UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Washington, DC 20036-3419

FAX:
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SECRETARY OF LABOR,

Complainant,

v.

DOVER ELEVATOR COMPANY,

Respondent.

Docket No. 90-0319

ORDER

This matter is before the Commission on a direction for review entered by Chairman Edwin G. Foulke, Jr., on July 6, 1992. The parties have now filed a stipulation and settlement agreement.

Having reviewed the record, and based upon the representations appearing in the stipulation and settlement agreement, we conclude that this case raises no matters warranting further review by the Commission. The terms of the stipulation and settlement agreement do not appear to be contrary to the Occupational Safety and Health Act and are in compliance with the Commission's Rules of Procedure.

Accordingly, we incorporate the terms of the stipulation and settlement agreement into this order, and we set aside the Administrative Law Judge's decision and order to the extent that it is inconsistent with the stipulation and settlement agreement. This is the final order of the Commission in this case. See 29 U.S.C. §§ 659(c), 660(a), and (b).

Edwin G. Foulke, Jr.
Chairman

Dated August 11, 1993

Velma Montoya
Commissioner

NOTICE OF ORDER

The attached Order by the Occupational Safety and Health Review Commission was issued and served on the following on August 11, 1993.

Daniel J. Mick, Esq.
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Office of the Solicitor, USDOL
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Patricia Rodenhausen, Esq.
Regional Solicitor
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W. Scott Railton, Esquire
Reed, Smith, Shaw & McClay
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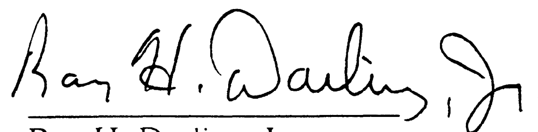
8251 Greensboro Drive
McLean, VA 22102-3844

Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 420
McCormack Post Office and Courthouse
Boston, MA 02109-4501

FOR THE COMMISSION



Ray H. Darling, Jr.
Executive Secretary

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ROBERT B. REICH, SECRETARY OF LABOR, Complainant, v. DOVER ELEVATOR COMPANY, Respondent.	OSHRC Docket No. 90-0319

STIPULATION AND SETTLEMENT AGREEMENT

In full settlement and disposition of the issues in this proceeding, it is hereby stipulated and agreed by and between the Complainant, Secretary of Labor, and the Respondent, Dover Elevator Company, that:

1. This case is before the Commission upon the granting of respondent's Petition for Discretionary Review seeking review of the Administrative Law Judge's Decision and Order dated May 7, 1992. Review was granted as to Repeat Citation 2, Item 3 alleging a violation of 29 CFR §1926.450(a)(10). (Review was sought but not granted as to the affirmance of Serious Citation 1, Item 1 alleging a violation of 29 CFR §1926.100(a); Repeat Citation 2, Item 1 alleging a violation of 29 CFR §1926.350(a)(9); and Other-than-serious Citation 3, Items 2, 6, and 8 alleging violations of 29 CFR §1926.50(f), 29 CFR §1926.150(e)(1) and 29 CFR §1926.405(a)(2)(ii)(E). No review was sought to the affirmance of Other-than-serious Citation 3, Item 5 alleging a violation of 29 CFR §1926.59(g)(1).) The Secretary did not seek

review of the dismissal of Other-than-serious Citation 3, Items 1, 3, 4, 5 and 9 alleging violations of 29 CFR §1926.25(b), 29 CFR §1926.59(e)(1), 29 CFR §1926.59(h), 29 CFR §1926.59(g)(1) and 29 CFR §1926.450(a)(2).

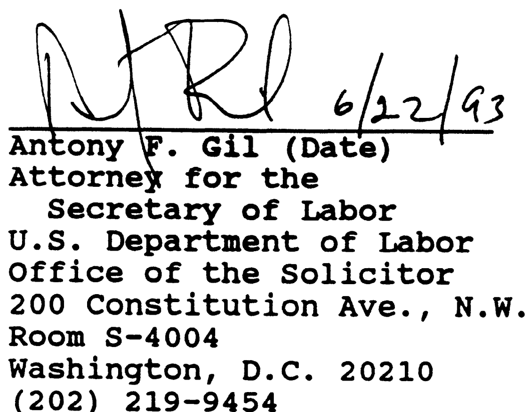
2. Respondent hereby withdraws its Notice of Contest to Repeat Citation 2, Item 3 and to the notification of proposed penalty thereto and agrees that the violation has been abated.

3. The Secretary hereby reduces the classification of Citation 2, Item 3 from Repeat to de minimis with no penalty.

4. Respondent certifies that a copy of this Stipulation and Settlement Agreement was posted at the workplace on the 3rd day of August 1993, in accordance with Rules 7 and 100 of the Commission's Rules of Procedure. There are no authorized representatives of affected employees and no employee has elected party status.

5. Complainant and Respondent will bear their own litigation costs and expenses.

FOR THE SECRETARY:



6/22/93

Antony F. Gil (Date)
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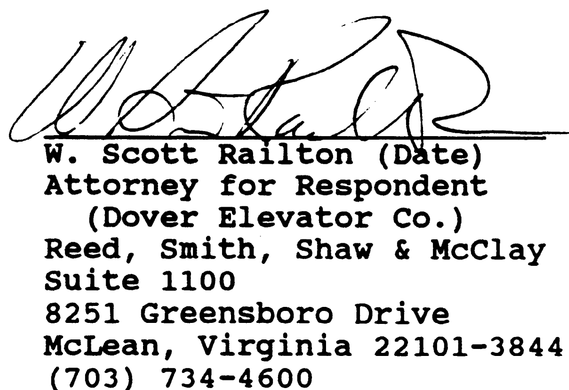
FOR RESPONDENT:



W. Scott Railton (Date)
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UNITED STATES OF AMERICA
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SECRETARY OF LABOR Complainant, v. DOVER ELEVATOR COMPANY Respondent.	OSHRC DOCKET NO. 90-0319

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 June 4, 1992. The decision of the Judge will become a final order of the Commission on July 6, 1992 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before June 24, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

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

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Date: June 4, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 90-0319

NOTICE IS GIVEN TO THE FOLLOWING:

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David G. Oringer
Administrative Law Judge
Occupational Safety and Health
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SECRETARY OF LABOR, Complainant v. DOVER ELEVATOR COMPANY Respondent.	OSHRC Docket No. 90-0319

Appearances:

William G. Staton, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

W. Scott Railton, Esq.
Reed, Smith, Shaw & McClay
Washington, D.C.
For Respondent

Before: Administrative Law Judge David G. Oringer

DECISION AND ORDER

This is a proceeding under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et. seq.*, (hereinafter referred to as "the Act") to review citations issued by the Secretary of Labor pursuant to § 9(a) of the Act and a proposed assessment of penalties thereon issued, pursuant to § 10(a) of the Act.

BACKGROUND

Compliance Officer Bert Zapken entered the construction worksite at 130 Prince Street, New York, New York, on June 28, 1989 to conduct a referral inspection. (Tr. 11,

172) The general contractor, Nycon, and seven subcontractors, of which Dover Elevator Company ("Dover") was one, were renovating and adding a fifth floor onto a four story building designated as a landmark. (Tr. 15, 194) Dover was the elevator subcontractor for the project and was engaged in the installation of a freight elevator and a duplex shaft passenger elevator. (Tr. 195-196) Upon his arrival at the worksite, Mr. Zapken held an opening conference with Nycon's superintendent. (Tr. 13-14) The following day, June 29, 1989, Mr. Zapken held an opening conference with all of the subcontractors on the worksite, including Dover's foreman for the project, J. Brannon. (Tr. 111)

During his four days at the worksite, Mr. Zapken observed several hazards on June 28th, 29th and July 7th, 1989, to which he alleges Dover employees were exposed. As a result of these observations, OSHA issued three citations against Dover, one "serious", one "repeat" and one "other than serious", alleging a total of thirteen violations of the Secretary's standards and proposing an aggregate penalty of $4340.00 for all allegations of violation. Dover timely filed a notice of contest and a hearing was held pursuant to due notice in New York City on March 25th and 26th, 1991. At the hearing, the Secretary withdrew item 2 of citation 2 and item 7 of citation 3, reducing the number of alleged violations to eleven and the proposed penalty to $2740.00. (Tr. 5-6) Both parties have submitted post-hearing briefs.

PRELIMINARY MATTERS

First, some comment must be made regarding the hyperbolic description contained in Dover's brief of Mr. Zapken as a "rookie" compliance officer. I find this characterization to be inaccurate. At the time of the inspection, Mr. Zapken had worked as a compliance officer for approximately thirteen months, six of which he spent in training under the tutelage of a senior compliance officer. (Tr. 11, 88) He also had conducted twenty-nine inspections, nineteen of which were in the field of construction and involved approximately four to seven worksites. (Tr. 89-90) In my opinion, this experience is more than sufficient to consider Mr. Zapken capable of conducting the inspection at issue here.

The only area in which Mr. Zapken can truly be described as a "rookie" is in serving as a witness at a hearing since, as he indicated at these proceedings, this was his first experience testifying in a hearing. (Tr. 9-10) Indeed, the fact that all of his prior inspections

have resulted in affirmed citations may well indicate that those inspections and the citations resulting therefrom contained sufficient merit to convince respondents not to contest them in a trial type proceeding.

Second, Dover's brief complains that this tribunal has refused to allow it to establish a record of the fact that all of the contractors at the Prince Street worksite received citations for the same alleged violations in dispute here. Since this question, however, lacks any relevance to the citations issued specifically against Dover, the development of such a record would be a waste of trial time. Dover's objections on this issue clearly stem from its contention that it is not liable for the hazards created by other employers on a multiemployer worksite. In support of this argument, Dover cites to *Underhill Constr. Co.*, 513 F.2d 1032 [2 BNA OSHC 1641] (2nd Cir. 1975) ("*Underhill*"). The *Underhill* decision, however, simply stands for the principle that an employer who creates a hazardous condition can be held responsible for employee exposure to it, even if those exposed are the employees of other contractors or subcontractors. *Id.* at 1038. In no way does the *Underhill* decision preclude the Secretary from citing contractors or subcontractors for exposing its own employees to hazards created by another employer.

Dover also cites to *Anning-Johnson Co.*, 516 F.2d 1081, 1091 [3 BNA OSHC 1166] (7th Cir. 1975), a 7th Circuit decision which held that subcontractors could not be held responsible for exposing their own employees to nonserious hazards created by other employers. In the following year, however, the Commission took the 7th Circuit's formulation of the multiemployer defense one step further by expanding the employer's burden of proof. In *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1198, 1975-76 CCH OSHD ¶ 20,690 (No. 3694, 4409, 1976) ("*Anning-Johnson*"), the Commission held that,

> "once a cited construction subcontractor has established that it neither created nor controlled the hazardous condition, it may affirmatively defend against the Secretary's charge by showing either (a) that its employees who were or may have been exposed to the hazard were protected by realistic measures taken as an alternative to literal compliance with the cited standard, or (b) that it did not have nor with the exercise of reasonable diligence could have had notice that the condition was hazardous."

(Footnotes omitted). Also see *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1975-76 CCH OSHD ¶ 20,691 (No. 12775, 1975). The Commission's reasoning in *Anning-Johnson* has been adopted by several Circuit courts, indicating a definitive rejection of the 7th Circuit's narrow interpretation of the multiemployer defense. See *D. Harris Masonry Contrac., Inc.*, 876 F.2d 343, 345 [14 BNA OSHC 1034] (3rd Cir. 1989) (citing to decisions from five different Circuits that have applied the Commission's formulation of the defense). Because I am bound by Commission precedent, as Dover has accurately observed in its brief, and because I believe it to be the more rational approach, I adopt the Commission's formulation of the multiemployer defense as set forth in *Anning-Johnson* for the purposes of this case.

Third, Dover's reliance upon this jurist's decision in *Tipperman Electric Co.*, 9 BNA OSHC 1990, 1981 CCH OSHD ¶ 25,423 (No. 79-4978, 1981) ("*Tipperman*") is misplaced. It is true I wrote in *Tipperman* that, in my opinion, citing all contractors at a worksite for identical violations was "overkill" and did not enhance the furtherance of the Act. Such sentiment, however, was purely *obiter dicta* and since then, my opinion has changed. I have found that many contractors will allow their employees to be exposed to any hazard at a worksite, believing that as long as they did not create the hazard, they cannot be cited by OSHA. In light of this fact, there may well be some wisdom in the Secretary's use of its vast prosecutorial powers to cite all employers whose employees are exposed to hazardous conditions, regardless of who controls or has created the hazard. Furthermore, the Secretary certainly has the right to enforce the Act and the standards promulgated pursuant to it in the manner in which she sees fit, despite the current opinion of Dover and the past opinion of this jurist.

Finally, Dover charges that OSHA's inspection of the worksite in question was conducted in a manner which deprived Dover of its right of accompaniment as set forth in § 8(e) of the Act. In order to establish such a defense, the Commission has held that the respondent must show that it has been prejudiced by being denied the right to accompany the compliance officer on the inspection. *S & H Riggers & Erectors, Inc.*, 8 BNA OSHC 1173, 1177, 1980 CCH OSHD ¶ 24,336 (No. 76-1104, 76-1739, 1980) *rev'd on other grounds*, 659 F.2d 1273 (10 BNA OSHC 1057) (5th Cir. 1981). Also see *Western Waterproofing Co., Inc.*, 560 F.2d 947 [5 BNA OSHC 1732] (8th Cir. 1977); *Able Contrac., Inc.*, 5 BNA OSHC 1975, 1977-78 CCH OSHD ¶ 22,250 (No. 12931, 1977); and *Accu-Namics, Inc.*, 515 F.2d 828 [3 BNA OSHC 1299] (5th Cir. 1975), *cert. denied*, 425 U.S. 903 [4 BNA OSHC 1090] (1976). Dover specifically contends that three of the eleven alleged violations were observed by Mr. Zapken without the presence of Mr. Brannon, but has failed, however, to introduce any persuasive evidence of how Mr. Brannon's absence resulted in prejudice.

It seems evident from the record that Dover clearly was aware of Mr. Zapken's presence even prior to the opening conference held with the subcontractors on June 29, 1989. (Tr. 111) When Mr. Zapken first arrived at the Prince Street worksite on June 28, 1989, it was Mr. Brannon who led him up to Nycon's office. (Tr. 213-214) In fact, Mr. Brannon testified that at that time, Mr. Zapken indicated that he wanted to have a meeting with all of the subcontractors at the worksite. (Tr. 218) Mr. Brannon also referred to the OSHA inspection in his construction safety meeting report for that week, where he noted that "OSHA was here on job 6/28, 29, 30." (Exhibit R-7, p. 8) His inclusion of "6/28" in the notation implies that he was aware that the inspection had begun prior to the opening

conference held on June 29th with the subcontractors. Also, according to the citation, the hazards for which Dover was cited were observed by Mr. Zapken on June 28th, 29th and July 7th, 1989, all dates on which Mr. Brannon apparently was aware of Mr. Zapken's presence at the worksite.

Furthermore, regardless of Mr. Brannon's personal knowledge of when Mr. Zapken commenced the inspection, the hazards observed by Mr. Zapken without the presence of Mr. Brannon were conditions which were in plain view, including those hazards which were observed and photographed prior to Mr. Zapken's opening conference with Mr. Brannon. See *Dovin Constr. Co., Inc.*, 9 BNA OSHC 1218, 1981 CCH OSHD ¶ 25,053 (No. 79-6671, 1980) (photographs taken of conditions in plain view prior to the opening conference admitted absent a showing of prejudice) and *Titanium Metals Corp. of Am.*, 7 BNA OSHC 2172, 1980 CCH OSHD ¶ 24,199 (No. 14080, 1980). Therefore, Dover's failure to show prejudice coupled with the fact that the violations alleged here occurred in plain view and on days on which Mr. Brannon apparently knew that Mr. Zapken was conducting an inspection, signifies that Dover has not shown that its § 8(e) rights were violated.

DISCUSSION

I. Alleged Serious Violation of 29 C.F.R. § 1926.100(a)

Mr Zapken testified that on June 29th, while he was on the fourth floor of the building interviewing the bricklayer subcontractor, he observed Dover employees leaving the worksite for lunch and noted that none of them were wearing hard hats. (Tr. 29-31, 145) According to Mr. Zapken, he recognized these workers as Dover employees because Mr. Brannon had previously identified them to him as such. (Tr. 30) Since the bricklayers were

still applying mortar, cement and brick to the building at this time, Mr. Zapken believed the situation to be hazardous to the Dover employees walking below without head protection. (Tr. 30-31, 146; also see Exhibits R-4 and R-5) In fact, Mr. Zapken testified that on July 7th, while conducting a closing conference with another subcontractor at the entrance of the building, a brick fell from where the bricklayers were working to the ground approximately three feet from where Mr. Zapken was standing, illustrating to him the hazard he had perceived earlier. (Tr. 30-31, 147)

As a result of these observations, Dover was cited for an alleged violation of 29 C.F.R. § 1926.100(a) which states:

> § 1926.100 Head Protection.
> (a) Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

A penalty of $540.00 was proposed.

At the hearing, Mr. Brannon testified that he had no way of knowing if bricklaying work was being done above the entrance of the building at the time Mr. Zapken observed the Dover employees leaving the worksite for lunch, particularly if the work was being done on the "offset", an area 8 feet back from the facade or very front of the building. (Tr. 221; also see Exhibits R-4 and R-5) Mr. Brannon seems, however, to base this conclusion on the fact that if overhead work of this nature was being done, a visible protective barricade or canopy would have been in place to protect both workers and pedestrians. (Tr. 279-280) Clearly, though, some kind of brick work was being done on the upper floor of the building, as evidenced by Exhibits R-4 and R-5. To assume otherwise simply because the worksite lacked the customary overhead protection canopy is imprudent. Absent corroborating

evidence that such protection was truly customary on a project such as this one, it was unreasonable for Mr. Brannon to assume that since there was no canopy, no overhead work was being done.

Further, Mr. Brannon's testimony that the brick work was being done on the offset, which he claims was 15 to 20 feet to the left of the entrance to the building, and not the facade, does not change the fact that brick or other material could have fallen from that area to the front of the building below as Mr. Zapken testified occurred on July 7th. (Tr. 30-31, 147, 220-221, 277; also see Exhibits R-4 and R-5) As pictured in Exhibit R-5, the brick work was being done along the offset, right up to the facade; taken together, Exhibits R-4 and R-5 show that this work was being done on both sides of the front of the building along Prince Street, where the entrance to the worksite was located. (Tr. 178, 277) As a result, workers coming in and out of that entrance were clearly exposed to the possibility of brick or other material falling from overhead to that area. The hazard is even more precarious in light of Mr. Zapken's testimony that the scaffolds on which the bricklayers were working were not equipped with toe boards to keep objects from falling to the ground below. (Tr. 149)

Dover further argues that regardless of where the brick work was being done, it was customary for everyone at the worksite to take lunch at the same time. (Tr. 220) Therefore, since the job was considered "shut down" at lunchtime, Dover's employees did not need to wear their hard hats as they exited the building for lunch. (Tr. 223, 279) Mr. Brannon conceded, however, that he did not really know if the bricklayers on that day had gone to lunch at the same time as the Dover employees. (Tr. 220, 279) As was the case with the

overhead canopy protection, assuming that all of the employees at a worksite will cease their work at the same time to go to lunch is simply not sound. Absent additional evidence beyond Mr. Brannon's testimony that this was truly a customary practice, it was unreasonable for Mr. Brannon to assume that the bricklayers had suspended their work to break for lunch at the same time that the Dover employees were exiting the worksite.

In sum, the Secretary has proven that a hazard did exist and that Dover's employees were exposed to it. Despite Mr. Brannon's vacillating testimony, it is evident that he was aware that some kind of bricklaying work was being done on the upper floors of the building; his argument that the lack of overhead protection indicated otherwise is not convincing. Furthermore, Mr. Brannon's assumption that the overhead work had ceased at the time Dover employees were walking underneath could have easily been verified by a quick look upwards; the fact that he could not be sure if the bricklayers had gone to lunch at the same time weakens his argument that doing so was customary. Finally, Dover could have easily abated the hazard by requiring its employees to wear hard hats upon leaving or entering the worksite. Indeed, upon discussing the matter with Mr. Zapken, Dover did issue hard hats to its employees at the worksite and required their use. (Tr. 33-34)

Dover's final argument that the violation is *de minimus* is without merit. The hazard to which Dover employees were exposed was far from "trifling" or "trivial"; these workers could have been seriously hurt by a brick falling upon them from a height of approximately 90 feet. (Tr. 278) Accordingly, the alleged violation of § 1926.100(a) is affirmed. Given the facts as discussed above, the Secretary's proposed penalty of $540.00 was reasonable and appropriate.

II. Alleged Repeat Violation of 29 C.F.R. § 1926.350(a)(9)

On June 29th, Mr. Zapken observed two unsecured compressed gas cylinders standing upright next to Dover's gang box and employee lockers. (Tr. 35, 37-38; also see Exhibit C-1) The cylinders were labelled with the name "Dover" and, although Mr. Brannon initially denied that the cylinders belonged to Dover, he later testified that they were indeed Dover's cylinders. (Tr. 35-36, 224)

Mistakenly assuming the unsecured cylinders to contain oxygen and acetylene, Mr. Zapken initially believed that a fire or explosion hazard existed. (Tr. 85) Upon later realizing that both cylinders contained acetylene, Mr. Zapken alleged that the unsecured cylinders, each weighing, in his opinion, 50 pounds, presented a falling hazard which could cause injury to the feet of Dover employees. (Tr. 86) As result, Dover was cited for an alleged violation of § 1926.350(a)(9) which states:

> § 1926.350(a) Transporting, moving, and storing compressed gas cylinders.
> (9) Compressed gas cylinders shall be secured in an upright position at all times except, if necessary, for short periods of time while cylinders are actually being hoisted or carried.

A prior citation for violation of the same standard was not contested by Dover and therefore, was affirmed. (Tr. 46-47; also see Exhibit C-2) The alleged violation was therefore classified as a repeat violation and a penalty of $800.00 was proposed.

According to Mr. Brannon's testimony, the cylinders pictured in Exhibit C-1 were not secured because they were awaiting pick-up and had just been placed there that morning. (Tr. 225, 228) Apparently relying on the language of the cited standard's section heading, "Transporting, moving and storing compressed gas cylinders", Dover contends that this temporary placement of the cylinders in the area pictured in Exhibit C-1 does not constitute

the "storage" of these cylinders. Although Dover is not explicit on this point, it seems that Dover is arguing that if the cylinders here were not being stored, then § 1926.350(a)(9) is inapplicable. In support of this argument, Dover cites to two Commission decisions, both of which are inapposite to the case at hand.

First, Dover alleges that the Commission in *Novak & Co., Inc.*, 11 BNA OSHC 1763, 1983-84 CCH OSHD ¶ 26,766 (No. 80-7335, 1984) ("*Novak*") vacated a citation where the failure to secure compressed gas cylinders was "transitory". This claim, however, while accurate, fails to convey several key factors that clearly distinguish *Novak* from the facts of the case at hand. The compressed gas cylinders in *Novak* did not belong to the respondent in that case, but belonged to another contractor on the same worksite; as a result, the respondent did not create or control the alleged hazard. *Id.* at 1764, 1766. Here, however, the cylinders did belong to Dover and their unsecured status was clearly attributable to Dover. Since the respondent in *Novak* did not create or control the hazard, the Commission then applied the multiemployer defense. Specifically, the Commission vacated the citation because it found that it was unreasonable to have expected the respondent to take any alternative measures to protect its employees in light of the fact that the cylinders were present on the worksite for only one day. *Id.* at 1766. Therefore, the transitory nature of the cylinders' placement was relevant only in terms of concluding that one day was not enough time to expect an employer to take alternative protective measures.

The other Commission decision upon which Dover relies is *Mellon Stuart Co.*, 12 BNA OSHC 1902, 1986-87 CCH OSHD ¶ 27,634 (No. 85-1193, 1986) ("*Mellon*"). Here, the Commission held that the term "storage" does not include the "transient placement" of gas

cylinders. *Id.* at 1903. The cited standard in *Mellon*, however, was § 1926.350(j) which states:

> § 1926.350(j) Additional rules. For additional details not covered by this subpart, applicable technical portions of American National Standards Institute [ANSI], Z49.1-1967, Safety in Welding and Cutting, shall apply.

Thus, in *Mellon*, the Commission was construing the language of a completely different standard than the one at issue here; in fact, the Commission was analyzing an ANSI standard. Further, the case to which the Commission cites for support in *Mellon*, *MCC of Florida Inc.*, 9 BNA OSHC 1895, 1981 CCH OSHD ¶ 25,420 (No. 15757, 1981) ("*MCC*"), is also distinguishable from the facts presented here. As in *Mellon*, the Commission in *MCC* was interpreting the language of a particular ANSI standard under § 1926.350(j). Also, the main issue in dispute in *MCC* involved the storing of oxygen and acetylene cylinders together, not the securing of them. Therefore, the Commission's reasoning in the cases cited by Dover is totally inapplicable to the facts before us.[1]

Dover also refers in passing to two Commission decisions which deal specifically with the cited standard in this case, § 1926.350(a)(9). In *Constructora Maza, Inc.*, 6 BNA OSHC 1208, 1211, 1977-78 CCH OSHD ¶ 22,421 (No. 12434, 1977) ("*Constructora*"), the Commission rejected the respondent's contention that it had not violated the cited standard because the unsecured cylinders in question were in use and not being transported, moved or stored and held that the plain language of § 1926.350(a)(9) requires that compressed gas cylinders be secured "at all times". In *Austin Bldg. Co.*, 8 BNA OSHC 2150, 2153, 1980

[1] Dover requests in its brief that I take judicial notice of sections 2.6 and 10.8.2 of ANSI/ASC Z49.1-88, Safety in Welding and Cutting. I take official notice thereof. These standards, however, deal specifically with cylinder *storage* and not the securing of cylinders. Accordingly, I find the above mentioned ANSI standards not determinative of the issues presented here.

CCH OSHD ¶ 24,839 (No. 77-3878, 1980) ("*Austin*"), the Commission agreed with the reasoning in *Constructora* and therefore affirmed the alleged violation of § 1926.350(a)(9). As was the case in *Constructora*, the respondent in *Austin* argued that it had not committed a violation of the cited standard because the cylinders in question were being *used* and not transported, moved or stored as set forth in the section heading of this standard. The Commission, however, stated that "headings and titles, although useful tools of reference, cannot be used to limit or alter the plain meaning of the text contained in statutes or regulations." *Austin* at 2153. The language of § 1926.350(a)(9) clearly requires that unless they are being hoisted or carried, compressed gas cylinders must be secured "at all times"; cylinders in any other condition, therefore, must be secured. *Id.* Also see *Shank-Ohbayashi*, 14 BNA OSHC 1697, 1987-90 CCH OSHD ¶ 28,760 (No. 88-1711, 1990) (violation of § 1926.350(a)(9) affirmed because standard requires cylinders to be secured "at all times"). Because the *Constructora* and *Austin* decisions are far more relevant to the case at hand than the other decisions cited by Dover, I adopt their reasoning on this issue. As a result, because Dover has conceded that the cylinders were not secured, it will be in violation of the cited standard if the Secretary has proven that a hazard did exist.

As noted above, Mr. Zapken alleged that the unsecured cylinders pictured in Exhibit C-1, which he believed to weigh 50 pounds, and then later, 80 pounds, presented a falling hazard to Dover employees, exposing them to the possibility of foot injury. (Tr. 86) Mr. Brannon, however, testified that the cylinders were empty and, contrary to Mr. Zapken's testimony, each empty cylinder weighed about 18-20 pounds. (Tr. 226) Furthermore, Mr.

Brannon stated that all Dover employees on the worksite in question wore steel-toed shoes. (Tr. 227)

Dover argues that the likelihood of these cylinders falling over is very small, pointing out that the cylinders were positioned partly underneath the plank table and against the wall. (See Exhibit C-1) One of the cylinders did appear to be underneath the plank table, but the other clearly was not; also, the cylinders were not against a wall, but seem to have been standing in front of Dover's employee lockers. (See Exhibit C-1) Dover also contends that the cylinders were unlikely to be knocked over or hit by any falling objects in the area. Mr. Brannon, however, testified that Dover employees utilized the area in which the cylinders were placed to pick up the dolly, which was leaning against the legs of the plank table, or to use the plank table to "shake out" material. (Tr. 228-229; also see Exhibit C-1) It would seem that a Dover employee engaged in either of these activities could have easily knocked one of the cylinders over, either with the dolly or with another piece of equipment or material being used on the plank table. The cylinders could also be knocked over if a Dover employee attempted to get into one of the lockers located directly behind the dolly, the cylinders and the plank table.

Therefore, I agree with the Secretary that the possibility of these cylinders falling over, by whatever means, constitutes a hazard. Dover's contention, however, that the weight of the cylinders in their empty state was not enough to cause serious injury raises a valid point, particularly in light of the fact that all Dover employees at the worksite wore steel-toed shoes. The Secretary, though, has alleged other injuries attendant to this alleged violation; the danger of such a hazard is surely not only injury to toes. The unsecured

cylinders could have just as easily fallen on an employee's unprotected foot or ankle. Furthermore, the resulting injury from the weight of a metal cylinder, even though empty, could very well be serious and not *de minimus* as Dover argues, depending upon the force with which the cylinder fell.

Since the Secretary has shown that a hazard existed and that Dover employees were exposed to it, the alleged repeat violation of § 1926.350(a)(9) is affirmed. Given the facts discussed above, however, a penalty of $400.00 is more reasonable and appropriate in the premises.

III. Alleged Violations of 29 C.F.R. § 1926.450(a)(10) and § 1926.450(a)(2)

On July 7th, Mr. Zapken observed an unsecured portable ladder positioned in one of the elevator shafts at the worksite which he noted had two broken rungs. (Tr. 49-50; also see Exhibits C-3 and R-1) The ladder extended 14 feet down the shaft from the first floor to the basement. (Tr. 59) Mr. Zapken also noticed that employees were using this ladder to gain access to the shaft and Mr. Brannon identified them to him as Dover employees. (Tr. 62-63)

As a result of these observations, Dover was cited for failing to secure a ladder, an alleged violation of § 1926.450(a)(10) which states:

> § 1926.450(a)(10) Portable ladders in use shall be tied, blocked, or otherwise secured to prevent their being displaced.

A prior citation for violation of the same standard was not contested by Dover and therefore, was affirmed. (Tr. 63-64; also see Exhibit C-4) The alleged violation was therefore classified as a repeat violation and a penalty of $1400.00 was proposed.

Dover was also cited for its use of the portable ladder with broken rungs, an alleged other than serious violation of § 1926.450(a)(2) which states,

> § 1926.450(a)(2) The use of ladders with broken or missing rungs or steps, broken or split side rails, or other faulty or defective construction is prohibited. When ladders with such defects are discovered, they shall be immediately withdrawn from service....

A zero penalty was proposed.[2]

Mr. Brannon initially identified the ladder pictured in Exhibit C-3 as belonging to Dover, but later stated that he could not be sure if the ladder was Dover's even though it did look like the kind of ladder Dover used. (Tr. 237-239) Mr. Brannon also admitted to discussing the ladder with Mr. Zapken and then examining it; he never mentions, though, whether he ever told Mr. Zapken that he was not sure if the ladder belonged to Dover. (Tr. 237) Mr. Brannon further testified that no one else would have been working in the elevator shaft where the ladder was positioned during the hours that Dover was present at the worksite. (Tr. 239-240)

Despite Mr. Brannon's uncertain testimony, I find his initial impression that the portable ladder in question did indeed belong to Dover to be the most reliable. His statement that the ladder resembled the kind of ladder Dover used on projects such as this and his failure to deny that the ladder belonged to Dover at any point throughout the

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[2] Dover argues that the Secretary's amendment of the construction standards issued on November 14, 1990 affects the citations issued here. See 55 Fed. Reg. 47,660-47,691 (1990). According to Dover, the alleged violation of § 1926.450(a)(10) is mooted, because this standard was deleted from the Secretary's amendment. Further, Dover argues that the differences between of the other cited standard, § 1926.450(a)(2), and its new replacement, should be taken into consideration.

The Secretary's amendment, however, as Dover itself points out, became effective on January 14, 1991; the dates of the alleged violations occurred in 1989. Dover was cited under the standards as they existed at that time and will be held to the requirements set forth in those cited standards. Any subsequent amendments, therefore, have no bearing on this case.

inspection only strengthens his original testimony that the ladder was indeed Dover's. Also, the fact that no other trades would have been in the shaft at this time strongly indicates that only Dover employees would have placed the ladder there.

Furthermore, Mr. Brannon basically admitted to Mr. Zapken when they were discussing the ladder in question that it was not secured. Mr. Brannon testified that when Mr. Zapken told him about tying or lashing the ladder down, "I indicated to [Mr. Zapken] that we weren't working in the shaft and that we're not using a ladder so...it's not our practice...." (Tr. 239) He later stated more equivocally that "it [the ladder] wouldn't be tied down if we're not using them." (Tr. 241) Also, in light of this testimony, Dover's contention that the ladder may have been braced at the bottom of the pit rather than lashed at the top lacks credibility for had that been the case, Mr. Brannon certainly would have pointed it out to Mr. Zapken rather than simply continue to assert that the ladder was not secured because it was not being used. Thus, the Secretary has established that a hazard did exist and that Dover was the one who created and controlled it.

The next issue for resolution is whether there was employee exposure to the hazard. Dover argues that there is no evidence showing that the ladder was used or would be used in its unsecured condition. According to Mr. Brannon, since no Dover employees were working in that particular elevator shaft, there was no possibility that Dover employees were using the unsecured ladder. (Tr. 242-243) If an employee had been working there, Mr. Brannon stated, he would have lashed the ladder to a beam. (Tr. 240) The question here, however, is not limited to whether Dover employees actually used the ladder. As the 2nd Circuit in *Underhill* held, once a hazard has been shown to exist, the Secretary need only

show that "the area of the hazard was *accessible* to the employees of the cited employer *or* those of other employers engaged in a common undertaking." *Underhill* at 1645 (Emphasis added). Also see *Pace Construction Corp.*, 13 BNA OSHC 1282, 1986-87 CCH OSHD ¶ 27,889 (No. 86-517, 1987) (violation of § 1926.450(a)(10) affirmed due to respondent's failure to secure a ladder where its own employees, as well as other employees, had access to the area of the hazard). In other words, the mere fact that Dover employees, or any other employees at the worksite, had *access* to the unsecured ladder is evidence of exposure to the hazard.

Here, as discussed above, the unsecured ladder was standing in one of the elevator shafts on the worksite and, as Mr. Brannon testified, "we [Dover] were the only ones doing the elevators." (Tr. 229) Also, Mr. Brannon's contention that Dover employees would not use this ladder to gain access to the lower level of the shaft, but would use one of the two available staircases leading down to that area, implies that Dover employees *did* indeed work in this area and therefore, could possibly have used the unsecured ladder rather than the stairs to reach this area. (Tr. 234-235) In fact, Mr. Brannon conceded that work had been done in the bottom of the shaft at some point during the project; he later testified that some of that work may even have been done at the time of the inspection, but he could not be sure. (Tr. 286-287) His statements seem to support Mr. Zapken's contention that he discussed the ladder with Mr. Brannon while observing Dover employees working in the shaft. (Tr. 62-63) The area of the hazard, then, was clearly accessible to Dover employees; indeed it is likely that the employees even performed work in that area.

There is also evidence of the fact that other employees at the worksite had access to the unsecured ladder. Mr. Brannon himself admitted that the building cleaners, who came in on the weekends, "had to have access to the pit." (Tr. 242) In fact, Mr. Brannon stated that "to get into the elevator pit, they [the cleaners] would have to use a ladder" and then speculated that "maybe [this] was our ladder and they used it."[3] (Tr. 242) In light of the *Underhill* decision, the exposure of these employees, even if Dover employees were never exposed to the hazard, is enough to prove a violation. Accordingly, the repeat violation of § 1926.450(a)(10) is affirmed. While the hazard of falling from the unsecured ladder to the basement area 14 feet below is obviously not *de minimus*, the Secretary's proposed penalty of $1400.00 is excessive in light of the fact that while Dover employees did have access to the unsecured ladder, the exposure was not great. Therefore, given the facts discussed above, and taking into account that this was a repeat violation, a penalty of $1000.00 is more appropriate in the premises.

According to the citation, in addition to being unsecured, the fourth and sixth rungs of the portable ladder were splintered and broken. Mr. Zapken testified that Exhibit R-1, a close-up photograph of the rungs of the ladder, was taken by him to represent the splintered rungs which he observed. (Tr. 160) He admitted that while "the photo leaves something to be desired", it does accurately depict the rungs as he observed them. (Tr. 161)

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[3]Mr. Brannon also speculated that the ladder may have belonged to the cleaners, who placed it in the elevator shaft in order to gain access to the pit. (Tr. 242) I am not convinced, however, that the cleaners would have left the ladder in the shaft beyond the short amount of time that it was needed by them.

However, if the ladder did belong to the cleaners or, for that matter, any other contractor on the site, Dover is still responsible for exposing its employees to the hazard unless it can establish the multiemployer defense. Here, though, there is no indication that Dover ever discussed the ladder with Nycon or any other contractor at the worksite nor did Dover warn its employees or take any alternative measures to protect its employees from the hazard. Therefore, Dover would still be in violation of the cited standard.

Exhibit R-1, however, shows only two consecutive rungs of the ladder. Since the citation alleges that the fourth and sixth rungs were the ones observed by Mr. Zapken as splintered and broken, the photograph could not possibly represent what Mr. Zapken claims he observed. Furthermore, while it is possible that of the two rungs pictured in Exhibit R-1, one represents either the fourth *or* sixth rung observed by Mr. Zapken, neither rung pictured there seems to be broken or splintered in any way. In fact, according to Mr. Brannon, when he and Mr. Zapken discussed and examined the ladder in question, he could not see any problem with the rungs. (Tr. 236)

In sum, the Secretary has failed to establish that the fourth and sixth rungs of the ladder in question were indeed splintered or broken. As a result, the other then serious violation of § 1926.450(a)(2) is vacated.

IV. Alleged Other than Serious Violation of 29 C.F.R. § 1926.25(b)

During his inspection of the worksite, Mr. Zapken observed that the perimeter of the building was cluttered with cardboard, cinder blocks, bricks and paper. (Tr. 66) According to Mr. Zapken, all employees had to walk over this debris in order to enter and exit the worksite. (Tr. 131-132) Mr. Zapken conceded that while he did not know which employer actually created this housekeeping problem, he did determine that Nycon, the general contractor, was responsible for cleaning up the debris. (Tr. 66-67)

Dover was cited for an alleged violation of § 1926.25(b) which states:

> § 1926.25 Housekeeping.
> (b) Combustible scrap and debris shall be removed at regular intervals during the course of construction. Safe means shall be provided to facilitate such removal.

A zero penalty was proposed for this other than serious violation.

Mr. Zapken testified that he recommended Dover be cited for this hazardous condition even though it was not responsible for the hazard, because he learned from Mr. Brannon that Dover had not complained to Nycon about the problem and had not warned its own employees about the hazard. (Tr. 67-68) Both of these actions would constitute alternative protective measures under the multiemployer defense as set forth in *Anning-Johnson* and Mr. Zapken acknowledged that he would not have cited Dover for the housekeeping problem had it taken these steps. (Tr. 132-133)

Mr. Brannon testified, however, that he *had* complained to Nycon about the housekeeping problem. (Tr. 294-295) Specifically, Mr. Brannon stated that he had complained as early as April 1989 about the debris around the building entrance as well as the garbage piled inside the elevator pits. (Tr. 204-205, 208) His testimony is supported by the construction safety meeting reports which he completed on a weekly basis, copies of which are sent to the general contractor on the worksite. (Tr. 210-211; also see Exhibit R-7) Several entries in these reports mention housekeeping as one of the items that was identified as a problem and discussed at Dover's weekly safety meetings. (Tr. 212-213; also see Exhibit R-7)

Mr. Zapken testified that he recalls Mr. Brannon informing him that complaints had been made to Nycon specifically about the debris in the elevator pits, but that no complaints had been made regarding the debris around the perimeter of the building. (Tr. 135-137) This testimony, however, is contradicted by a statement contained in one of the construction safety meeting reports dated May 24th, which notes that "housekeeping through out [the] job site" was discussed on that day. (Exhibit R-7, p. 5) In fact, Mr. Brannon testified that

Nycon, apparently in response to these complaints, *did* clean up the area around the entrance of the worksite by the time of the OSHA inspection; otherwise, he would never have allowed Dover employees to reenter the worksite. (Tr. 297-298)

Mr. Brannon's claim that the area which Mr. Zapken alleges was cluttered with debris was actually clean at the time of the inspection is bolstered by Mr. Zapken's inability to capture the hazardous condition on film. Mr. Zapken admitted that Exhibit R-6, a photo of an area of debris located at the worksite, was taken by him to document the housekeeping problem which existed along the perimeter of the worksite. (Tr. 184-185) He went on to state that Exhibit R-6, however, did not depict the area where Dover employees would have been exposed to the hazard. (Tr. 184-185) In fact, Mr. Brannon, upon examining Exhibit R-6, testified that the area pictured there represented the northeast corner of the building, an area to the *left* of the entrance. (Tr. 296) Furthermore, Mr. Zapken's only photograph of the worksite entrance, Exhibit R-2, does not show ground level and therefore, does not depict the hazardous conditions which he alleges existed around the entrance at that time. This lack of definitive evidence coupled with Mr. Brannon's testimony that the area in question had been cleaned in response to complaints that he made to Nycon requires that this item be vacated.

Even if the Secretary had credibly established a violation, which she failed to do here, Dover has met the requirements of the multiemployer defense set forth in *Anning-Johnson*. Mr. Brannon did complain to Nycon about housekeeping on the worksite, as evidenced in his weekly reports. (See Exhibit R-7) These reports also indicate that the housekeeping problems were discussed on a virtual weekly basis with Dover employees at the worksite,

clearly satisfying the requirement that Dover alert its employees to the hazard. Accordingly, the alleged violation of § 1926.25(b) is vacated.

V. Alleged Other than Serious Violation of 29 C.F.R. § 1926.50(f)

Mr. Zapken testified that shortly after the opening conference, he noticed that there were no emergency telephone numbers posted at the worksite. (Tr. 69, 99) Mr. Zapken pointed out the problem to Nycon's superintendent, who took about 10 minutes to look up the appropriate numbers, such as the numbers for the nearest hospital and fire department, and then posted them. (Tr. 99-100)

According to Mr. Zapken, the fact that these emergency numbers were not posted exposed all employees at the worksite to a hazard. Therefore, Dover was cited for an alleged other than serious violation of § 1926.50(f) which states,

> § 1926.50(f) The telephone numbers of the physicians, hospitals, or ambulances shall be conspicuously posted.

A zero penalty was proposed.

Mr. Zapken conceded that Nycon's abatement of this hazard constituted abatement for all of the subcontractors at the worksite, including Dover. (Tr. 101) As a result, it is clear that the failure to post these numbers as required by the cited standard posed a hazard that was created and controlled by Nycon, not Dover. Because Dover employees were exposed to this hazard, however, Dover will have violated the cited standard unless it can meet the requirements of the multiemployer defense set forth in *Anning-Johnson*.

According to Mr. Brannon's testimony, he was apparently aware that these emergency numbers had not been posted by Nycon, but did not complain to the general contractor about the problem. (Tr. 272-273) Mr. Brannon testified that he did not believe it was

necessary to post the specific numbers for each emergency service because calling "911" was the common method used in the New York City area to access these services. (Tr. 243-244) Mr. Zapken contends, however, that not all employees are aware of the "911" system, particularly if the employees are not from the New York City area. (Tr. 104)

On this issue, I agree with Mr. Zapken; it is not prudent to assume that all employees will know to call "911" to promptly access emergency service simply because the worksite is located in New York City. Such an assumption does not satisfy the plain meaning of the cited standard that employees have access to these numbers. Furthermore, if calling "911" is, as Mr. Brannon suggests, the most efficient way to access emergency service, posting that number alone may suffice to meet the requirements of the standard. In fact, Mr. Brannon admitted that on larger jobs where Dover has its own shanty and telephone line, a form with the number "911" is posted right on the wall by the telephone. (Tr. 243) This fact coupled with Mr. Brannon's testimony that he had had to call "911" while at the Prince Street worksite to access ambulance service for an employee who had suffered heat stroke clearly establishes Dover's knowledge of the importance of being able to access emergency service and the hazards involved in not knowing the proper methods for doing so. (Tr. 244-245)

Because Dover was aware of the hazard yet did not complain to Nycon about the problem, even to suggest posting the number "911", it has not established the multiemployer defense. Accordingly, the alleged violation of § 1926.50(f) is affirmed. It should be noted, however, that I do not resolve here the question of whether posting the number "911" satisfies the requirements of the cited standard. In this case, no emergency numbers were posted.

VI. Alleged Other than Serious Violations of 29 C.F.R. § 1926.59(e)(1), § 1926.59(h), and § 1926.59(g)(1)

Mr. Zapken testified that while interviewing Mr. Brannon, he asked to see a copy of Dover's hazard communication program, but claims that Mr. Brannon told him that they did not have one. (Tr. 70, 126) He also testified that he asked to see Dover's material safety data sheets, but Mr. Brannon was unfamiliar with them as well as with hazard communication in general. (Tr. 74)

Mr. Zapken's concerns regarding hazard communication involved the hazardous materials used by Dover as well as other subcontractors at the worksite. (Tr. 70) The materials used by Dover included the unsecured compressed gas cylinders which Mr. Zapken observed and a linking arc welder, the use of which he did not actually observe but was informed about by Mr. Brannon. (Tr. 71, 115-116, 123) Mr. Brannon had also asked Mr. Zapken about the hazards involved with monokote, a fireproofing material which was being used at the worksite by another subcontractor. (Tr. 117-118) In addition, Mr. Zapken testified that he observed a certain kind of cement being used by another subcontractor that is hazardous because it contains silicon. (Tr. 71)

As a result of these observations, Dover was cited for alleged violations of three standards dealing with hazard communication. The first cited standard, § 1926.59(e)(1), deals with Dover's failure to have a written hazard communication program and states:

> § 1926.59(e) Written hazard communication program.
> (1) Employers shall develop, implement, and maintain at the workplace, a written hazard communication program for their workplaces which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met....

The second cited standard, § 1926.59(h), deals with what Mr. Zapken perceived as Dover's failure to train its employees as to the hazards involved with the use of the substances noted above and states:

> § 1926.59(h) Employee information and training. Employers shall provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area.

The third cited standard, § 1926.59(g)(1), deals with Dover's failure to have the proper material safety data sheets at the worksite and states:

> § 1926.59(g) Material safety data sheets.
> (1)...Employers shall have a material safety data sheet for each hazardous chemical which they use.

A zero penalty was proposed for all three alleged violations.

Mr. Brannon testified that Dover *does* have a written hazard communication program, a copy of which he had in his toolbox on the worksite at the time of the inspection. (Tr. 249, 250-252; also see Exhibit R-10) According to Mr. Brannon, he and all other Dover construction employees attended a training seminar three months prior to the inspection which was sponsored by Dover and dealt with hazardous materials awareness. (Tr. 248-249, 264) At the seminar, all employees were issued copies of Dover's hazardous communication program and were told not to enter a worksite without having the book inside their individual toolboxes. (Tr. 249, 264-265) Mr. Brannon reviewed the book's contents at the hearing, pointing out that it contains a list of hazardous substances as well as information regarding employee training. (Tr. 252-253; also see Exhibit R-10) Also included in the book are the material safety data sheets for the hazardous substances commonly, as well as occasionally, used at Dover's field operations. (Tr. 253; also see Exhibit R-10 at p.8)

When asked why he did not provide Mr. Zapken with the information regarding Dover's hazard communication program when it was requested, Mr. Brannon explained that he had misunderstood Mr. Zapken's statements on this issue. Mr. Brannon testified that he does not recall Mr. Zapken specifically asking him about Dover's hazard communication program or requesting to see any of the material safety data sheets. (Tr. 274) According to Mr. Brannon, Mr. Zapken discussed the hazard communication program at the opening conference with all of the subcontractors and said only that it was their responsibility to provide copies of their programs and material safety data sheets to Nycon. (Tr. 274-76) Mr. Zapken confirmed that his inquiries regarding hazard communication were indeed made during the subcontractor opening conference. (Tr. 108-109) In fact, as a result of Mr. Zapken's remarks, Mr. Brannon testified that he called his office and requested that the necessary hazard communication information be sent to Nycon. (Tr. 277)

I agree with Mr. Brannon that there was a misunderstanding regarding exactly what information Mr. Zapken was seeking with regard to hazard communication. The Secretary's broad contention that Mr. Brannon clearly lacked any awareness of hazard communication is strongly contradicted by the fact that after meeting with Mr. Zapken, he knew enough about the subject to call his office and request that they send the relevant information to Nycon. In fact, his actions evidence a sincere attempt to comply with what he believed Mr. Zapken had requested of him. The fact of the matter is that Dover does have a written hazard communication program as required by the cited standard; simply because a copy was not made available to Mr. Zapken does not change the truth of this fact. Therefore, the alleged violation of § 1926.59(e)(1) is vacated.

With regard to the alleged violation of § 1926.59(h), Mr. Zapken testified that he cited Dover primarily because it had not trained its employees with regard to the hazardous substances being used by other subcontractors on the worksite. (Tr. 117) In Mr. Zapken's opinion, employees should be trained regarding the hazards involved with materials that may be used around them by other employers. (Tr. 118-120) According to the cited standard, however, employee information and training must be provided for hazardous substances being used in the employees' "work area". "Work area" is defined in § 1926.59(c) as a "room or *defined space in a workplace* where hazardous chemicals are produced or used, and where employees are present." (Emphasis added) I read this language to limit an employer's responsibility regarding employee training to those hazardous substances being used in that employer's defined work area on a particular worksite; this responsibility, therefore, does not extend to substances being used in another employer's work area.[4]

Any additional questions dealing with Dover's training of employees regarding the hazards involved in the use of certain materials are satisfied by Mr. Brannon's testimony about the hazardous substances training seminar held by Dover for its construction employees. While Mr. Brannon testified that he does not recall Mr. Zapken asking for information regarding employee training, he does remember telling Mr. Zapken about this training seminar which Dover employees had attended three months earlier. (Tr. 274-275) Also, further evidence of the fact that Dover employees did indeed receive training and information on these issues is Mr. Brannon's testimony that he would pick a chapter from

[4] It is worth noting that Mr. Brannon's concerns regarding the use of monokote at the worksite could have easily been allayed had the subcontractors at this worksite provided their material safety data sheets to Nycon at the start of this construction project as required by § 1926.59(e)(2).

the Elevator Industry Field Employees' Safety Handbook to discuss with employees at the weekly construction safety meetings. (Tr. 256, 266;also see Exhibit C-5) For instance, one of Mr. Brannon's reports states that the "storage of combus[tible] items" was discussed at that week's meeting. (Exhibit R-7, p.9)

Finally, the Secretary argues that because Mr. Brannon testified that one of the Dover employees at the worksite in question had not received training on the hazards involved with welding, this alleged violation must be affirmed. (Tr. 267) The Secretary, however, has misconstrued Mr. Brannon's testimony. Mr. Brannon appears to have been referring to the training needed to become a certified welder for the city of New York and at most, admitted only that he himself did not review welding hazards with the Dover employees at the Prince Street worksite. (Tr. 266-267) This admission does not change the fact that these same employees attended the hazardous substances training seminar sponsored by Dover three months earlier and received extensive hazard communication training there. (Tr. 265, 302; also see Dover correspondence dated July 16, 1991) In addition to the seminar, all Dover employees are issued a copy of the Employees' Safety Handbook discussed above, which contains specific information regarding welding hazards. (Tr. 257 & 259; also see Exhibit C-5) In light of the fact that only certified welders are permitted by Dover to perform welding work and as a result, are already well-versed on the hazards involved in such work, I find that the hazardous substances training seminar plus the Safety Handbook provide adequate training and information regarding the hazards of welding to *all* Dover employees, including those who are not certified welders, but may be present at a worksite where welding is being done. (Tr. 259) Therefore, since Dover has

provided adequate training and information for its employees, and the cited standard does not require Dover to provide training for any hazardous materials not used in its defined work area, the alleged violation of § 1926.59(h) is vacated.

The last hazardous communication standard for which Dover was cited deals with material safety data sheets. Mr. Zapken testified that when he asked Mr. Brannon to see these sheets, Mr. Brannon said he did not have any in his possession. (Tr. 74, 126) Mr. Brannon, on the other hand, testified that he does not recall Mr. Zapken asking him if he had any material safety data sheets in his possession. (Tr. 274) As was the case with the written hazard communication program, Mr. Brannon explained that he understood Mr. Zapken to mean only that this information had to be turned over to Nycon. (Tr. 250-251, 274-276)

As noted above, Dover's written hazard communication program contains the material safety data sheets for a large number of hazardous substances that may be used at a worksite. (Tr. 252-253; also see Exhibit R-10) Included among these are the material safety data sheets for both oxygen and acetylene, two of the substances mentioned specifically in the citation for which Dover allegedly did not have sheets. (Tr. 254; also see Exhibit R-10) In addition, since Mr. Zapken conceded that it would be unreasonable to require Dover to have the material safety data sheets for the hazardous materials which may be used by other subcontractors on the same worksite, it is immaterial whether Dover had in its possession the sheets for monokote or portland cement. (Tr. 119-122)

Mr. Brannon, however, did admit that the book does not contain the material safety data sheet for welding rods. (Tr. 254) According to Mr. Zapken, while he personally had

not seen any welding being performed during the course of his inspection, Mr. Brannon told him that the linking arc welder he observed at the worksite did belong to Dover. (Tr. 71, 115-116, 123) Mr. Brannon essentially confirmed this fact when he testified that Dover employees had performed some welding work at the Prince Street worksite prior to the OSHA inspection. (Tr. 269)

Dover argues that the Employees' Safety Handbook contains all of the necessary information regarding the hazards involved in the use of welding rods and serves as an adequate substitute for the missing material data safety sheet. While the information contained in the Handbook coupled with the Dover training seminar was enough to satisfy the employee training requirements that § 1926.59(h) imposes on Dover, it is not enough to fulfill the plain meaning of § 1926.59(g)(1). The mandate of the cited standard is clear; there must be a material safety data sheet for every hazardous material used by employees. Since Mr. Brannon admitted that welding had been done at the worksite, but that he did not have the material safety data sheet for welding rods in his possession at that time, the alleged violation of § 1926.59(g)(1) must be affirmed.

VII. Alleged Other than Serious Violation of 29 C.F.R. § 1926.150(e)(1)

Mr. Zapken testified that Nycon's superintendent told him there was no alarm system installed at the Prince Street worksite that would alert employees if a fire were to occur. (Tr. 77) Mr. Zapken said that he discussed the lack of an alarm system with Mr. Brannon, who told him that he did not believe it was Dover's responsibility to provide such a system. (Tr. 78) Based upon Mr. Zapken's observations, Dover was cited for an alleged violation of § 1926.150(e)(1) which states:

§ 1926.150(e) Fire alarm devices.
(1) An alarm system, e.g., telephone system, siren, etc., shall be established by the employer whereby employees on the site and the local fire department can be alerted for an emergency.

A zero penalty was proposed.

It seems evident from the record that the hazards involved with the lack of an alarm system at this worksite were created and controlled by Nycon, not Dover. To require each subcontractor to provide a separate alarm system would be impractical; clearly, one system encompassing the entire worksite so that all employees can be notified at once in the case of an emergency is a far more logical approach. Therefore, I find that it was Nycon's responsibility to ensure that an alarm system was in place at the worksite. However, because Dover apparently never discussed the problem with Nycon and exposed its employees to a hazard of which it should have been aware, a multiemployer defense has not been established and the citation must be affirmed. (Tr. 78)

Mr. Zapken testified that he asked Mr. Brannon whether he had discussed the lack of an alarm system with Nycon's superintendent and Mr. Brannon said that he had not. (Tr. 78) Furthermore, Mr. Brannon admitted that there were no alarm systems in place at the worksite and explained that such a system would not be installed until a certain point in the construction was reached. (Tr. 301-302) Mr. Brannon's acknowledgement that an alarm system would eventually be installed at the worksite implies an awareness of the need to have one in place. In addition, his earlier testimony detailing his concerns about the presence of debris and garbage in the elevator shafts, some of which was combustible, suggests that Mr. Brannon should have had a heightened awareness of the possibility of a fire occurring at the worksite, particularly in Dover's work area. (Tr. 203-204, 208-210)

Dover argues that the telephone located in Nycon's shanty at the worksite constitutes a "telephone system", which is referred to in the cited standard as an example of an alarm system. In arguing as such, Dover seems to be suggesting that even if Mr. Brannon had been aware of the hazard, the presence of a telephone at the worksite constituted an adequate alarm system. While a telephone, however, might adequately serve to alert the fire department in an emergency, I fail to see how it could effectively warn employees who are scattered throughout a worksite. See *A.C. Smith & Co., Inc.*, 5 BNA OSHC 1748, 1977-78 CCH OSHD ¶ 21,570 (No. 76-471, 1977) (held that the presence of two telephones and a municipal fire alarm box at the worksite was not an adequate system to alert employees and affirmed the violation of § 1926.150(e)(1)). Therefore, since Dover was aware of the hazard and offered no evidence to contradict Mr. Zapken's testimony that Mr. Brannon had not discussed the problem with Nycon, the alleged violation of § 1926.150(e) is affirmed.

VIII. Alleged Other than Serious Violation of 29 C.F.R. § 1926.405(a)(2)(ii)(E)

Mr. Zapken testified that approximately 90% of the temporary lighting located throughout the worksite lacked protective covers. (Tr. 81) Specifically, he stated that he observed a lamp in the area around the Dover employee lockers that lacked a protective cover over it. (Tr. 79-80; also see Exhibit C-1) Based on these observations, Dover was cited for an alleged violation of § 1926.405(a)(2)(ii)(E) which states:

> § 1926.405(a)(2)(ii)(E) All lamps for general illumination shall be protected from accidental contact or breakage....

A zero penalty was proposed.

As with the alarm system discussed above, the hazard presented here by the lack of protective covers over the temporary lighting used throughout the worksite in question is not

a hazard that was created or controlled by Dover. Mr. Zapken testified that all of the temporary lighting for the project was installed by the electrical subcontractors for this particular worksite. (Tr. 127) He also stated that the citation was abated by one of these subcontractors and admitted that any attempt on Dover's part to abate this hazard would have meant crossing trade lines and causing a jurisdictional dispute. (Tr. 128-130)

Dover, however, has not met the requirements of the multiemployer defense here. First, Mr. Brannon admitted that he had noticed lights at the worksite that were not protected by covers. (Tr. 299) This admission is not altered by Mr. Brannon's testimony that he believes the one lamp pictured in Exhibit C-1 does have a protective cover. (Tr. 291-292) The fact that he viewed other lamps that were not protected in areas of the worksite to which Dover employees might have had access is enough to establish knowledge of the hazard. For instance, Mr. Zapken testified that the lamps pictured in Exhibit R-3 were some of the lamps which he observed as lacking protective covers. (Tr. 175) Since these lamps were in plain view and clearly located in the immediate area of the elevator shafts to which Dover employees had access, I find that Dover did have knowledge of the hazard involved here. (Exhibit R-3)

Furthermore, Dover has not shown that it discussed the lack of protective covers with Nycon or even the electrical subcontractor. In fact, Mr. Brannon admitted that while he had written in his weekly safety reports about problems with lighting at the worksite, he was referring to the *adequacy* of lighting and *not* to the lack of protective covers. (Tr. 290-291; also see Exhibit R-7) Therefore, Dover has not established a multiemployer defense and the alleged violation of § 1926.450(a)(2)(ii)(E) must be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact and conclusions of law contained in this opinion are incorporated herein in accordance with Rule 52 of the Federal Rules of Civil Procedure.

ORDER

1. Serious citation 1, item 1 alleging a violation of 29 C.F.R. § 1926.100(a) is AFFIRMED and a penalty of $540.00 is ASSESSED.

2. Repeat citation 2, item 1 alleging a violation of 29 C.F.R. § 1926.350(a)(9) is AFFIRMED and a penalty of $400.00 is ASSESSED.

3. Repeat citation 2, item 3 alleging a violation of 29 C.F.R. § 1926.450(a)(10) is AFFIRMED and a penalty of $1000.00 is ASSESSED.

4. Other than serious citation 3, item 1 alleging a violation of 29 C.F.R. § 1926.25(b) is VACATED.

5. Other than serious citation 3, item 2 alleging a violation of 29 C.F.R. § 1926.50(f) is AFFIRMED and a penalty of zero dollars is ASSESSED.

6. Other than serious citation 3, item 3 alleging a violation of 29 C.F.R. § 1926.59(e)(1) is VACATED.

7. Other than serious citation 3, item 4 alleging a violation of 29 C.F.R. § 1926.59(h) is VACATED.

8. Other than serious citation 3, item 5 alleging a violation of 29 C.F.R. § 1926.59(g)(1) is AFFIRMED and a penalty of zero dollars is ASSESSED.

9. Other than serious citation 3, item 6 alleging a violation of 29 C.F.R. § 1926.150(e)(1) is AFFIRMED and a penalty of zero dollars is ASSESSED.

10. Other than serious citation 3, item 8 alleging a violation of 29 C.F.R. § 1926.405(a)(2)(ii)(E) is AFFIRMED and a penalty of zero dollars is ASSESSED.

11. Other than serious citation 3, item 9 alleging a violation of § 1926.450(a)(2) is VACATED.

DAVID G. ORINGER, JUDGE, OSHRC

Dated: May 29, 1992
Boston, Massachusetts