UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 92-3189
EBAA IRON, INC.,	:	
Respondent.	:	

DECISION

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

BY THE COMMISSION:

At issue is whether EBAA Iron, Inc. ("EBAA"), a foundry operator in Cordele, Georgia, exposed its employee to excessive respirable crystalline quartz silica in serious violation of 29 C.F.R. § 1910.1000(c).[1] We agree with former Review Commission Judge James D. Burroughs that the Secretary did not establish a violation based on the evidence in the record. We also conclude that the judge did not abuse his discretion in denying the Secretary's motion to reconsider his decision and reopen the record.

I.

EBAA manufactures iron "retainer gland devices" for connecting water pipes. During the manufacturing process, molten iron is poured into sand molds. When the iron

[1]At the time of the inspection, section 1910.1000(c) provided:

> *Table Z-3.* Table Z-3 is applicable for the transitional period and to the extent set forth in paragraph (f) of this section. An employee's exposure to any substance listed in Table Z-3 in any 8-hour work shift of a 40-hour work week shall not exceed the 8-hour time weighted average limit given for that substance in the table.

cools, the sand molds are separated from the castings in an "oscillating shaker pan," after which the iron castings are rolled around (as in a washing machine) in a "gideon." The castings are then disconnected, run through a "shot blaster," and finally sent to the grinder to smooth off the rough edges.

An Industrial Hygienist ("the IH") from the Occupational Safety and Health Administration ("OSHA") took personal air samples of the operator of the inner diameter grinder, and he sent them to OSHA's Salt Lake City lab for analysis. When he received the lab's analysis, he calculated that the air in the breathing zone of the grinder operator contained respirable crystalline quartz silica in excess of the standard's permissible exposure limit ("PEL").[2] The Secretary also introduced a letter that OSHA sent to EBAA on July 25, 1990, explaining that OSHA's April 1990 testing at the Cordele plant showed that the operator of a hand grinder was exposed to silica at a level of over ninety percent of the 8-hour time weighted average for silica. Although the grinder at issue here is of a different type, we consider the letter relevant. It is undisputed that silica is in the sand used in the plant.

Based on the evidence above,[3] we conclude that the Secretary made a prima facie showing that EBAA violated the terms of the standard.[4]

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[2]EBAA is charged with violating the transitional PEL for respirable crystalline quartz silica established when section 1910.1000 was revised on January 19, 1989. See Table Z-3 of section 1910.1000 (1989). It is the same level as in the original standard and the present standard, which was issued after the 1989 revised standard was struck down more than a month after the alleged violation occurred in this case. *See AFL-CIO v. OSHA*, 965 F.2d 962 (11th Cir. 1992).

[3]The Secretary's counsel did not move to admit into evidence Exhibits C-1 through -3, which show the IH's and the lab's sampling results, after the judge sustained EBAA's temporary initial objections. However, the judge implicitly treated the exhibits as if they had been admitted into evidence for purposes of his decision. There being no further objections from EBAA, we consider these exhibits as well.

[4]To make a prima facie showing that a cited standard was violated, the Secretary must prove that (1) the standard applies, (2) the employer violated the terms of the standard, (3) its employees had access to the violative condition, and (4) the employer had actual or constructive knowledge of the violative condition. *E.g., Gary Concrete Prods., Inc.*, 15 BNA

(continued...)

II.

Once the Secretary has shown that the listed air contaminant is present at the workplace at a level exceeding the PEL,[5] the burden shifts to the employer to rebut by showing that the sampling results were not reliable. *Bay State Refining Co.*, 15 BNA OSHC 1471, 1473, 1991-93 CCH OSHD ¶ 29,579, pp. 40,022-23 (No. 88-1731, 1992); *Anaconda Aluminum Co.*, 9 BNA OSHC 1460, 1465, 1981 CCH OSHD ¶ 25,300, p. 31,338 (No. 13102, 1981). For example, the employer may show that some other substance was present in a sufficient quantity to render the Secretary's measurements unreliable. *Id.* The employer must do more than merely raise the suggestion that the sampling results may not be reliable. *Id.*

At the hearing, EBAA challenged the reliability of OSHA's sampling results. EBAA introduced the Material Safety Data Sheet ("MSDS") for the grinding wheel, which shows that silica and five other impurities comprise less than one percent of it, and that the grinding wheel is composed of forty percent "Zirconium Oxide," commonly known as "Zirconia." OSHA Instruction CPL 2-2.20B recognizes in Appendix 1-E "Sampling for Special Analyses" that "Zircon (Zirconium silicate)" can "interfere" with a lab's X-ray diffraction analysis of a silica sample. For that reason, it instructs industrial hygienists to notify the lab if a sample they send for silica analysis is from a work environment where zircon is present. The IH here acknowledged on cross-examination that he was not aware that zircon can "interfere" with the lab's X-ray diffraction analysis for silica, did not recall reading the OSHA Instruction, did not notify the lab that zircon may be present in the samples, and did not look at the MSDS for the grinding wheel. Based on this evidence, we agree with the judge that EBAA rebutted the Secretary's case by showing that zircon was

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[4](...continued)
OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344, p. 39,449 (No. 86-1087, 1991). The judge found that the Secretary did not prove that EBAA violated the terms of the standard or had knowledge of the condition. In light of our finding that the Secretary failed to prove that EBAA violated the terms of the standard and thus failed to prove a violation, we need not reach the issue of whether the Secretary proved employer knowledge.

[5]Commissioner Foulke believes that as part of the prima facie case, the Secretary must show that he has sampling and testing procedures in place to ensure that accurate results are obtained and that those sampling and testing procedures were properly followed.

present in sufficient quantities to "interfere" with the Secretary's results for silica sampling and thus render those results unreliable.[5]

III.

We next consider whether the judge erred in denying the Secretary's motion to reconsider his decision and reopen the record to admit evidence addressing the reliability of the sampling results.

The judge sent his decision to the parties on July 6, 1993. On July 23, 1993, during the 20-day period before the judge files his decision with the Executive Secretary for docketing, see 29 C.F.R. § 2200.90(b), the Secretary filed a motion asking the judge to reconsider his decision and reopen the record to admit the accompanying affidavit of the OSHA lab chemist who analyzed the samples, or permit his deposition. Attached to the motion was the affidavit of the Secretary's counsel. He avers that during a March 2, 1993, conference call with the judge, the parties agreed that, to avoid the expense and inconvenience of having the chemist at the hearing when he may not be necessary, "the record [would] be left open for 30 days after the hearing" for the Secretary to take and introduce the chemist's deposition if EBAA were to raise any question about the accuracy of the sampling results.[6] The judge summarily denied the motion on the same day that the motion was hand-delivered to him.

In deciding whether to reopen the record in a case, the Commission generally considers (1) the time the motion to reopen was made, (2) the character of the additional evidence, and (3) the effect of reopening the record. *E.g., Article II Gun Shop, Inc.*, 16 BNA OSHC 2035, 2036, 1994 CCH OSHD ¶ 30,563, p. 42,299 (No. 91-2146, 1994) (consolidated); *Chesapeake Operating Co.*, 10 BNA OSHC 1790, 1793, 1982 CCH OSHD ¶ 26,142, p. 32,915

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[5]We assume, as the judge did, that for purposes of interference with silica samples the "Zircon (Zirconium silicate)" referred to in the OSHA Instruction is the equivalent of the "Zirconium Oxide," or "Zirconia," that comprises a large part of the grinding wheel. The Secretary has not shown otherwise.

[6]The Secretary's counsel also avers that, although not made part of the record (even though it was reported to the judge and EBAA's counsel at the hearing), the OSHA lab chemist told him over the telephone during a break in the hearing that his analysis was not affected by the possible presence of zircon in the samples.

(No. 78-1353, 1982); *see* 6A *Moore's Federal Practice* ¶ 59.04[13] at pp. 59-33, 59-36 (2d ed. 1994). Other concerns are the interests of fairness, substantial justice, and adjudicative efficiency. *Id.*

Applying these criteria, we conclude that the judge did not abuse his discretion in denying the Secretary's motion to reopen the record. The key factor is that the motion was not timely. The affidavit of the Secretary's counsel and the Secretary's motion to reopen refer to an understanding that the record would remain open for *30 days* after the hearing. The hearing ended on March 24, 1993. The motion to reopen was filed with the judge on July 23, 1993, *120 days* after the hearing ended. Nothing in the record suggests an agreement to extend the time. Indeed, the motion to reopen was not filed until after the Secretary's receipt of the judge's decision. Noticeably absent from the Secretary's brief on review is any reference to the fact that the agreement to leave open the record included a time limit. Moreover, the Secretary does not explain why the affidavit could not have been filed within 30 days after the hearing.[7] Given the absence of any explanation for the three-month delay, we find that the Secretary's untimeliness alone was a sufficient reason for the judge to deny the Secretary's motion. *See generally J.A. Jones Constr. Co.*, 16 BNA OSHC 1497, 1498, 1994 CCH OSHD ¶ 30,301, p. 41,752 (No. 87-2059, 1993) (untimeliness as important factor in denying motion to amend the pleadings).

For the reasons above, we conclude that the judge did not abuse his discretion in denying the Secretary's motion. Because the Secretary did not introduce into the record any evidence addressing the reliability of his sampling results, we conclude that he has not rebutted EBAA's evidence of possible interference.[8] We therefore find that the Secretary has not proven the overexposure required by the standard and thus has not established a violation of section 1910.1000(c). We therefore affirm the judge's decision vacating citation no. 1, item 3a, as amended, which alleges a serious violation of this standard.

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[7]We do not consider the judge's comment at the close of the hearing that he would hold the matter of the chemist's testimony "in abeyance" to be, as the Secretary suggests, a "ruling" that introduction of that evidence was open-ended.

[8]In Chairman Weisberg's view, if the affidavit had been timely offered and admitted into evidence, it would have been sufficient to shift the burden back to EBAA.

IV.

Because we find that the Secretary did not establish a violation of section 1910.1000(c), we agree with the judge that the Secretary has not proven a violation of 29 C.F.R. § 1910.1000(e), which was alleged in another citation item that was directed for review. That standard requires that where an employer has exposed its employee to excessive levels of a listed contaminant "[t]o achieve compliance with paragraphs (a) through (d) of this section, administrative or engineering controls must first be determined and implemented whenever feasible" and, when not feasible, protective equipment or other protective measures shall be used to keep employee exposure within the prescribed limits. Having found no overexposure, there can be no violation of section 1910.1000(e). We therefore affirm the judge's decision to vacate citation no. 1, item 3b, which alleges a serious violation of this standard.

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: February 7, 1995

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Complainant,	:	
v.	:	Docket No. 92-3189
EBAA IRON, INC.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on February 7, 1995. **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.

February 7, 1995
Date

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-3189

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,
v.
EBAA IRON, INC.
Respondent.

OSHRC DOCKET
NO. 92-3189

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 August 5, 1993. The decision of the Judge will become a final order of the Commission on September 7, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before August 25, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

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Review Commission
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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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

Ray H. Darling, Jr.

Date: August 5, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-3189

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SECRETARY OF LABOR, Complainant, v. EBAA IRON, INC., Respondent.	OSHRC Docket No. 92-3189

APPEARANCES:

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U. S. Department of Labor
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For Complainant

Robert E. Rader, Jr., Esquire
Rader, Campbell & Fisher
Dallas, Texas
For Respondent

Before: Administrative Law Judge James D. Burroughs

DECISION AND ORDER

EBAA Iron, Inc. (EBAA), contested serious violations of § 1910.23(c)(1), for failure to guard an open-sided floor or platform more than 4 feet above the adjacent floor or ground level; § 1910.132(a), for failure to require employees handling metal castings to wear steel-toed shoes; § 1910.1000(c),[1] for excessive exposure of an inner diameter grinder operator to excessive respirable crystalline quartz silica; § 1910.1000(e), for failure to provide

[1] The citation refers to § 1910.1000(d). It was amended to refer to § 1910.1000(c) (Tr. 36-37).

feasible administrative or engineering controls to protect employees from overexposure to crystalline quartz silica dust; and § 1910.1048(d)(1)(i), for failure to monitor employees' exposure to formaldehyde. EBAA contested "other" violations as follows: § 1910.22(a)(1), for failure to keep the aisleway between the Hunter 20 and Hunter 32 mold machines in a clean and orderly manner; § 1910.38(a)(1), for failure to have a written action plan available for review in the event of a fire emergency; § 1910.95(m)(1), for failure to maintain employee exposure measurements; and § 1910.1030(c)(1)(i), for failure to establish a written exposure control plan for employees who make contact with blood or other potentially infectious materials during first aid procedures.[2]

Facts

EBAA operates an industrial foundry in Cordele, Georgia, where it manufactures retainer gland devices for water piping systems (Tr. 16). It also operates a second foundry in Eastland, Texas (Tr. 99, 193). Prior to 1992, the Cordele facility has been inspected on at least two separate occasions. It is a typical foundry (Tr. 15).

Pursuant to a complaint containing fifteen allegations (Tr. 15), an inspection was conducted by industrial hygienist Robert Gidel at EBAA's Cordele, Georgia, foundry during the period of May 18 to 20, 1992. On May 18 an opening conference was held by Gidel with David W. Norris, EBAA's plant manager. Norris informed Gidel that EBAA's procedure required that the plant manager have permission from the general manager in order to allow an inspection of the facility (Tr. 19). Norris explained that he could not allow an inspection, that the consenting person, Earl Bradley, was in England and could not be reached on May 18 (Tr. 19).[3] Norris agreed to contact Bradley during the evening hours. Gidel was

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[2] The Secretary withdrew the serious allegations of § 1910.1048(d)(1)(i) and the "other" allegations of § 1910.95(m)(1).

[3] Ostensibly, because of a large number of processes and products that were patented, the owner issued the following letter to all supervisors (Exh. R-4; Tr. 312).

> You and our other supervisors incharge [*sic*] of company shops and property are hereby notified that at no time are you to permit the entry of any inspector from local, state
>
> (continued...)

to return at 7:00 a.m. on May 19 to learn if he could proceed with the inspection (Tr. 21). Upon his return on May 19, Gidel was informed by Norris that he could conduct an inspection limited to the complaint allegations (Tr. 313). Bradley had informed Norris that he would allow the inspection but it had to be limited to the allegations in the complaint (Tr. 313). Gidel initially recognized this restriction on his consent to inspect but now contends that it was expanded by the acquiescence of EBAA's safety director, Joy Cole.

Serious item 3b relates to feasible engineering controls for exposure to silica. The Secretary must establish an overexposure before feasible engineering controls become a viable issue. Due to EBAA's insistence and the indication of forceful evidence to support the argument that there was no overexposure to silica dust, it was agreed to hold a bifurcated hearing, if necessary.[4] If the Secretary established overexposure, additional discovery and experts' depositions were to be permitted and a second hearing held on the issue of feasible engineering controls. No evidence relating to serious item 3b was presented at the March 23 hearing. No further proceedings will be necessary.

A closing conference was held at the worksite with Norris and Cole on May 20. When all the sampling results were obtained, a second closing conference was held with Cole by phone to discuss the sampling results (Tr. 23).

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[3](...continued)

> or federal agencies into any of the property of EBAA Iron, Inc. for any reason. The inspection of the property of EBAA Iron, Inc. at any location is not permitted as a matter of policy of this company. Permission to inspect our properties can be given by the general manager only after the general manager has been notified. Should any inspector come to our property and ask permission to inspect, you are to get in touch immediately with the general manager and you will receive instructions.
>
> * * *

[4] The Secretary opposed this procedure. EBAA argued that it was a small company and did not have unlimited resources. It did not want to hire an expert unless the Secretary established a prima facie case. It felt strongly that the Secretary's evidence was insufficient.

Motion to Suppress

The complaint contained fifteen allegations (Tr. 103). The citations issued to EBAA contain only one issue relating to the complaint (Tr. 104). Five of the six issues being litigated in this case are beyond the scope of the original complaint (Tr. 104-105). EBAA believes that the inspection transgresses the limitations which were placed on the consent. For this reason, EBAA filed a motion to suppress the evidence on three of the allegations. The motion raises several important questions: (1) Who can give consent? (2) What constitutes consent? (3) Did Gidel exceed the scope of consent?

EBAA's Position

EBAA argues that the Secretary may not exceed the boundaries of the consent and that any evidence gathered beyond those boundaries must be excluded, citing *United States v. Martinez*, 949 F.2d 1117, 1119 (11th Cir. 1992). It states that whether consent has been given, whether there were any limitations placed on the consent, and whether the search conformed to those limitations are questions of fact to be determined by a totality of the circumstances, citing *United States v. Blake*, 888 F.2d 795, 798 (11th Cir. 1989). EBAA contends that the factual inquiry must consider what the parties knew at the time to be the object of the search and, in that light, must determine what a reasonable person would have understood the consent to encompass. *United States v. Martinez, supra*; *Florida v. Jimeno*, 500 U.S. __, 114 L.Ed.2d 197, 302-03 (1991). It submits that the Secretary has the burden of proving that consent was given, that it was unequivocal, and that the search did not exceed the scope of the consent given. *United States v. Strickland*, 902 F.2d 937, 941 (11th Cir. 1990); *United States v. Werking*, 915 F.2d 1404, 1409 (10th Cir. 1990).

Three serious and three "other" than serious allegations have been submitted for decision. Of these items, only the allegation pertaining to overexposure to silica is related to the complaint that was the catalyst for the inspection (Tr. 104). EBAA contends that three of the allegations are based on evidence obtained outside the boundaries of its consent

and must be dismissed unless the violations can be deemed to be within Gidel's "plain view" while inspecting the complaint items. *Tri-State Steel Construction, Inc.*, 15 BNA OSHC 1903, 1909, 1992 CCH OSHD ¶ 20,851 (Nos. 89-2611 & 89-2705, 1992).[5]

EBAA concedes that item 1 of the serious citation, alleging a guardrail violation, and "other" than serious citation, item 1, alleging a housekeeping violation, fall within the "plain view" exception and that serious citation, item 2, relating to steel-toed shoes, "other" than serious citation, item 2, relating to a written emergency evacuation plan, and "other" than serious citation, item 4, relating to a written exposure control plan, by Gidel's own admission, were not obvious and in "plain view" (Tr. 106-107). It submits that evidence relating to serious citation, item 2, and "other" than serious citation, items 2 and 4, should be suppressed and that these allegations should be vacated.

Assuming *arguendo* that Cole and Norris had authority to consent to an expanded inspection, EBAA contends it was not clear that Gidel was exceeding the scope of the original consent until the inspection was completed (Tr. 205-207, 256-258, 268, 341-344). EBAA argues that it would have been a useless gesture to object at that time since an unreasonable search had already occurred.

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[5] This is a well recognized exception in the law of warrants. In *Tri-State Steel Construction, Inc.*, 1992 CCH OSHD at ¶ 40,732, the Commission quoted the following:

> There are two significant limitations to the "plain view" doctrine, both of which render it inapplicable to the cases now before us. The first of these is that plain view *alone* is never enough to justify the warrantless seizure of evidence." *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971) ("*Coolidge*"). Instead, the "plain view" doctrine can only be applied when the OSHA inspectors made their "plain view" observations from a location where they are legally justified in being. *See id.*, 403 U.S. at 466; *Illinois v. Andreas*, 463 U.S. 765, 771 (1983) ("*Andreas*").
>
> "The second limitation is that the discovery of evidence in plain view must be inadvertent . . . . [W]here the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different." *Coolidge*, 403 U.S. at 469-70. *See also id.*, 403 U.S. at 471 n. 27 ("This Court has never permitted the legitimation of a planned warrantless seizure on plain view grounds . . . and to do so here would be flatly inconsistent with the existing body of Fourth Amendment law"); *United States v. Marbury*, 732 F.2d 390, 399 (5th Cir. 1984) ("*Marbury*").

The Law of Consent

The Fourth Amendment protects an individual against "unreasonable" search and seizure. *Florida v. Jimeno*, 500 U.S. __, 111 L.Ed. 2d 297 (1991). Since *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S. Ct. 1816 (1978), OSHA officials, in the absence of consent by the employer, have obtained warrants in aid of their inspection efforts. The standard of probable cause established in *Barlow's* is not as strict as criminal probable cause. "[T]he Secretary need only establish administrative probable cause, which is tested by a standard of reasonableness, requiring the magistrate or judge to 'balance the need to search against the invasion in which the search entails.' " *West Point Pepperell, Inc. v. Donovan*, 689 F.2d 950, 957 (11th Cir. 1982).

It has long been recognized that Government agents possessing neither reasonable suspicion nor probable cause, may obviate the need for a warrant by obtaining the voluntary consent of the individual. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041 (11th Cir. 1973). A consensual search is reasonable so long as it remains within the scope of consent. The extent of a properly obtained voluntary consent is confined to the terms of its authorization. The court in *United States v. Rackley*, 742 F.2d 1271 (11th Cir. 1984) states:

> A suspect's consent can impose limits on the scope of a search in the same way as do the specifications of a warrant, and those limits serve to restrain the permissible boundaries of the search. *United States v. Milian-Rodriguez*, 759 F.2d 1558, 1563 (11th Cir.), *cert. denied*, 474 U.S. 845, 106 S.Ct. 135, 88 L.Ed.2d 112 (1985).

If the Government does not conform to the limitations placed upon the right granted to search, the search is impermissible. *U. S. v. Blake*, 888 F.2d 795 (11th Cir. 1989).

Whether an employer voluntarily gave consent to a search is a question of fact to be determined by the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. at 249-50, 93 S.Ct. at 2059; *United States v. Chemaly*, 741 F.2d 1346, 1352 (11th Cir. 1984), *vacated*, 741 F.2d 1363, *reinstated on reh'g*, 764 F.2d 747 (11th Cir. 1985) (en banc). The Government bears the burden of proving both the existence of consent and that the consent

was not a function of acquiescence to a claim of lawful authority but rather was given freely and voluntarily. *United States v. Massell*, 823 F.2d 1503, 1507 (11th Cir. 1987).

The courts generally require the following three requirements to identify voluntary consent:

> (1) There must be clear and positive testimony that consent was "unequivocal and specific" and "freely and intelligently" given; (2) the government must prove consent was given without duress or coercion, express or implied; and (3) the courts indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived. *United States v. Werking, supra*, 915 F.2d at 1409 (10th Cir. 1990).

The scope of a consensual search is determined by the terms of the actual consent. *United States v. Strickland*, 902 F.2d 937, 941 (11th Cir. 1990); *United States v. Blake*, 888 F.2d 795, 798 (11th Cir. 1989). The Government may not exceed the boundaries of the consent, and any evidence gathered beyond those boundaries must be excluded. When an individual gives a general statement of consent, without express limitations, the scope of a permissible search is not without limits. The consent is still subject to the bounds of reasonableness. In other words, the search is limited to what the OSHA compliance personnel could reasonably expect the consent to mean. *United States v. Harris*, 928 F.2d 173 (11th Cir. 1991). The reasonableness inquiry must consider the state of knowledge of the parties at the time of the inspection. *Florida v. Jimeno*, U.S. Ct. at 1804. The inquiry must be done on a case-by-case analysis. *Schneckloth v. Bustamonte*, 412 U.S. at 224-225. Relevant factors to consider include the extent and level of cooperation by the employer, the employer's awareness of his right to refuse consent to the search, the employer's education and intelligence, and his belief that no incriminating evidence will be found. *United States v. Chemaly*, 741 F.2d at 1352 (11th Cir. 1984).

The Agreement

There is no dispute concerning the essential facts. Norris and Cole made it clear at the outset that they had no authority to consent to an inspection and that consent would

have to be given by Earl Bradley (Tr. 19, 205, 252-256, 311-312). Norris gave Gidel a copy of the January 25, 1982, internal letter from Earl Bradley, president and general manager of EBAA, notifying all supervisors that they were not to permit entry of any Government inspectors onto EBAA property. They were advised that consent could only be given by the general manager (Exh. R-4; Tr. 213). Gidel clearly understood that only Bradley could consent to an inspection (Tr. 18-20). Norris and Cole exhibited nothing to indicate that they could give consent in their own right by reason of their relationship to the premises. *See U.S. v. Matlock*, 415 U.S. 168 (1974). The evidence does not indicate that Norris and Cole possessed common authority over the property that gave them a sufficient relationship to allow an inspection or expand the consent of the inspection.[6] The law against unlawful search and seizure protects the right of privacy. Norris and Cole had no reasonable expectation of privacy in the premises and have not been shown to have any authority to waive the conditions of consent granted by Bradley. The owner had specifically removed any cloak of authority from Norris and Cole to allow an inspection. They were not delegated with any authority to expand the consent of the owner.

Bradley was on vacation in England when Gidel arrived to inspect (Tr. 19). Norris advised Gidel that he would have to wait until he could contact Bradley and see whether he would consent to an inspection. After being contacted, Bradley consented to an inspection but limited it to the complaint and related documents. He further stipulated that the inspection should not begin until corporate safety director Cole arrived at the Cordele, Georgia, plant. This condition was fulfilled by Gidel.

Cole testified that the terms of the consent were as follows (Tr. 204-205, 255):

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[6] The Supreme Court recognizes that any co-inhabitant has a right to permit the inspection in his own right and that others have assumed the risk that one of their number might permit the common area to be searched. *U.S. v. Matlock*, 94 S.Ct. at 993. *United States v. Sferas*, 210 F.2d 69, 74 (CA7), cert. denied sub nom, *Skally v. United States*, 347 U.S. 935, 74 S.Ct. 630, 98 L.Ed. 1086 (1954), expressed the rule "that where two persons have equal rights to the use or occupation of premises, either may give consent to a search, and the evidence thus disclosed can be used against either."

A. We allowed him to come in with his agreement that the only thing that he was going to look at was the items on the complaint letter and the related areas, and that was it. That would include, like, the OSHA 200 Log, the respirator program that would be related.

Q. When you say "related," do you mean related to the complaint?

A. To the complaint letter, yes.

Q. Did you -- and by that I mean, you as the representative of EBAA or any other representative of EBAA in your presence -- make it clear to the compliance officer that that's what you were agreeing to; that the inspection would be limited to the complaint items and a limited review of documents that related to the complaint items?

A. Yes, sir.

I'm sure there was no doubt in my mind that this man understood because that was the only way that I would allow the inspection to go forward.

Q. Now, did you have to get permission from the owner in order to allow the inspection? Did you and Mr. Norris have to get permission before you could go forward with the inspection?

A. Yes, sir.

Q. Did the owner stipulate that the inspection had to be limited to the complaint items?

A. Yes, he did.

He made two stipulations about the inspection going on. The first one was I had to be present. The second one was that it was restricted to what the complaint letter said and any related items to that complaint letter, like the OSHA 200 or respirator program.

The testimony of Cole and Norris provide clear and positive evidence that Bradley's consent was unequivocal, specific, and freely and intelligently given. There is nothing constitutionally

suspect in a person voluntarily allowing a search. *Schneckloth v. Bustamonte, supra.* There was an initial relinquishment of a "known right," but the scope of consent was restricted.

Gidel Knew Limits of Inspection

Gidel testified that he did not tell representatives of EBAA that the citations would be limited to the complaint items (Tr. 178). On May 18 Norris' main concern was whether entry would be allowed (Tr. 179). Upon Gidel's return on May 19, he testified that he was advised (Tr. 180):

> A. They said they would allow the inspection if we would look at the complaint items. But, again, I re-emphasized that or I said that in the area of the complaint items, there might be other things that we would look at, and we couldn't overlook those.
>
> Q. Did you understand their response to mean that they would not allow you to look at records or written plans?
>
> A. No.

Gidel acknowledged he made the following work notes of the inspection (Tr. 186-187):

> Q. Mr. Gidel, I'm reading from your work notes of the inspection, and it states that, "upon arrival in the plant, Mr. Norris agreed to the inspection being conducted for the complaint items only and also to a limited review of records."
>
> You're not disputing that now, are you?
>
> A. No, that's correct.

His testimony makes it clear he knew the limits of the inspection. He testified (Tr. 103):

> Q. Now, in this case, the company agreed to allow the inspection without requesting a search warrant, and you agreed to limit the inspection to the complaint items; isn't that right?
>
> A. That's correct.

Gidel was aware that Norris had to secure the consent of Bradley in order to allow him to conduct an inspection. He was advised that Bradley was in England and could not be reached on the afternoon of May 18 (Tr. 19). Norris would not allow Gidel to enter the facility on May 18 (Tr. 19). As suggested by Norris, Gidel returned on May 19 and, according to him, was informed (Tr. 20):

> Q. And, what were you informed?
>
> A. I was informed that the owner did give permission for the inspection and to look at the complaint items and accomplish what I had to do by either sampling or interviewing employees and taking a walk-around; all the things that we do during a normal OSHA inspection.
>
> Q. Were you given permission to review records and written plans?
>
> A. Yes.
>
> Q. Now, the previous day, was that the extent of the opening conference?
>
> A. The main thing that we did on the eighteenth was just to talk about what I would be doing during the inspection.
>
> Mr. Norris was hesitant to release anything to me until he had permission from the owner.

Gidel held a second opening conference, which was attended by Norris and Cole. Gidel testified (Tr. 21):

> A. On the nineteenth, I returned to the plant and I met with Mr. Norris and the safety director, Joy Cole, was there at the plant. She had driven there or flown and driven there over the night hours to meet me there at 7:00. So, both Ms. Cole and Mr. Norris and myself met for an abbreviated opening conference.

A walk-around was conducted in the presence of Cole (Tr. 22). Norris needed to work on other things (Tr. 313) and did not participate in the walk-around inspection (Tr. 313).

The consent was restricted but was voluntarily given by Bradley. This does not foreclose the inquiry. It is incumbent upon the Government not only to establish that the consent was obtained without coercion, but also that the search was conducted within the

purview of the consent received. *United States v. Blake, supra*, 888 F.2d at 800. The Secretary "must conform to the limitation placed upon the right granted to search." *United States v. Blake, supra*, 888 F.2d at 800. Care needs to be exercised in order to ensure that OSHA compliance personnel obtained proper consent and did not conduct an "unreasonable search."

Was There Any Expansion of Consent?

The Secretary contends that EBAA subsequently consented to an expanded inspection when Cole and Norris failed to object to Gidel's investigation of items outside the complaint. His logic is flawed. Bradley had expressly deprived all employees of any authority to consent to an inspection by OSHA. He had a right to expressly limit his employees' authority in this regard. Gidel knew that Cole and Norris had no authority to consent to an inspection. EBAA argues that where the Secretary knows the employees' authority has been limited, the Government may not rely on any appearance of authority the employee may have by virtue of his or her position or title, citing *United States v. Miller*, 800 F.2d 129, 135 (7th Cir. 1986). EBAA further submits that the Secretary cannot legitimatize the expansion of the inspection by contending Cole or Norris consented to an expanded inspection. Bradley was not present during the inspection, and the Secretary presented no evidence that he consented to an expanded inspection.

Allegations that were not in "plain view" were based on Cole's response to questions (Tr. 182-183). If Gidel had stopped to reasonably analyze the facts, he would have concluded that Cole had no authority to expand the consent. When Gidel arrived at the site on May 18, he was advised by Norris that he could not inspect until consent was given. Upon his arrival at the plant on May 19, he was advised that he could inspect as long as he limited his inspection to the complaint items and a limited review of documents that related to items in the complaint (Tr. 204). Gidel accepted the terms of consent and commenced his investigation of the complaint allegations and related documents.

Cole was aware that Gidel was on the premises pursuant to the terms granted by Bradley (Tr. 256). She did not consent to a broader search than permitted by Bradley (Tr.

256). Gidel had insufficient basis to conclude that Norris or Cole would expand the consent. Gidel was aware that Cole and Norris had no authority to consent to an inspection. He was unable to inspect until the decision was made by Bradley. This should have been an indication to Gidel that Norris and Cole did not have authority to expand the consent. There has been no evidence established that Norris and Cole could waive any of the terms of the consent. Cole and Norris have not been shown to have had reasonable expectation of privacy in the place being searched, or otherwise possessed authority to waive the condition of consent granted by Bradley. *See U.S. v. Matlock*, 415 U.S. 164, 171 (1974).

The Secretary argues that neither Norris nor Cole objected to the scope of the inspection as described by Gidel (Tr. 180-181). Gidel relied in part on the answers by Cole and employees to cite some of the allegations in this case. The Secretary states that the Supreme Court in *Florida v. Bostick*, 666 U.S. __, 111 S.Ct. 241 (1991), held that merely asking questions does not constitute a search within the meaning of the Fourth Amendment. The present facts are distinguishable from *Florida v. Bostick, supra*. Gidel was lawfully on the premises by accepting the consent granted by Bradley. Cole had no authority to waive that consent. The original consent granted by Bradley did not grant the right to question employees, which includes Cole. The Supreme Court in *Florida v. Bostick, supra*, recognized that repeatedly questioning does not constitute a seizure. The Court relied heavily on two factors: (1) Bostick was advised that he had a right to refuse the question, and (2) at no time was he threatened. Cole at no time was advised of her right to refuse to comment. In addition, Bostick involved the person claiming the search in lieu of an employee or agent of the owner of the business.

Cole probably understood the importance of her answers. She testified that she regarded her discussions with Gidel as more of an academic discussion. She knew that Gidel was on the premises only for the purposes granted to him by Bradley. The Fourth Amendment does not have the significance our founding fathers intended if evidence is allowed which exceeds the scope of consent. The inspection was not conducted pursuant to agreed terms. One has to view the terms of consent which were given in the case and resulted in the inspector being lawfully on the premises. An employer should be able to rely on the terms of consent made with Government agents without subterfuge. Cole had no

reason to suspect that her answers would constitute evidence to be used against EBAA. She had no authority to assist in presenting the Secretary with such evidence. She was not informed by Gidel that the items would be cited until the inspection had been completed. She assumed he had reference to the complaint items.

"Plain View"

Gidel's contention that the allegations involved violations that were covered by "the plain view" exception is not fully warranted. He testified (Tr. 105):

> A. Well, we limited the actual plant visit to the complaint items, but these were areas that were seen upon looking at the complaint items.
>
> They were seen in the vicinity of the complaint items, and it was mentioned in the opening conference if there was anything else we would see that looked to be a violation, you know, we would have to include that. We can't walk away from something we see.

Counsel for EBAA points to the admission by Gidel that the allegations pertaining to steel-toed shoes, emergency evacuation plans, and written exposure plans were not in plain view (Tr. 105-108). He testified (Tr. 106-107):

> Q. Well, was it open and obvious when you walked around the plant? Could you see whether employees were wearing steel-toed shoes?
>
> A. Not unless you got up close to them.
>
> Q. Even then, you can't tell by looking, can you?
>
> A. You have to go up to them and ask them, that's correct.
>
> Q. And, that's what you did. You asked the employee named Calvin Crater?
>
> A. That's correct.
>
> Q. If he was wearing steel-toed shoes?

A. That's correct.

Q. And, really, the company representatives had no way to stop you at that point and had no idea that you were considering a violation or a citation for steel-toed shoes until the closing conference, did they?

A. I guess that's correct.

Q. Let's take the emergency evacuation plan. That came up in the closing conference as well, didn't it?

A. That's correct.

Q. And, the company had no way of knowing that you were considering citations under that standard until after your walk-around was done, and you were in the closing conference, right?

A. That's correct.

Q. Whether or not they had a written exposure control plan is not something that's open and obvious as you walk around the plant.

A. No.

Evidence is Excluded

EBAA requests that the evidence with respect to the serious violation of § 1910.132(a) and "other" violations of §§ 1910.38(a)(1) and 1910.1030(c)(1)(i) be suppressed and the allegations be vacated. The three allegations were not any of the complaint items that Bradley gave his consent to inspect and were not within "plain view" (Tr. 107-108). Gidel acknowledged these facts (Tr. 104-108).

The motion is granted. The allegations and penalties are vacated with regard to the serious violations of § 1910.132(a) and "other" allegations of § 1910.38(a)(1) and § 1910.1030(c)(1)(i).

The allegation with regard to the serious violation of § 1910.23(c)(1) and "other" than serious violation of § 1910.22(a)(1) were within "plain view" as Gidel conducted the walk-

around. EBAA recognizes this fact and does not argue to the contrary. Sections 1910.1000(c) and (e) were related to the complaint. EBAA argues that the evidence fails to support the violations or that compliance with § 1910.23(c)(1) would create a greater hazard.

SERIOUS CITATION

Item One - § 1910.23(c)(1)

Serious Citation No. 1 alleges a violation of § 1910.23(c)(1), which requires that open-sided floors or platforms be guarded by a standard railing 42 inches high. It provides:

> (c) *Protection of open-sided floors, platforms, and runways.* (1) Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a toeboard wherever, beneath the open sides . . . .

EBAA has an elevated pouring platform where it pours molten iron into molds (Tr. 115, 195). There is a standard railing around the pouring platform except in one location. The railing is lower in this one location in order to allow the pouring ladle, bringing molten iron from the furnaces, to pass through (Tr. 116, 195-196). The Secretary recommended this allegation because the railing where the pouring ladle travels through is only 22 inches high (Tr. 25).

In its answer, EBAA raises the greater hazard affirmative defense. The Commission has recognized that an employer can establish such a defense by showing (1) the hazards created by compliance with the standard are greater than the hazards of noncompliance; (2) alternative means of protecting employees from the hazards are not available; and (3) a variance is not available or application for a variance is inappropriate. *E.G., Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1225, 1991 CCH OSHD ¶ 29,442, p. 39,681 (No. 88-821, 1991); *see Walker Towing*, 14 BNA OSHC 2072, 2078 & n. 10, 1991 CCH OSHD ¶ 29,239, p. 39,161 & n. 10 (No. 87-1359, 1991).

EBAA argues that it would create a greater hazard to install a 42-inch railing. The pouring ladle lifts up over that railing. The pouring ladle is suspended from an overhead hoist by a chain (Tr. 201). It is as close to the floor as possible. This permits the pourer guiding the ladle to maintain eye contact with the molten iron as it begins to slosh and avoid being burned by a splash. The molten iron is 2,650 degrees Fahrenheit. The procedure of having to raise the ladle over a 42-inch railing increases the chance the molten metal will slosh and spill (Tr. 197).

Cole testified that it is standard practice in foundries to keep a pouring ladle as close to the ground as possible when moving molten iron (Tr. 196). According to her, if a spill overflows from a high ladle, it will splatter and endanger more people than at a lower level. If the ladle is low and it spills the molten metal, it is "going to stay pretty much where it is" (Tr. 197).

Gidel agreed "it would make sense" to keep the pouring ladle as close to the ground as possible (Tr. 117). The Secretary argues that EBAA should have designed some alternative method of fall protection, using removable guardrails or chains at the location where the pouring ladle crossed through the guardrail onto the pouring platform. EBAA argues that the Secretary never presented any evidence on the feasibility of alternative methods of fall protection. EBAA's argument is not well founded. The burden is on EBAA to establish that there are no alternative means of protection which could have been used in lieu of compliance with the standard. EBAA bears the burden of proof on this point. EBAA presented testimony that it had considered alternative methods of fall protection, including a gate, a chain, a removable railing, and safety belts, and explained, according to it, why each of these alternatives presented a greater hazard (Tr. 199-203). The mere argument that alternative methods of compliance will not work is unpersuasive. The evidence fails to establish that EBAA, in good faith, pursued alternative methods of compliance.

EBAA's evidence fails to indicate that a greater hazard existed if employees complied with the standard. No steps were taken to file for a variance. It contends that the filing would have been a useless gesture. The greater hazard defense requires a showing that a

variance is not available or inappropriate. EBAA may consider the filing to be a useless gesture, but its evidence does not establish this point.

The allegation is affirmed as a *de minimis* violation. In 1978 OSHA issued OSHA Instruction Std. 1-1.8 directing field personnel not to apply § 1910.23(c) to metal pouring platforms in hot metal pouring operations such as are involved in this case. OSHA Instruction Std. 1-1.8 precludes anything but a *de minimis* violation.

"OTHER" CITATION

Item One - § 1910.22(a)(1)

Item 1 of the "other" citation alleges a violation of the general housekeeping standard at § 1910.22(a)(1) because the compliance officer saw some sand on the floor between the Hunter 20 and the Hunter 32 mold machines. Section 1910.22(a)(1) provides:

> (a) *Housekeeping.* (1) All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition.

He believed the sand was in a "passageway" and was a tripping hazard (Tr. 86-88).

There is always some sand on the floor in a foundry. Gidel admitted that "it's inherent that there's going to be some sand on the floor" (Tr. 132). At this particular location the sand came from several sources. First, there was a trench in the floor that is normally filled with sand and leveled off (Tr. 321). Sand gets kicked out of that trench onto the adjacent concrete floor (Tr. 273, 316). Sand trickles from the overhead belts in that area (Tr. 132, 314). Sand trickles out of the carts that carry the molds as the conveyor brings them from underneath the pouring platform back on top for a new load (Tr. 132, 273). EBAA states that the issue is not whether the floor must be kept perfectly clean--that is impossible (Tr. 132). The issue is whether EBAA cleaned the sand off the floor frequently enough to prevent a hazard.

The area between the Hunter 20 and Hunter 32 mold machines is *not* a regular "passageway" as Gidel believed. It is a work area (Tr. 266-267, 313). The area itself is small and narrow--probably about 3 to 4 feet wide (Tr. 129, 293-294, 319, 320). Only one

person can work there at a time (Tr. 293). EBAA provides a shovel to the employee at his work station and requires that he clean up the sand if it becomes a problem (Tr. 273, 296, 314). The employee is required to shovel up the sand at least once a shift and to leave the area clean for the beginning of the next shift (Tr. 273, 314).

EBAA contends the question reduces to whether the employee at his work station had allowed the sand to accumulate in that area to the point that it was a tripping hazard. Cole and Norris observed the area before the shift commenced on the morning of the inspection. There was no sand on the floor (Tr. 272, 314, 318).[7] Gidel observed the area shortly before noon (Tr. 273). Norris observed the area an hour or two after Gidel. He observed only 2 or 3 inches of sand (Tr. 319). When questioned by the administrative law judge about how much sand would have accumulated when the compliance officer was there, Norris testified that "Normally, there wouldn't be that much sand [to create a tripping hazard] in a half shift's period" (Tr. 319).

EBAA admitted it did not specifically focus on the amount of sand on the floor at the time. It did not suspect the sand on the floor was an issue. Gidel did not point it out during the walk-around. Cole testified that if there had been enough sand to constitute a hazard, she would have noticed, and she did not notice a tripping hazard when they went through that area (Tr. 267, 274). Norris likewise testified that when he went through the second time after the compliance officer had been there, there was not enough sand to be a tripping hazard. If there had been enough sand to be a tripping hazard, he stated that he would have required that it be cleaned up (Tr. 314-315).

Gidel initially testified that the sand was 8 to 9 inches deep (Tr. 86). He later admitted the sand that was 8 to 9 inches deep was the sand leveled off in the trench, not on the floor (Tr. 131). On rebuttal, Gidel agreed with Norris' testimony that there were only 2 inches of sand on the floor (Tr. 335). There is a fact question as to whether 2 inches of sand in a 2- to 3-foot diameter (Tr. 319-320) constitutes a tripping hazard to the worker at his work station. Gidel believed it was a hazard. Norris testified it was not a hazard. Cole

[7] There is a typographical error in the transcript at page 318, line 13. This typographical error is clear from the next line of testimony, as well as Norris' testimony at page 314 that there was *no* sand on the floor at 7:00 a.m. in the morning.

testified that she did not observe a hazard in that area. The allegation is vacated. No evidence was introduced which showed any employee experienced difficulty as a result of excess sand. The Secretary has failed to prove by a preponderance of the evidence that there was a violation of the standard.

Item 3a - § 1910.1000(c)

Item 3a alleges that an inner diameter grinder operator was exposed to levels of respirable quartz silica in excess of the permissible exposure level specified in § 1910.1000(c), which provides:

> (c) *Table Z-3.* Table Z-3 is applicable for the transitional period and to the extent set forth in paragraph (f) of this section. An employee's exposure to any substance listed in Table Z-3 in any 8-hour work shift of a 40-hour work week shall not exceed the 8-hour time weighted average limit given for that substance in the table.

EBAA contends that the grinder could not be overexposed to silica because there is simply no silica in that area or in the materials he works with. EBAA submits that OSHA's sampling and lab results cannot be taken to establish overexposure. It argues that the sampling is flawed. Gidel failed to notify the lab of the presence of zircon in the grinder's immediate work environment. OSHA Instruction CPL 2-2.20B requires awareness of zircon because it will show up in the lab analysis as silica if the analysis is by X-ray diffraction, as it was here.

EBAA also contends that serious citation, item 3, should be vacated for the additional reason that EBAA had no knowledge or reason to believe there was overexposure to silica. EBAA's prior sampling and OSHA's own prior sampling in 1990 showed no overexposure. Even if there were an overexposure, it contends it had implemented a combination of engineering controls and personal protective equipment that complied with the standard.

Lack of Silica in Grinding Area

The inner diameter grinder's job is to grind rough edges off the finished casting (Tr. 137). It is the last step in the manufacturing process. After the molten iron has cooled in the packed sand mold, the sand mold is literally shaken apart in an "oscillating shaker pan." The castings are conveyed into a "gideon" (described as a big washing machine laid on its side) where they are rolled around and banged against each other to knock the residual sand off. Next, the castings are disconnected from each other, or "degated," with a sledge hammer. Then the castings are run through a shot blaster. When the castings come out of the shot blaster, they are supposedly "shiny and clean"--a fact not refuted by the Secretary. In the final procedure, they go to the grinder to smooth off any rough edges. EBAA claims that by the time the castings get to the grinding area, there is no sand on them (Tr. 137-138, 217-218, 305-308).

Due to the lack of sand in the grinding area, EBAA questions where the silica comes from that allegedly shows up in the sampling results. Gidel was uncertain as to the source of the sand (Tr. 137-140). Gidel's testimony that it was "very unlikely" the silica dust causing the grinder's overexposure came from an adjacent area is supported by his sampling results. Those results showed that the employees in the other areas, including the shakeout area, were not overexposed (Tr. 140-141). If the employees who mix the sand and who work in the area where the sand is knocked off the castings are not overexposed, then it is difficult to see that the grinder would be overexposed from the dust generated in these other areas.

Gidel, in part, contends that the "cleaning process isn't as complete as they think it is," and there was still enough sand left on the castings when they got to the grinder to cause overexposure (Tr. 138, 141). EBAA submits that this theory defies all reason. Even if the shaker pan gideon and the shot blaster did not remove every speck of sand, EBAA states that it would be impossible for enough sand to remain on the casting to cause the welder to be exposed to greater levels of silica than the shakeout operator.

Cole testified that there is no independent source of silica in the grinding area (Tr. 304). If the casting is clean of sand when it gets to the grinding area and, if there is no

overexposure from sand in adjacent areas, then EBAA submits that the only other possible source of silica could be the grinding wheel (Tr. 140). The material safety data sheet (MSDS) for the grinding wheel shows that silica, together with five other impurities, comprises less than one percent of the grinding wheel (Exh. R-3; Tr. 219-220).

EBAA states that there is no sand in the grinding area and that the grinder could not possibly have been overexposed to silica. So what, then, of the "readings" that Gidel obtained from his sampling? EBAA believes that the readings are the zirconium oxide in the grinding wheel that was mistaken by the lab for silica. It submits that the lab results are unreliable. Gidel testified that a sampling cassette will occasionally pick up an "extra" substance that is not being tested which will affect the reading. This phenomenon is known as "interference" (Tr. 114-115). Because of this phenomenon, OSHA's technical manual, issued by OSHA Instruction CPL 2-2.20B, directs OSHA hygienists to notify the OSHA lab when certain "interfering substances" are present in the work environment so that the lab can take additional measures to verify the analysis (Exh. R-2).

CPL 2-2.20B provides that the compliance officer should notify the lab if any of the thirteen chemicals listed in subsection 2.c.(2)(b) are present in the work environment because these substances will interfere with the analysis, *i.e.*, show up as silica. One of the interfering chemicals listed is zircon, a major component of the grinding wheel used by the grinder in this case. Gidel testified that he asked the lab to analyze for a single component--silica--from a mixture (Tr. 146). He did not tell the lab there might be zircon present in the sample (Tr. 148, 150). He had never read CPL 2-2.20B and was not aware that zircon can show up in the lab analysis as silica (Tr. 148). After reading CPL 2-2.20B, Gidel admitted it was possible the lab had mistaken the zircon for silica in the sample (Tr. 151).

Additional facts tend to cloud the reading and contribute to its unreliability. The MSDS for the grinding wheel shows it contains 40 percent zirconium oxide (Exh. R-3; Tr. 220). Gidel testified the grinder's breathing zone was "very close" to the part he was grinding (Tr. 141). A prior OSHA inspection detected no overexposure. Sampling by EBAA had disclosed no overexposure. There was only one employee sampled that resulted in an overexposure. There is no corroboration to support the readings on the individual

involved. There has been no showing of any significant source of sand to which the operator was exposed.

The Secretary Did Not Establish the Requisite Element of Knowledge

OSHA had sampled for silica in 1990 and determined there was no overexposure at that time (Tr. 143). Although the 1990 sampling was done on a "different piece of equipment," the fact remains that the sampling was done in the grinding area (Exh. C-4; Tr. 297). EBAA had also previously tested for silica and had not detected an overexposure (Tr. 304). EBAA had no knowledge or reason to believe its grinders were overexposed to silica (Tr. 221, 303). EBAA was unaware of a source of sand, and the Secretary did not show any reason for the overexposure. Since knowledge is an essential element of the Secretary's burden of proof, item 3a must be vacated. *See e.g. Secretary of Labor v. OSHRC and Milliken & Co.*, 947 F.2d 1483, 1484 (11th Cir. 1991), affirming 14 OSHC 2079 (No. 91-8365, 1991).

EBAA Contends It Had Implemented a Combination of Engineering Controls and Personal Protective Equipment That Complied With the Standard

On January 19, 1989, OSHA revised § 1910.1000 to impose new PELs for over 400 substances, including silica. The new PELs were designated as "final rule limits." Existing PELs were designated as "transitional limits." The revised standard provided a transitional period of September 1, 1989, through December 30, 1992, for implementing engineering and/or administrative controls to achieve compliance with the new final rule limits.

EBAA contends that there can be no violation because it was in compliance with the transitional rules. It contends that employers were permitted to achieve compliance with the final rule limits "by any reasonable combination of engineering control, work practices, and personal protective equipment." In this case, the inspection took place in May, 1992. The evidence reflects that EBAA was using a combination of engineering controls and personal

protective equipment to protect its employees from silica. EBAA contends that even if the levels of silica in its foundry exceeded its PEL, it was still in compliance because it was in the transitional period which allowed it to use a combination of respirators and engineering controls. The Secretary disputes this contention. It is unnecessary to resolve this question since EBAA had no knowledge of the overexposure and it is considered unreliable.

The allegation is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

In view of the foregoing decision, it is

ORDERED: (1) That item 1 of the serious citation and proposed penalty issued to EBAA on September 10, 1992, is affirmed as a *de minimis* violation and no penalty is assessed for the violation;

(2) That items 2, 3a and 3b of the serious citation and proposed penalties issued to EBAA on September 10, 1992, are vacated; and

(3) That the "other" citation and proposed penalties issued to EBAA on September 10, 1992, are vacated.

James D. Burroughs

JAMES D. BURROUGHS
Judge

Date: July 26, 1993