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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 91-0110
TRICO TECHNOLOGIES CORPORATION,	:	
Respondent.	:	

DECISION

BEFORE: WEISBERG, Chairman, and MONTOYA, Commissioner.

BY THE COMMISSION:

At issue on review are (a) a Notification of Failure to Abate Alleged Violation ("the FTA notice"), which proposed the assessment of $300,300 in additional penalties ($300 per day for 1001 days) for Trico Technologies Corporation's ("Trico's") alleged failure to abate a previously-cited and uncontested violation of 29 C.F.R. § 1910.132(a), and (b) an amended citation ("the recordkeeping citation") for willful violations of the Secretary's recordkeeping regulations with a corresponding proposed penalty of $306,000 ($3000 per citation item for 102 items).[1] Commission Administrative Law Judge Stanley M. Schwartz affirmed all of the

[1] The original recordkeeping citation contained 107 items. Pursuant to OSHA's policy on "egregious" willful violations, items 1 through 105 alleged independent violations of 29 C.F.R. § 1904.2(a) based on Trico's failure to record (or, in some instances, to accurately record) 105 specifically identified injuries and illnesses. The Secretary alleged that these incidents were improperly omitted from Trico's OSHA 200 forms (the log and summary of (continued...)

alleged violations that are now before us, but he reclassified them as other than serious and accordingly assessed penalties that were substantially lower than those proposed by the Secretary ($1000 for the 1910.132(a) violation and a total of $11,400 for the 102 recordkeeping violations). We conclude that the judge erred in holding that the Secretary was barred as a matter of law from citing the 1910.132(a) charge as a failure to abate, and we remand that charge for a hearing on the Secretary's disputed factual claim that the previously-cited violation of 1910.132(a) remained unabated throughout the 1001-day period following the expiration of the prescribed abatement date. However, we affirm the judge's resolution of the contested issues relating to the recordkeeping citation, *i.e.*, his classification of the violations as other than serious rather than willful or serious and his assessment of penalties totaling $11,400.

I. THE FTA CHARGE

A. BACKGROUND

Trico is a relatively new, Texas-based affiliate of a much older and more established company, Trico Products Corporation ("Trico Products"). In 1986, Trico Products closed a manufacturing plant in Buffalo, New York, where it is headquartered, and transferred that plant's operations to a pilot project involving twin plants in Brownsville, Texas, and

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[1](...continued)
occupational injuries and illnesses or "OSHA log") for the years 1988 through 1990. Item 106 alleged a violation of 29 C.F.R. § 1904.5(c) based on failure to sign the 1989 log (thereby certifying it was true and complete), and item 107 alleged a violation of 29 C.F.R. § 1904.5(a) based on the posting of logs in 1988 and 1989 that were not accurate and complete. Following a six-day hearing that was restricted to the allegation of willfulness and a preliminary order dismissing that charge, the parties settled the merits of the individual citation items. The Secretary withdrew items 9, 12, 13, 56, and 85 of the citation, while Trico stipulated that it "should have ... recorded" the injuries and illnesses identified in the remaining 100 items that allege violations of section 1904.2(a).

Matamoros, Mexico. "Trico" was created in March or April 1986 for the purpose of operating this pilot project, but a separate affiliate was created sometime in 1987 to take over the Matamoros plant.

In July or August 1987, safety department supervisor JoAnna Tijerina and company nurse Viola Guevara, who ran the company's health clinic, noticed that a number of employees working in a single department, "department 4010" or "the press room," were reporting the development of skin rashes. In a memorandum dated October 19, 1987, Tijerina informed the press room supervisor of her suspicion that the cause of these incidents was the combined exposure of some employees to Roll Form 20, an amine soap that was being used on several power presses as both a die lubricant and a detergent, and the hand cleaner that was also being used (for personal hygiene) at that same time. Accordingly, Tijerina recommended that employees in the press room begin (a) wearing latex gloves under their work gloves, (b) using a "coating cream ... as a skin protector," and (c) using a different hand cleaner.

On January 5 & 6, 1988, OSHA conducted an inspection of Trico's workplace that was triggered by an employee complaint and that included an investigation of the recurring incidents of contact dermatitis among press room personnel. As a result, the Secretary cited Trico for an other than serious violation of 29 C.F.R. § 1910.132(a), alleging (in item 5) that employees in Trico's press room were using cloth gloves that "were damp with Roll Form 20" to handle parts ejected from power presses, that Trico had failed to take suitable measures "to prevent skin contact with the Roll Form 20," and that "[o]ne method of abatement would be to use a suitable barrier cream or impermeable (coated) gloves." Trico did not contest this citation, and it became a final order of the Commission by operation of law. 29 U.S.C. § 659(a).

On February 4, 1988, two days after the prescribed abatement date for item 5 had passed, Trico safety supervisor Tijerina wrote to OSHA to inform it that the recently-cited

violations had been corrected. Tijerina notified OSHA that the employees identified in item 5 had been "provided a latex glove to be worn underneath their cloth gloves," that they had been informed that the use of these latex gloves under cloth gloves was mandatory in the press room to prevent contact with Roll Form 20, and that the press room supervisors had been instructed to enforce the wearing of the latex gloves. It is undisputed that OSHA accepted Trico's representation of abatement and closed its file on the January 1988 inspection administratively, without conducting a "followup inspection." OSHA's file remained closed until mid- or late 1990, when information discovered by OSHA industrial hygienist and compliance officer Ann E. Fox ("IH Fox") during a second inspection of Trico's workplace led her to conclude that the January 1988 citation item had not in fact been abated, as Trico had previously claimed. That determination led to the issuance of the FTA notice that is now before us.

Trico filed a prehearing motion for partial summary judgment in which it sought dismissal of this FTA charge on the ground that the 2½-year "delay" between the abatement date for the previously-cited violation of section 1910.132(a) and the inspection that served as the basis for the FTA charge rendered the FTA notice "unreasonable and the inappropriate enforcement tool in these circumstances." In a pre-hearing order, Judge Schwartz granted Trico's motion "insofar as the classification of the citation and any penalty amount over $10,000" are concerned. That ruling (as clarified in a second order and in the judge's decision) has been challenged by the Secretary on review.[2]

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[2] Based on his "conclusion that the notification was unreasonable as a matter of law," the judge held that the Secretary was barred from citing the section 1910.132(a) violation as a failure to abate. He therefore made a *sua sponte* amendment to the FTA notice, transforming it from a failure to abate notice into a citation for other than serious violation with a proposed penalty of $1000 (the then-applicable statutory maximum). At the beginning of the hearing, *see supra* note 1, Trico withdrew its notice of contest to the amended charge, and the judge accordingly affirmed the 1910.132(a) allegation as an other serious violation with a $1000 assessed penalty.

B. ANALYSIS

The judge based his ruling on inferences he drew from several provisions of the Act that relate generally to the Secretary's authority to conduct inspections and issue citations, as well as from provisions of the Secretary's *Field Operations Manual* ("*FOM*") that dealt expressly with "followup" inspections, *i.e.*, inspections conducted to determine whether previously-cited violations have been abated.[3] We conclude, however, that these provisions do not bar the issuance of an FTA notice solely on the ground that it is based on information discovered by the Secretary more than six months after the prescribed abatement date.

Section 10(b) of the Act, 29 U.S.C. § 659(b), which authorizes the issuance of FTA notices, includes no time limitation on their issuance and does not even require the Secretary to conduct a followup inspection before issuing a notice. Instead, the issuance of an FTA notice is mandated whenever "the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction," regardless of when or how the Secretary receives the information that leads to that belief. As the Secretary correctly reasons in his review brief, the fact that a followup inspection is not even required under the Act certainly suggests that, "if the Secretary does conduct [such] an inspection, its timing could [not] render an otherwise valid FTA notification unreasonable."

The statutory provisions cited by the judge do not persuade us otherwise. The "reasonable promptness" requirement and "six months following the occurrence" limitation of sections 9(a) & (c) of the Act, 29 U.S.C. § 658 (a) & (c), apply by their terms only to the issuance of "citation[s]," and not to the issuance of FTA notices. The phrase in section 8(a)(1), 29 U.S.C. § 657(a)(1), authorizing the Secretary to enter a workplace "without

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[3] In his review brief, the Secretary notes that "[t]he *FOM* has been largely superseded by OSHA's *Field Inspection Reference Manual*, CPL 2.103 (Sept. 26, 1994)." However, he acknowledges that the *FOM* provisions cited by the judge were "in effect at the time."

delay" is directed at the possibility that an employer may delay entry by OSHA inspectors, not at delay by the Secretary in seeking entry. As for the various "reasonableness" restrictions of section 8(a), we conclude that they were designed to place limitations on the Secretary's authority to physically intrude into an employer's workplace or to disrupt its work processes.[4] Nothing in section 8(a) can be construed as dealing in any way with the time intervals between abatement dates, followup inspections, and/or FTA notices.

The *FOM* provisions cited by the judge were equally inapplicable to the situation before us. In pertinent part, the *FOM* instructed OSHA personnel to conduct followup inspections "as promptly as resources permit" and to close cases administratively when no followup inspection has been conducted within six months of an abatement date that has become a final order of the Commission. However, nothing in the *FOM* even suggested that an administratively-closed file could not be reopened if the Secretary, during a subsequent inspection, acquired information that led him to believe that a previously-cited violation had never in fact been abated.

While the judge grounded his ruling on the statutory and *FOM* provisions discussed above, Trico has based its arguments in support of the judge on an appeal to equitable considerations. In essence, it urges us to read into the Act an implied statute of limitations on the issuance of FTA notices because it would be *unfair* to employers ("[un]reasonable" within the meaning of section 8(a)) to allow the Secretary to sit back and wait after an abatement date has expired before conducting a followup inspection, thereby allowing daily penalties to accumulate into exorbitant fines that would not have been possible if the Secretary had conducted his followup inspection in a timely manner ("without delay"). However, whatever the merits of this reasoning may be, we conclude that it has *nothing to*

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[4] Section 8(a)(1) of the Act authorizes the Secretary to enter workplaces "without delay and at reasonable times." Section 8(a)(2) requires the Secretary to conduct his inspections and investigations "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner." 29 U.S.C. § 657(a)(1) & (2).

do with the facts of this case. Here, the record conclusively establishes that Trico's alleged failure to abate was *not* discovered during a "followup" inspection. Instead, OSHA had previously accepted Trico's representation of abatement and, on that basis, had closed its file on the 1988 inspection administratively, without conducting a followup inspection. The alleged failure to abate was discovered almost accidentally, during the course of a general scheduled, programmed inspection, which was focused on health issues. Only after IH Fox reviewed injury and illness records during her 1990 inspection that revealed a continuing problem with dermatitis at the workplace did OSHA re-open its closed file on the 1988 inspection and turn its attention to the previously-cited 1910.132(a) violation, which it had considered abated. On these facts, we conclude that the record provides *no* basis for finding that the timing or issuance of the FTA notice was in any way unreasonable, inequitable, or unfair to Trico, and therefore there is no basis for granting to Trico the relief that it is seeking.

For the reasons stated, we reverse Judge Schwartz' determination that OSHA was barred as a matter of law from issuing an FTA notice based on Trico's alleged continuing noncompliance with 29 C.F.R. § 1910.132(a). We restore the FTA notice to its original form and remand this case for a hearing on the merits of OSHA's original charge. We also reject Trico's argument that it is entitled to summary judgment on the merits.[5] Summary judgment is not appropriate here because the central factual allegation of the FTA notice, *i.e.*, the Secretary's assertion that Trico failed to abate the cited violation of 29 C.F.R. § 1910.132(a) throughout the entire 1001-day period between the prescribed abatement date and the date of the FTA notice, is a genuine issue of material fact that is vigorously disputed by the

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[5] Trico initially raised this alternative argument in a post-hearing "supplemental" motion for partial summary judgment in which it claimed that the FTA charge must be dismissed on the basis of evidence that the previously-cited violation had in fact been abated during the interval between the two inspections.

parties.[6] Moreover, at this point in this proceeding, neither party has yet been given an opportunity to fully litigate its position on this issue. On the contrary, at the outset of the only hearing held thusfar in this case, *see supra* note 1, Judge Schwartz expressly warned the Secretary's counsel that any evidence introduced concerning the incidence of contact dermatitis at Trico's workplace would be considered only in conjunction with the alleged willfulness of the recordkeeping violations and would "not be considered for the failure to abate."[7] While the parties subsequently stipulated, *after* the hearing had been adjourned, that the evidence already in the record *could* be considered in connection with the FTA charge, they did not stipulate that the record on this issue is closed. Indeed, when their stipulation is viewed in the context of the entire proceeding, it becomes clear that, at the time they

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[6] Contrary to the arguments of both parties, we conclude that Judge Schwartz did not rule -- alternatively, implicitly or otherwise -- on the merits of the FTA charge. Instead, he expressly stated in his decision that he was *not* ruling on Trico's supplemental motion for partial summary judgment, *see supra* note 5, and that "no specific findings of fact are being made in regard to the merits of the notification." These statements were consistent with the judge's clear acknowledgment (at the hearing and in his decision) that the parties would have to be given an opportunity to introduce evidence on the merits of the FTA notice if the Commission were to reverse his pre-hearing ruling on the legality of its issuance, as we have now done.

[7] As the Secretary correctly points out, there is only a partial overlap between the two charges. In connection with the charge that the recordkeeping violations were willful, the Secretary was allowed to introduce evidence in support of his contention that the dermatitis problem at Trico's workplace was so pervasive and longstanding that Trico management could not have failed to notice the absence of dermatitis cases on its official OSHA 200's. However, the question of whether Trico's previously-cited violation of section 1910.132(a) remained unabated throughout the 1001-day period identified in the FTA notice was clearly *irrelevant* to the alleged willfulness of the recordkeeping violations. That issue was therefore *not* tried.

entered into it, *both* parties intended to supplement the existing record with additional evidence relevant to the FTA charge. Consistent with that expectation, we remand this case for that purpose.[8]

II. THE RECORDKEEPING CITATION

A. BACKGROUND

Throughout most of the time period covered by the citation at issue (January 1988-November 1990), responsibility for the preparation, processing, and maintenance of Trico's injury and illness records was divided among three employees. Listed in hierarchical order from the top down, they were human resources director Jack Myers, safety department supervisor JoAnna Tijerina, and company nurse Viola Guevara.[9] Also involved in Trico's recordkeeping throughout this period was Stefan Kablak, who held the same position with Trico Products in Buffalo (safety department supervisor) that Tijerina held with Trico.[10]

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[8] In view of our ruling that the judge erred in granting Trico's original motion for partial summary judgment, we need not address the Secretary's contention that the judge further erred, almost exactly a year later, in cancelling the scheduled reconvening of the hearing on May 11, 1993, thereby depriving the Secretary of the opportunity to prove his FTA charge and to support his proposed penalty. Assuming without deciding that the judge did err, that error has been remedied by our remand order, which now provides the Secretary the opportunity he seeks to introduce the evidence in question.

[9] In March or April 1990, less than two months before IH Fox began the inspection that led to this proceeding, nurse Guevara resigned her position, and a new employee, emergency medical technician (EMT) Jose Martinez, was hired to replace her. Martinez worked for Trico for only 108 days before he was fired for poor job performance.

[10] At the time of the hearing, Kablak had been an employee of Trico Products for 24 years. After assisting Trico in setting up its safety and recordkeeping programs, Kablak acted as "[a] continuing consultant ... because the operations that were down there [in Brownsville were operations that] we had had for 30 years." Kablak also initiated and then continued (along with Tijerina and Guevara) the practice of conducting annual, end-of-the-recordkeeping-year, telephone-conference-call reviews of Trico's OSHA logs, including each of the logs that is at issue here.

Under Trico's standardized recordkeeping procedures, the first record created of any occupational injury was an internal accident investigation report. This report was prepared by the safety supervisor (Tijerina) based on her personal investigation of the reported accident, and it included her determinations as to the cause of the accident, appropriate remedial measures, and whether reported injuries were work-related. The next step was for nurse Guevara to prepare an "E-1 form," *i.e.*, a Texas workers compensation form captioned "Employer's First Report of Injury or Illness."[11] For Trico, this form, which was "to be filled out and typed by the company nurse within 24 hours of the accident,"[12] served multiple purposes. When required under state law, *i.e.*, when an accident resulted in one or more "lost" workdays, the original of the form was filed with the state Industrial Accident Board. When required under Trico's arrangements with its workers compensation insurance carrier, the original (in non-lost workday cases) or a copy was filed with the insurance company as notification of Trico's determination that the claimed injury or illness was work-related and as a foundation for the filing of subsequent claims for reimbursement of medical expenses.

In addition, Trico used the E-1 forms in meeting its obligations under OSHA's recordkeeping regulations. IH Fox testified that the E-1 forms are regarded by OSHA as an acceptable substitute for the OSHA 101 form and that employers in Texas commonly rely upon them for that purpose. Trico accordingly kept copies of the E-1 forms in "Accident Report Notebooks," referred to throughout the hearing as "E-1 binders." Initially, Trico's practice was to assemble all of the E-1 forms for any given calendar year in a single

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[11] Guevara testified that she normally received a copy of Tijerina's accident investigation report before she prepared a penciled draft of the E-1 form. Tijerina would then review the penciled draft and make changes in it, *e.g.*, changes based on her own investigation, before the E-1 form was typed up and signed. This description of Trico's routine procedures was not contradicted by Tijerina or by any other evidence.

[12] The evidentiary record clearly establishes that Trico also prepared E-1's in non-accident situations, *e.g.*, when employees came to its health clinic for treatment of dermatitis.

notebook and to keep a cumulative draft version of the OSHA 200 form for that year in the front jacket of the binder. Following the guidelines set forth on the back of the OSHA 200 form and using the information about particular incidents contained in the E-1 forms, nurse Guevara would make handwritten entries on the draft log when and if they became appropriate.[13]

On or about May 26, 1987, Trico adopted an additional internal recordkeeping system, referred to as the "paid in-house ('PIH') system," which was superimposed on top of the pre-existing, government-mandated records system, as described above. The PIH system involved payment of medical expenses by Trico in certain cases.[14] In implementing this new system, Guevara initiated the practice of creating and maintaining two separate sets of E-1

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[13] Kablak, Tijerina and Guevara examined these cumulative, chronologically-arranged, handwritten draft logs during their annual, end-of-the-recordkeeping-year, telephone-conference-call reviews. Guevara testified that the purpose of these reviews was to determine which injuries and illnesses would be included on Trico's official OSHA logs, but Kablak and Tijerina both testified that the focus of the reviews was on the completeness and internal consistency of those entries that Guevara had already made on the log, prior to the conference call, and that there was *no* review of *Guevara's* determinations as to which particular injuries and illnesses should be recorded. In his arguments before us, the Secretary adopts the description of these conference calls that was given by Kablak and Tijerina, implicitly abandoning the claims of his own witness, Guevara. The judge also implicitly resolved this evidentiary dispute in favor of Trico's witnesses.

[14] Tijerina prepared written guidelines (dated May 26, 1987) for Guevara to use in distinguishing which medical bills were to be paid in-house and which were to be submitted to the workers compensation insurance carrier. Tijerina testified that the criteria in that memorandum were *not* intended for use in determining OSHA recordability and, at several points in her hearing and deposition testimony, Guevara supported these assertions. On this evidentiary record, we consider it beyond dispute that Trico's PIH system was designed and intended to relate *solely* to the payment of medical bills. We further conclude that Guevara herself recognized Trico's true intent and purpose, as shown by her own testimony detailing the conscientious efforts that she had made, throughout the first several months of operation under the new system, to ensure that all recordable PIH injuries and illnesses were included on Trico's OSHA logs.

binders, each with its own separate OSHA 200 log, for any given calendar year. One set of binders, which contained the posted version of the OSHA log (hereafter the "official OSHA 200s") was marked for (internal) identification as the "OSHA 200" or "OSHA log" notebooks. The other set, which was kept in a separate location in different-colored notebooks, was identified as the "Paid In-House" binders. Each of these newly-created notebooks contained separate OSHA 200 forms that were similarly stamped "Paid In-House" across the top. On review, both parties appear to agree, as IH Fox testified, that the violations now before us are based on her belated discovery of previously-undisclosed injuries and illnesses that should have been recorded on Trico's official OSHA 200's but instead had been recorded only on its separate PIH logs.

At the hearing, the Secretary sought to prove the willfulness of Trico's recordkeeping violations primarily through the testimony of former employees Guevara and Martinez. Although Guevara's explanation of the recordkeeping omissions and errors at issue here changed repeatedly over the course of the OSHA investigation, two subsequent depositions (one in this case and an earlier one in a private suit she had initiated against Trico and Tijerina), and the hearing below, the witness was relatively consistent in asserting that the errors (including in particular the omission of dermatitis cases and eye injuries) were *deliberate* rather than inadvertent. In addition, both Guevara and Martinez claimed that they had been specifically instructed by Tijerina and/or by Myers to hide Trico's PIH binders from OSHA, thereby concealing the very records that would have alerted, and ultimately did alert, the agency to the existence of the omitted incidents. In response, Trico elicited testimony from Myers, Tijerina, Kablak, Trico security chief Joe de la Cerda, and even IH Fox, that contradicted every critical factual assertion made by Guevara and/or Martinez.

In a preliminary order issued seven months before his final decision and order, Judge Schwartz carefully considered and firmly rejected the showing made by the Secretary on the willfulness issue. He implicitly discarded all of Guevara's profferred explanations for the

recordkeeping omissions, suggesting that the recording errors had not been intentional at all, but rather inadvertent, due to Guevara's confusion of "the paid-in-house system with OSHA recordability." In addition, he expressly discredited "the testimony of Guevara and Martinez ... insofar as it indicates Trico's knowledge of the recordkeeping violations," finding instead that "no company supervisor was aware that incidents were not being recorded as required." Finally, he considered and rejected each of the Secretary's collateral factual claims on the ground that the evidence introduced in support of them was insufficient and/or unreliable. He therefore affirmed Trico's recordkeeping violations as other than serious rather than willful violations of the Act.

B. ANALYSIS

On review, the Secretary expressly abandons the challenge he raised in his PDR to Judge Schwartz' credibility determinations. In addition, he implicitly abandons his exception to the judge's finding that Trico's supervisors lacked knowledge of the recording omissions and errors that are before us. Nor does the Secretary dispute the judge's findings on any of the other collateral factual issues that were considered and resolved by the judge. Nevertheless, the Secretary continues to argue before us that Trico's recordkeeping violations were willful, reasoning that, while they may not have been the result of Trico's deliberate and knowing actions, as he claimed previously, they were the result of Trico's plain indifference to or reckless disregard of its obligations under the cited recordkeeping regulations.[15] We disagree.

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[15] In particular, the Secretary argues that "the most egregious manifestation of Trico's indifference" was its failure to conduct an "audit" of the OSHA logs, meaning specifically its failure to have someone other than Guevara verify (by "comparing each OSHA Log with the underlying E-1 forms") that Guevara had included all recordable injuries and illnesses on Trico's official OSHA logs. The Secretary also claims that Tijerina's insistent testimony that she had not noticed the absence of dermatitis cases on the logs in question during the telephone-conference-call reviews "is, if true, particularly telling evidence of [Trico's] indifference."

Commission Rule 92(c), 29 C.F.R. § 2200.92(c), provides as follows:

> (c) *Issues not raised before Judge.* The Commission will ordinarily not review issues that the Judge did not have the opportunity to pass upon. In exercising discretion to review issues that the Judge did not have the opportunity to pass upon, the Commission may consider such factors as whether there was good cause for not raising the issue before the Judge, the degree to which the issue is factual, the degree to which proceedings will be disrupted or delayed by raising the issue on review, whether the ability of an adverse party to press a claim or defense would be impaired, and whether considering the new issue would avoid injustice or ensure that judgment will be rendered in accordance with the law and facts.

Applying this rule to the record before us, we conclude that we would be fully justified in rejecting the Secretary's plain indifference argument simply on the ground that it was not raised before the judge. Although the Secretary argues on review that he had "squarely placed that contention before the judge below," we see nothing in his post-hearing brief or in his other submissions to the judge (written or oral) that could be characterized as a clearly-articulated, alternative theory of willfulness based on Trico's alleged indifference to its known legal obligations. The argument that the Secretary has presented on review is not just fundamentally different from the position he took before the judge. The two positions are in their essence diametrically opposed to one another. Basically, the Secretary argued before Judge Schwartz that the violations at issue were willful because Trico management was *intimately involved* in the preparation of the company's OSHA 200's and directly responsible for the recording policies that led to the cited violations. He now argues before us that the violations were willful because management *failed to involve itself* in the preparation of the OSHA logs, leaving the decisions as to which injuries and illnesses were to be recorded to nurse Guevara.

In any event, regardless of whether the Secretary's argument is properly before us, we further conclude that it must be rejected because it is not supported by the evidence. It is undisputed that Trico established a standardized recordkeeping system during the first year of its operations (1986) that was fully adequate to achieve the intended goals of (a) creating

and maintaining complete and accurate records of occupational injuries and illnesses and (b) complying with applicable laws and regulations, including OSHA's recordkeeping regulations. In setting up this system, Trico sought and obtained the assistance of its experienced corporate affiliate, Trico Products, and particularly of Trico Products' veteran safety department supervisor, Stefan Kablak.

In addition, the newly-formed company sought out and hired a skilled professional, with extensive experience in maintaining OSHA-mandated records and knowledge of OSHA's recordkeeping requirements, to be both its health clinic operator and its occupational injury and illness recordkeeper. Indeed, the record strongly suggests that, at the time of the alleged violations, nurse Guevara was more knowledgeable of the specific provisions of OSHA's recordkeeping regulations than either her immediate supervisor, Tijerina, or Tijerina's supervisor, Myers. In contrast to Myers' total lack of experience in OSHA recordkeeping prior to becoming the director of human resources and Tijerina's limited experience with a single employer prior to becoming the safety department supervisor, Guevara had had five years of prior experience, filling out OSHA 200 and Texas E-1 forms for three different employers, prior to coming to work for Trico. Both Guevara and Tijerina, who had been one of Guevara's two employment interviewers, testified that this prior experience had been one of the reasons why Trico had hired Guevara and made her responsible for preparing and maintaining its injury and illness records. Indeed, when asked whether her interviewers had been "interested" in her "training with regard to preparation of E-1's and the OSHA 200 log," Guevara responded, "I'm sure they were. I don't think they would have hired me if they weren't."

Once in her new position, Guevara apparently went through a period of on-the-job training and close supervision before Trico turned over responsibility to her for the creation and maintenance of its OSHA 200's. In deposition testimony introduced into evidence in this proceeding, Guevara claimed that, while she had received previous training in OSHA

recordkeeping from a nurse at Luria Brothers, one of her previous employers, she had learned " a lot more" about OSHA recordkeeping from Tijerina as a result of working "under her wing." She further testified that she had been told at the time of her employment interview that there would be a transition period relating to recordkeeping, with Tijerina supervising Guevara's work on the E-1's and OSHA logs until Tijerina was satisfied that Guevara could do the work properly. According to the witness, Trico had seemed to be satisfied with her ability to fulfill its recordkeeping obligations by the time the company moved into its permanent location, which was nine or ten months after she had begun working for Trico. Nevertheless, even after Trico transferred these recordkeeping responsibilities to Guevara, it continued to exercise some degree of supervision over her work, as indicated by Tijerina's continuing supervision of the E-1 forms and the involvement of *two* corporate safety supervisors (Tijerina and Kablak) in the annual telephone-conference-call reviews of the draft OSHA 200 forms. The Secretary justifiably criticizes these reviews because they did not include any effort to determine whether Guevara had listed all recordable incidents on the form. However, the fact that Trico's management conducted these annual reviews, before finalizing and posting the company's official OSHA 200's, shows sufficient concern by Trico to counter a finding of willfulness.

Based on the record before us, including in particular the evidence set forth above, we reject the Secretary's characterization of Trico as acting with plain indifference to or reckless disregard of its legal obligations under the Secretary's recordkeeping regulations. We therefore affirm the judge's conclusion that the violations at issue before us were not willful.

We also reject the Secretary's alternative argument that the violations should be classified as serious rather than other than serious. Under Commission precedent, when the Secretary fails to establish his allegation of willfulness, the violation generally will be classified as other than serious, "unless the parties have expressly or impliedly consented to try the issue of whether the violation was serious," *Atlas Indus. Painters*, 15 BNA OSHC

1215, 1218, 1991-93 CCH OSHD ¶ 29,439, p. 39,673 (No. 87-619, 1991), *aff'd*, 976 F.2d 743 (11th Cir. 1992), or the seriousness of the violation was "evident." *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2176, 1991-93 CCH OSHD ¶ 29,962, p. 41,010 (No. 87-922, 1993), *citing Simplex Time Recorder Co.*, 12 BNA OSHC 1591, 1984-85 CCH OSHD ¶ 27,456 (No. 82-12, 1985). Here, the Secretary concedes that the allegation of seriousness was *not* tried by the parties, but urges us nevertheless to affirm the violations as serious since trial of the issue by consent was precluded by the judge's "precipitous cancellation of the May 1993 hearing." *See supra* note 8. We consider this position untenable, particularly in view of the Secretary's failure to move for an amendment of the pleadings at any time during the seven-month period between the issuance of the judge's preliminary order, which rejected the willfulness classification of the recordkeeping violations, and the judge's final decision and order. *Cf. J.A. Jones Constr. Co.*, 16 BNA OSHC 1497, 1498, 1994 CCH OSHD ¶ 30,301, pp. 41,751-52 (No. 87-2059, 1993), *petition for review withdrawn*, No. 94-1223 (4th Cir. Mar. 28, 1994) (amendment from willful to repeated denied where no trial by consent and the Secretary failed to avail himself of "an opportunity to raise the issue" after the judge's original ruling). Nor can we conclude that the seriousness of Trico's recordkeeping violations was "evident," particularly when we consider those violations in the light of Commission precedent describing similar recordkeeping violations as being of "low gravity" and classifying them as other than serious violations of the Act. *E.g.*, *Caterpillar*, 15 BNA OSHC at 2178 & 2176, 1991-93 CCH OSHD at pp. 41, 012 & 41, 010.[16]

We therefore affirm the judge's classification of Trico's recordkeeping violations as other than serious, rather than willful or serious. We also affirm his assessment of penalties

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[16] In *Simplex*, "the death of an employee," apparently as a result of the violation in question, was the fact that made "the seriousness" of that violation "evident." 12 BNA OSHC at 1597, 1984-85 CCH OSHD at p. 35,572.

totaling $11,400 for those violations. The Secretary has not presented any argument before us challenging either the penalty amounts assessed by the judge or his detailed, underlying findings of fact.[17]

III. ORDER[18]

We reverse the judge's order granting Trico's motion for partial summary judgment on the FTA charge, restore the FTA notice to its original form, and remand the case to Judge Schwartz for a hearing on the merits of the Secretary's original allegation. We affirm the Secretary's recordkeeping citation as modified first by the stipulation of the parties and then

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[17] The only argument presented by the Secretary concerning the recordkeeping penalties is a procedural challenge that is not properly before us on review. The Secretary argues that the judge's decision to cancel the scheduled reconvening of the hearing on May 11, 1993, *see supra* note 8, further deprived him of the opportunity to "prove his case for recordkeeping penalties." Because there was *no* reference to the judge's penalty assessment procedures in the Secretary's petition for discretionary review, former Commissioner Foulke's direction for review, or the Commission's briefing order, we conclude that this argument clearly falls outside of the scope of our review. We also note that the issue was not properly raised before Judge Schwartz. The judge cancelled the hearing in question only after *both* parties had expressly notified him that their evidence at the hearing would be limited to the FTA charge. *See supra* Part I. It was not until three weeks after the reconvened hearing had already been cancelled that the Secretary first informed the judge of his desire to introduce additional evidence relating to recordkeeping penalties.

[18] The issuance of our decision and order in this case renders Trico's pending motion for oral argument moot. It is therefore denied.

by the decision and order of the judge. We affirm the judge's assessment of penalties totaling $11,400 for Trico's other than serious violations of 29 C.F.R. §§ 1904.2(a), 1904.5(a) & 1904.5(c).

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Velma Montoya
Velma Montoya
Commissioner

Dated: January 19, 1996

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

Office of
Executive Secretary

Phone: (202) 606-5100
Fax: (202) 606-5050

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 91-0110
TRICO TECHNOLOGIES CORPORATION,	:	
Respondent.	:	

NOTICE OF REMAND ORDER

The attached Order of Remand by the Occupational Safety and Health Review Commission was issued on January 19, 1996.

FOR THE COMMISSION

Date: January 19, 1996

Ray H. Darling, Jr.
Executive Secretary

91-0110

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,
v.
TRICO TECHNOLOGIES CORPORATION
Respondent.

OSHRC DOCKET
NO. 91-0110

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 16, 1993. The decision of the Judge will become a final order of the Commission on September 15, 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 September 7, 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:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
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200 Constitution Avenue, N.W.
Washington, D.C. 20210

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

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: August 16, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-0110

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SECRETARY OF LABOR, Complainant, v. TRICO TECHNOLOGIES CORPORATION, Respondent.	OSHRC DOCKET NO. 91-0110

APPEARANCES: Daniel Curran, Esquire
Dallas, Texas
For the Complainant.

Martin Schneiderman, Esquire
Sara Beth Watson, Esquire
Washington, D.C.
For the Respondent.

Before: Administrative Law Judge Stanley M. Schwartz

DECISION AND ORDER

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's facility in Brownsville, Texas, from May 22, 1990 until November 20, 1990; as a result of the inspection, Respondent ("Trico") was issued a notification of failure to abate as well as a serious, a willful and an "other" citation.

Notification of Failure to Abate

The notification alleges that Trico failed to abate a nonserious violation of 29 C.F.R. § 1910.132(a) which was cited pursuant to a previous inspection of the facility in January of 1988; specifically, the 1988 citation alleged that Trico had not provided appropriate

protective equipment to employees exposed to skin contact with a chemical called Roll Form 20. Trico filed a motion for partial summary judgment seeking dismissal of the notification and the proposed penalty of $300,300.00; the basis of the motion was that the issuance of the notification more than two years after the initial citation was improper under the Act and OSHA's Field Operations Manual ("FOM"), that the proposed penalty was excessive, and that Trico had, in fact, attempted to correct the condition. In his response to the motion, the Secretary asserted the penalty was not excessive and that Trico's claim that OSHA did not act with reasonable promptness was no defense under the circumstances of this case.

Pursuant to Trico's motion, the undersigned issued an order on May 5, 1992, which reclassified the notification to allege a nonserious violation with a proposed penalty of $1,000.00; this ruling was based on my conclusion that the issuance of the notification was unreasonable as a matter of law. Although the Secretary was provided an opportunity to amend the notification he did not do so, and at the beginning of a hearing held July 14-17 and 30-31, 1992, which was directed to the willful classification of citation number 2, discussed *infra*, Trico withdrew its contest of the notification. (Tr. 5-7). In an order issued on January 4, 1993, it was noted that the Secretary had essentially made an offer of proof in regard to the merits of the failure to abate issue during the July 1992 hearing, and that there was substantial evidence on that issue in the record. It was further noted that it appeared the issue could be tried quickly along with the merits of the citation number 2 recordkeeping violations, and that a hearing addressing both matters would be scheduled to preclude the necessity of a remand. Prior to a hearing set for May 11, 1993, the parties essentially settled the recordkeeping violations. The parties also stipulated that the evidence adduced during the July 1992 hearing could be used for the failure to abate issue to obviate the need to reintroduce documents or repeat prior testimony. Notwithstanding, the Secretary advised that he planned to call seventy-three witnesses to testify in respect to the failure to abate issue and that it was estimated a week would be required to present such testimony.

In light of the foregoing and after a conference call with the parties on May 6, 1993, the undersigned issued an order canceling the hearing and announcing an intent to rely on

the May 5, 1992 ruling rather than to conduct a lengthy hearing on the merits of the failure to abate issue. That ruling, as noted above, was based on my conclusion that the notification was improper as a matter of law. My reasons for so concluding follow.

As Trico noted in its motion, the Act provides for the issuance of a notification of a failure to abate after a follow-up inspection reveals that the same condition is uncorrected; however, the Act also requires inspections to be reasonable and conducted without delay and citations to be issued with reasonable promptness and within six months of the occurrence of the violation. *See* 29 U.S.C. §§ 657(a), 658 and 659(b). Further, OSHA's FOM requires follow-up inspections to be "conducted as promptly as resources permit" and the administrative closing of cases in which a required follow-up inspection has not been conducted within six months of the abatement date and the case has become a final order of the Commission. *See* FOM Chapter II section F.1.c., *reprinted in* CCH Employment Safety and Health Guide, Vol. 3, ¶ 7962.125.

The undersigned judge is aware that the FOM's primary purpose is not to give employers particular rights or defenses in adjudicatory proceedings. *See Del Monte Corp.*, 9 BNA OSHC 2136, 2140, 1981 CCH OSHD ¶ 25,586, p. 31,914 (No. 11865, 1981). At the same time, an employer can defend on the basis that an inspection is unreasonable under section 8(a) of the Act. The FOM provides guidance in resolving this issue.

Trico points out that, consistent with the FOM, the 1988 inspection was apparently closed and then reopened shortly before the completion of the 1990 inspection. *See* Appendix D to Trico's motion. The record shows that the subject inspection conducted two years after the final order date was not a follow-up inspection. To so conclude would require a finding that it was both reasonable and conducted without delay. In my view, as noted by Trico, to so hold would be contrary to the Act and the FOM. Accordingly, it is found that the 1990 inspection was a general inspection.

Trico suggests OSHA's motivation in issuing the notification was its desire to enhance the penalty. There is no basis to conclude such was OSHA's motivation. However, it is clear that OSHA had other enforcement tools contemplated by the Act to accomplish its goals. The Secretary, as noted in previous orders, could have easily amended the notification of failure to abate to focus on a willful or repeat citation. In addition, an

egregious willful citation could have been issued citing the dermatitis cases on an instance-by-instance basis. Relevant evidence would have been admitted on these issues. However, as mentioned above, the Secretary chose not to amend the notification and chose instead to stand on the notification as having been appropriately issued; this is especially disturbing in light of the Secretary's specifically objecting on May 26, 1993 to being unable to present evidence on the alleged failure to abate, since he could have cured this problem by following the undersigned's suggestion to amend.[1] For these reasons, the notification of failure to abate is affirmed as a nonserious violation and a $1,000.00 penalty is assessed.

Having canceled the hearing, I am aware that should the Secretary seek and obtain review of the notification issue the Commission may decide that a remand is necessary. However, upon considering the portions of the record of the July 1992 hearing addressing the issue, which are summarized below, I am convinced of the Secretary's inability to meet his factual burden of proof in regard to the notification.

The record shows that Roll Form 20, an industrial lubricant used at the facility, caused dermatitis in a number of employees who contacted it pursuant to their job duties; employees with the condition were treated at the facility's health clinic with prescription creams or lotions or were referred to the company physician for treatment, who in turn referred some cases to a dermatologist. The record further shows the dermatitis problem was well known at the facility, that it was one of the topics addressed by the company's safety committee, and that numerous measures were taken in an attempt to eliminate the problem, including the use of different lubricants as well as the use of protective creams, gloves, sleeves and suits; C-124-128, interoffice memos dating from 1987 through 1990, detail more fully the measures taken. Finally, the record indicates that although these measures helped, Trico's efforts were not fully successfully. (Tr. 20-24; 32-33; 44-46; 76-77, 84-91; 116-18; 130-31; 140-43; 165-67; 229; 251-52; 256-58; 265-70; 276-78; 282-96; 428-30; 446-50; 468-71; 729-31; 842-43; 980; 983; 1122; 1175-77; 1354-56).

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[1]These comments are not intended to reflect adversely on the Secretary's decision, since it is well settled that he has complete prosecutorial discretion in determining how he will present his case; the point of these comments, rather, is to clarify how the undersigned has attempted to perfect the evidentiary record should the Secretary prevail as a matter of law on this legal issue.

The foregoing tends to show that Trico made ongoing efforts to eliminate the dermatitis problem, and that while the company was not entirely successful in abating the condition its efforts were nonetheless reasonable under the circumstances. The Secretary, as noted *supra*, planned to call seventy-three witnesses to testify that the dermatitis condition was not abated. However, much of this testimony would be cumulative, and while no specific findings of fact are being made in regard to the merits of the notification it would appear that such testimony would be easily rebutted by the evidence already adduced on the issue; in fact, it is difficult to conceive of what additional evidence the Secretary could present that would establish his case. This is true even assuming *arguendo* the 1990 inspection was a follow-up to the 1988 inspection, in light of the intervening two-year period during which time the dermatitis problem was well known at the facility and constantly addressed. Regardless, for the reasons set out *supra,* the notification is affirmed as a nonserious violation and a penalty of $1,000.00 is assessed.[2]

Serious Citation Number 1

On January 6, 1992, the parties filed a joint motion to amend citation and notice of contest and partial settlement. In that motion, the Secretary withdrew item 7(e) of citation number 1 and amended the penalties for all eight items as follows:

Item 1	$550.00
Item 2	$550.00
Item 3	$550.00
Items 4(a) and 4(b) (grouped)	$550.00
Item 5	$500.00
Item 6	$600.00
Item 7	$700.00
Item 8	$700.00

Trico, in return, withdrew its contest of both citation number 1 and citation number 3, discussed *infra*. Accordingly, items 1 through 8 of citation number 1 are affirmed as

[2]On June 16, 1993, Trico filed a supplemental motion for partial summary judgment in which it essentially reiterated many of the same points made in its original motion. Trico supported the motion by reference to depositions and the transcript. Trico also noted the Secretary would oppose its motion. The undersigned has reviewed the motion and determined that a ruling is unnecessary in view of the disposition of the notification of failure to abate.

serious violations, with the exception of item 7(e), which is vacated, and penalties are assessed as set out above.

Willful Citation Number 2

Based on the agreement of the parties to bifurcate the proceedings in this case, the July 1992 hearing, as noted *supra*, was held for the purpose of determining whether the recordkeeping violations alleged by the Secretary were willful.[3] In an order dated January 4, 1993, it was found that the recordkeeping violations were not willful. The order is hereby reproduced, as relevant, in its entirety for the purpose of incorporating it into this final decision and order.

Background

Trico is an affiliate company of Trico Products Corporation ("Trico Products"). Trico Products, located in Buffalo, New York, fabricates windshield wipers and other parts for automobile manufacturers. In 1986, Trico Products began moving its linkage and assembly operations to two twin facilities being set up in Brownsville, Texas and Matamoros, Mexico. A project team from Trico Products undertook the start-up of the new facilities, both of which hired numerous employees.[4] The Buffalo plant provided ongoing assistance as the various operations were transferred.

Jo Anna Tijerina was hired in August 1986 as the supervisor of the safety department of the Brownsville facility. Tijerina was responsible for setting up the department, coordinating and maintaining the safety program, and investigating work-related accidents and illnesses. She also supervised the facility's nurse, Viola Guevara, an LVN who was hired in October 1986 to work in the health clinic where employees were given first aid or referral

[3]The citation at issue, which relates to the company's OSHA 200 logs for 1988, 1989 and 1990, alleges 105 violations of 29 C.F.R. § 1904.2(a), one violation of 29 C.F.R. § 1904.5(c), and one violation of 29 C.F.R. § 1904.5(a).

[4]Although the Brownsville facility had only about twenty employees at the beginning of 1987, it had approximately 300 employees by 1988 and 400-450 employees in 1989 and 1990.

to the company physician.[5] Guevara also processed work-related injury and illness claims, maintained the records in that regard, and recorded incidents on the plant's OSHA 200 logs.

Clinic visits were recorded on a daily log, and Tijerina, pursuant to her investigative duties, prepared an accident report upon the occurrence of a work-related incident. Guevara used the report to prepare Form E-1, Employer's First Report of Injury or Illness. If a case involved over one day of lost time, the original E-1 was sent to the Industrial Accident Board in Austin, Texas and a copy to the company's worker compensation insurer; otherwise, the original E-1 went to the insurer. A copy of the E-1 was kept in the company's employee medical file and another copy in a binder containing the E-1's and OSHA 200 logs for that period. Guevara recorded incidents on the logs pursuant to the E-1's.

Initially, any incidents requiring referral were paid by the company's insurer. Sometime in 1987, Trico initiated a "paid-in-house" system whereby the company paid for injuries involving no lost time and treatment costing $100.00 or less; in 1988, the amount increased to $250.00. Guevara took the E-1's to be paid in-house to the facility's human resources director for approval; after November 1987, that individual was Jack Myers, who prior to that time was on the start-up team. Paid-in-house E-1's were kept in white binders entitled "Paid In-House" and insurance-processed E-1's were kept in colored binders entitled "OSHA 200." The binders were also labeled to indicate the dates of their contents.

In January of each year, the Brownsville facility had a telephone conference with Stefan Kablak, Tijerina's counterpart in the Buffalo plant, at which time a review of the draft OSHA 200 logs for the preceding year would occur. The logs would then be typed up and posted at the facility. OSHA inspected Trico in January 1988, and reviewed its logs at that time; although the company was cited for not providing appropriate protective equipment to employees exposed to Roll Form 20, no citations were issued in regard to OSHA recordkeeping.

OSHA initiated another inspection of Trico on May 22, 1990, at which time Tijerina was on maternity leave and Guevara had resigned and been replaced by Jose Martinez, a

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[5]The health clinic was part of the safety department, and Tijerina and Guevara each had an office in that area.

certified emergency medical technician.[6] Ann Fox, the OSHA industrial hygienist who inspected the facility, was assisted in locating company records by Martinez, Myers and Joe de la Cerda, Trico's fire chief. She requested the OSHA 200 logs and corresponding E-1's for 1988, 1989 and 1990, and upon reviewing them found no deficiencies other than the 1989 log being unsigned. On June 13 Fox discovered the paid-in-house binders and noted many recordable incidents which did not appear on the logs she initially saw. Myers had no explanation for the discrepancies, and phoned Guevara to ask her about the logs. Guevara also had no explanation, but agreed to meet with Myers and Fox at the facility. When she did not appear for either the first appointment or another one set later that week, Myers sent de la Cerda to her home with the binders the following week; however, Guevara told de la Cerda she would not help the company.

Fox held a conference with Trico on June 15, after which OSHA obtained a medical access order and began receiving the company's employee medical records. Upon reviewing the records, Fox found 113 instances of unreported injuries or illnesses, 105 of which were ultimately determined to be willful based in part on Myers or Tijerina having signed the relevant documents; of those, thirty-two were rashes or dermatitis related to contact with Roll Form 20 and fifteen were eye injuries. Fox's inspection continued until November 20, 1990, during which time she interviewed employees and took statements from supervisors, including Myers, Tijerina and Kablak. Fox and her supervisor also took statements from Guevara and Martinez, who Trico had terminated on August 17, 1990; in those statements, Guevara and Martinez said they were told to not record certain injuries on the OSHA 200 logs and to not show the paid-in-house binders to OSHA. In August 1990 Trico submitted corrected logs for 1987 through 1990 to OSHA.

The Contentions of the Parties

The Secretary contends the violations were willful based on the large number of unrecorded incidents, management's knowledge of the condition, and the instructions Guevara and Martinez received. He further contends that employees were discouraged from

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[6]Guevara left Trico at the beginning of April 1990, and Martinez began working at the facility at the end of that month.

reporting injuries, that Trico prepared "hit lists" of employees to be terminated based on their reporting of injuries, and that the company's lost workday injury rate ("LWDI") without the reported incidents was just below the industry average.

Respondent, on the other hand, contends that management had no knowledge of the condition, and that while the failure to properly record injuries and illnesses may have been negligent it was not willful. Respondent disputes the Secretary's assertions regarding discouraging employees from reporting injuries, "hit lists" and its LWDI, and asserts that Guevara and Martinez are not credible.

Based on the foregoing, a determination of whether the violations were willful must be resolved by a close examination of the relevant evidence in this case, as follows.

The Evidence

Viola Guevara appeared and testified. She had performed industrial nursing at three different companies before Trico, for a total of about five years, and told Trico during her interview of her experience in the areas of first aid, worker compensation and OSHA recordkeeping. When she was hired, Tijerina informed her she herself would oversee the clinic and be responsible for the OSHA logs, and that Guevara would assist with the E-1's and the logs; Guevara's other duties were first aid and referral, absenteeism reports, worker compensation orientation and personal insurance matters. (Tr. 729-38; 753-56; 807-09; 934-52; 1105-08).

After filling in an E-1, Guevara would give it to Tijerina for review, and if it was recordable enter it on the OSHA log.[7] When Myers and Tijerina developed the paid-in-house system, Guevara put the titles on the binders, based on what Tijerina told her, to keep the records from becoming confused; she kept the records in color-coded binders and in two separate drawers for the same reason, and maintained OSHA logs stamped "Paid In-House" in the paid-in-house binders. Guevara entered insurance-processed incidents on the OSHA 200 logs and paid-in-house incidents on the paid-in-house logs; however, when a paid-in-

[7]Guevara first indicated Tijerina determined recordability and decided who would sign the E-1's; she later said she herself signed the E-1's and determined recordability from the back of the OSHA 200 log. (Tr. 753-59; 773-74; 1272).

house E-1 was recordable, she would move it from the paid-in-house to the OSHA 200 binder and enter it on that log. Although none of Guevara's previous jobs had involved such a system, she understood it to be a type of self-insurance. (Tr. 746-48; 753-60; 763-65; 778-79; 880; 954-56; 962-68; 972; 989-97; 1116-21; 1127-28; 1243-44; 1248-49; 1257-62).

Guevara and Tijerina initially got along well, and Guevara recorded injuries as she believed appropriate. Guevara further testified that sometime in 1988, Tijerina began criticizing her work. She told her there were too many rashes and eye injuries, to process them in-house instead of through the insurance company, and to not record them on the OSHA 200 logs. She also told her to treat as many cases as possible in the clinic instead of referring them to the doctor, to not record first aid on the OSHA 200 logs, and to not show the paid-in-house logs to OSHA. Guevara indicated these instructions occurred following a meeting with the insurance carrier regarding its quarterly reports, after which the paid-in-house level rose to $250.00 and Tijerina began deleting entries from the OSHA 200 logs. Guevara understood that the purpose of the instructions was to reduce the incidents that were reported and to keep down insurance costs. (Tr. 742; 756-57; 765-79; 794-95; 877-80; 905-08; 931-33; 965; 975; 979-89; 997-98; 1121-30; 1245-49).

Guevara wrote a complaint to Myers about Tijerina and asked to be put under his supervision, but the complaint was to no avail. Guevara also told Tijerina the instructions were wrong, but was informed they had come from Myers and Art Stroh, Trico's president at the time. At one point, Guevara and Tijerina went over the OSHA 200 log with Myers, who left the responsibility of recording to Tijerina but said they were to keep first aid on the paid-in-house logs and other items on the OSHA 200 logs. On another occasion, Guevara, Tijerina and Myers discussed an employee with a bad case of dermatitis; Guevara told them it was recordable, but Tijerina and Myers decided it was not based on the doctor's report. Guevara felt intimidated by Myers and obeyed Tijerina's instructions because she believed her job was in jeopardy if she did not. She did not recall the specific language of the instructions, but said she had not confused the paid-in-house system with recordability. She also did not recall if she discussed the instructions with Myers, and did not know if he knew of them or the fact the logs were incomplete. Stroh never told her to misrecord on the logs.

(Tr. 757; 765-69; 773-74; 880-82; 930-31; 975-79; 983-85; 988-89; 1129; 1160-63; 1200-01; 1232; 1244-47; 1262-67).

Guevara did her best to see that all employee visits to the clinic were noted in the clinic log, which was kept on a table and visible upon entering the clinic; Tijerina never told her to not record rashes and eye injuries in the log or to not show the log to OSHA. During the 1988 inspection, Guevara provided the OSHA 200 binders and logs when Myers requested them. She asked him if he also wanted the paid-in-house logs, and Myers said he did not; however, since she had not yet been instructed to not record rashes and eye injuries, the logs were filled out correctly as far as she knew. Guevara also provided the OSHA 200 logs to the insurance representatives when they visited Trico. She did not give them the paid-in-house binders, but knew of no reason not to since she was sure they knew about the system. She knew she was not to show the binders to OSHA, and noted that was why they were kept in a different location from the OSHA 200 binders. (Tr. 761-65; 789-90; 960-64; 990-91; 1135-37; 1165-72; 1250-56).

According to Guevara, the yearly reviews of the logs were mostly between Kablak and Tijerina, and her own participation was limited to answering questions that arose.[8] For the review of the 1988 log, Guevara gave both the OSHA 200 and the paid-in-house binders to Tijerina, and they went over all incidents on both logs with Kablak and added and deleted entries as he instructed.[9] Guevara first said Kablak did not have copies of the logs for the reviews. She then indicated he did, but that she never sent them to him; however, she identified R-9 as the draft 1989 log and her cover memo to Kablak and noted she sent the log pursuant to Tijerina's instructions. Kablak did not get copies of E-1's or the paid-in-house logs, to Guevara's knowledge; she was at first sure he was aware of the logs, but later said she did not know if he was. She did not tell him about her instructions regarding rashes and eye injuries, and other than the reviews, did not talk to him about recordability. (Tr. 779-86; 795-804; 819-21; 825-26; 903-05; 1046-60; 1130-35; 1138-39; 1200; 1262-64).

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[8]Guevara recalled only the review of the 1988 log, and did not remember reviewing the 1987 and 1989 logs. (Tr. 785-88; 795-97; 832-35; 838-40; 903-04; 1046-47).

[9]Guevara later indicated Kablak's role was to look at the internal consistency of the logs, and that while he questioned some items, Tijerina could take his advice or not. (Tr. 1134).

Guevara first indicated the initials on C-108, the 1988 log, were hers; she then said they were not, that the form was not complete and that there were more than two eye injuries and one rash that year. She remembered eye injuries and rashes being deleted from the rough draft and telling Kablak she disagreed with the deletions; however, she later stated she recalled no disagreements with Kablak over the recordability of incidents and that she didn't know if he deleted entries. Guevara identified her signature on C-111, the 1987 log, and noted that while C-106, the 1989 log, was unsigned, she or Tijerina had signed the one that was posted. Guevara said C-106 was incorrect because it showed only two rashes, and that C-107, the rough draft of the 1990 log, was incomplete because she left Trico that year. (Tr. 785-89; 795-96; 804-05; 819-21; 825; 832-42; 904-05; 1134-35; 1139-42).

Guevara acknowledged the eye injury and dermatitis cases on the OSHA logs contrary to her instructions, but indicated she had recorded them on her own initiative or because the doctor bills exceeded $250.00; she recorded one incident because the employee had lost time and had an attorney. Guevara also acknowledged the large number of unreported cases that were not eye injuries or rashes. She said there were certain other cases Tijerina had told her to not record, and that some of the unreported incidents could have occurred when she was out, when Tijerina would make entries on the logs; Tijerina could also have deleted cases when she took the binders home to work on them, and one of the secretaries who had worked in the clinic area could have mis-stamped or misfiled some of them. Guevara indicated she could have made some mistakes, but that it was not possible she had made all of them; she had been overburdened with work and behind in her absenteeism reports but had kept up with the E-1's and OSHA logs because she knew OSHA could walk in at any time. (Tr. 757-59; 898-901; 973-74; 990; 1039-44; 1065-69; 1109-13; 1124; 1129; 1144-60; 1210-22; 1268-70).

Guevara said the safety incentive program discouraged employees from seeking medical treatment because it awarded prizes to employees in departments reporting no injuries and disqualified departments that reported injuries; she knew of employees who did not report injuries, some of which resulted in lost time, because they did not want to disqualify co-workers. Guevara also said employees with recurring injuries were laid off. Myers asked her at various times in late 1988 and early 1989 for lists of those who had had

rashes and eye injuries, and gave her lists of employees on which she was to highlight those who had had injuries. Guevara did not know the purpose of the lists she provided Myers; he could have wanted them for safety committee meetings. She referred to the lists Myers gave her as layoff or "hit lists," and said they were not the same as the lists she was given to prepare COBRA paperwork. She recalled Myers mentioning Javier Vega as one employee to be laid off because he had had hernia and back problems. (Tr. 815-19; 841; 846-48; 854-58; 876; 1012-14; 1034-39; 1162-64; 1240-42).

Guevara described the circumstances surrounding her leaving Trico. She was under a lot of pressure due to the amount of work she had, and complained to Tijerina and Myers about having to look up employee attendance records. She also complained about Tijerina interfering in her worker compensation and other duties, and when Myers refused to do anything she became very upset, her blood sugar level got out of control, and she ended up in the hospital. While hospitalized, she learned Tijerina had filled out paperwork to fire her. Myers approved the termination, but then retracted it and she was reinstated; however, she resigned two weeks later after Myers refused her request to be supervised by him or anyone besides Tijerina. Guevara identified R-14 as her resignation letter. She said she put all her complaints in writing, but that Trico claimed it no longer had them and her copies had been stolen. She also said she was involved in a lawsuit against Trico after leaving.[10] (Tr. 896-98; 1000-02; 1006-11; 1177-82; 1188-95; 1231-32).

Although Guevara told Myers when he called that she would help with the OSHA logs, she did so only to get him off the phone and had no intention of assisting because of what Trico had done to her. She knew OSHA had found a problem with the logs, and, based on what Myers said, that OSHA would be contacting her. She was worried at the outset of her interview with the OSHA officials; however, she had the impression that she herself was not in trouble after talking to them and telling them about the instructions she had received. (Tr. 908-19; 931-33; 1182-88; 1195-98; 1206-07).

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[10]Guevara initially denied her involvement, but then said she was persuaded to take part in an action filed on behalf of a number of former employees of Trico; she joined the suit in part to recover her medical expenses, and later settled her portion of the suit. (Tr. 999-1002; 1014-16; 1189-95).

Jo Anna Tijerina also appeared and testified.[11] Prior to being employed at Trico she received her MBA and worked for Norton Company, where in 1985 she was responsible for safety, training and benefits, and maintaining the OSHA 200 logs. After being hired by Trico she went to Buffalo and spent a week at that facility; she received no formal training, but Kablak explained what her job would entail and gave her OSHA recordkeeping guidelines. Upon returning to Brownsville Tijerina participated in interviewing Guevara, who was hired due to her previous experience. Tijerina went over the job duties with Guevara and gave her the OSHA guidelines. (Tr. 165-77; 188-95; 227-29; 239-43; 298).

Although one of Tijerina's responsibilities was to maintain government-required records, it was Guevara's job to determine the recordability of incidents and enter them on the OSHA 200 logs; Tijerina rated Guevara in this regard, and believed she was maintaining the logs properly. Tijerina performed clinic duties, including referrals, filling out E-1's and making entries on the logs, when Guevara was absent; she may not have made all the required entries during those times, but left the E-1's for Guevara to file when she returned and assumed she would also record them if they had not been since that was her job. Tijerina did not follow up to ensure this was done because she trusted Guevara to do her job in running the clinic; she was also unable to check everything she did. (Tr. 196-208; 222-27; 238; 243; 247-50; 306; 359-61).

Tijerina never took the E-1 binders home, and the only time she went over the logs or discussed them was during the yearly conferences with Kablak, which she participated in as Guevara's supervisor. The purpose of the reviews was to ensure the columns added up; they did not involve comparing the E-1's with the logs, which Guevara should already have done, and Tijerina knew of nothing other than copies of the rough drafts being faxed to Kablak. Tijerina did not add or delete entries during the reviews, and Kablak never instructed her to do so.[12] She recalled no discussions about eye injuries or dermatitis or

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[11]Tijerina no longer works for Trico; she resigned at the end of September 1991, and the following week began working at the Texas Workers Compensation Commission in the OSHA Consultation Program, where she is still employed. (Tr. 303-04; 369-70; 386-87).

[12]Tijerina talked to Kablak about individual cases, including dermatitis, throughout her employment with Trico; however, she never discussed recordability of incidents with him. (Tr. 216-22).

differences of opinion between Kablak and Guevara regarding recordability, which was left to Guevara's discretion. Tijerina did not consider the reviews audits, and said there was no audit procedure for the logs. (Tr. 221; 244; 247-50; 275; 286-87; 306-10; 354-58; 364).

Trico's insurers made quarterly visits during which they reviewed records such as the OSHA logs, and some of the reports following the visits discussed dermatitis and eyes injuries, both of which were addressed by the facility. Tijerina did not recall telling Guevara there were too many such cases, but said she could have; however, she never told Guevara what to record on the OSHA logs or to not record dermatitis or eye injuries; she also never told her to not record first aid, which in any event is not reportable. She did instruct Guevara to post the OSHA logs, but did not tell her to sign them because Guevara already knew she was supposed to do so. (Tr. 260-66; 312-13; 351; 356-59; 376).

Tijerina identified C-124-128 as interoffice memos from 1987 through 1990 regarding methods used to try to eliminate the dermatitis caused by Roll Form 20; she said everyone at the facility was aware of the problem, that she discussed it with management, and that it was one of the items addressed by the safety committee.[13] Tijerina knew the condition was reportable, and acknowledged that C-111, C-108 and C-106, the logs for 1987, 1988 and 1989, showed very few dermatitis cases, and that C-107, the rough draft of the 1990 log, showed none; however, it never occurred to her during the reviews of the logs that cases were not being recorded correctly because that was not her job. She did not believe the safety committee ever looked at the logs. (Tr. 229-30; 239; 243; 249-50; 256-60; 265-97).

Tijerina said there should have been only one OSHA log for each year with all recordable incidents on it, and that if there were paid-in-house logs she did not set them up or know about them. She agreed C-88 and C-89 included copies of logs with "Pd. In House" written on them, but noted the writing was that of Martinez and the incidents on the logs occurred during the period she was on maternity leave. She also noted that Guevara could have confused the paid-in-house system with OSHA recordability, but that she had guidelines to follow. (Tr. 262-63; 329-34; 378-81).

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[13]Tijerina formed the committee in 1987 or 1988, and conducted its monthly meetings. (Tr. 229-30; 256-57).

Tijerina was responsible for clinic duties after Guevara left and before Martinez arrived, and any failure to record incidents on the OSHA log during that period was due to the many other demands of her job. Tijerina was involved in interviewing and hiring Martinez, and also trained him. She thought he was having some difficulty grasping his job by the time she went on maternity leave, but gave him the benefit of the doubt because he had had no previous industrial nursing experience and had only been on the job two weeks. His termination after she returned was not based on mistakes on the OSHA logs, but on deficiencies such as giving out incorrect insurance information, misspelling names and putting down the wrong individuals on E-1's. (Tr. 298-306; 405-08).

For the first two months after Myers became the human resources director, Tijerina computed the facility's LWDI and provided it to him on a typed form for use at staff meetings; however, since no one understood the numbers, Myers asked her to do graph interpretations instead. Tijerina derived the numbers for both the LWDI and the graphs from her accident investigation reports; the graphs, which showed the accident rate by department, were produced by another employee. (Tr. 232-33; 244-46; 274).

Tijerina described the safety incentive program implemented by the safety committee in 1988. Every employee without an accident during the applicable period received a lottery-type ticket, and employees in departments with no accidents received an additional ticket. Those having tickets with three matching symbols received prizes such as coolers; moreover, all employees could write their names and department numbers on their tickets and place them in a box where they were kept for a quarterly drawing at which a prize such as a television would be awarded. (Tr. 344-48).

Jose Martinez testified Tijerina told him during his interview that besides first aid he would have significant administrative responsibilities, including worker compensation claims and the OSHA 200 logs; he told her he had some knowledge of OSHA logs but was not 100 percent proficient in them. After he was hired, Tijerina trained him and instructed him to document incidents under $250.00 in the paid-in-house binder and those over $250.00 or requiring a doctor visit or suturing, even if under $250.00, on the OSHA 200 logs. Before going on maternity leave, Tijerina told him to get the clinic records in order because they were a mess and she had a feeling OSHA would be inspecting Trico; she also told him to

not show the paid-in-house binders to OSHA. Martinez said he filed E-1's and filled in the OSHA 200 log pursuant to Tijerina's instructions. (Tr. 525-28; 532-48; 560-61; 573; 611-12).

Martinez further testified that Fox, after reviewing the OSHA 200 binders, asked him if he had anything else because something seemed to be missing. He initially told her he knew of nothing else, but talked to de la Cerda about the propriety of the instructions he had received.[14] He also talked to a friend at another company, who told him everything relating to accidents and incident reports should be shown to OSHA. On June 13, when Fox asked about the records again, Martinez gave her a paid-in-house binder and told her to "keep an eye out" because Tijerina had instructed him to not show it to OSHA and he could be terminated for doing so. He recalled her saying something like "bingo, everything seems to be matching up now," and noted he provided the binder, even though Myers was present, because he thought it was required by law.[15] Martinez had not talked to anyone at Trico besides de la Cerda about the instructions, and Myers said nothing when Fox was handed the binder. (Tr. 534-36; 562-78; 606-17).

Martinez said he was fired three or four days after giving Fox the paid-in-house binders. He then said he was not fired until mid-August, and that he was told of problems with his job performance at that time. Martinez identified R-5 as a statement he made setting out his complaints against the company, and noted he had filed a lawsuit against Trico for wrongful discharge which had settled. (Tr. 536-37; 571; 584-87; 596-602; 608).

Guadalupe Sanchez was a machine operator at Trico from 1988 until November 1991, when he was terminated. He testified employees were discouraged from reporting injuries, but that the sweepstakes program was not the basis for his belief; he and others with rashes had gone to the clinic, and Tijerina and Guevara had said their "hands were tied." Sanchez had served on the safety committee, which had addressed the problem; different kinds of chemicals were used, and creams and lotions were provided to employees. (Tr. 429-31; 435-37; 446-50).

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[14]Martinez did not recall his conversation with de la Cerda until reviewing R-3, a deposition he gave in August 1991. (Tr. 565-68).

[15]Martinez initially testified Myers was not present when he gave Fox the binder, but then said he was. (Tr. 536; 574; 613-14; 617).

Rolando Martinez worked in the tool room at the facility from 1986 through the first half of 1990. He testified his department did not have a problem with rashes, although he had had one, and that he understood it was the punch press department that had had rashes and some friction about reporting them. (Tr. 451-54).

Javier Vega, who worked at the facility from 1987 until mid-1990, testified he was afraid to report injuries; however, he had reported a 1988 hernia and been sent to the doctor. (Tr. 455-59).

Paul Mitchell worked at Trico from 1986 until mid-1990. He testified employees were discouraged from reporting injuries, that Trico falsified records, and that Guevara told him no records were made of the spider bite or hand injury he had had. He noted R-2 appeared to be a record of the spider bite incident. (Tr. 460-66).

Ann Fox testified that on June 13 she asked Myers if she could re-review several E-1's; he took her to Martinez, who, in Myers' presence, handed her a binder entitled "Paid In-House" she had not seen before. Martinez then told her she did not want the binder; however, Fox replied she did want it and any similar books for 1988 through 1990. Fox said the company was cooperative and the inspection routine up to this point, and that she was shocked to discover the logs' deficiencies; she considered the dermatitis cases the most significant deficiency because the logs she first saw reflected only three such cases. Fox also said the major problem was that the incidents on the paid-in-house logs were not included on the OSHA 200 logs she initially saw; if they had been, the recordkeeping problem would not have been of the same magnitude. She did not believe the omissions were mistakes due to the statements of Guevara and Martinez and the fact they were clearly recordable from the information on the back of the OSHA 200 log. (Tr. 485-93; 513-15; 520-24; 639-49).

Fox said no one at Trico had prior notice of the inspection to her knowledge, and that she would have been surprised if anyone had. Martinez never told her at the site he was instructed to not show her the paid-in-house binders, and she did not recall stating "bingo, everything seems to be matching now" or Myers reacting or saying anything when Martinez gave her the binder. Fox had access to the clinic area during the inspection, but did not know about its log until it was received pursuant to the medical access order. Once the dermatitis cases became apparent from the paid-in-house and clinic logs, she had no

trouble locating employees who were aware of the problem. (Tr. 622-27; 636; 672-74; 1275-84; 1339-45).

Fox returned to the plant on July 24, 1990, when she asked Myers if the companies with which Trico did business required its LWDI in their contracts; he said they did. Fox computed Trico's LWDI from the OSHA logs for 1988 and 1989 to be 9.3, just below the industry average of 9.4 her supervisor provided her; she recalculated the LWDI after discovering the unreported injuries, and found it to be 13.93. Fox believed the LWDI could be significant if Trico knew the industry average; however, there was no indication Trico had such knowledge and she did not ask to see its contracts. Fox identified R-29 as Trico's 1988 and 1989 overtime records, which show her original computation. She did not know if R-29 included vacation and holiday pay, rather than just actual hours worked; if it did, her initial computation would have been higher. (Tr. 490; 510-12; 709-16; 722-29; 1311-21).

Jack Myers has been with the company for thirty years and is presently a paint plant supervisor at Trico Products. He testified his previous duties had not involved safety, but that as the human resources director of the Brownsville facility he oversaw safety, security, personnel, training and recruiting. Myers met with Tijerina and Guevara shortly after assuming his duties in November 1987 to get an overview of the safety department, and at that time became aware of OSHA 200 logs and posting requirements; after meeting with them he felt the job was in good hands, particularly since they told him they were working with Kablak. (Tr. 76-77; 83-85; 88-91; 109-10; 115-23; 156-57; 1382-83; 1423-24).

Myers further testified that although Tijerina was ultimately responsible for the OSHA logs, she had a number of other duties and it was Guevara's job to take care of the E-1's and make entries on the logs. Myers saw some accident reports and the E-1's Guevara gave him to sign, but did not review such documents on a regular basis. He also did not approve the OSHA logs or make any effort to determine if injuries were properly recorded; he relied on Tijerina and Guevara to do so. Myers knew of the dermatitis because Trico was working on ways to eliminate it, and Guevara, pursuant to his or Tijerina's request, made lists of employees with the condition so the safety committee could address it; however, he did not know such cases were not being recorded on the logs. Myers also knew

of the paid-in-house system, but did not know such incidents were kept and recorded separately. (Tr. 118-25; 130-33; 136-37; 140-56; 161-62; 1387; 1397-98; 1412).

Myers indicated the corporate office in Buffalo recommended the paid-in-house system to control costs, and that while he was not involved in implementing it he did participate in the decision to raise the level to $250.00. He was not aware of the Buffalo office ever auditing Trico or, other than Kablak's yearly reviews, its OSHA logs; however, insurance representatives audited Trico and reviewed the logs. Myers first became aware of problems with the logs on June 13, 1990, but did not recall Martinez telling Fox he had been instructed to not show her the paid-in-house books. Myers decided to terminate Martinez after complaints from Tijerina and others regarding his paperwork and performance in general; the decision did not have to do with Trico's OSHA problems. (Tr. 92; 96-103; 121; 144; 157; 1382-91; 1413-15).

Myers did not tell Guevara to not show documents to the inspector during the 1988 inspection, and Guevara never complained Tijerina had told her to record improperly or to not record rashes and eye injuries. There was no friction between the two, to Myers' knowledge, until Guevara was hospitalized and Tijerina took steps to terminate her due to absenteeism. Myers discussed the situation with Tijerina, who agreed she did not have the documentation to justify terminating Guevara and that she would talk to her about problems areas upon her return. Myers himself signed no documents recommending Guevara's termination. (Tr. 137-39; 161-62; 1391-98).

Myers said layoffs at the facility started in 1989 due to changes in management and the economy. Supervisors and managers compiled lists of candidates for layoff based on a ranking system; from these, management made a final list which was submitted to Guevara so she could prepare the necessary paperwork to inform employees of their rights to COBRA benefits. Myers knew of no other lists given to Guevara in this regard, and never asked her to look at a list of candidates to determine if they had filed worker compensation claims. (Tr. 1420-22).

Myers did not recall Fox or the 1988 inspector asking about LWDI's and did not tell either the term was in company contracts; he did not know what LWDI meant then, and was still unsure of its meaning. Myers did not review company contracts or know what was in

them, and was unaware of OSHA's policy of conducting "records only" inspections for businesses with low LWDI's. He had heard of "frequency and severity" analyses, and recalled that Tijerina had given him charts with such information for a two-month period in 1988; nothing in them showed how Trico's average compared with the national average, and since he and the other supervisors did not understand the charts he asked her to make graphs instead which reflected incidents by department. Prior to Fox's inspection, General Motors ("GM") sent Trico a package of materials with new guidelines for GM suppliers, some of which dealt with frequency and severity of accidents and OSHA inspections. GM visited Trico to review company information the week of June 18, 1990, and could have asked for the OSHA 200 logs. Myers recalled telling Fox about the GM guidelines; to his knowledge, they are not part of GM contracts and such an effort had not been undertaken before. (Tr. 103-07; 163-64; 1398-1411; 1426-29).

Stefan Kablak is currently a plant superintendent at Trico Products. He testified his previous responsibilities as safety director included OSHA recordkeeping, with the assistance of a nurse, and serving as a consultant to Trico. No one in Brownsville reported to him, and his yearly reviews of the OSHA 200 logs were for the purpose of checking for technical compliance, such as column totals and checks in appropriate boxes; he did not receive copies of E-1's, could not recall adding or deleting entries on the logs, and was unaware of any incidences of improper recording. Kablak recalled no discussions with Guevara about recordability, and said Tijerina had the appropriate reference materials. He knew of the paid-in-house system, but was not involved in approving it or aware of the use of separate binders. (Tr. 1433-43).

Joe de la Cerda, presently Trico's safety and security coordinator, testified he had no OSHA recordkeeping responsibility from 1988 through 1990. When asked to locate some of the OSHA 200 logs, he called Tijerina, who told him where they were; he was then unaware of separate binders entitled "Paid In-House," and neither Tijerina nor Myers told him to not show particular documents to Fox. De la Cerda said Martinez never talked to him about the recordkeeping instructions he'd received or told him he'd been asked to do something illegal. (Tr. 1444-47; 1454-55).

Discussion

As noted *supra*, the issue to be determined at this time is whether the alleged violations were willful. To prove a willful violation, the Secretary must demonstrate it was committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-0355, 1987). As *Williams* further states:

> A willful violation is differentiated by a heightened awareness - of the illegality of the conduct or conditions - and by a state of mind - conscious disregard or plain indifference. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard....It is therefore not enough for the Secretary simply to show carelessness or a lack of diligence in discovering or eliminating a violation.

Id. at 1256-57 and p. 36,589.

In order to meet the "heightened awareness" requirement of *Williams*, the Secretary must establish Trico had actual knowledge of the violation. *Western Waterproofing Co., Inc.*, 5 BNA OSHC 1064, 1977-78 CCH OSHD ¶ 21,572 (No. 9225, 1977); *Georgia Elec. Co.*, 5 BNA OSHC 1112, 1977-78 CCH OSHD ¶ 21,613 (No. 9339, 1977). This may be accomplished by showing a supervisory employee had actual knowledge of the violation. *Clarence M. Jones*, 11 BNA OSHC 1529, 1983 CCH OSHD ¶ 26,516 (No. 77-3676, 1983); *MCC of Florida*, 9 BNA OSHC 1895, 1981 CCH OSHD ¶ 24,420 (No. 15757, 1981). The record in this case shows company supervisors knew of the recordkeeping requirements and of the dermatitis, eye injuries and other conditions at the plant. However, the record does not show any supervisor knew of the failure to record injuries and illnesses as required. My reasons follow.

Normally, the undersigned follows the Commission's suggestion to avoid any unnecessary impugning of the character of a witness. *See C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1298, 1977-78 CCH OSHD ¶ 22,481, p. 27,102, n.8 (No. 14249, 1978). In many cases, conflicts in testimony are due to the misinterpretation of a witness, such as the situation described below wherein Fox misunderstood what Myers told her. In other cases, conflicting

testimony can only be decided by evaluating the credibility of the witnesses. In this case, Tijerina, Myers, Kablak and de la Cerda all denied knowledge of the failure to record injuries and illnesses as required, whereas Guevara and Martinez specifically stated they did have such knowledge. However, even a cursory review of the record as set out above reveals the many discrepancies and contradictions in the testimony of Guevara and Martinez. Moreover, the respective demeanors of these two witnesses as they testified about the crucial factual issues indicated they were less than candid in placing fault for the failure to record. Finally, the undersigned has noted the circumstances under which Guevara and Martinez left Trico and their involvement in lawsuits against the company. It is found, therefore, that Guevara confused the paid-in-house system with OSHA recordability, and, when her errors were discovered, attempted to rationalize them by implicating her superiors. It is further found that Martinez also made mistakes in his recordkeeping and other duties, and that his efforts to inculpate Trico had to do with his termination. Consequently, the testimony of Guevara and Martinez is not credited insofar as it indicates Trico's knowledge of the recordkeeping violations, and it is found as fact that no company supervisor was aware that incidents were not being recorded as required.

Although the foregoing is sufficient to dispose of the issue of willfulness, the Secretary's other assertions will be addressed briefly. In regard to discouraging reporting injuries, Guevara's testimony about the safety incentive program differed significantly from Tijerina's, and her unsupported statement that she knew of employees who did not report injuries because they did not want to disqualify co-workers was not credible. Sanchez, moreover, indicated he did not believe the program discouraged reporting injuries, and his statement about Guevara and Tijerina telling employees their "hands were tied," without more, provides no basis for the Secretary's assertion. Finally, Vega said he was afraid to report injuries but nonetheless reported a hernia, and while Mitchell said employees were discouraged from reporting injuries he gave no reason for his belief. Based on the record, the Secretary has not demonstrated Trico discouraged employees from reporting injuries.

In regard to employees being terminated for reporting injuries, Guevara's testimony about the "hit lists" she was given to highlight employees who had had injuries was contradicted by Myers. He testified the lists were compiled based on a ranking system and

given to Guevara for COBRA purposes, that he knew of no other lists given to her, and that he did not ask her to look at the lists to determine who had had worker compensation claims. Pursuant to my findings *supra*, the testimony of Myers is credited over that of Guevara, and the Secretary has not shown employees were terminated for reporting injuries.

As regards Trico's LWDI, the figure is significant only if it is lower than the industry average for the applicable period and Trico was aware of the industry average. Based on the logs for 1988 and 1989, Fox calculated Trico's LWDI to be 9.3, which was lower than the industry rate of 9.4 provided her; with the unreported cases, the LWDI was 13.93. The record was left open for Trico to submit its own LWDI calculations, which have been received in the form of an affidavit of Kablak and supporting documents.

The affidavit states Fox's calculations are incorrect because R-29 includes vacations and holidays, which Fox herself admitted would make the LWDI lower, and that based on actual hours worked, the LWDI for 1988 and 1989 was 10.06. Moreover, as Trico points out, the 9.4 rate given Fox was not the appropriate rate. According to Bureau of Labor Statistics' surveys, the LWDI for motor vehicle parts and accessories manufacturers, SIC code 3714, was 6.9 for 1988 and 7.5 for 1989. *See* Occupational Injuries and Illnesses in the United States by Industry, 1988, *reprinted in* CCH Employment Safety and Health Guide No. 1009, September 4, 1990, and Survey of Occupational Injuries and Illness, 1990, *reprinted in* CCH Employment Safety and Health Guide No. 1087, February 18, 1992.

Based on the foregoing, even assuming *arguendo* that Fox's original calculations were correct, they are well above the appropriate industry average rates, *supra*, and thus provide no basis for the Secretary's assertion. In any case, the record does not establish Trico was even aware of the industry average. Myers denied telling Fox that the companies with which Trico did business required the LWDI in their contracts, and while it is clear Fox sincerely believed he gave her this information Myers' credibility on this point is equally clear. Myers' testimony about his lack of understanding of the term LWDI was also believable and supported by the testimony of Tijerina. Accordingly, it can only be concluded Fox misinterpreted what Myers told her about the GM guidelines, that Trico had no knowledge of the national LWDI, and that the recordkeeping violations in this case were not willful.

After the foregoing was issued in my order of January 4, 1993, the parties essentially settled this citation by the Secretary's agreement to vacate items 9, 12, 13, 56 and 85 in return for Trico's stipulation that the remaining items should have been recorded. In a subsequent order dated May 6, 1993, the parties were instructed to submit proposed findings of fact with respect to each remaining penalty item and a suggested penalty or an agreed penalty settlement. The parties advised the undersigned on May 26, 1993 that they had not reached agreement upon a penalty settlement, and the Secretary stated he was unable to submit proposed findings because there was an insufficient record in regard to Trico's size, history and good faith and to the gravity of the violations; however, the Secretary did suggest that a penalty of $300.00 would be appropriate for each nonserious violation based on his original proposal of $3,000.00 for each willful violation.

Trico, on the other hand, filed detailed proposed findings of fact on June 3, 1993, in which it proposed the assessment of a penalty of $100.00 for each violation, for a total penalty of $10,000.00. Alternatively, it proposed the Commission's approach in *Caterpillar, Inc.*, 15 BNA OSHC 2153, 1993 CCH OSHD ¶ 29,962 (No. 87-0922, 1993), that is, to assess a separate penalty for each recordkeeping violation based on the circumstances of each incident; pursuant to this approach, in which Trico set out a summary of each incident and penalties ranging from $75.00 to $150.00, the total penalty would be $11,400.00.[16] The undersigned has reviewed Trico's proposed findings and has also sought guidance from the Commission's decision and from his own previous decision involving the same employer. *See Caterpillar, Inc.*, 90 OSAHRC 2/A3, 3/A3, 4/A3, 5/A3 (No. 88-0134, 1990) (ALJ). Having done so, it is concluded that Trico's alternative proposal is the more appropriate.[17] Consequently, Trico's alternative proposed findings are adopted as my own and are hereby incorporated by reference. In accordance with those findings, and pursuant to the parties'

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[16]This amount includes a $75.00 penalty each for items 106 and 107, pursuant to Trico's June 9, 1993 amendment to its proposed findings; these items, as noted *supra*, allege violations of 1904.5(c) and 1904.5(a), respectively.

[17]The Secretary's suggested penalty is rejected because it is not consistent with the Commission's decision in *Caterpillar*.

previous agreement in regard to items 9, 12, 13, 56 and 85, those items are vacated, the remaining items are affirmed as nonserious, and a total penalty of $11,400.00 is assessed.

"Other" Citation Number 3

As noted *supra*, Trico has withdrawn its contest of this citation pursuant to the parties' joint motion to amend citation and notice of contest and partial settlement. Accordingly, items 1 through 9 of citation number 3 are affirmed as nonserious violations, and no penalties are assessed.

Conclusions of Law

1. Respondent, Trico Technologies Corporation, is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in nonserious violation of 29 C.F.R. §§ 1904.2(a), 1904.5(a), 1904.5(c), 1910.95(d)(3), 1910.95(g)(6), 1910.95(h)(4), 1910.95(m)(2)(ii), 1910.95(m)(3)(ii), 1910.132(a), 1910.157(c)(1), 1910.157(e)(3) and 1910.1200(e)(1)(i).

3. Respondent was in serious violation of section 5(a)(1) of the Act and of 29 C.F.R. §§ 1910.147(c)(4)(i), 1910.147(c)(7)(i), 1910.215(a)(4), 1910.215(b)(9), 1910.1200(e)(2), 1910.1200(g)(1) and 1910.1200(h).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. The notification of failure to abate is AFFIRMED as a nonserious violation, and a penalty of $1,000.00 is assessed.

2. With the exception of item 7(e), which is VACATED, items 1 through 8 of citation number 1 are AFFIRMED as serious violations. A penalty of $550.00 each is assessed for items 1 through 4, and penalties of $500.00, $600.00, $700.00 and $700.00 are assessed for items 5 through 8, respectively.

3. With the exception of items 9, 12, 13, 56 and 85, which are VACATED, items 1 through 107 of citation number 2 are AFFIRMED as nonserious violations and a total penalty of $11,400.00 is assessed for those items.

4. Items 1 through 9 of citation number 3 are AFFIRMED as nonserious violations, and no penalties are assessed.

Stanley M. Schwartz
Administrative Law Judge

Date: JUL 12 1993