United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,

Complainant,

v.

AMERICAN AIRLINES, INC.,

Respondent.

OSHRC Docket Nos. 93-1817
& 93-1965

DECISION

BEFORE: WEISBERG, Chairman; and MONTOYA, Commissioner.

BY THE COMMISSION:

Following a fatality at an aircraft maintenance/repair facility operated by American Airlines ("AA") in Tulsa, Oklahoma, the Occupational Safety and Health Administration ("OSHA") issued citations for other-than-serious and serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Two of the serious items alleged noncompliance with OSHA's guardrail requirements for floor openings and open-sided floors. Administrative Law Judge Paul L. Brady rejected AA's claim that OSHA was preempted from enforcing these standards against it, affirmed the items and assessed penalties of $2,500 and $5,000 for them, respectively. Two other serious items alleging noncompliance with OSHA's hazard communication requirements were also affirmed by the judge, for which he assessed two $1,275 penalties. He also vacated an other-than-serious item that alleged noncompliance with various recordkeeping requirements.

For the reasons that follow, we affirm the judge's decision and penalty assessments as to the four serious items and reverse the judge as to the other-than-serious recordkeeping item.

GUARDRAILS

Preemption

To make out an exemption under section 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1),[1] an employer must establish that another federal agency has the statutory authority to regulate the cited working conditions and that it has exercised that authority by issuing regulations that have the force and effect of law. *Alaska Trawl Fisheries, Inc.*, 15 BNA OSHC 1699, 1703-4, 1991-93 CCH OSHD ¶ 29,758, p. 40,449 (No. 89-1017, 1992). AA argues that a "ground operations manual" that the Federal Aviation Administration ("FAA") required it to keep is such an exercise of regulatory authority. This manual includes a provision for guardrails.

It is well-settled that the FAA has the statutory authority to regulate the safety of airline employees. *Northwest Airlines, Inc.*, 8 BNA OSHC 1982, 1985-89, 1980 CCH OSHD ¶ 24,751, pp. 30,487-91 (No. 13649, 1980). As the Secretary points out, however, it is also well-settled that the only FAA manuals having "the force and effect of law" so as to preempt OSHA are those subject to FAA approval. *Northwest Airlines, Inc.*, 8 BNA OSHC at 1989-93, 1980 CCH OSHD ¶ 24,751, at pp. 30,487-91 (lockout/tagout requirement in FAA-accepted/approved maintenance manual preempts OSHA lockout/tagout standard). As the FAA points out in its *amicus* brief in this case, ground operations manuals do not have "acceptable" or approved status pursuant to the pertinent FAA regulations; only maintenance

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[1]Section 4(b)(1) provides:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

manuals have such status. *American Airlines, Inc.*, 9 BNA OSHC 1415, 1981 CCH OSHD ¶ 25,225, p. 31,169 (No. 78-918, 1981) (involving AA maintenance manual). *Compare* 14 C.F.R. § 43.13(c) ("[u]nless otherwise notified by the Administrator, the methods, techniques, and practices contained in the maintenance manual or the maintenance part of the air carrier manual . . . constitute acceptable means of compliance . . ."), *with* 14 C.F.R. § 121.133(a) ("[e]ach domestic and flag air carrier shall prepare and keep current a manual for the use and guidance of flight and ground operations personnel in conducting its operations"). In sum, the FAA only requires the airlines to prepare ground operations manuals. As these manuals are not subject to FAA approval or disapproval, their safety provisions lack the force and effect of law necessary to constitute an exercise of regulatory authority preempting OSHA.[2] Accordingly, we affirm that part of Judge Brady's decision rejecting AA's preemption claim.

Merits

The citation items allege that guardrails required by 29 C.F.R. § 1910.23(a)(7) and 29 C.F.R. § 1910.23(c)(1)[3] were not in place around several unguarded floor openings and an

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[2]Because we find as a threshold matter that the manual AA relies on does not have the force and effect of law, we find it unnecessary to reach AA's evidentiary and procedural arguments regarding the FAA's treatment of the manual during investigations and enforcement activities. Also, contrary to the argument presented by AA, *American Airlines* is not res judicata since it apparently did not involve a ground operations manual. Even if the wording of the guardrail provision now before us does not substantially differ from the provision involved in *American Airlines*, the controlling factor for our consideration at this point is its inclusion in a manual lacking the force and effect of law.

[3] The standards provide as follows:

> **§ 1910.23 Guarding floor and wall openings and holes.**
>
> (a) *Protection for floor openings.*
>
> . . . .
>
> (7) Every temporary floor opening shall have standard railings, or shall be constantly attended by someone.

(continued...)

open-sided floor at AA's facility. The work station in question was an approximately 27-foot high (*i.e.*, three-story) "tail stand" or mobile work platform that was positioned at the tail section of an aircraft during maintenance work. The leading edge of each platform level was equipped with "sliders," *i.e.*, extensible tray-like platform sections which closed the gaps between the tail stand's work surfaces and the aircraft's skin. The open-sided floor that the compliance officer observed was along the outside edge of the tail stand where an existing guardrail was not fully extended along with the slider. The floor openings, on the other hand, were on the tail stand's second and third stories where some sliders were not extended far enough toward the aircraft, leaving gaps that "ranged up to a foot" wide. The fatality in this case happened when an employee fell from the tail stand's third story all the way through to the ground.

An aircraft painter who was on the tail stand around the time of the accident testified that some of the sliders — which he specified were 4-5 feet long, were "wide open" while employees "walked around" them. An AA quality assurance inspector gave similar testimony, stating that four sliders were completely open on the tail stand's second level and that various sliders on the top level were also open.

In order to prove that an employer violated an OSHA standard, the Secretary must prove that (1) the standard applies to the working conditions cited, (2) the terms of the standard were not complied with, (3) employees had access to the violative conditions, and (4) the employer knew of the violative conditions or could have known with the exercise of reasonable diligence. *Astra Pharmaceutical Prods., Inc.*, 9 BNA OSHC 2126, 1981 CCH OSHD ¶ 25,578 (No. 78-6247, 1981), *aff'd*, 681 F.2d 69 (1st Cir. 1982). Here it is undisputed that the standard applies. It is also clear that the standards' terms were not

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> . . . .
>
> (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 . . . on all open sides . . . .

complied with and that employees were exposed to the violative conditions. We find no basis for AA's claim that the openings were too small to present a hazard in light of the painter's testimony that the sliders were "wide open" and the fact that an employee fell through. Moreover, we have found that a floor opening "measuring 12 inches or more in its least dimension," as defined by 29 C.F.R. § 1910.21(a)(2), presents a hazard even if employees cannot fall all the way through. *Monitor Constr. Co.,* 16 BNA OSHC 1589, 1592, 1994 CCH OSHD ¶ 30,338, p. 41,824 (No. 91-1807, 1994). We also find that AA had constructive knowledge of both the open sliders and the open-sided floor. The record establishes that these conditions were in plain view and that supervisory personnel were present throughout work operations.[4]

Penalties

In assessing penalties, we must give "due consideration" to the gravity of the violations and the employer's size, history of violation, and good faith pursuant to 29 U.S.C. § 666(j). The violations are undisputedly serious, and the judge correctly found their gravity "severe," for several employees were exposed throughout a work shift to an open-sided floor 27 feet above ground level and to numerous other floor openings at that and lower heights. Judge Brady also correctly found, on the basis of this evidentiary record, that AA is a large employer with no significant history of prior violation who is entitled to credit for good faith because of its good safety program. We therefore affirm Judge Brady's assessment of $2,500 for the floor openings and $5,000 for the open-sided floor.[5]

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[4]AA did not comply with Commission rule 34(b), 29 C.F.R. 2200.34(b), by raising the affirmative defense of unpreventable employee misconduct in its answer, so that defense is not properly before us. However, even if it had been properly raised, AA failed to prove it here. In particular, AA failed to show that it had a communicated and enforced safety rule prohibiting employees from walking around open sliders and requiring employees to close the sliders after performing necessary work.

[5]Chairman Weisberg agrees to affirm Judge Brady's penalty assessments. He believes, however, that, particularly given the size of AA, $2,500 is too low a penalty for so many

(continued...)

HAZARD COMMUNICATION

The other two serious items allege violations of 29 C.F.R. § 1910.1200(f)(5)(i) and (ii), which require each employer to "ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with the . . . (i) [i]dentity of the hazardous chemical(s) contained therein; and (ii) [a]ppropriate hazard warnings[.]" The compliance officer observed employees in AA's blade and vane shop using an acid, *i.e.*, a corrosive that can cause chemical burns, out of a container labeled only as "Class B Etchant." The container of "Class B Etchant" was in plain view and ready for use on a workbench. The label did not identify the chemicals that are in a "Class B Etchant" and did not list the appropriate hazard warnings.

AA had a written hazard communication program under which its personnel were trained in hazard communication requirements.[6] AA's supervisors therefore had actual knowledge of the labeling requirements and should have discovered any violative labeling. Therefore, inasmuch as the improperly labeled bottle of acid was in plain view, we reject AA's arguments that it lacked knowledge of the violations. We affirm the judge's finding that AA violated labeling standards.

We also affirm Judge Brady's assessment of $1,275 penalty for each item. In view of the corrosiveness of the acid, the gravity of these terms were properly found to be severe.

(...continued)
unguarded floor openings, particularly when the fatal 27-foot fall occurred through one of the unguarded openings. He would therefore have preferred to assess $5,000, which is the amount that the Secretary originally proposed.

[6]An employer is not excused from using and ensuring the use of proper labeling simply because it provides training in the requirements for proper labeling. *Cf. ARA Living Centers,* 15 BNA OSHC 1417, 1418, 1991-93 CCH OSHD ¶ 29,552, pp. 39,956-57 (No. 89-1894, 1991) (compliance with information requirements of hazard communication standard does not excuse failure to comply with training requirements).

We find no merit in AA's claim that a single penalty should be assessed for both items because the same penalty calculation sheet was used for both.[7]

RECORDKEEPING

The Secretary's allegation that AA failed to comply with 29 C.F.R. § 1904.2(a)[8] turns on AA's failure to use an OSHA 200 and on the failure of AA's internally-generated form to include the information that an OSHA 200 requires in its columns "D" and "1 through 13."[9] Judge Brady vacated the item because "[i]t is not sufficiently shown how [AA]'s equivalent form was not acceptable in meeting the standard's requirements."[10]

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[7]Commissioner Montoya would have preferred to group these violations for penalty purposes, as abatement of either violation would, in all likelihood, have resulted in abatement of the other. *H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046, 1981 CCH OSHD ¶ 25,712, p. 32,056 (No. 76-4765, 1981).

[8]Section 1904.2(a) provides that:

> (a) Each employer shall, except as provided in paragraph (b) of this section, (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred. For this purpose form OSHA No. 200 or an equivalent which is as readable and comprehensible to a person not familiar with it shall be used. The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

[9]The Secretary does not take exception to the judge's vacation of the allegation that AA recorded one calendar year's entries in the next calendar year, so we will not address the allegation.

[10]Judge Brady also relied on testimony that OSHA had approved AA's computerized form at another AA facility. But, absent evidence of affirmative misconduct, a compliance officer's opinion does not estop the Secretary. *See Con Agra Flour Milling Co.*, 16 BNA OSHC 1137, 1148-49 n.15, 1993-95 CCH OSHD ¶ 30,045, p. 41,241 n.15 (No. 88-1250, 1993), *rev'd in part on unrelated grounds*, 25 F.3d 653 (8th Cir. 1994).

We disagree with the judge regarding the burden of proof. In *Dick Corp.*, 7 BNA OSHC 1951, 1953, 1979 CCH OSHD ¶ 24,078, p. 29,249 (No. 16193, 1979), we held that the cited employer, not the Secretary, has the burden of proving the equivalence of the protection in use pursuant to a safety standard that permits the use of equivalent protection. Thus, we similarly hold here that it is AA that has the burden to establish the equivalence of its recordkeeping form.

Applying the proper burden of proof, we must disagree with the judge's decision to vacate this item. In column D of an OSHA 200, an employer must record an injured/ill employee's "regular job title."[11] AA's form did not include the employee's job title, but AA recorded the employee's company number, name, branch number, and social security number. Moreover, according to unrefuted testimony, the branch numbers indicated an injured/ill employee's department assignment at the time of his or her injury/illness. Also, according to manager Flynn, AA could have provided explanations for the branch numbers. In *Anoplate Corp.*, 12 BNA OSHC 1678, 1688, 1986-87 CCH OSHD ¶ 27,519, p. 35,686 (No. 80-4109, 1986), the Commission held that a failure to record an injured employee's job title was *de minimis* because the employer described each injured employee's injury, recorded each injured employee's name, and had such a small workforce that the company manager could "make a fair assumption as to the location in the plant" of the particular employee's injury. Similarly here, we find that AA's failure to record job titles should be characterized as *de minimis* because AA did record enough identifying information to reveal the injured/ill employee's department assignment.

Columns 1-6 on injuries and 8-13 on illnesses are for recording fatality dates, or the occurrence of and number of lost-time days and/or restricted activity days, or the fact that no workdays were lost during the particular injury/illness. AA's form had fewer columns and their headings were in code — "NLT" for no lost time, "OUT" and "RTW" for dates out and returned to work, "R.D.-#Days" for restricted duty days, and "Days Lost" for the number of

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[11]AA manager John R. Flynn's discussion of column D's contents is erroneous.

days lost from duty. We find the meaning of these codes to be essentially self-evident. Thus, their use amounts, again, to a mere technical or *de minimis* violation. Where all of the details required by OSHA are being given, "the purposes of the form" are being "achieved." *See Anoplate,* 12 BNA OSHA at 1688, 1986 CCH OSHD at p. 35,686.[12] However, the lack of a column or code for fatality dates equivalent to the one in the OSHA 200 does establish a basis for affirming the item as other-than-serious and assessing some penalty.

We also find that AA violated the standard by failing to differentiate certain illnesses in which OSHA is apparently particularly interested, such as "skin diseases" or "repeated trauma," from "other occupational illnesses." This is the function of the OSHA 200's column 7. AA's form only gave verbal descriptions with unclear codes.[13] AA manager Flynn only testified that the codes distinguishing injuries from illnesses were "available." But AA's failure to highlight those illnesses listed on the OSHA 200 could prevent "the purposes of the form" from being "achieved." *Compare Kohler Co.,* 16 BNA OSHA 1769, 1993-95 CCH OSHD ¶ 30,457 (No. 88-237, 1994) (miscoding injuries is not *de minimis* because it can hinder OSHA's use of the employer's form).

On review, the Secretary asks the Commission to affirm the proposed penalty of $1,800 for noncompliance with recordkeeping requirements. Since we find substantially less pervasive noncompliance than the Secretary alleged and substantially lower gravity overall, we assess a penalty of $900.

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[12]*Kohler Co.,* 16 BNA OSHC 1769, 1993-95 CCH OSHD ¶ 30,457 (No. 88-237, 1994), only involved the *miscoding* of recordable injuries as nonrecordable "FA" (first aid) cases. OSHA accepted Kohler's computerized format utilizing a coding system. 16 BNA OSHC at 1771 n.4, 1993 CCH OSHD at p. 42,059 n.4.

[13]For example, "35-nerve injury both hands" was coded "99" while "35-hands falling asleep" was coded "98" and "34-pain in wrist (carpel tunnel[])" was coded "98." In general, the number "35" would seem to designate a hand problem (be it an injury — "laceration" — or an illness — "numbness"), whereas the number "34" would seem to designate a wrist injury or illness. But the code "98" was also associated with "42-strain to back," "13-hearing loss," and "44-congestion in chest."

ORDER

Accordingly, we affirm serious violations of 29 C.F.R. § 1910.23(a)(7) and 29 C.F.R. § 1910.23(c)(1), for which we assess penalties of $2,500 and $5,000, respectively. We affirm serious violations of 29 C.F.R. § 1910.1200(f)(5)(i) and (ii), for which we assess two $1,275 penalties. We also affirm an other-than-serious violation of 29 C.F.R. § 1904.2(a), for which we assess a penalty of $900.

Stuart E. Weisberg
Stuart E. Weisberg
Commissioner

Velma Montoya
Velma Montoya
Commissioner

Dated: February 23, 1996

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket Nos. 93-1817 & 93-1965
AMERICAN AIRLINES, INC.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on February 23, 1996. **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

Date: February 23, 1996

Ray H. Darling, Jr.
Executive Secretary

93-1817 & 93-1965

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SECRETARY OF LABOR Complainant, v. AMERICAN AIRLINES, INC. Respondent.	OSHRC DOCKET NOS. 93-1817 93-1965

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 December 8, 1994. The decision of the Judge will become a final order of the Commission on January 9, 1995 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before December 28, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

Executive Secretary
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: December 8, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NOS. 93-1817 & 93-1965

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SECRETARY OF LABOR, Complainant, v. AMERICAN AIRLINES, INC., Respondent.	OSHRC Docket Nos. 93-1817 and 93-1965

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For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

These proceedings are brought pursuant to section 10 of the Occupational Safety and Health Act of 1970 (Act). American Airlines, Inc. (American), contests three citations and proposed penalties issued by the Secretary of Labor (Secretary) which have been consolidated in the above dockets for hearing and decision.

The citations, alleging violations of the Act, were issued as a result of an inspection of American's maintenance and repair facility in Tulsa, Oklahoma. In answer to the complaint, American affirmatively states that jurisdiction over the workplace involved in this

proceeding lies with the Federal Aviation Administration (FAA). It is contended that § 4(b)(1) of the Act precludes its application to the work conditions and areas in issue in these proceedings.

The hearing, which was continued from time to time, was scheduled for March 1, 1994. On February 9, 1994, the Secretary filed a motion for partial summary judgment on the § 4(b)(1) issue. It is asserted that the Occupational Safety and Health Administration (OSHA) has jurisdiction over the cited working conditions, and there is no genuine issue of material facts regarding the matter of preemption. In support of the motion was an attached affidavit of Thomas Stuckey, manager of the Flight Standards Division, Southwest Region of the FAA.

On February 28, 1994, American filed its response to the Secretary's motion and a cross-motion for partial summary judgment. American maintains that OSHA's position is barred jurisdiction by the doctrine of res judicata. It is pointed out that the Commission, in *Secretary of Labor v. American Airlines, Inc.*, 9 BNA OSHC 1415, 1981 CCH OSHD ¶ 25,225 (No. 78-918, 1981), concluded that OSHA lacked jurisdiction at the facility, including some operations relating to employee fall protection.

Both parties raise objections to the motions based on noncompliance with the motion requirements of Rule 40 of the Commission's Rules of Procedure. Since the issues raised in the motions are of a procedural nature, and no prejudice having been shown, they are both dismissed.

The first question to be dealt with on the preemption issue is the matter of burden of proof. American initially raised the issue as an affirmative defense, which was also addressed by the Secretary in its motion for summary judgment. While precedent shows differing views on the question of burden of proof, in these cases the preemption issue will be resolved in the ruling on the motion and cross-motion for partial summary judgment. Section 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1), provides in pertinent part:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

Under the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1301, *et seq.*, the FAA was granted comprehensive and exclusive responsibility and authority for the regulation of the safety of civil aircraft design, operation and maintenance. Subpart G of Part 121 of the Federal Aviation Administration's regulations requires each air carrier to develop "manuals for the use of its flight and ground operations personnel in the performance of their duties." Section 121.133 reads as follows:

> (a) Each domestic and flag air carrier shall prepare and keep current a manual for the use and guidance of flight and ground operations personnel in conducting its operations.
>
> (b) Each supplemental air carrier and commercial operator shall prepare and keep current a manual for the use and guidance of flight, *ground operations*, and management personnel in conducting its operations. (Emphasis added)

Section 121.135 outlines the requirements which must be met before a carrier's manuals will be approved by the FAA. That section reads in pertinent part:

> (a) Each manual required by § 121.133 must --
>
> > (1) *Include instructions and information necessary to allow the personnel concerned to perform their duties and responsibilities with a high degree of safety;*
> >
> > * * *
> >
> > (b)(16) *Instructions and procedures for maintenance, preventive maintenance, and servicing.*
> >
> > * * *
> >
> > (24) *Other information or instructions relating to safety.* (Emphasis added)

Under 14 C.F.R. § 43.13a, the required maintenance manuals must be "acceptable to the administrator." The manner of acceptance is set forth at § 43.13c which states:

> (c) *Special provisions for air carriers and commercial operators.* Unless otherwise notified by the Administrator, the methods, techniques and practices contained in the maintenance manual or the maintenance part of the air carrier manual of a certificated air carrier or commercial operator . . . constitute acceptable means of compliance with this section.

The Commission took the view in *American Airlines, supra*:

> [T]he mandated maintenance manuals contain instructions and procedures to permit maintenance personnel to perform with "a high degree of safety" constitutes an exercise of the FAA's statutory power to prescribe standards or regulations affecting the occupational safety or health of airline ground maintenance personnel. Similarly, the FAA has exercised its statutory authority to enforce standards or regulations affecting the safety and health of these same employees by assigning its inspectors to regularly monitor American's compliance with the safety requirements of the FAA approved maintenance manuals.

The question to be resolved in these proceedings, as in the previous case, is:

> Were the specific working conditions cited by the Secretary covered by FAA approved requirements prescribed in the maintenance manuals; and, if so, were these requirements enforced by the FAA?

While the question was answered in the affirmative in the prior decision, the facts of these cases do not support such a conclusion. American's affirmative pleadings and cross-motion are based on the contention that the *American Airlines* decision operates as res judicata. Therefore, OSHA's jurisdiction is barred as a matter of law. This includes jurisdiction at the same location and on the same issue regarding fall protection from work platforms.

The doctrine of res judicata makes a final judgment conclusive on the parties and bars further litigation on all issues resolved in prior cases. In *Georgia Power Co., Harlee Branch Plant*, 4 BNA OSHC 1497, 1975-76 CCH OSHD ¶ 21,199 (No. 16092, 1976), the Commission recognized this doctrine. It was stated:

> In the absence of a showing of a change of working conditions, a change in policy, such as a revision of a standard, or a change in controlling legal principles, the doctrine of *res judicata* is deemed applicable to Commission proceedings.

The Secretary shows that consistent with the *Georgia Power* holding and Tenth Circuit case law, res judicata is inapplicable in this proceeding. He states:

> In *Clark v. Haas Group, Inc.*, 953 F.2d 1235 (10th Cir. 1992), the court stated that *res judicata* generally applies where there is an identity of parties and of claims and a final judgment on the merits. The case at bar is analogous to the facts of *Clark* in that the parties are identical to those in *Secretary of Labor v. American Airlines, Inc.*, 9 OSHC (BNA) 1415 (1981), and there was a final judgment on the merits. However, in the case at bar, the cause of action is clearly not the same.

The Tenth Circuit in *May v. Parker-Abbott Transfer and Storage, Inc.*, 899 F.2d 1007, 1009-1010 (10th Cir. 1990), adopted the transactional approach of the *Restatement (Second) of Judgments*, § 24 (1982), which provides:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . ., the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a 'transaction', and what groupings constitute a 'series', are to be determined pragmatically, giving weight to such considerations as to whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

The argument is made that the facts of the previous case have changed so substantially that they are no longer "related in time, space, origin or motivation." The record discloses that American's Exhibit R-19 is the relevant portion of those manuals which was the basis for the previous decision. This portion is taken from the *General Technical Manual* which states:

> B. PROCEDURE
>
> The open sides of platforms, floors, or workstands must be protected by guard rails. Open doors and openings in guard rails which could cause a fall must be barricaded or otherwise protected.

Since that time, however, the manuals have changed, as has the factual basis for the previous decision. American's Exhibit R-20 is the relevant portion of respondent's *General Procedures Manual* and currently reads:

> f. Check the general condition of jacks, work stands, ladders, ground power cables, etc. Ensure that work platform safety rails are in place.

The earlier case determined that the FAA had exercised its statutory authority to enforce standards or regulations affecting employee safety and health "by assigning its

inspectors to regularly monitor Americans' compliance with the safety requirements of the FAA-approved maintenance manuals." American's witness, John Flynn, acknowledges the current manuals do not contain the same language used in the manual which provided the basis for the prior decision (Tr. 247).

On the basis of the record, American has not established that OSHA is barred from jurisdiction by res judicata in this case. It is argued, however, that preemption is established regardless of res judicata. American points out that the Commission has interpreted the § 4(b)(1) preemption to exist when a Federal agency having statutory authority to regulate the working condition, which is the subject of the OSHA citation, has exercised its authority to prescribe or enforce safety standards. *Northwest Airlines, Inc.*, 8 BNA OSHC 1982, 1989, 1980 CCH OSHD ¶ 24,751 (No. 13649, 1980). The Commission decision recognized that the FAA possessed the statutory authority to regulate the health and safety of airline maintenance personnel and that the FAA had validly exercised this authority through duly promulgated rules that require airlines to develop manuals that include provisions designed to further the safety of such personnel.

American argues:

> The facts deemed conclusive by OSHRC in *Northwest Airlines* are present in this case. The evidence at the hearing revealed that American Airlines has an FAA required and approved manual which governs the cited hazards. See Respondent's Exhibit 20 at page 6, paragraph (e)(1)(f) which requires American Airlines inspectors to 'insure that work platform safety rails are in place.' Furthermore, witnesses John Flynn, Manager of Corporate Ground Safety Department, Paul Wilson, Manager of Quality Assurance Surveillance and FAA ATA Liaison, and Ralph Grunhof [sic], Manager of Production and Aircraft Overhaul, all testified that American Airlines' General Procedures Manual (Respondent's Exhibit 20) was required and approved by the FAA, and that it includes a procedure that requires checking work platform safety rails, including those on a tail dock. Tr. pp. 233, 276, 389.

Witnesses Paul Wilson and Ralph Grunhoff testified as to FAA's enforcement procedures for safety violations. They explained that the provisions in the manual are enforced by sending discrepancy letters describing the violative conditions. A response must detail the corrective action that has been taken, or by contesting the alleged condition, at which time the FAA may instigate a formal enforcement action (Tr. 272-274, 285).

American's Exhibits R-23 through R-30 are discrepancy letters from the FAA to American Airlines regarding employee safety conditions at the Tulsa maintenance facility and elsewhere (Tr. 256-272).

In support of his motion, the Secretary filed an affidavit of Thomas E. Stuckey, manager of the Flight Standards Division, Southwest Region of the FAA. Regarding §§ 121.133 and 121.125, Mr. Stuckey states:

> [I]t is the FAA's position that the air carrier has complied with those sections by merely having the proper procedures in the manual. These sections, unlike the section governing aircraft maintenance, preventive maintenance and alterations, do not contain provisions that require air carriers or air carrier personnel to conduct their operations according to the procedures in the manual. Failure to follow manual procedures relating only to the safety of an employee engaged in ground operations is considered unenforceable. In other words, it is the FAA's position, in view of its statutory authority, that compliance with the procedures contained in ground operations manuals dealing solely with occupational safety is the responsibility of the air carrier.

In addition, he stated:

> I have reviewed the OSHA citations in this case. I can confirm that there are no enforceable FAA regulations or FAA-approved manual provisions that address the working conditions detailed in the citations issued June 23, 1993, and July 1, 1993. The cited working conditions do not fall within the scope of any maintenance provisions of the Federal Aviation regulations and, in my opinion, do not affect flight safety.

American attacks the admissibility of the affidavit as evidence in these proceedings because it is hearsay and was not offered by the Secretary. The Commission has held that hearsay evidence is admissible, and such evidence may be probative. *See Ultimate Distribution Systems, Inc.*, 10 BNA OSHC 1568, 1982 CCH OSHD ¶ 26,011 (No. 79-1269, 1982). For purposes of this decision, the affidavit will be considered as evidence in support of the motion for partial summary judgment.

Witnesses for American recognized Mr. Stuckey and his position with the FAA. Mr. John Flynn, manager for the corporate ground station department, admitted Stuckey is head of the department which exercises FAA authority over the matter in issue (Tr. 250). Mr. Paul Wilson, manager of Quality Assurance Surveillance and FAA liaison, testified Mr. Stuckey is the person who supervises the FAA inspectors who are at the American facility

on a weekly basis (Tr. 280-281). He also acknowledged that he is not aware of any FAA enforcement proceedings relating to platform guarding at the Tulsa facility (Tr. 282). The discrepancy letters, American's Exhibits R-23 through R-30, do not relate to the hazards involved in these cases and refer to incidents that occurred prior to the execution of the affidavit.

In *Northwest, supra*, the Commission stated that "another agency preempts the Act only by issuing standards or regulations having the force and effect of law" and found that the FAA had exercised its authority "[b]ecause the [safety] manual addresses the specific hazard for which Northwest was cited . . . ." 8 BNA OSHC at 1989. Mr. Stuckey specifically states that there are no enforceable FAA regulations applicable to the working conditions cited in these cases.

American, in response to the motion in these cases, offered no evidentiary material to counter the statements in the affidavit. In *Cowgill v. Raymark Indus., Inc.*, 780 F.2d 324 (3d Cir. 1985), the court held that:

> When a party has filed a motion for summary judgment, the opposing party is under an obligation to respond to that motion in a timely fashion and to place before the court all materials it wishes to have considered when the court rules on the motion.

The record does not disclose a § 4(b)(1) exemption exists in these cases. The motion for partial summary judgment is therefore granted.

Since the Act applies to the facts in these cases, it must now be determined if the alleged violations occurred. The Commission has held that to establish a violation of a standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991).

Docket No. 93-1817

Alleged Violation of § 1910.23(a)(7)

The Secretary alleges that American violated the standard at § 1910.23(a)(7), which provides: "Every temporary floor opening shall have standard railings or shall be constantly attended by someone." It is alleged in the citation that a temporary floor opening was created by retracted floor sliders which were not guarded.

Mr. John Ammon, compliance officer, conducted the inspection on behalf of the Secretary. He testified that Exhibits C-5 and C-7 depict the retracted sliders and floor openings. The sliders were retracted at least one foot (Tr. 22-23). Ammon stated that Ralph Grunhoff told him employees worked in the area (Tr. 26). Ammon believed a substantial fall hazard existed of 7 feet from the top level to the next level and then 20 feet to the floor (Tr. 26). In fact, Grunhoff told him a death occurred when an employee accidently fell from an opening on the top floor through an opening on the second level to the ground. Two employees, Troy Sam and Robert Bielawski, testified that on the night of the accident, the sliders were completely open (Tr. 63, 88). Mr. Sam stated that he had never seen any type of railing around the openings prior to the time of the accident (Tr. 64). Mr. Grunhoff acknowledged that at various times holes are left between the plane and the sliders (Tr. 197).

Mr. Alvin Evans, an American employee for 18 years, testified that the process of retracting sliders away from the aircraft begins at the top level. The sliders are moved by a steel bar to "pry" openings from underneath (Tr. 200-202). He stated that the only time sliders are moved from the top is when they are required to be opened approximately 1 foot to reach a panel or some part of the aircraft to perform maintenance (Tr. 203-204).

American argues that a 1-foot opening cannot create a fall hazard, and because an employee fell does not prove a violation of the cited standard. It is further argued that no one was present at the time, and it was not shown American had knowledge of any violative condition. Mr. Sam testified that any employee can pull the sliders in and out at any time, which could have happened before the accident without American's knowledge (Tr. 64).

There is no dispute the use of the sliders resulted in temporary floor openings where employees worked. American contends that the size of the openings, approximately 1 foot, as observed by the inspecting officer, did not constitute a fall hazard. The standard, however, is not restricted in its application to the size of the openings, and the evidence indicates a failure to comply with its explicit terms.

American also contends the Secretary failed to establish a violation because knowledge of any violative conditions has not been shown. It is argued that even if Sam and Bielawski accurately depicted the conditions near the time of the accident, they were not supervisors, and it was not shown supervisory personnel had knowledge of any violative conditions. A review of the evidence shows that both Sam and Bielawski testified the sliders were "pulled all the way back" and totally open on the night of the accident. No guardrails were present (Tr. 63-64, 88). In referring to the open sliders, Mr. Sam stated that employees "walked around them all night; well, all the time we was up there working on it" (Tr. 63). Mr. Ammon testified that management is present in the area where the work, which is quite visible, is being performed (Tr. 28). Certainly, with reasonable diligence, American could have known of the violative conditions described in the citation.

American also points out that the sliders can be randomly moved by individual employees when it is necessary to perform a particular maintenance task. Mr. Bielawski explained that while he is responsible for employee safety, he did not know what tasks were being performed by employees which might require the sliders to be open (Tr. 88-91). In this regard, Mr. Sam stated employees are instructed to use "safety harnesses when they were available" if fall hazards existed. He stated further that "mostly, we are responsible for our own safety and to work as safely as we can" (Tr. 78). Mr. Sam's statement is consistent with Mr. Bielawski's opinion that the company and employees both take responsibility for employee safety (Tr. 91).

While employees have a responsibility for their safety, the Commission has repeatedly held that it is the employer, and not the employee, who has ultimate responsibility for complying with the Act. *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1991-93 CCH OSHD ¶ 29,456 (No. 90-1307, 1991). *Brennan v. Gerosa, Inc.*, 491 F.2d 1340, 1344-45 (2d Cir. 1974); *Atlantic & Gulf Stevedores*, 3 BNA OSHC 1003, 1010, 1974-75 CCH OSHD ¶ 19,525,

p. 23,304 (No. 2818, 1975) (consolidated). A preponderance of the evidence in these cases establishes the violation as alleged.

Alleged Violation of 29 C.F.R. § 1910.23(c)(1)

The standard, which requires protection for open-sided floors, platforms, and runways provides in pertinent part:

> Every open-sided floor or platform four feet or more above adjacent floor or ground level shall be guarded by a standard railing on all open sides.
>
> a) On March 10th, 1993 an employee fell off the open sided floor created by the retraction of the sliders on the top working level.
>
> b) When the tail dock was moved to or pulled away from the aircraft.
>
> c) On the top floor of the deck, extensible sections of the guardrails were not pulled to the leading edge of the aircraft tail.

Mr. Ammon testified that on two occasions he observed open-sided floors with no guardrails, and employees were exposed to the violative condition. Exhibit C-2 depicts the condition as described (Tr. 30). Based on information provided by Mr. Grunhoff, he determined these conditions existed at the time the employee fell to his death (Tr. 32). He stated the hazard present was a fall of approximately 27 feet to the ground, and the condition was plainly visible to supervisory personnel in the area (Tr. 31).

Mr. Alvin Evans, an American employee who had worked on the tail docks for 18 years, testified that when retracting sliders were away from the aircraft, employees started at the top level and moved to the next lower level (Tr. 200-202). Thus, he testified that when sliders were moved in or out from underneath, no fall hazard was created (Tr. 73, 189-190, 202-203). Mr. Sam's testimony is controlling in this instance. He stated the sliders had been pulled back and were wide open on the night of the accident. When he was working in the area, he walked around the sliders all night (Tr. 63). Based on Sam's testimony, and the reasons set forth above, the evidence is sufficient to establish the alleged violation.

Alleged Violation of 29 C.F.R. § 1910.147(c)(4)(i)

The standard, which pertains to the control of hazardous energy, provides as follows:

> *Energy Control Procedure.* Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in activities covered by this Section.

The citation alleges:

> Maintenance shop; employee(s) were engaged in facility maintenance activities on equipment such as: roll-up doors and cranes, for which there were no specific lock-out/tag-out procedures, employees were exposed to the hazards of uncontrolled energy sources such as electromechanical, spring, and gravity.

Mr. Ammon testified that the standard was violated because American had inadequate procedures. Although the company had a lockout/tagout program (Exhs. R-15A, R-15B), it did not have procedures applicable to specific machines and equipment (Tr. 33). Ammon noted specific procedures were implemented for equipment used in aircraft work. Thus, it is contended these procedures were also necessary for other equipment which "may have different sources of energy that need to be restrained or locked out or otherwise negated so they will not activate on the employee when they're working on it" (Tr. 34-35).

Mr. John Flynn, manager of American's ground safety department, testified the lockout/tagout procedures were prepared directly from the OSHA-suggested form (Tr. 148). It is, therefore, argued that nowhere in the standard is there a requirement that lockout/tagout procedures include specific procedures applicable to each and every energy source--which would be impossible. American also points out that the compliance officer did not observe any work being done and only spoke to employees hypothetically.

There is no dispute that American had a program in effect to control hazardous energy (lockout/tagout). Mr. Ammon testified, however, that through interviews he learned they worked on machinery and equipment with sources of hazardous energy that should have been contained. He states that because American had implemented a program for equipment used in aircraft work, it should have known of these other hazardous conditions.

The Secretary has not shown by a preponderance of evidence how the terms of the standard were not met. Since no employees were named or called to testify, it is not sufficiently established what activities the employees were engaged in and how they were hazardous, or how American knew or could have known of the specific conditions.

The alleged violation is vacated.

Alleged Violation of 29 C.F.R. § 1904.2(a)

The standard, which pertains to log and summary of occupational injuries and illnesses, requires in pertinent part as follows:

> Each employee shall . . . (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred. For this purpose form OSHA No. 200 or an equivalent which is as readable and comprehensible to a person not familiar with it shall be used. The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

The alleged violation is described in the citation as follows:

> The employer's computer equivalent to the OSHA 200 form used in 1992 and 1993; the columns did not correspond to the OSHA 200's columns 1 through 13 and column D. The 1992 equivalent contained entries from 1990 and 1991; the 1993 equivalent contained entries from 1992.

Mr. Ammon testified that American's log did not meet the requirements of the OSHA 200 log in that column "D" and columns "1 through 13" were missing. He explained that this information related to injuries and illnesses which was further broken down to show fatalities, restricted activity, or lost time (Tr. 37). The compliance officer also noted that American had included incidents in the log from past years, and that each log should contain entries only on an annual basis (Tr. 38).

Mr. John Flynn testified that American's automated OSHA 200 log was the equivalent to OSHA's Form 200 log. He explained that column D in the Form 200 refers to restricted duty days, and the equivalent form simply used a code, "RD," on the right-hand side, to specify an illness or injury instead of a column. In addition, the equivalent form

shows "NLT" for "No Lost Time" or the date the employee left work and the date of return to work. It was indicated the code is readily available to anyone (Exh. C-14; Tr. 143-144). Mr. Flynn stated that injuries of prior years showing on a current year's record is simply a matter of overreporting (Tr. 146).

The evidence fails to establish the alleged violation. It is not sufficiently shown how American's equivalent form was not acceptable in meeting the standard's requirements. In addition, testimony is not refuted that a year prior to the inspection, an OSHA compliance officer approved American's equivalent form (Tr. 166-167).

The alleged violation is vacated.

Docket No. 93-1965

Alleged Violations of 29 C.F.R. §§ 1910.1200(f)(5)(i) and (f)(5)(ii)

The standard at § 1910.1200(f)(5)(i), which pertains to hazard communication, requires, in pertinent part:

> The employer shall ensure that each container of hazardous chemicals in the work place is labeled, tagged or marked with the identity of the hazardous chemical contained therein.

Compliance Officer Diane Taylor testified that she observed American employees in the blade and vane shop using acid out of containers labeled "Class B Etchant." The bottles contained corrosive chemicals but had no hazard warnings on them (Tr. 103). Two supervisors, Virgil Phipps and Dean Killian, testified they were not aware of their contents (Exh. C-15; Tr. 99-102). Ms. Taylor stated that employees were exposed to serious injuries due to chemical burns, and American should have known about the condition because it had a hazard communication program (Tr. 101).

The standard at § 1910.1200(f)(5)(ii) requires as follows:

> The employer shall ensure that each container of hazardous chemicals in the work place is labeled, tagged or marked with the appropriate hazardous warnings.

American defends the allegations charging violations of § 1910.1200(f)(5)(i) and (ii) by referring to its training programs regarding hazardous communication. Mr. Flynn testified

that he personally speaks with all new employees about American's safety policies. This includes hazardous communication and how to access material safety data on the computer (Tr. 168). American therefore argues that all employees received proper training in the use of hazardous chemicals and, if one failed to label a bottle, it is not American's fault. In addition, it is asserted that no evidence was presented to show American had knowledge the bottles were not properly labeled.

There is no dispute that the containers in question were not properly labeled, and the standards specifically require the employer to "ensure" that the containers, as in these cases, are labeled to identify hazardous chemicals and provide appropriate warnings. In view of American's compliance with other aspects of hazard communication under § 1910.1200, it obviously had knowledge of the labeling requirements.

The evidence clearly establishes the violations as alleged.

Alleged Violation of 29 C.F.R. § 1910.1200(h)(1)(iii)

The standard provides, in pertinent part, as follows:

> Employees shall be informed of the location and the availability of the written hazard communication program, including the required lists of hazardous chemicals and material safety data sheets required by this section.

Compliance Officer Diane Taylor testified that she conducted the inspection regarding the alleged violation and during her walk-around, she saw the acid being used which was labeled "Class B Etchant." Also, no one knew what was in the Class B etchant, and material safety data sheets (MSDSs) were not available (Tr. 105-106). She stated it took some time to determine the components of the etchant. There was no MSDS for one of the components, hydrochloric acid (Tr. 109-110). While some of the MSDSs were on a computer, no one knew how to access them (Tr. 110). It was not until the second day that she was able to obtain an MSDS for the Class B etchant (Tr. 113).

John Flynn testified that there had been an MSDS on the Class B etchant on the computer since 1988 (Tr. 150). He also indicated that the computer program is commonly used by employees, and the MSDSs are easily accessed by typing in the name of the

chemical (Tr. 135-137). American, therefore, argues that through its extensive hazardous communication program and access to MSDSs on the computer, the standard was satisfied.

The standard allegedly violated pertains to employee information and training and the specific information employees shall be provided; more specifically, the location and availability of the written hazard communication program. Although the Secretary maintains Ms. Taylor was not provided an MSDS for the Class B etchant, and raised other related issues, the sole issue for determination is whether employees were informed of the location and availability of the written hazard communication program, including certain requirements.

Mr. Flynn testified that all employees are trained in American's hazardous communication program. Also, the required MSDSs are on a computer in which employees are trained, and they know how to access the material, which includes a listing of hazardous chemicals (Tr. 133, 135-136). There is no reason to discount the testimony of Mr. Flynn, and no employees were named who were not provided with the required information. In this regard, it is noted Ms. Taylor testified: "They have a hazard communication program which addressed training of employees and access to material safety data sheets" (Tr. 112). There is not a preponderance of evidence to establish that the location and availability of the required information was not provided employees.

The alleged violation is vacated.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSAHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act, in determining the appropriate penalty the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

American is a large employer that has demonstrated good faith in safety matters and has a good safety program. No history of previous violations was indicated. The gravity of the violations is severe.

Upon due consideration of the relevant factors, it is determined that appropriate penalties for the violations are as follows:

Docket No. 93-1817

Citation No. 1	Penalty
Violation of § 1910.23(a)(7)	$2,500.00
Violation of § 1910.23(c)(1)	$5,000.00

Docket No. 93-1965

Citation No. 1	Penalty
Violation of § 1910.1200(f)(5)(i)	$1,275.00
Violation of § 1910.1200(f)(5)(ii)	$1,275.00

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

Based upon the foregoing decision, it is ORDERED that the citations contained in Docket Nos. 93-1817 and 93-1965 be disposed of as follows:

Docket No. 93-1817

Citation No. 1	Disposition	Penalty
§ 1910.23(a)(7)	Affirmed	$2,500.00
§ 1910.23(c)(1)	Affirmed	$5,000.00
§ 1910.147(c)(4)(i)	Vacated	- 0 -
§ 1904.2(a)	Vacated	- 0 -

Docket No. 93-1965

Citation No. 1	Disposition	Penalty
§ 1910.1200(f)(5)(i)	Affirmed	$1,275.00
§ 1910.1200(f)(5)(ii)	Affirmed	$1,275.00
§ 1910.1200(h)(1)(iii)	Vacated	- 0 -

Paul L. Brady

PAUL L. BRADY
Judge

Date: November 29, 1994