wire display goods, catering products, hardware."(T-80).

The alleged violation of 29 CFR 1910.23 (C)(3) took place in the nickel plating area of the plant. The plating process was generally described by Gerald Berkman, the company president as follows: The items to be plated are hung on a plating rack or with copper wire to induce conductivity; they are put through a cleaning process(an alkaline caustic cleaner), then rinsed in a mild muriatic acid solution, rinsed again and put into nickel plating tanks; the nickel plater lifts the work out of the bath and hangs it above the tank so that the chemicals dripping therefrom can be recovered; the item is then given further rinses and then goes out of the plating room by an overhead conveyor. (T89) The nickel plating tank is maintained at a PH level of 4 which is mildly corrosive. (T91) The temperature of the chemicals in the nickel plating tank is maintained at approximately 140 degrees. The tank contains nickel sulfite, nickel chloride, boric acid, ammonia and other chemical compounds. Atop the nickel tank is a cathode bar which separates the tank at midpoint (T97), being necessary in the electroplating process to attract the positively charged metal. There is a wooden walkway approximately 1-2 feet above the floor surrounding the tanks which the employees use to walk on when working around the tanks. The height of the tanks extended approximately 30-32 feet above the walkway.

Alleged Violation of 29 CFR 1910.23 (c)(3)

The Secretary alleges that the Respondent violated the section by failing to provide employees working around the tanks in the nickel plating area protection from falls into the tanks and contact with the hazardous chemical materials therein.

The standard provides:

1910.23 (c)(3) Protection of open-sided floors, platforms, and runways.

(3) Regardless of height, open-sided floors, walkways, platforms, or runways above or adjacent to dangerous equipment, pickling or galvanizing tanks, degreasing units, and similar hazards shall be guarded with a standard railing and toe board.

The compliance officer(CO) testified she observed two employees working and walking on a raised wooden walkway adjacent to the tanks of chemicals used in the electroplating process. The walkway was noted to be wet and slippery. These tanks contained hazardous chemicals (T149, 150). The employees were subject to the hazard of falling into the tanks and coming into contact with their hazardous chemical contents while either working lifting objects in and out of the tanks, or while walking in the vicinity. To protect the employees from the hazard therein the CO suggested feasible methods of abatement including removable railings, tieing up of employees to a stationary object, automation of the work so that objects could be placed in the tanks and lifted and lowered automatically as was being carried out in the brass operation at the plant. Mr. Peter Martinez, the head plater at Berkman testified that management had installed railings all around the tanks and asked him to do his regular job; with the railings installed he worked 5-10 minutes on three or four days, and found lifting the materials above the railings so that it could be plated and rinsed caused pain in his back and arms.

Mr. Gerald Berkman, the company president testified he felt the guard railings could not be used because it created a greater hazard for his employees causing them back problems, etc. He stated they could not tie off while doing the work since they were always moving around between tanks; Finally, he was of the opinion that the nickel process could not be automated as was done in the brass plating area since there was not adequate space and mainly because it was too expensive to install. His best estimate was that it would cost half a million dollars to install. He stated that the company had applied for a variance the week prior to the hearing.

By its plain language this standard applies to the unguarded tank operation herein. The evidence is clear that the chemicals in the nickel plating tank which were heated, and

the other tanks containing deleterious substances were hazardous to the employees working at the plant. Berkman had knowledge of such hazard, having been supplied this information by their outside consultant engineer. (T112, Exh. C-2).

In short, there is no dispute of the applicability of the standard, that the tanks contained hazardous materials, that the employees had access to the hazard, and that Berkman knew of the violation. Actually, Gerald Berkman testified, "we work under the assumption that all of the tanks contain hazardous materials and they need to be treated with respect and appropriately."(T119).

Berkman asserts two affirmative defenses. It contends: (1) Compliance with the standard is a greater hazard than noncompliance; and (2) Infeasibility of compliance with the standard.

An employer is excused from strict compliance with the standard if compliance would result in a greater hazard than noncompliance. To establish such defense, the employer must prove: (1) The hazards created by complying with the standard are greater than those of non-compliance; (2) Other methods of protecting its employees from the hazards are not available, and (3) a variance is not available or that application for a variance is inappropriate. *Spancrete Northeast, Inc.* 15 BNA OSCH 1020, 1022 (No. 86-521, 1991).

The allegation that the railings which had been installed around the tanks presented a greater hazard to employees than working without them is based on the statement of Martinez that on three occasions while working with them in place for 5-10 minutes he experienced arm and back pain. Berkman made no further investigation, called in no consultants in the field of ergonomics or other experts in the dynamics of work activity, so that a more positive appraisal be given to the problems, if any, were associated with the work activity if a railing was used. The verbalized fears of the employee engendered after a very short trial period carried out at the request of his employer and under the employers observation and at his request is not the type of fully credible evidence demonstrating the presence of a hazard. *House Wood Products Company*, 3 BNA OSHC 1993 (1976). Similarly, Berkmans unsupported opinion is likewise unacceptable to prove a greater hazard. Hurlock Roofing Co., 7 BNA OSHC 1108 (1979).

Among the other means of protecting the employees working at the tanks from the hazard present was the recommendation by the CO that automation similar to what was already in place in the brass plating room be used; the general response by Berkman that this cannot be accomplished because of lack of space and cost is rejected; no proof of its economic or technological infeasibilty was presented; no investigation of is feasibility was carried out, no outside consultants were sought for an opinion thereof; the unsupported statements of Gerald Berkman, who has no expertise in the engineering field as to the technical and economic aspects of installing automated procedures cannot be given any serious credibility, and is rejected.

Finally, there is a complete failure to comply with third element, the variance factor. The testimony demonstrated that such variance application was essentially a sham, being sought about one week before trial. To allow such belated use of the variance defense at the time of trial would negate it and allow employers to disregard a standard when they mistakenly believe their work practice is safer than complying with the standard. Thusly, employees would be exposed to a hazard through the entire time up to the final disposition of the enforcement proceedings. On its face this prolongment of the hazard is contrary to the intent of the Act in promoting the safety and health of the nations employees. "Both the Commission and the Courts have habitually looked on such claims with a jaundiced eye when they have been raised for the first time in enforcement proceedings by employers who have made no prior attempt to seek either a variance -- or a modification." *Diebold, Inc. v. Marshall*, 585 F2d 1327 (6th Cir. 1978). It is clear that Berkman has failed to prove any of the elements of the greater hazard defense and it is rejected.

The defense of infeasibilty of compliance is likewise found unavailable herein. The burden of proving that alternative means of compliance were infeasible rests with the employer. The Commission in *Dun-Par Engineering Forms Company*, 12 BNA OSHC 1949 (No. 79-2553, 1986) stated: " the question of whether a means of protection is infeasible must be answered in light of practical realities of the particular workplace." Reviewing respondent's operations in light of the evidence of record demonstrates the

suggested methods of compliance are practical and realistic. The CO testified that either railing or automation are feasible. In fact the work was carried out with the railings in place, the complaint of the employee notwithstanding; the short trial period as stated previously did not persuasively demonstrate it presented a greater hazard to the worker; additionally, the automatic operation option which was successful in another part of the plant was similarly shown as feasible; the allegation of economic and technical infeasibility was not proven in any way, and is nothing more than a self-exculpatory allegation by Berkman. On this record, the respondent did not sustain the burden of proving the means of compliance put forth by the Secretary were infeasible. Accordingly, the standard was violated as alleged.

The Secretary proposed a penalty of $560. The Commission stated in *Secretary v. National Realty & Construction Co.*, 72 OSAHRC 9/a2, 1 BNA OSHC 1049. 1971-3. CCH OSHD, par. 15,188 (No. 85, 1971) that the elements to be considered in determining the gravity are: (1) the no. of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury.

Having considered the evidence in the record relating to those factors, the penalty of $560 proposed by the Secretary is appropriate.

FINDINGS OF FACT

The findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear in the decision. See Rule 52(a) of the Federal Rules of Civil Procedure.

CONCLUSIONS OF LAW

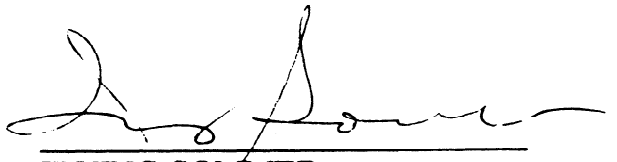
1. The record establishes by a preponderance of the evidence that the Respondent committed a serious violation of 29 CFR 1910.23 (c)(3).

2. A penalty of $560 is appropriate.

ORDER

Based upon the findings of fact, conclusions of law, and the entire record, it is ORDERED

1. Citation no. 1, issued February 25, 1991, is AFFIRMED and a penalty of $560 is ASSESSED.



IRVING SOMMER
Judge, OSHRC

DATED: MAR 23 1992
Washington, D.C.