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SECRETARY OF LABOR, Complainant, v. KOHLER COMPANY, Respondent, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA ("UAW"), LOCAL 833, Authorized Employee Representative.	OSHRC DOCKET NO. 88-237

DECISION

BEFORE: FOULKE and MONTOYA, Commissioners.[1]

BY THE COMMISSION:

At issue in this case are whether the judge erred in: (1) affirming 277 nonserious instances of violation of recordkeeping requirements of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. §§ 651-678; (2) rejecting Kohler Co.'s claim that those

[1]Chairman Weisberg did not participate in the decision of this case. While he is troubled by his colleagues' finding that these recordkeeping violations resulted from "simple inadvertence," it would serve no meaningful purpose to further delay issuance of a decision in this case which was voted on before he joined the Commission. The Secretary issued the citation in 1988 and this case is the oldest case pending before the Commission. May 4, 1994 marked four years that it has been at the Commission awaiting decision. Under these circumstances and since his vote will not change the result, Chairman Weisberg has chosen not to participate in this case.

instances were *de minimis*; (3) rejecting the Secretary of Labor's claim that they were willful; and (4) assessing a combined penalty of $1000. For the reasons that follow, we find 277 instances of violation but find that a total penalty of $29,430 is appropriate.

Kohler is a large manufacturer of plumbing fixtures. It also engages in pottery making, brass manufacture, die casting, and engine and generator manufacture. The Secretary of Labor's Occupational Safety and Health Administration ("OSHA") conducted an extensive investigation of Kohler's OSHA-required injury and illness records at its plant in Kohler, Wisconsin, starting on July 14, 1987.

As a result of the investigation, the Secretary issued a citation alleging 466 instances of incomplete or inaccurate entries in Kohler's required injury records, in violation of 29 C.F.R. § 1904.2(a). The Secretary deemed each instance to be "egregious willful," and accordingly proposed a penalty of $3,000 for each. Prior to the hearing, the Secretary withdrew 176 instances. Of the 290 remaining instances, the judge affirmed 277.

1. Whether the instances of violation were established

The judge affirmed each instance on the ground that, although the injuries concerned were listed on Kohler's required log and summary of occupational injuries and illnesses for 1986 (its "OSHA 200"equivalent), they were erroneously described as first aid cases rather than recordable cases. Section 1904.2(a) requires each employer to list accurately each recordable injury and illness on the log and summary.[2] Recordable injuries consist of fatalities, cases involving lost work days, and "*[n]onfatal cases without lost workdays which*

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[2]That section provides:

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

result in transfer to another job or termination of employment, or *require medical treatment (other than first aid)* or involve: loss of consciousness or restriction of work or motion." Section 1904.12(c)(3) (emphasis added).

The judge found the 277 injuries to be recordable because they received medical treatment other than first aid. The judge relied on the definitions of recordable medical treatment in a document published in 1978 by the Secretary's Bureau of Labor Statistics ("BLS"), entitled *What Every Employer Needs to Know About Recordkeeping.* BLS Report 412-3.

Kohler argued before the judge that reliance on the BLS report was unjustified because it had not been promulgated as a regulation or incorporated by reference in the Secretary's recordkeeping standards. However, the Commission has resolved this issue in a case issued subsequent to the judge's decision. *Caterpillar Inc.*, 15 BNA OSHC 2153, 1991-93 CCH OSHD ¶ 29,962 (No. 87-922, 1993). The Commission held there that "the Secretary's interpretation of what constitutes medical treatment in BLS Report 412-3 is a reasonable interpretation of the regulation, which is grounded in the language of the regulation." 15 BNA OSHC at 2161, 1991-93 CCH OSHD at p. 40,994. The Commission stated further that it would accord BLS Report 412-3 "great weight in determining which injuries cited by the Secretary are required to be recorded on the OSHA 200." *Id.* It also held that "taken as a whole, the cited regulation, the definitions accompanying the regulation, the OSHA 200, and the copromulgating agency's [BLS's] view of what the regulation means embodied in BLS Report 412-3, provide a fair and reasonable warning of what injuries and illnesses must be recorded on the OSHA 200." *Id.*

Kohler acknowledges that it had full knowledge of BLS Report 412-3 and that Safety Manager George Henle instructed his assistant for OSHA recordkeeping, Kathy Mertes, to follow that report. Thus, it is fair to hold Kohler legally responsible for compliance with the instructions in BLS Report 412-3. *See id.*, 15 BNA OSHC at 2161-62, 1991-93 CCH OSHD at pp. 40,994-95 (where it was employer's practice to follow guidance of BLS Report 412-3, employer had sufficient notice of Secretary's interpretation of recordable medical treatment).

On review, Kohler does not dispute that the 277 injuries at issue were recordable under BLS Report 412-3. It merely argues that certain instructions in the report are ambiguous, negating any claim that its noncompliance with them was willful.[3] We find, as did the judge, that Kohler failed to make the 277 entries at issue consistently with BLS Report 412-3, because it termed those injuries first aid cases rather than recordable injuries.

Kohler argues, however, that the mere failure to list the injuries involved as recordable is not a violation, because it included all first aid cases as well as recordable cases on its log. The log, which was computerized, had been approved as an OSHA 200 equivalent by OSHA's area director, Robert Hanna, in 1974. Henle, who was in charge of Kohler's recordkeeping for OSHA and worker's compensation, testified that he discussed the computerized log in depth with Hanna in 1974. Henle specifically testified that he told Hanna he intended to enter both the first aid cases and the recordable cases on the computerized log, and that Hanna stated that was "an excellent idea." However, Henle acknowledged that he understood that Kohler would be subject to citation if a recordable case were incorrectly listed as a mere first aid case on the log.[4]

Kohler distinguished between recordable injuries, recordable illnesses and first aid cases on the log by means of a notation in the column "OSHA CODE." The number "7"

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[3]Kohler has effectively abandoned its arguments that BLS Report 412-3 is unenforceable or unauthoritative in this case, because Kohler did not address those questions in its review brief, although both parties were invited to do so.

[4]When OSHA area director Hanna approved Kohler's computerized format in 1974, Henle did not tell him that only the first day's treatment was going to be entered. (The record does not indicate what Kohler's policy was at that time.) The instructions to the OSHA 200 state:

> If, during the 5-year period the log must be retained, there is a change in an extent and outcome of an injury or illness which affects entries in columns 1, 2, 6, 8, 9, or 13, the first entry should be lined out and a new entry made.

Medical treatment given after the first day for injuries that originally were treated with first aid would specifically affect entries in columns 6 and 13 of the OSHA 200. Those columns require a check if the event (1) is recordable, and (2) does not involve death, lost work days, or work restrictions.

(which sometimes was followed by a letter) denoted a recordable illness, "10" denoted a recordable injury, and "FA" denoted a first aid case. All of the alleged instances of violation in this case were based on entries that were coded as first aid cases, but which the Secretary believes should have been coded "10," for a recordable injury. There was no description of the injury on the log other than the code.

Kohler argues that the mere erroneous notation of "FA" beside an entry in its log is no violation, because each entry in question here "was recorded on the same log and in the same detail as were . . . the other 1,625 'FA' marked cases[.]" However, the entries at issue contained no description of the type of injury involved except for the incorrect code, and the code was the only basis on the log from which OSHA could evaluate whether those injuries were recordable. The instructions on the OSHA Form 200 have consistently provided that first aid cases are not to be included on that Form.[5] Thus, the designation "FA" on Kohler's OSHA 200 equivalent indicated to OSHA that it could ignore the entry.[6] By failing to include injuries coded "FA" on the annual summary of recordable injuries part of the OSHA 200 form, Kohler also misstated the total of recordable injuries for the year.

As a result, Kohler's computerized log was not a full report, and the codings were not mere margin notes, as it claims. These 277 miscodings prevented OSHA from learning the true injury picture at the plant from the log. We therefore conclude, as did the judge, that the erroneous first aid designations made the entries inaccurate under the OSHA 200 form and instructions, and thus violated the cited standard.

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[5]Those instructions state:

> The entire entry for an injury or illness should be lined out if later found to be nonrecordable. For example, an injury which is later determined not to be work related, or which was initially thought to involve medical treatment but later was determined to have involved only first aid.

[6]The evidence indicates that OSHA did not ultimately rely on Kohler's first aid designations, because OSHA suspected errors and ultimately investigated the underlying records. However, the miscoding clearly impeded OSHA's ability to learn the history of recordable injuries in the workplace.

II. Characterization of the instances of violation

A. De minimis issue

We next consider Kohler's argument that the judge erred in concluding that the instances of violation were not *de minimis*. "A *de minimis* violation is one having no 'direct or immediate' relationship to employee safety; normally, that classification is limited to situations in which the hazard is so trifling that an abatement order would not significantly promote the objectives of the Act." *Dover Elevator Co.*, 15 BNA OSHC 1378, 1382, 1991-93 CCH OSHD ¶ 29,524, p. 39,850 (No. 88-2642, 1991). In rejecting Kohler's argument, the judge stated:

> Just as the prevention of illness and injury is a vital part of any safety program, so too is a thorough recording system, founded upon appropriate emphasis on accuracy and detail, to enable the employer to track a history of injury or illness; to recognize and correct areas of accident or illness repetition within the industry. Recordkeeping [is a] vital function. Periodic review of the procedures employed must be on-going.

Kohler bases its argument that any violation was *de minimis* on its position that all the injuries were fully recorded. It notes that OSHA did not rely on the log entries, but rather reviewed the underlying injury records, and argues that the union never looked at the log or discussed it in bargaining. It argues that the classification of a violation "relates to the impact of a *particular* violation on safety or health conditions within a particular workplace." (Emphasis in original.) Thus, in Kohler's view, all 277 entries were *de minimis*, because of their minimal impact on safety and health, even though it does not question the general importance of recordkeeping. It argues that its computerized format was superior to what other employers were using.

The judge properly rejected Kohler's arguments. We recently reaffirmed that "[t]he Act's recordkeeping requirements 'play a crucial role in providing the information necessary to make workplaces safer and healthier.'" *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2070, 1991-93 CCH OSHD ¶ 29,240, p. 39,170 (No. 82-630, 1991), (quoting *General Motors Corp., Inland Div.*, 8 BNA OSHC 2036, 2040-41, 1980 CCH OSHD ¶ 24,743, p. 30,470 (No. 76-5033, 1980)). As mentioned above, the miscoding of recordable injuries as nonrecordable first aid cases on Kohler's computerized log inevitably impeded

OSHA's efforts to identify the true nature and extent of injury problems at the plant. OSHA was able to discover the necessary facts only through a six-to-seven week investigation of underlying records such as Kohler's OSHA 101 equivalents, medical case cards and X-rays. Thus, the miscodings were related to safety and health.

In arguing that the instances of violation should be termed *de minimis*, Kohler also relies on *Anoplate Corp.*, 12 BNA OSHC 1678, 1986-87 CCH OSHD ¶ 27,519 (No. 80-4109, 1986). There, the Commission held that the employer's failure to record the job title and regular department of certain injured employees, as required by OSHA Form 200, was *de minimis*. However, the Commission concluded that "it appears that the purposes of the form were achieved," based on testimony that all the employees knew what jobs the other employees did, and that OSHA's representative was unhindered in conducting his investigation by the missing information. 12 BNA OSHC at 1688, 1986-87 CCH OSHD at p. 35,686. Here, by contrast, the miscoding of injuries clearly hindered the Secretary's investigation.[7]

Kohler further relies on an affidavit signed and sent to the judge by UAW local vice president Ron Platz, regarding the adequacy of Kohler's recordkeeping from his perspective. However, Kohler did not offer the affidavit in evidence at any time. UAW Local 833, the authorized employee representative, opposed consideration of the affidavit and moved to withdraw it. The Secretary objected to Kohler's reference to the affidavit in its post-hearing brief below.[8] We conclude that it would be inappropriate to consider such an affidavit on

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[7]Kohler argues that the 277 instances of violation found by the judge comprised only 11 percent of its total injuries and illnesses for the period in question (including first-aid cases). However, inaccurate entries on an OSHA 200 or equivalent are not *de minimis* unless they truly do not hinder OSHA's investigation, as in *Anoplate*. The Secretary points out that those 277 instances constituted about 37 percent of the total number of recordable injuries for 1986 (277 out of 750). Those 277 cases also represented more than a 100 percent increase in the number of recordable "injuries without lost workdays" on Kohler's annual summary for 1986. Kohler had reported 216 such cases.

[8]So far as the record shows, the judge did not rule on the union's motion to withdraw the affidavit or the Secretary's objections to it. Nor did he refer to it in his decision.

review where the matters asserted therein were not offered in evidence below at the hearing on the merits, despite a full opportunity to do so.[9]

B. Alleged willfulness

We next consider whether the judge erred in finding that the instances of violation were not willful.

> A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. [It] 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 to show carelessness or lack of diligence in discovering a violation.

Williams Enterp., Inc., 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). *See, e.g. Caterpillar*, 15 BNA OSHC at 2173-74, 1991-93 CCH OSHD at pp. 41,007-09. The alleged willfulness of the instances of violation is based on the circumstances in which the miscodings took place and the way Kohler trained its employees.

1. Kohler's recordkeeping procedures and training

Kohler's injury and illness log was in an advanced, computerized format. It had been approved as an acceptable equivalent to the OSHA 200 form by OSHA's area director in 1974. When an employee went to Kohler's medical department to report an injury, occupational health nurses prepared detailed records for each injury. From those records, the nurses prepared an Accident Investigation Report ("AIR") which summarized the first day's treatment. The AIR's were Kohler's equivalent of OSHA Form 101 -- the required supplementary record containing the specifics of each recordable injury. Mertes, a clerk-typist in the safety department, filled out other information on the AIR, such as the

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[9]Furthermore, a hearsay document such as an affidavit would not be admissible in evidence in these circumstances. Fed. R. Evid. 802, 803, which apply to Commission proceedings under Commission Rule 71. *Cf.* Fed. R. Civ. P. 56(c) (affidavits generally may be used for purposes of motions for summary judgment).

employee's social security number and job title. Mertes then entered the injury on Kohler's computerized log, and she made the decision whether to code it as a recordable injury or illness or a first aid case, based on the first day's treatment reflected on the AIR.

Ramona Maala, another clerk in the safety department, checked back with the medical department daily, for two to five days, to determine whether any injuries logged in by Mertes resulted in three days of lost time or restricted duty. If they did, they were listed on Kohler's worker's compensation records and were coded as recordable injuries on its computerized log. If an injury did not involve at least three days of lost time or restricted duty, Kohler recorded no information on follow-up treatment on its log. This failure to track follow-up treatment for non-worker's compensation cases accounts for most of the instances of violation in this case. In thirty instances (by our count), nurses failed to enter treatment on the AIR's that made the injury recordable on the first day. In forty-five other instances (again by our count), the safety department failed to code injuries as recordable despite sufficient information on the AIR's. OSHA did not challenge the way Kohler coded the remainder of the 2,475 injuries and illnesses that occurred in 1986.

Henle, Kohler's safety manager, was responsible for Kohler's OSHA 200. Although he was familiar with OSHA's recordkeeping regulations and BLS Report 412-3, he testified that it never occurred to him that Kohler's system lacked an adequate means of tracking subsequent treatment of cases that initially were treated only with first aid. Henle gave his assistant Mertes a copy of BLS Report 412-3 and instructed her to follow it. Mertes testified in her deposition, which was received in evidence, that she was not sure exactly what any of the "medical treatment" categories in BLS Report 412-3 meant. Henle disagreed with the suggestion that he considered recordkeeping not to be "worthwhile or valuable or important." However, he testified that it "was not one of my prime concerns because I had other duties to perform which to me were more important . . . ." Henle's supervisor, Kenneth Conger, testified that "[r]ecord keeping in my own humble opinion was a very small part of [Henle's] responsibilities." Conger noted that Henle's responsibilities included Kohler's entire safety and health program, not only at its main plant, where it had as many

as 7,000 employees, but at its "major branch factories in South Carolina and Texas."[10] Conger testified that OSHA-required injury records were not critical to knowing how many serious injuries were occurring, because "we have absolutely independent information of everything" that those records would reveal. Conger testified that Henle contacted him promptly if he had a safety or health problem that the safety department alone could not correct. Conger added that the union "was a very assertive group," and that he received a monthly report of all injuries independent of the OSHA-required records.

The Secretary investigated Kohler's OSHA recordkeeping procedures in 1983-84. A citation issued following that inspection alleged that "[i]n 1981, 1982 and 1983 recordable cases were listed as first aid and not included in the recordable case summaries."[11] The citation was based on a random sample of 40 injuries for which OSHA reviewed supplemental records furnished by Henle. OSHA's compliance officer ("CO") Gordon Krohn, who conducted the 1983-84 investigation as well as the 1987 investigation, testified that he gave Henle further information about those entries at the closing conference in 1984. "I identified recordkeeping violations in the area of restricted work activity and fractures . . . ."

As explained by Krohn to Henle, the 1984 citations were based on two specific problems. One was a failure to record three injuries that resulted in work restrictions for an employee. The other was a failure to record three finger fractures. Henle testified that no one from OSHA mentioned any systemic problem with the records, such as failure to track follow-up treatment of injuries, at any time. When asked why he did not develop a system for tracking subsequent treatment of cases other than worker's compensation cases, he testified that it "[n]ever occurred to me." Krohn did not determine why the company

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[10]The judge's finding is undisputed that Kohler's "comprehensive safety program demonstrates an active concern with safety and hygiene in general." The Secretary argues that the 1987 citation, based on a wall-to-wall inspection, shows a lack of compliance. However, there is no evidence as to which of those items were affirmed or vacated. The evidence shows that Kohler had a conscientious safety program overall.

[11]Kohler entered into a settlement agreement with the Secretary regarding the 1984 citations. Kohler waived its right to contest the recordkeeping item, in return for a penalty reduction from $100 to $50. Henle signed the settlement agreement for Kohler.

failed to record the injuries and illnesses he considered recordable. He explained that it was not the Secretary's policy to go into depth in recordkeeping in 1984.

2. Discussion

The Secretary contends that four factors establish that Kohler's failure to properly code injuries on its OSHA 200 form was the result of Kohler's plain indifference to its recordkeeping responsibilities under the Act. The Secretary relies on the failure of Kohler's safety director Henle to properly oversee the recording of injuries and train those charged with recording, on Henle's and Kohler's failure to follow up on problems in Kohler's recordkeeping that were brought to their attention during OSHA's 1983-84 inspection of Kohler's OSHA 200, on Kohler's attitude toward OSHA recordkeeping, and on Kohler's contrasting strong interest in ensuring that its workers' compensation records were correct.

Although we conclude that Kohler's failures to properly code the injuries stemmed from Henle's failure to properly supervise and train those charged with filling out Kohler's OSHA 200 equivalent, we find that the evidence does not establish that those failures resulted from either intentional disregard of the Act's recordkeeping requirements or plain indifference to them. Henle's knowledge of OSHA recordkeeping requirements and Kohler's recordkeeping format should have enabled Kohler to keep the OSHA 200 log. However, we accept as credible, as did the judge, Henle's explanation that it did not occur to him to track injuries to see whether subsequent treatment made them recordable on the OSHA 200. Nor is there any evidence that Maala, or other safety department personnel who tracked subsequent treatment for worker's compensation cases, were aware that other injuries initially treated with only first aid had subsequently become recordable for OSHA purposes.

Furthermore, there was no showing that Kohler's OSHA recordkeeping procedures, initially devised in the early 1970's, were reviewed in conjunction with its worker's compensation procedures. Kohler's tracking of subsequent treatment was done pursuant to a different statute -- the State of Wisconsin's worker's compensation law.[12] We cannot

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[12]Kohler was subject to penalties and possible loss of its self-insured status under that law (continued...)

conclude that Kohler's failure to track follow-up treatment of injuries for OSHA purposes was willful merely because its procedures for worker's compensation cases were different.

As to Kohler's training of recordkeepers, Henle testified that there had been a two-hour training session on recordkeeping for all the nurses, held to the best of his recollection in the early 1980's. There is no evidence that Henle knew that the two-hour training session was inadequate to inform the nurses of their OSHA recordkeeping duties.[13] The Secretary notes that Sandra Bawden, Kohler's supervisor of nurses since 1980, testified that she never saw a copy of BLS Report 412-3 or the OSHA recordkeeping regulations before 1987. However, there is no indication that that fact was brought to Henle's attention before the citation was issued. Moreover, it is not clear from Mertes' testimony whether her confusion was attributable to lack of training, as the Secretary argues, or to lack of precision in the guidelines, as Kohler argues. Nor does the evidence show that Kohler was aware that Mertes was misapplying BLS Report 412-3 and ignored the situation. Thus, we agree with the judge that Kohler's failure to provide additional training for the nurses and for Safety Department recordkeeping personnel in the BLS criteria does not establish willfulness.

The judge found that the 1984 citation did not provide clear enough notice to Kohler of the systemic nature of its errors to justify finding the 1986 instances of violation willful. Like the judge, we find that the information conveyed to Kohler by the compliance officer in 1983-84 and in the 1984 citation did not inform Kohler that its OSHA recordkeeping program had a systemic problem. Without a showing that Kohler had a "heightened awareness -- of the illegality of the conduct," *Williams Enterp.*, we cannot conclude that Kohler's failure to discover that its recordkeeping procedures were inadequate is deserving

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[12](...continued)
if it did not report such cases. Under that law, Kohler also had to submit its annual summary of recordable OSHA injuries to the State, but accuracy in the summary was not a factor in Kohler's self-insured status. Henle testified that the lack of state penalties for inaccurate annual summaries of OSHA-recordable injuries never occurred to him while thinking about his worker's compensation reporting system.

[13]Henle did not know how a nurse would have been trained to fill out the AIR forms, if hired after that training session. However, there was no evidence that any nurses were hired after that training session.

of the opprobrium associated with a willful classification.[14] If, as the Secretary suggests, Kohler's inability to discover its recordkeeping flaws was due in part to its poor attitude toward OSHA recordkeeping, we cannot ignore the fact that keeping the OSHA log also had been a low priority for the Secretary, at least before 1986. For example, compliance officer Krohn testified that it was the Secretary's policy not to go into recordkeeping in depth in 1984.[15]

Having considered Kohler's recordkeeping program, we find that while parts of Kohler's system of recordkeeping were flawed, other parts were excellent. Kohler's failure

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[14]As mentioned above, the 1984 citation was based on two specific problems: failure to record three work restriction cases and three finger fractures. There is no claim that Kohler did not promptly correct those specific errors. Further, the Secretary has not presented evidence in this case that Kohler consciously ignored cases involving work restrictions or lost time during 1986, or that it failed to respond in good faith to the 1984 citation regarding such cases.

The problem of failing to record fracture injuries was not completely cured following the 1984 citation. However, the problem affected a much lower percentage of the entries that OSHA reviewed in its 1987 inspection. In 1984, of the cases reviewed by Krohn that had been coded "first aid" by Kohler, 7.5 percent (3 out of 40) were found to be recordable fractures. By contrast, only about 1 percent (20 out of 1902) of the cases reviewed during the 1987 inspection involved recordable fractures. That is an indication that Kohler made a good faith effort to correct the problem following the 1984 citation.

[15]The Secretary analogizes this case to a trenching case in which the Commission found two willful violations. *Calang Corp.*, 14 BNA OSHC 1789, 1791, 1987-90 CCH OSHD ¶ 29,080, p. 38,870 (No. 85-319, 1990). There, the Commission found willfulness because the company's president chose to ignore a compliance officer's observation that a trench was not properly sloped and a spoils pile was too close to the edge of the trench. The warnings, which were explicit, came on the morning of the inspection. When the compliance officer returned in the afternoon, his observations had been ignored.

This case is very different from *Calang*. As noted above, *supra* note 14, there is no claim that Kohler did not promptly correct the specific errors pointed out to it in 1984. The Secretary argues that Kohler should have investigated the underlying reasons for those errors and discovered the flaws in its procedures and training that caused them. That would have been ideal, but the evidence is lacking that its failure to do so was other than inadvertent. Again, OSHA's compliance officer did not discover those underlying problems and did not suggest to Kohler what they might be.

to discover the shortcomings in its program reflects some lack of diligence. *E.g., Williams Enterp.* However, the Secretary has failed to establish by a preponderance of the evidence that Kohler's failures to correctly enter the recordable injuries cited here was the result of conscious disregard of, or plain indifference to, the Act's recordkeeping requirements. On this record, we conclude that simple inadvertence is a more plausible explanation for the instances of violation that we have found today.

III. Assessment of Penalties

We next consider the final issues directed for review--whether the judge erred in failing to assess instance-by-instance penalties and in assessing a combined penalty of $1000. In his decision, the judge found that the Secretary's proposed penalties were not justified, because the instances of violation were not proven willful, and because:

> [I]nstance-by-instance penalties need not be assessed in order to provide an incentive for Kohler's compliance with the Act. The record establishes that Kohler has already instituted follow-up procedures which will eliminate the flaw in its system.

Both Kohler and *amicus* Phillips 66 Company argue that the Commission has no authority to assess instance-by-instance penalties. However, in *Caterpillar*, the Commission held that it has the authority to assess instance-by-instance penalties in appropriate circumstances, for failures to record injuries on the OSHA 200 as required by section 1904.2(a). 15 BNA OSHC at 2172-73, 1991-93 CCH OSHD at p. 41,005-07.

The Secretary argues that his proposed penalties are appropriate in light of the high number of instances, the willful nature of the noncompliance, and the fact that Kohler took corrective steps only after it became aware that OSHA might impose megafines on it. The Secretary states that the combined penalty of $1000 "makes a mockery of the Act, and 'reflect[s] more of a license than a penalty.'" (quoting *Olin Constr. Co. v. OSHRC*, 525 F.2d 464, 467 (2d Cir. 1975)). The Secretary also argues that the contrast between Kohler's careful tracking of follow-up treatment in worker's compensation cases, and its complete lack of tracking in other cases, shows that Kohler's actions are strongly related to the threat of penalties. Thus, the Secretary argues, his proposed penalty is more appropriate. Kohler argues that if the Secretary wants to penalize erroneous recordkeeping entries on a per

instance basis, the Commission must assess the significance of each individual instance, which it believes is *de minimis*.

Generally, the Commission will evaluate a penalty recommendation of one of its judges based on the judge's underlying findings of fact and consideration of the statutory criteria under section 17(j) of the Act. *See, e.g., J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993). The Commission has wide discretion in penalty assessment. *E.g., Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1621-23, 1994 CCH OSHD ¶ 30,363, pp. 41,881-83 (No. 88-1962, 1994). *See generally* 2 Am Jur 2d *Administrative Law* § 672 (1962).

Because we have found that the judge's finding that the instances of violation in question were not willful is supported by the record, we agree that the Secretary's proposed penalty is not appropriate. On the other hand, considering the large number of errors and the notice that Kohler had of their existence, we agree with the Secretary that their cumulative gravity renders a total penalty of $1000 inappropriate as insufficient.[16] For the more specific reasons that follow, we find that this record supports a more appropriate combined penalty of $29,430.[17]

As noted previously, the factors for the Commission's assessment of penalties are set forth in section 17(j) of the Act, 29 U.S.C. § 666(j). This section requires that when assessing penalties, the Commission must give "due consideration" to four criteria: the gravity of the violation, the employer's size, good faith and history of violations. *See Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1525, 1993 CCH OSHD ¶ 30,303, p. 41,762 (No. 90-2866, 1993). These factors are not necessarily, however, afforded equal weight. The chief factor in penalty assessment generally is the gravity of the violation. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972).

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[16]For example, such a penalty is out of line with the instance-by-instance penalties assessed for unrecorded injuries in *Caterpillar*, which ranged from $75 to $550.

[17]This combined assessment could be broken down into an assessment of $90 for each of the 202 instances of violation which (by our count) were due solely to failure to track follow-up treatment, and $150 for each of the 75 other instances of violation.

This case is largely similar to *Caterpillar* regarding penalty factors. Both employers were large in size. Kohler had at least 5,500 employees during the relevant time period. Both had a good overall OSHA history, based on the evidence. As to Kohler's history of violations, the only ones shown by the record to have been affirmed were based on the 1984 citation.

The next specific penalty factor under 29 U.S.C. § 666(j) is good faith. Both here and in *Caterpillar*, the Commission found the instances of violation nonwillful. In both cases, the employers cooperated with the inspection, but their neglect in handling OSHA recordkeeping responsibilities contrasted with their meticulous compliance with other recordkeeping procedures. *See* 15 BNA OSHC at 2177-78, 1991-93 CCH OSHD at p. 41,011. Also touching upon Kohler's good faith, it is well established that the company had a comprehensive overall safety program. Additionally, as the judge observed, Kohler demonstrated some good faith in curing the flaws in its recordkeeping system before the hearing.

The remaining criterion, the gravity of the violation, has traditionally been given greater weight by the Commission. In *Caterpillar*, the Commission noted that a determination of gravity is generally guided by evidence in the record relating to: (1) the number of employees exposed; (2) the duration of the exposure to the hazard; (3) whether any precautions have been taken against injury; and (4) the degree of probability that an accident would occur. 15 BNA OSHC at 2178, 1991-93 CCH OSHD at p. 41,012. Applying these factors to the case before us, we find, as in *Caterpillar*, that each instance of this type of violation is of low gravity because recordkeeping violations generally "only bear on these factors in the most tangential way[.]" *Id.*

This case is somewhat different from *Caterpillar*, however, because there the employer failed to record numerous lost workday cases and other cases that greatly exceeded the definition of nonrecordable first aid in section 1904.12(e). Those cases were the most highly penalized in *Caterpillar*. Here, the Secretary does not argue that high penalties are warranted based on cases that clearly were recordable based on the regulations alone. Most of the injuries at issue here had received only first aid on the initial day of treatment, and

the Secretary's basis for showing recordability was the detailed definitions of "medical treatment other than first aid" in the BLS Guidelines.

Thus, the instances of violation here generally would fall toward the lower end of the penalty scale in *Caterpillar*. Furthermore, the majority of the instances resulted from a single policy -- failure to track follow-up treatment for injuries treated with only first aid on the first day. In view of that fact, a reduction of the per instance penalty is warranted.

While the gravity of each instance may be low, however, it is clear that 277 individual instances compound this factor. In this case, 202 instances of violation were based on failure to track follow-up treatment. In addition, 75 instances of violation involved individual failures by nurses or safety department personnel to note readily available information that made injuries recordable under BLS Report 412-3. We consider those 75 instances to be of somewhat higher individual gravity than the other 202, but the cumulative effect of all 277 instances is higher still.

Thus, we affirm the judge's finding of 277 instances of an other than serious violation of section 1904.2(a), and assess a total penalty of $29,430.

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Commissioner

Dated: May 23, 1994

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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant,	:	
v.	:	Docket No. 88-237
KOHLER COMPANY, Respondent,	:	
UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA ("UAW"), LOCAL 833, Authorized Employee Representative.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on May 23, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

May 23, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 88-237

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April 4, 1990

IN REFERENCE TO SECRETARY OF LABOR v.

Kohler Co. OSHRC DOCKET NO. 88-0237

NOTICE IS GIVEN TO THOSE LISTED BELOW:

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Judge Benjamin R. Loye
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NOTICE OF DOCKETING

Notice is given that the above case was docketed with the Commission on 4/4/90. The decision of the Judge will become a final order of the Commission on 5/4/90 unless a Commission member directs review of the decision on or before that date.

Petitions for discretionary review should be received on or before 4/24/90 in order to permit sufficient time for their review. See Commission Rule 91, 29 C.F.R. sec. 2200.91. Under Rule 91(h) petitioning corporations must also file a declaration of parents, subsidiaries, and affiliates.

All pleadings or other documents that may be filed shall be addresses as follows:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St., N.W., Room 401
Washington, D. C. 20006-1246

A copy of any petition for discretionary review must be served on the Counsel for Regional Trial Litigation, Office of the Solicitor, USDOL, 200 Constitution Ave., N.W., Room S4004, Washington, D. C. 20210. If a Direction for Review is filed the Counsel for Regional Trial Litigation will represent the Department of Labor.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

(3/90)

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. KOHLER COMPANY, Respondent, - - - - - - - - - - - - - - - - - - UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 833, Authorized Employee Representative.	OSHRC DOCKET NO. 88-0237

APPEARANCES:

For the Complainant:
Peter Broitman, Esq., Allen Bean, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, IL

For the Respondent:
Robert Mann, Esq., Seyfarth, Shaw, Fairweather and Geraldson, Chicago, IL; Paul H. Ten Pas, Esq., Kohler Company, Kohler, WI

For the Authorized Employee Representative:
George F. Graf, UAW Local 833, Milwaukee, WI

DECISION AND ORDER

Loye, Judge:

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

As a result of an inspection of respondent's workplace in Kohler, Wisconsin begun on July 14, 1987 (Tr. 230) by the Occupational Safety and Health Administration (OSHA) respondent, Kohler Company, was issued a number of citations and proposed penalties pursuant to the Act. Kohler timely contested Willful citation 3 items 1(a) through 1(i), which alleged 466 violations of 29 C.F.R. §1904.2(a)[1], and the proposed penalties of $3,000.00 per violation, totalling $1,398,000.00.

Prior to hearing the Secretary withdrew 176 of the alleged violations, reducing the proposed penalty to $870,000.00. Both parties entered Motions for Summary Judgment which were denied.

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[1] Section 1904.2(a) states:

> Each employer shall, except as provided in paragraph (b) of this section, (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred. . .

Willful citation 3 alleges:

> 29 CFR 1904.2(a): The log and summary of occupational injuries and illnesses (OSHA Form No. 200 or its equivalent) was not completed in the detail provided in the form and the instructions contained therein.

However in an Order dated April 18, 1989, this judge rejected respondent's contentions: 1) that the above captioned action was barred by the time limitation set forth in Section 9 of the Act, and 2) that the cited injuries were, in fact, reported within the meaning of 29 CFR §1904.2(a).

A hearing was held on October 10-12, 1989 in Milwaukee, Wisconsin. The parties have filed briefs and this matter is now ready for decision.

ISSUES

Whether the cited injuries or illnesses were recordable under §1904.2(a)?

Whether the alleged violations, if proven, were properly characterized as Willful?

Whether the proposed penalty of $3,000.00 per violation is appropriate?

Jurisdiction

Kohler is a large company with approximately 5,500 employees (Tr. 337). Kohler manufactures plumbing fixtures and has operations encompassing pottery making, brass manufacture, die casting, engine and generator manufacture (Tr. 337). Respondent admits it is engaged in a business affecting commerce, is an employer within the meaning of the Act, and is subject to the requirements of the Act (Answer p. 4).

Alleged Violation of §1904.2(a)

Section 1904.2(a) requires employers to enter each recordable injury and illness onto a log no later than 6 working days after receiving information that a recordable injury or illness has occurred.

"Recordable occupational injuries or illnesses" are defined in §1904.12(c) as occupational injuries or illnesses which result in:

> (1) Fatalities, regardless of the time between the injury and death, or the length of the illness; or
> (2) Lost workday cases, other than fatalities, that result in lost workdays, or
> (3) Nonfatal cases without lost workdays which result in transfer to another job or termination of employment, or require medical treatment (other than first aid) or involve: loss of consciousness or restriction of work or motion. . .

In each of the cases here cited respondent listed a case which the Secretary maintains involved "medical treatment" as an unreportable "first aid" case, (Tr. 122-128; Ex. C-10, C-11; Answer). Cases requiring "medical treatment," i.e. treatment other than first aid, are recordable under the plain language §1904.12(c)(3) supra.

Section 1904.12(d) states that:

> (d) "Medical treatment" includes treatment administered by a physician or by registered professional personnel under the standing orders of a physician. Medical treatment does not include first aid treatment even though provided by a physician or registered professional personnel.
>
> (e) "First Aid" is any one-time treatment, and any followup visit for the purpose of observation, of minor scratches, cuts, burns, splinters, and so forth which do not ordinarily require medical care. Such one-time treatment, and followup visit for the purpose

of observation, is considered first aid even though provided by a physician or registered professional personnel.

In 1972, the Bureau of Labor Statistics (BLS) began publishing guidelines for compliance with OSHA's recordkeeping regulations pursuant to a grant of authority from the Secretary of Labor. See 36 Fed. Reg. 8754 (May 12, 1971). The BLS guidelines contain a more detailed interpretation of "medical treatment," applying the term to specific medical procedures and injuries. The 1978 BLS Guidelines list, inter alia, as medical treatment:

> Antiseptics applied on second or subsequent visit to a doctor or nurse
> Burns of second or third degree
> Butterfly sutures
> Compresses, hot or cold on second or subsequent visit to a doctor or nurse
> Cutting away dead skin (surgical debridement)
> Foreign bodies, removal if embedded in eye
> Infection, treatment for
> Prescription medications used
> Soaking, hot or cold, on second or subsequent visit
> Sutures
> Whirlpool treatment
> X-ray which is positive

(Ex. C-5, p.2). The Secretary has adopted the BLS guidelines as the official agency interpretation of the recordkeeping guidelines (Secretary's Brief, p. 5).

Respondent argues that the BLS guidelines are unenforceable in that they are not adopted by the regulation itself and have never been promulgated by OSHA as regulations in their own right.

While the BLS guidelines are not binding as law, they are entitled to substantial deference as the official

interpretation of a duly promulgated regulation. Udall v. Tallman, 380 U.S. 1, at 16, 87 S.Ct. 792, at 801 (1965). Moreover, Kohler safety personnel accepted the guidelines as authoritative and claim to have used them in determining recordability (Tr. 127, 154-55; Respondent's Brief, p. 10).

In light of both parties' reliance on the BLS guidelines, this judge will accept that document as authoritative in this case.

Though respondent admits that a number of the cited injuries did involve recordable "medical treatment" as defined by the BLS guidelines, it contests the recordability of the majority of the items, as listed more specifically below (Respondent's Brief, p. 52, 67). The parties have stipulated to the admission of the relevant medical records and have submitted those cases for this judge's determination as to recordability (Tr. 10-11; Ex. C-1).

Item 1(a) of the citation, as amended, alleges 36 instances where:

> Cases involving medical treatment or restricted work due to laceration injuries were improperly recorded as first aid cases for calendar year 1986 and 1987.

Respondent admits that eight of these cases (Items 1(a)12; 13; 25; 27; 28; 59; 82; 87) were treated with sutures and were thus recordable (Respondent's Brief, p. 54). Of the remaining 28 cases, 17 employees were prescribed multiple doses of

prescription medicines[2] (Items 1(a)5; 9; 42; 45; 63; 66; 67; 70; 71; 76; 77; 83; 84; 86; 94; 97; 100), nine required the application of antiseptics or other treatment for infection during multiple visits (Items 1(a)3; 11; 7; 22; 23; 31; 50; 54; 62), and one required surgical debridement (Item 1(a)6). A number of the cases already listed also required multiple visits for hot or cold soakings or whirlpool treatments (Items 1(a)9; 42; 62; 67; 76; 77; 100).

Each type of treatment listed above is defined by the BLS guidelines as "medical treatment." Those items, therefore, should have been listed as OSHA recordable rather than as first aid cases and are affirmed as violations of the Act.[3]

The one remaining case (1(a)51), as well as several of those already listed, required the application of steri-strips or adhesive tape closures (Item 1(a)6; 7; 11; 22; 23; 31; 50). (See, C-1, Vol. VI). Although this judge's own experience suggests that steri-strips and tape closures are the equivalent of butterfly sutures, defined as medical treatment by the BLS guidelines, the Secretary introduced no evidence on which this

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[2] While a number of the medications appearing in the medical records did not appear on the parties stipulated list of prescription drugs (See also, Tr. 432-437), this judge takes notice that, Flexeril; Keflex; Motrin; Naprosyn, are listed as prescription medications. PHYSICIANS' DESK REFERENCE, 1332, 910, 2138, 2101 (42d ed. 1988).

[3] Items 1(a)1; 2; 4; 8; 10; 14-21; 24; 26; 29; 30; 32-41; 43; 44; 46-49; 52; 53; 55-58; 60; 61; 64; 65; 68; 69; 72-75; 78-81; 85; 88-93; 95; 96; 98; 99; 101 were withdrawn in the Secretary's Amended Complaint.

judge can make such a factual finding. As a result Item 1(a)51 will be dismissed.

Item 1(b) of the citation, as amended, alleges 20 instances where:

> Cases involving medical treatment or restricted work activity or days away from work due to fracture injuries were improperly recorded as first aid cases for calendar year 1986 and 1987.

All 20 of the injuries listed in items 1(b)1 through 11 and 13 through 21[4] resulted in positive X-rays. In addition, three of the listed injuries were treated with antiseptics during multiple visits (1(b)4; 7; 19), 14 employees were prescribed multiple doses of prescription medicines (1(b)1; 2; 3; 5; 6; 7; 9; 11; 14; 16; 17; 18; 19; 20) and nine cases required hot or cold soaking and/or whirlpools on multiple visits (1(b)1; 5; 6; 7; 8; 17; 18; 20; 21).

Kohler questions the diagnosis in only five of these cases (1(b)4; 6; 8; 18; 19). (Respondent's Brief, p. 54).

On review, this judge finds that all five did, in fact, involve a positive X-ray. (See Ex. C-1, Vol. VII). Because a positive x-ray is defined as medical treatment under the BLS guidelines, all 20 of the cited cases were recordable under §1904.2(a). Moreover, the BLS guidelines list as medical treatment the separate criteria listed above, under which a number of the injuries would also have been recordable.

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[4] Item 1(b)12 was withdrawn in the Secretary's Amended Complaint.

Kohler points out that the Secretary introduced only its 1986 logs into evidence and that two of the instances cited (1(b)14; 15) were 1987 injuries. Since Kohler denied the Secretary's allegations that it failed to record those injuries (Answer p. 9), the burden is on the Secretary to provide proof of the failure to record. Absent such proof the 1987 items must be dismissed.

Items 1(b)1-11; 13; 16-21 are affirmed.

Item 1(c), as amended, alleges 52 instances where:

> Cases involving medical treatment or restricted work activity or days away from work due to eye injuries were improperly recorded as first aid cases for calendar year 1986 and 1987.

The respondent admits that 18 of the cases cited (1(c)1; 12; 15; 26; 49; 50; 58; 59; 63; 64; 66; 67; 70; 72; 77; 80; 82; 88) involved the medical removal of foreign bodies embedded in the eye (Respondent's Brief, p. 56). Respondent contends that 29 of the cases (1(c)3; 8; 10; 16; 17; 19; 22; 24; 27; 28; 31; 32; 34; 37; 41; 42; 44; 45; 46; 47; 53; 60; 61; 65; 75; 76; 79; 85; 86) were non-recordable because the "foreign body" was flushed from the eye and only a "rust stain" was removed. As to the remaining five cases (1(c)13; 29; 38; 52; 68) Kohler maintains that the medical records give no indication that the foreign bodies removed were embedded.[5]

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[5] Items 1(c) 2; 4-7; 9; 11; 14; 18; 20; 21; 23; 25; 30; 33; 35; 36; 39; 40; 43; 48; 51; 54-57; 62; 69; 71; 73; 74; 78; 81; 83; 84; 87 were withdrawn.

Respondent's witness, Nurse Sandra Bawden, testified that a non-embedded foreign body is one that can be removed with ease using a moistened cotton swab. An embedded foreign body is one that must be removed with some instrumentation, a spud or a drill (Tr. 438). When a metallic substance lodges in the eye, it is exposed to moisture and air and forms rust in the eye itself (Tr. 439). Rust stains are removed with instrumentation, such as a spud or a burr or a drill (Tr. 455).

Examination of the medical records reveals that the foreign body involved in item 1(c)29 was removed with a spud; the injury was therefore medically treated and reportable. This judge is unable to ascertain whether the foreign bodies involved in cases 13, 38, 52 and 68 were embedded. However, in those cases, as in the other 29 listed by respondent, rust stains were removed. Rust, not normally found in the human eye, is a "foreign" body. In fact, rust is frequently referred to as "rust fb" in respondent's medical records. Rust removal is by medical means, i.e. by burr; spud; or drill, and is therefore reportable. (See, Ex. C-1, Vol. VIII).

All 52 items under 1(c) are affirmed.

Item 1(d), as amended, alleges 53 instances where:

> Cases involving medical treatment or restricted work activity or days away from work due to burn injuries were improperly recorded as first aid cases for calendar year 1986 and 1987.

Kohler admits that 13 of the burn cases (1(d)3; 7; 9; 20; 25; 27; 28; 32; 36; 40; 41; 45; 46) were unequivocally 2nd or 3rd degree burns and should therefore have been recorded

(Respondent's Brief, p. 56). In all but two of the remaining cases, multiple doses of a prescription medication was dispensed (1(d)1; 2; 4; 8; 10; 11; 12; 13; 14; 15; 16; 17; 18; 19; 21; 22; 23; 26; 29; 31; 33; 34; 42; 43; 44; 47; 48; 49; 50; 51; 53; 54; 55; 56; 57; 58; 60; 61). One remaining injury (1(d)6), as well as a number of the previously listed cases, required multiple whirlpool baths. For the final item (1(d)30) no medical records were available.[6] (See, Ex. C-1, Vol. IX).

Respondent argues that use of silvadene, the prescription medication dispensed in these cases, to prevent infection rather than to treat an injury is unrecordable.

The BLS does not distinguish between usages of prescription medications, but merely defines the use of prescription drugs as medical treatment, therefore recordable. Moreover, the repeated use of antiseptics to treat or prevent infection is defined as medical treatment. Where a prescription antimicrobial cream is used to identical purpose it can only be considered recordable medical treatment.

Items 1(d)53; 54; 55; 56; 57; 58; 60 all arise out of 1987 incidents. As discussed above, no evidence of Kohler's 1987 logs is before this judge. The 1987 items are dismissed.

Item 1(d)30, unsupported by any medical records, is dismissed.

The remaining 45 items listed under 1(d) are affirmed.

Item 1(e), as amended, alleges 44 instances where:

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[6] Item 1(d) 5; 24; 35; 37; 38; 39; 52; 59 were withdrawn.

> Cases involving medical treatment or restricted work activity or days away from work due to contusions injuries (sic) were improperly recorded as first aid cases for calendar year 1986 and 1987.

Kohler admits that medical treatment was provided in 14 of the cited cases (1(e)8; 27; 28; 33; 36; 37; 41; 44; 46; 48; 52; 55; 58; 60), and that one case (1(e)65) was recordable because it involved unconsciousness (Respondent's Brief, p. 57-58). Of the remaining 29 cases, 25 involved the use of multiple doses of prescription medication (1(e)1; 5; 9; 10; 14; 15; 22; 23; 24; 25; 26; 30; 31; 32; 34; 35; 38; 42; 43; 49; 51; 54; 62; 63; 64). One item (1(e)4) required hot or cold compresses during multiple visits. The remaining three injuries (1(e)13; 19; 29) and a number of those already listed (1(e)1; 31; 60), required hot or cold soakings or whirlpools involving multiple visits.[7] (See, Ex. C-1, Vol. X).

Respondent argues that prescription medications dispensed for analgesic purposes are unrecordable.

As noted above, the BLS guidelines do not distinguish between various uses of prescription drugs. When a prescription analgesic, rather than aspirin or other over the counter preparation, is dispensed, the injury treated (this judge declines to separate the pain caused by an injury from the injury itself) becomes recordable.

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[7] Items 1(e)2; 3; 6; 7; 11; 12; 16; 18; 20; 21; 39; 40; 45; 47; 50; 53; 56; 57; 59; 61 were withdrawn in the Amended Complaint. Item 1(e)17 was withdrawn prior to the hearing (Tr. 11-12).

Item 1(e)31 refers to an 1987 injury. Since the Secretary failed to introduce the 1987 log into evidence, this item will be dismissed.

Since the remainder of the injuries cited involved care defined as medical treatment by the BLS guidelines, those 43 items are affirmed.

Item 1(f), as amended alleges 51 instances where:

> Cases involving medical treatment or restricted work activity or days away from work due to strains and sprains injuries were improperly recorded as first aid cases for calendar year 1986 and 1987.

Respondent admits that 13 of the strain and sprain cases involved both an event in the nature of a slip, trip, fall, blow to the back or overexertion and a resulting physical condition which was treated with medical-level care (Respondent's Brief, p. 62). Under the BLS guidelines those cases are recordable (1(f)8; 9; 19; 22; 28; 29; 41; 50; 57; 66; 67; 72; 82).

Of the remaining 38 cases, 21 involved the use of multiple doses of prescription medications (1(f)11; 13; 16; 17; 18; 24; 30; 31; 33; 34; 35; 37; 39; 40; 51; 53; 54; 58; 60; 79; 81). The remaining seventeen cases (1(f)5; 20; 21; 25; 26; 36; 38; 42; 43; 44; 45; 46; 47; 61; 65; 69; 70), plus a number of those already listed (1(f)11; 16; 18; 24; 33; 35; 37; 39; 40; 54; 60;

79) required hot or cold compresses or whirlpool baths on multiple visits.[8] (See, Ex. C-1, Vol. XI).

Respondent argues that in a number of the cited cases, there was no evidence of an occupational "event," i.e. a slip, trip, fall, blow or overexertion which was the cause of the injury, specifically pointing to items 1(f)33; 36; 37; 38; 39; 42; 43 as having been "re-manifestations of chronic back problems."

The Commission has examined the legislative history of the Act in regard to the recordkeeping requirements and found that "Congress showed a clear preference for overreporting injuries and illnesses rather than underreporting them. Given this background, employers must record illnesses in which the occupational environment either was a contributing factor to the illness or aggravated a preexisting condition." General Motors Corporation, Inland Division, 8 BNA OSHC 2036, 2040 (No. 76-5033, 1980).

In strain and sprain cases, it is often the case that, at the onset of pain, injured employees are performing job related tasks which may have contributed to or aggravated a preexisting condition. It is up to the employer to make a good faith determination regarding the occupational nature of an injury,

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[8] Item 1(f)1; 2; 3; 4; 7; 14; 15; 23; 27; 32; 48; 49; 52; 55; 56; 59; 62; 63; 68; 71; 73-78; 83; 84; 85) were withdrawn in the Amended Complaint. Items 1(f)6; 10; 12; 64; 80 were withdrawn prior to trial (Tr. 11-12).

taking into account the stated preference for overreporting noted in General Motors Corporation, supra.

In this case, respondent's computer logs contain columns designated "premis" and "occ," under which it is noted whether the injury or illness took place on the premises and whether the injury or illness was occupational (Tr. 131; Ex. C-10). All of the injuries contested contain a Y, for yes, in these columns (Ex. C-10). Respondent cannot now deny the occupational nature of the cited injuries after having listed them as such in its own records.

Respondent points out that the only medical treatment in case 1(f)53 was provided in 1985 and thus would not have been listed on 1986 logs. There being no evidence of any 1986 medical treatment that item is dismissed.

As medical treatment, defined by the BLS, was provided in the remaining 50 cases, those items are affirmed.

Item 1(g), as amended, alleges 35 instances where:

> Cases involving medical treatment or restricted work activity or days away from work due to abrasion injuries were improperly recorded as first aid cases for calendar year 1986 and 1987.

Respondent admits that three of the cited cases (1(g)8; 10; 37) required treatment beyond simple first aid (Respondent's Brief, p. 63). Of the remaining 32 cases, all but one involved the use of prescription medications. The last item (1(g)17) along with 1(g)1; 10; 17; 18; 20; 28; 29; 33; 36; 39 required hot or cold soaking or whirlpool baths on

multiple visits.[9] (See, Ex. C-1, Vol. XII).

This judge is unable to ascertain whether the treatment provided in 1(g)18 was related to the cited abrasion or to an unrelated ulcerous condition. That item will therefore be dismissed.

Because the care involved is defined as medical treatment by the BLS, the remaining 34 cases named in Item 1(g) are affirmed.

Item 1(h) and 1(i) were withdrawn prior to hearing (Tr. 11-12)

Willful Characterization

The Secretary argues that Kohler's failure to record the above cited injuries constituted a willful violation of the Act in that:

1. 228 of the cited injuries required recordable medical treatment subsequent to the employee's first visit to Kohler's medical facility. Those cases were designated as "first aid" based on the initial visit because Kohler's Safety Department had no system for tracking subsequent treatment. (Complainant's Brief, Appendix N).

2. 44 of the cited injuries were identifiable as recordable injuries based on the information on Kohler's accident investigation reports but were miscoded due to insufficient training of Kohler's recordkeeping personnel. (Complainant's Brief, Appendix O).

---

[9] Items 1(g)7; 9; 13; 22; 23; 24 were withdrawn.

3. 34 employees received recordable medical treatment on their initial visit to Kohler's medical department which was not noted on accident investigation reports because of the unfamiliarity of Kohler medical personnel with the recordkeeping guidelines. (Complainant's Brief, Appendix P).

Facts

Ms. Sandra Bawden, Supervising Nurse in Kohler's Medical Department since 1980 (Tr. 178-181), testified that medical secretaries initially send injured employees using the Kohler medical facility to the "general treatment" area (Tr. 183). The employee is either treated there by an occupational health nurse or, if the injury requires the attention of a physician, is taken to a "trauma room" or a third area where minor surgery is performed (Tr. 184-187). At the time of treatment a health history is taken, detailing how and when the injury occurred (Tr. 192-193). That information as well as any treatment the employee receives is recorded on medical case cards by the nurse (Tr. 194-196). The same information is entered onto an accident investigation report (Tr. 196, 200). The accident investigation reports are then forwarded to Kohler's Safety Department (Tr. 197). The medical case cards remain in the Medical Department; further treatment is noted thereon (Tr. 197). The training of occupational health nurses does not include training in OSHA record-keeping regulations (Tr. 150, 198).

The accident investigation reports are received by Kathy Mertes in the Safety Department, who compiles additional information, including the employee's current job title, home address and social security number, codes the injury and enters it into the Kohler computer log (Tr. 152, 355; Ex. C-10). An injury is coded 7, 10 or FA depending on whether it involves an OSHA recordable occupational illness or injury or non-reportable first aid, respectively (Tr. 128). Ramona Maala, also in the Safety Department, follows up on the accident reports for two to five days to determine whether the employee involved misses more than three days due to the injury. A loss of more than three work days is recorded for Kohler's workmen's compensation records. Ms. Maala also reclassifies the injury if necessary (Tr. 357-358). At year's end all entries coded 7 or 10 are included on the OSHA summary (Tr. 115, 123-126; Ex. C-11).

Ms. Mertes and Ms. Maala were instructed in the use of BLS Guidelines to determine recordability (Tr. 108, 127, 154-155). Ms. Mertes stated that she basically received on-the-job training, discussing particular cases with Mr. Henle, and that she and Mr. Henle would also discuss changes and updates to the BLS guidelines as they came in (Kathy Mertes deposition; Ex. J-7, p. 93-95). Nonetheless, Ms. Mertes stated that she still did not fully understand the reporting criteria (Ex. J-7, p. 54-55).

Mr. George Henle was Kohler's Safety Manager between 1967 and 1987 (Tr. 106-108). Mr. Henle testified that he has been responsible for Kohler's compliance with OSHA recordkeeping requirements since the Act became law in 1970 (Tr. 107). He set up the computer recording system used by Kohler in 1971 or 1972 (Tr. 131). Henle stated that he has been familiar with the BLS guidelines for recordkeeping since 1973 (Tr. 140, 394), and that he was responsible for training Ms. Mertes and Ramona Maala in injury coding (Tr. 108, 127, 154-155). Specifically Henle was aware that, under the guidelines, an injury, otherwise unrecordable, could become recordable based on treatment provided at a later date (Tr. 143, 389).

It is undisputed, however, that Kohler's Safety Department evaluated only the employee's initial treatment to determine recordability (Tr. 143). Mr. Henle testified that it "never occurred" to him that this procedure would result in a failure to record injuries which became recordable solely because of subsequent treatment (Tr. 377, 395).

Mr. Henle testified that because of the size and diversity of the Kohler operation, 95% of OSHA regulations were applicable to the various plants (Tr. 337). Henle stated that he was responsible for the entire safety program and for assuring OSHA compliance in all areas (Tr. 337) and so had other duties to perform which were more important than recordkeeping (Tr. 160-161). Kenneth Conger, Kohlers Vice President of Human Resources and Mr. Henle's supervisor, also stated that record

keeping was a very small part of Henle's job responsibilities (Tr. 208).

In 1984, Kohler was cited for an Other than serious violation of §1904.2 (Tr. 137; Ex. C-12). The citation alleged that "[i]n 1981, 1982 and 1983 recordable cases were listed as first aid and not included in the recordable case summaries." Three fracture cases, and three cases involving restricted work activity were found listed as first aid (Tr. 237-238). The item was settled with a reduced penalty (Ex. C-13). Henle testified that no mention of injuries requiring subsequent treatment was made during settlement negotiations and that no one called to his attention any systemic problems with Kohler's computerized recording system (Tr. 340-341, 361).

Around February 1987, Mr. William Smith replaced Mr. Henle as Safety Director upon Henle's retirement (Tr. 493-494). In or around June 1987, Smith implemented a "feedback mechanism" in the injury recording system to track medical treatment after an employee's initial visit to Kohler's medical facility (Tr. 495). Smith testified that he was aware of OSHA's recent emphasis on record-keeping violations. That, coupled with OSHA's representations in April and May that they would be returning to look at Kohler's records, prompted Smith to investigate the system and led to the institution of follow-up procedures (Tr. 511-514, 521-530).

Required recordkeeping is utilized by OSHA to target inspections in those industries and those companies that have

the highest accident and injury rates (Testimony of John A. Pendergrass, Assistant Secretary for Occupational Safety and Health in John Morrell & Company, (No. 87-0635, 1988), Ex. J-1, p. 637-638).

In addition, Mr. Franklin Mirer, Director of the Health and Safety Department of the United Auto Workers International Union (Tr. 268), testified that comprehensive injury and illness records are essential to the improvement of employee safety and health (Tr. 274). Without accurate records it is impossible to compare rates from different companies, identify particular problem areas, or assure that health and safety improvements actually result in a falling injury and illness rate (Tr. 274-276). Recently the Union, in attempting to upgrade safety in other industries, has used the OSHA 200 form as an indicator of high gravity injuries pointing to areas worthy of attention (Tr. 276-279).

Finally, Kohler is required to submit OSHA injury figures to the State Workmen's Compensation Board along with its renewal application for self insured status (Tr. 321, 386).

However, Henle testified that the Kohler facility was inspected by OSHA over 20 times during his tenure without reference to the injury and illness logs (Tr. 361). To his knowledge the Union never used the logs in their safety and health activities there (Tr. 361). Mr. Conger, chairman of the UAW bargaining committee, stated that he had never participated in any union negotiations based on the OSHA injury

and illness logs (Tr. 314-315). Moreover, Kohler's self insured status was based solely on lost workday cases, none of which are involved in this litigation (Tr. 321, 328, 387).

Mr. Henle testified that the OSHA 200 format was very cumbersome and stated that he initiated the computer program Kohler uses so that he could more efficiently isolate and track particular types of cases, such as by injury or illness (carpal tunnel cases), or by location (iron foundry cases) (Tr. 338, 342-343). The system was set up to classify and print out all cases without reference to their OSHA designation (Tr. 342).

Apart from its recording system, Kohler apparently had a comprehensive safety program. Andrew Cassidy, Assistant Safety Director with Kohler, testified that he ran new employee training programs and programs in running punch presses and power industrial trucks. Cassidy was also in charge of following up on employee complaints and conducting general and accident inspections (Tr. 402). Kelly Diane Groth, a Project Industrial Hygienist with Kohler, testified that she was one of two industrial hygienists employed to conduct corporate wide industrial hygiene audits (Tr. 416). Together with a industrial hygiene technician she assessed all the different operations for environmental, including ergonomic, hazards, conducted exposure monitoring and reported back to area supervisors (Tr. 417-421, 424-426; Ex. R-E). Sandra Bawden testified that the Medical Department ran programs including hearing conservation, lead monitoring, respirator training, and pulmonary function

monitoring (Tr. 449-451).

Discussion

The Commission has held that in order to establish that a violation was willful:

> It is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting a violation; such evidence is necessary to establish any violation, serious or nonserious.... there must be evidence of such reckless disregard for employee safety or the requirements of the law generally one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it.

Williams Enterprises, Inc., 13 BNA OSHC 1249, 1256-57 (No. 85-355, 1987). See also Brock v. Morello Brothers Construction, Inc., 809 F.2d 161, 163-65 (1st Cir. 1987). The issue of willfulness focuses on "the employer's state of mind, e.g. its general attitude toward employee safety." Seward Motor Freight, Inc., 13 BNA OSHC 2230, 2234 (No. 86-1691, 1989).

Based on the evidence, this judge is unable to conclude that the cited violations of §1904.2(a) were "willful" as defined by Commission precedent.

Respondent's failure to train nurses in BLS criteria does not in itself indicate an unwillingness to comply with those guidelines. Nurses had no say in determining recordability and had only to accurately record the actual treatment provided for later examination by Safety personnel. In retrospect, it seems clear that such training would assure that nurses include recordable criteria on abbreviated accident reports. However, Kohler's failure to provide training does not appear designed

to achieve underreporting and, in fact, resulted in very few miscodings.

Nor does the misrecording of a number of cases by Kohler's Safety personnel indicate willfulness. The vast majority of the cases miscoded based on first day treatment fall into two categories: Non-displaced fractures with positive X-rays, and eye injuries where only rust rings required medical removal.

While the BLS guidelines are relatively clear, there is some ambiguity introduced in the question and answer portion of the guidelines regarding X-rays. Addressing a question regarding negative X-rays, the guidelines suggest that X-rays are diagnostic and would not in themselves constitute medical treatment (Ex. C-5, p. 23). While this language cannot negate the clear inclusion of positive X-rays as a recordable criteria, this judge finds that some honest confusion may have resulted from the apparent inconsistency.

A violation is not willful if the employer had a reasonable, good faith belief that the violative conditions conformed to the requirements of the Act. Keco Industries Inc., 13 BNA OSHC 1161, 1169 (No. 81-263, 1987); RSR Corp., 11 BNA OSHC 1163, 1172 (No. 79-3813, 1983) aff'd, 764 F.2d 355 [12 OSHC 1413] (5th Cir. 1984).[10]

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[10]Although Mr. Henle was apparently informed during the 1984 settlement conference of three fractures which were "medical treatment" cases (Tr. 238), the record does not disclose whether the Compliance Officer made clear, as we do here, that all cases involving positive x-rays are recordable.

This judge finds further that, respondent's argument that rust rings are only the residue of and not a foreign body in themselves, though erroneous, is not so unreasonable that respondent's recordkeeping personnel could not have held that belief in good faith.

Finally this judge is not convinced that Kohler's failure to develop a method of following up on subsequent treatment was a willful act. Although the flaw in Kohler's system clearly was a large one, i.e. one which allowed a large number of cases to slip through unidentified as reportable, the evidence does not show with equal clarity that the flaw was an obvious one. This judge cannot conclude that examination of the computer log would necessarily have disclosed that recordable cases were not being designated as such.

Moreover, this judge can discern no motive for purposeful underreporting. Wall to wall inspections were conducted regularly by OSHA without reference to Kohler's illness and injury records. The Union had never used the illness and injury logs in negotiating safety and hygiene issues. Kohler's self-insured status would not have been affected by the recording of any of the cases involved here.

Finally, this record does not disclose Kohler's plain indifference to employee safety or the requirements of the Act. While it does appear that Kohler's management took a somewhat cavalier attitude towards the recordkeeping requirements in particular, its comprehensive safety program demonstrates an

active concern with safety and hygiene in general. The Secretary presented no evidence that respondent's allegedly indifferent attitude extended into any of the many other areas of Kohler's operation governed by the Act.

Kohler contends that the violations here should be classified de minimus, i.e. as bearing such a negligible relationship to employee safety or health as to render inappropriate the assessment of a penalty or the entry of an abatement order. Cleveland Consolidated, Inc., 13 BNA OSHC 1114, 1118 (No. 84-696, 1987).

Though the violations here cannot be characterized as willful, this judge does not wish to minimize the importance of the recordkeeping requirements. As stated by the Commission "[t]hose requirements are a cornerstone of the Act and play a crucial role in providing the information necessary to make workplaces safer and healthier." General Motors Corporation, supra at 2041. While the record-keeping requirements need not be emphasized over the Act's substantive provisions, minimizing the importance of adequate and responsible recording of injuries and illnesses is unacceptable. Just as the prevention of illness and injury is a vital part of any safety program, so too is a thorough recording system, founded upon appropriate emphasis on accuracy and detail, to enable the employer to track a history of injury or illness; to recognize and correct areas of accident or illness repetition within the industry. Recordkeeping, while perhaps a small part of the

Safety Managers' responsibilities, must be viewed as a vital and essential part of his overall obligation; that of insuring safety of the worker and the workplace environment. Its importance must be underscored periodically by the employer with such of his staff as are responsible for this important and vital function. Periodic review of the procedures employed must be on-going.

Kohler's contention that the violations be classified as "de minimis" is therefore rejected.

PENALTIES

The Secretary has proposed a separate penalty of $3,000.00 for each of the cited items in this case.

The Commission has held that "separate instances of the same violation may be charged either in combination or as separate violations". RSR Corporation, 11 BNA OSHC 1163, 1180-1181 (Nos. 79-3813, 80-1602, 79-6392 and 79-5062, 1983). In RSR Corporation Commissioner Cleary noted, however; that "it has been the usual practice of the Secretary in proposing penalties and of the Commission in assessing them to group all instances of noncompliance with a single standard at one site into one citation with one penalty". Id.

The Secretary deviates from past practice here because: 1) a single penalty would provide little incentive for a company the size of Kohler to devote time and resources to accurate recordkeeping (Complainant's Brief, p.30), and 2) because under a new OSHA policy in force since approximately April, 1986,

"egregious" violations are to be penalized on an instance-by-instance basis (Deposition of Frank White, Deputy Assistant Secretary for the Occupational Safety and Health Administration, p. 11-15).

The Secretary determined that the Kohler violations were "egregious" based on Kohler's earlier citation for the same standard and on the large number of violations, "indicative of a high degree of willfulness." (Deposition of Frank White, p. 10, 16).

It is clear that ultimate authority for assessment of penalties lies with the Commission under 29 U.S.C. §666(j) and that the Secretary's internal guidelines are not binding. United States Steel Corporation, 10 BNA OSHC 2123 (No. 77-3378, 1982). In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. Nacirema Operating Co., 1 BNA OSHC 1001, (No. 4, 1972).

This judge finds that although accurate recordkeeping under OSHA regulations is important to employee safety and health, the Secretary's proposed instance-by-instance fines in this case are not justified. The Secretary failed to prove either that the proven violations were the result of a deliberate attempt to circumvent OSHA regulations or that the prior citation for the same standard would have put respondent on

notice of the deficiencies in its system. Moreover, instance-by-instance penalties need not be assessed in order to provide an incentive for Kohler's compliance with the Act. The record establishes that Kohler has already instituted follow-up procedures which will eliminate the flaw in its system.

Taking into account Kohler' size and the failure of its management to appreciate the importance of accurate record-keeping and to place appropriate emphasis on this aspect of its safety and health program, this judge finds that a combined penalty of $1,000.00 is appropriate.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed Findings of Fact or Conclusions of Law that are inconsistent with this decision are denied.

ORDER

1. Citation 3, items 1(a) 3, 5, 6, 7, 9, 11, 12, 13, 22, 23, 25, 27, 28, 31, 42, 45, 50, 54, 59, 62, 63, 66, 67, 70, 71, 76, 77, 82, 83, 84, 86, 87, 94, 97, 100 are AFFIRMED.

2. Citation 3, item 1(a) 51 is DISMISSED.

3. Citation 3, items 1(b) 1-11, 13, 16-21 are AFFIRMED.

4. Citation 3, items 1 (b) 14, 15 are DISMISSED.

5. Citation 3, items 1(c) 1, 3, 8, 10, 12, 13, 15-17, 19, 22, 24, 26-29, 31, 32, 34, 37, 38, 41, 42, 44-47, 49, 50, 52, 53, 59-61, 63-68, 70, 72, 75-77, 79, 80, 82, 85, 86, 88 are AFFIRMED.

6. Citation 3, items 1(d) 1-4, 6-23, 25-29, 31-34, 36, 40-51, 61 are AFFIRMED.

7. Citation 3, items 1(d) 30, 53-58, 60 are DISMISSED.

8. Citation 3, items 1(e) 1, 4-5, 8-10, 13-15, 19, 22-30, 32-38, 41-44, 46, 48, 49, 51, 52, 54, 55, 58, 60, 62-65 are AFFIRMED.

9. Citation 3, item 1(e) 31 is DISMISSED.

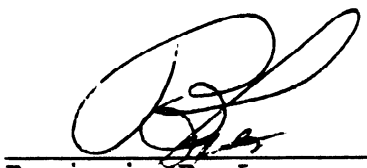
10. Citation 3, items 1(f) 5, 8, 9, 11, 13, 16-22, 24-26, 28-31, 33-47, 50, 51, 54, 57, 58, 60, 61, 65-67, 69, 70, 72, 79, 81, 82 are AFFIRMED.

11. Citation 3, item 1(f) 53 is DISMISSED.

12. Citation 3, items 1(g) 1-6, 8, 10-12, 14-17, 19-21, 25-41 are AFFIRMED.

13. Citation 3, item 1(g) 18 is DISMISSED.

14. A combined penalty of $1,000.00 is ASSESSED.



Benjamin R. Loye
Judge, OSHRC

Dated: March 29, 1990