United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Atlanta, GA 30303-3104

ACTING SECRETARY OF LABOR, Complainant, v. BARNARD CONSTRUCTION COMPANY, INCORPORATED, Respondent.	OSHRC Docket No. 16-1275
ACTING SECRETARY OF LABOR, Complainant, v. BARNARD CONSTRUCTION COMPANY, INCORPORATED, Respondent.	OSHRC Docket No. 16-1294

DECISION AND ORDER

COUNSEL:

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JUDGE: Honorable John B. Gatto, United States Administrative Law Judge.

I. INTRODUCTION

In these consolidated enforcement proceedings, Barnard Construction Company, Incorporated (Barnard) was issued separate "Safety" and "Health" citations under the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. § 651 et seq., by the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging "serious" and "other-than-serious" violations of section 5(a)(2) of the Act for failing to comply

with certain safety and health standards promulgated under the Act.[1] After Barnard contested the citations, the Secretary filed formal complaints[2] with the Commission seeking orders affirming the citations and proposed penalties.

In case number 16-1275, involving Inspection Number 1148423, two Safety citations were issued on July 12, 2016, a two-item serious citation and a two-item other-than-serious citation. Safety citation 1 is a one-item "grouped"[3] (1a and 1b) citation alleging serious violations of 29 C.F.R. § 1926.303(c)(1) and (2) relating to a bench grinder, with a proposed penalty of $2,550.00. Safety citation 2 is a two-item citation alleging other-than-serious violations of 29 C.F.R. §§ 1926.300(b)(6) relating to the anchoring of a drill press, and 1926.502(i)(3) relating to trough coverings, both without any proposed penalties. In case number 16-1294, involving Inspection Number 1148377, a three-item Health citation was issued alleging serious violations of 29 C.F.R. §§ 1910.1200(e)(1)(i) relating to the availability of a chemical list, with a proposed penalty of $2,550.00, 1910.1200(g)(8) relating to the availability of safety data sheets, with a proposed penalty of $2,550.00, and 1926.353(d)(1)(ii) relating to welding personal protective equipment, with a proposed penalty of $5,100.00.

Since the cases involved common parties and common questions of law or fact, the Court *sua sponte* consolidated the actions for trial and disposition. A bench trial was subsequently held in Nashville, Tennessee.[4] There is no dispute that jurisdiction of these actions is conferred upon the Commission by section 10(c) of the Act, 29 U.S.C. § 659(c), that Barnard is an employer

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[1] Under section 17 of the Act, violations are characterized as "willful," "repeated," "serious," or "not to be of a serious nature" (referred to by the Commission as "other-than-serious"). 29 U.S.C. §§ 666(a), (b), (c). A "serious" violation is defined in the Act; the other two degrees are not.

[2] Attached to the complaints and adopted by reference therein were the citations at issue. Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R § 2200.30(d).

[3] The citation indicates these items were "grouped because they involve similar or related hazards that may increase the potential for injury or illness."

[4] The Act provides that unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure. *See* 29 U.S.C. § 661(f). The Commission has adopted Simplified Proceedings, which apply in certain cases. *See* Subpart M of 29 C.F.R. Part 2200 (29 C.F.R. §§ 2200.200 - 2200.211). The trial was held under the Simplified Proceedings, where the "Judge will receive oral, physical, or documentary evidence that is not irrelevant, unduly repetitious or unreliable. Testimony will be given under oath or affirmation." 29 29 C.F.R. § 2200.209(c). Since the Federal Rules of Evidence do not apply in Simplified Proceedings, *see id.*, hearsay is admissible, "[p]rovided it is relevant and material," and under certain circumstances, "can constitute substantial evidence." *Bobo v. United States Dept. of Agriculture*, 52 F.3d 1406, 1414 (6th Cir.1995) (*citation omitted*).

engaged in a business affecting commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5), and that its principal place of business of is in Bozeman, Montana. (Compl. ¶¶ 1-3; Answer ¶¶ 1-3).

Pursuant to Commission Rules 90(a) and 209(f),[5] after carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings under section 12(j) of the Act. 29 U.S.C. § 661(j). If any finding is in truth a conclusion of law, or if any conclusion stated is in truth a finding of fact, it shall be deemed so. The Court holds that for the reasons indicated *infra*, Barnard failed to comply with the provisions of 29 C.F.R. §§ 1926.303(c)(2) and 1926.502(i)(3), and therefore, involving Inspection Number 1148423, Safety Citation 1, Item 1b is **AFFIRMED** as a "serious" violation with a civil penalty assessment of $2,550.00 and Safety Citation 2, Items 2 is **AFFIRMED** as an "other-than-serious" violation with no penalty assessment. All other citations and items involving Inspection Numbers 1148423 and 1148377 are **VACATED** without penalty assessments.[6]

II. BACKGROUND

Barnard is a civil construction company that was performing work at a hydroelectric plant owned by the U.S. Army Corps of Engineers, a part of the U.S. Department of Defense, in Smithland, Kentucky, where there was an ongoing project constructing a hydroelectric dam being built on the Ohio River.[7] (Tr. 11, 13). This was a large project which had been going on for several years. (Tr. 10-12). On May 18, 2016, OSHA safety and health inspections were conducted at the worksite by Michelle Sotak, an OSHA Compliance Safety and Health Officer, and James Provins, an OSHA Industrial Hygienist, after OSHA's Nashville Area Office received a complaint involving the worksite. (Tr. 10, 11). At the time of the inspections, Barnard was a subcontractor working for American Municipality Power, Inc. where its work on the project was

[5] 29 C.F.R. §§ 2200.90(a) and 2000.209(f).

[6] Any defenses raised in Barnard's Answers, which were not addressed herein, are deemed to have been waived and warrant no further discussion.

[7] The Act permits OSHA to approve state plans allowing individual states to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated. 29 U.S.C. § 667. While Kentucky has an OSHA-approved State Plan and therefore enforces occupational safety and health standards in that state, since the worksite at issue was federally owned, OSHA has jurisdiction.

limited to the installation of the turbine generators.[8] (Tr. 12). The inspections were focused on the welding shop and the turbine house. (Tr. 14). As a result of the inspections, Sotak issued the Safety citations and Provins issued the Health citations at issue here.

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). "To promote this remedial purpose of the statute, the Act and regulations must be liberally construed so as to afford workers the broadest possible protection." *Nat'l Eng'g & Contracting Co. v. Occupational Safety & Health Admin., U.S. Dep't of Labor*, 928 F.2d 762, 767 (6th Cir. 1991) (*citing Whirlpool*, 445 U.S. at 13).[9] To achieve this purpose, the Act imposes two duties on an employer. The first duty is a general duty to provide to "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). The second duty is a specific duty to "comply with occupational safety and health standards promulgated" by the Secretary. 29 U.S.C. § 654(a)(2).

The Secretary delegated his authority under the Act to the Assistant Secretary of Labor for Occupational Safety and Health, who heads OSHA, and assigned responsibility for enforcement of the Act to OSHA. *See* 77 FR 3912 (2012).[10] The Assistant Secretary promulgated the Occupational Safety and Health Standards, otherwise known as the general industry standards, *see* 29 C.F.R. Part 1910, and adopted several industry-specific "established Federal standards," *see* 29 C.F.R. §§ 1910.12–.16, which were previously established by federal

[8] Prior to the inspections, Barnard was relieved of its Construction Manager duties at the project, effective February 29, 2016. Barnard's work originally included construction management services until February 29, 2016, when American Municipality Power (AMP) assumed those services and Barnard became a subcontractor involved only in the installation of the turbine generators.

[9] Under the Act, an employer may seek review in the court of appeals in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the employer has its principal office. 29 U.S.C. § 660(b). This case arose in Kentucky, which is in the Sixth Circuit, and Barnard's home office is based in Bozeman, Montana, which is in the Ninth Circuit. In general, where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has applied the precedent of that circuit in deciding the case, "even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). The Court therefore applies the precedent of the Sixth Circuit in deciding the case, where it is highly probable that a Commission decision would be appealed to.

[10] The Assistant Secretary has authorized OSHA's Area Directors to issue citations and proposed penalties to enforce the Act. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a).

statute or regulation, 29 U.S.C. § 652(10), including the construction industry standards of 29 C.F.R. Part 1926, *see* 29 C.F.R. § 1910.12.

Congress also established an "unusual regulatory structure," which "separated enforcement and rulemaking powers from adjudicative powers" and vested the Commission with the "adjudicatory powers typically exercised by a court in the agency-review context." *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151, 154 (1991). Thus, the "Commission's function is to act as a neutral arbiter and determine whether the Secretary's citations should be enforced[.]" *Martin v. Am. Cyanamid Co.*, 5 F.3d 140, 143 (6th Cir. 1993) (*citing omitted*).

Under the law of the Sixth Circuit, "[t]o establish a prima facie violation of the Act, the Secretary of Labor must show by a preponderance of the evidence that '(1) the cited standard applies to the facts, (2) the requirements of the standard were not met, (3) employees had access to the hazardous condition, and (4) the employer knew or could have known of the hazardous condition with the exercise of reasonable diligence.'" *Mountain States Contractors, LLC v. Perez*, 825 F.3d 274, 279 (6th Cir. 2016) (citation omitted).

Employer Knowledge

For brevity, the Court first addresses the fourth requirement of the Secretary's prima facie case collectively since the same analysis applies to each of the alleged violations. The "fourth and final condition for a prima facie violation of the Act requires that the employer knew of the hazardous condition, or could have known through the exercise of reasonable diligence." *Mountain States Contractors, LLC*, 825 F.3d at 283 (*citing Carlisle Equip. Co.*, 24 F.3d at 792–93). "The knowledge of a supervisor or foreman . . . can be imputed to the employer." *Id.* at 283-84 (*citing Danis–Shook Joint Venture XXV v. Sec'y of Labor*, 319 F.3d 805, 812 (6th Cir. 2003)). The Secretary "can show constructive knowledge on the part of a supervisor by establishing by a preponderance of the evidence that knowledge of a hazard could have been obtained through the exercise of reasonable diligence." *Id.* at 285 (*citing Carlisle Equip. Co.*, 24 F.3d at 793).

Earl Whitehurst, Barnard's site safety manager, knew of the alleged hazardous conditions, or could have known through the exercise of reasonable diligence, since he performed daily inspections of the site, as well as weekly documented inspections, and was frequently in the shop. (Tr. 20, 24, 29, 34-35). Tracey Chambers, Barnard's project

superintendent, also knew of the alleged hazardous conditions, or could have known through the exercise of reasonable diligence, since he was also in the turbine house daily. (Tr. 34-35, 135). The violations were in plain sight. (Tr. 20, 24, 29, 34-35). The knowledge of Whitehurst and Chambers are imputed to Barnard. Thus, the Secretary has established the knowledge element of his prima facie cases. [11]

Unforseeable Employee Misconduct Defense

For brevity, the Court also collectively addresses the unforseeable employee misconduct defense. The Sixth Circuit regards a "claim of unforseeable employee misconduct as an affirmative defense to be proved by the employer after the Secretary has made out a prima facie case of a violation of the Act" where "the proper focus in employee misconduct cases is on the effectiveness of the employer's implementation of its safety program[.]" *Brock v. L.E. Myers Co., High Voltage Div.*, 818 F.2d 1270, 1276, 1277 (6th Cir. 1987). The employer bears the burden of establishing an affirmative defense by a preponderance of the evidence. *Faragher v Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

"In the Sixth Circuit, in order to successfully assert this defense, an employer must show that it has a thorough safety program, it has communicated and fully enforced the program, the conduct of the employee was unforeseeable, and the safety program was effective in theory and practice." *Danis–Shook Joint Venture XXV v. Sec'y of Labor*, 319 F.3d 805, 812 (6th Cir. 2003). Likewise, the Commission has held as to each alleged violation, the employer bears the burden of proving "(1) that it has established work rules designed to prevent the violation; (2) that it has adequately communicated these rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered." *Nooter Construction Co.*, 16 BNA OSHC 1572, 1578 (No. 91-237, 1994).

In its answer, Barnard refers to this defense as an "independent employee action defense" and in its brief only addresses this defense as it relates to 29 C.F.R. § 1926.353(d)(1)(ii), the alleged welding personal protective equipment violation (*see* Resp't's Br. 7), which is not relevant since, as indicated *infra*, the only violations the Secretary has established are §§ 1926.303(c)(2) and 1926.502(i)(3). Further, the Court agrees with the Secretary that while

[11] Barnard also asserts as an affirmative defense it "took effective action to eliminate employee exposure to the alleged hazard as soon as alleged violation was discovered or with due diligence could have been discovered." As indicated, the Court finds no merit in this argument.

"there was testimony in the broad sense, no actual proof was presented of employees being terminated for safety violations, or even of being given written or verbal warnings for safety violations. There was no proof of steps being taken to specifically discover safety violations." (Compl't's Br. 23). Therefore, as to the Safety violations the Secretary has proven, §§ 1926.303(c)(2) and 1926.502(i)(3), Barnard failed to carry its burden of proving (1) that it has established work rules designed to prevent the violations; (2) that it has adequately communicated these rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered. Therefore, this defense must fail.

A. SAFETY CITATIONS

1. Alleged Serious Violations of 29 C.F.R. § 1926.303(c)(1) & (2)

In Citation 1, the Secretary issued grouped Items 1a and 1b for alleged serious violations of OSHA's standard relating abrasive wheels and tools. The Secretary alleges in Items 1a and 1b employees were exposed to struck-by hazards in the welding shop on or about May 18, 2016[12] when the bench grinder "was not equipped with a tongue guard that was adjusted properly" and "was not equipped with properly adjusted work rests." The cited standard provides in relevant part that (1) floor stand and bench mounted abrasive wheels "used for external grinding, shall be provided with safety guards (protection hoods)"[13] and (2) floor and bench-mounted grinders "shall be provided with work rests which are rigidly supported and readily adjustable. Such work rests shall be kept at a distance not to exceed one-eighth inch from the surface of the wheel." 29 C.F.R. § 1926.303(c)(1) and (2). There is no dispute that the bench grinder did not have guards at the time of the inspection but did have work rests.

a. Whether Cited Standard Applied

Barnard asserts as an affirmative defense "[t]he safety regulations allegedly violated were not applicable to [Barnard's] work activity" and argues in its brief "these regulations only apply to grinders actually in use[.]" (Resp't's Br. 8) (emphasis in original). The Court agrees in part. The cited standard is in Subpart I of the construction industry standards, and under the general requirements of Subpart I, *guards* are required on power operated tools designed to accommodate guards only "when in use." 29 C.F.R. § 1926.300(b)(1). Thus, in conformity with

[12] For brevity, since all the citations reference this same alleged violation date, it will not be repeated.

[13] The "safety guards" were referred to by the parties as "tongue guards."

section 1926.300(b)(1), before the Secretary can enforce the guarding requirements of section 1926.303(c)(1), he must *first* establish the bench grinder was "in use." Sotak admitted at trial that the cited bench grinder was not in use at the time of the inspection but asserted she was told by one of Barnard's unnamed pipefitters that the grinder has been used the day before the inspection. (Tr. 19). The Court does not credit this testimony since it does not find the value of this evidence probative, reliable or persuasive.[14]

In contrast, John Doerr, one of Barnard's managers at the worksite, testified at trial that the cited grinder was taken out of service after the guard broke and while the company waited for a replacement guard. (Tr. 166). Doerr also testified he had not seen anyone using the grinder during that period before the parts came in. (Tr. 166). Likewise, Matt Jones, another Barnard manager at the worksite, testified he was aware of the grinder being taken out of service, although he could not say when. (Tr. 202). Jones also testified that he had never seen anyone using the grinder without a guard. (Tr. 203). The Court finds both Doerr and Jones to be credible witnesses and credits their live testimony. Thus, the Court concludes the Secretary failed to establish by preponderance of evidence the bench grinder was "in use" as required by section 1926.300(b)(1). Therefore, the Court concludes the Secretary failed to establish section 1926.303(c)(1) applied to the facts. Accordingly, Safety citation 1, Item 1a must be vacated.

As to Item 1b, there is no "when in use" requirement under the general requirements of Subpart I related to work rests. There is no dispute the bench grinder was equipped with work rests, which were required to meet the requirements of section 1926.303(c)(2). Therefore, section 1926.303(c)(2) applied to the facts.

b. Whether Requirements of Standard Met

Since the cited machine had been provided with work rests, the Secretary was required to prove that the work rests were kept at a distance that exceeded "one-eighth inch from the surface of the wheel." Sotak measured the work rest on the left-hand side to be three-quarters of an inch from the grinding wheel and the work rest on the right-hand side to be three-eighths of an inch

[14] Sotak's testimony was not based upon her first-hand knowledge. The Secretary could have, but chose not to, call the unidentified pipefitter to testify at trial, and Barnard did not have an opportunity to test the veracity of that unnamed pipefitter's allegation through cross-examination at trial. Further, the Secretary offered no additional evidence to corroborate the unnamed pipefitter's allegation. Therefore, the Court does not find the value of this evidence probative, reliable or persuasive.

from the grinding wheel. (Tr. 22). Therefore, the Court concludes the requirements of paragraph (2) of the cited standard were not met by Barnard.

c. Whether Employees had Access to Hazardous Condition

Barnard argues Sotak "failed to inquire as to whether the grinder work rests were adjusted prior to use and whether the grinder was taken out of use when new guard and rests were ordered. Until these pre-requisites for the application of the regulation are met, the regulation itself does not apply and no citation for violation can be issued." (Resp't's Br. 9). The Court does not agree with Barnard. In *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976), the Commission adopted a "rule of access based on reasonable predictability." *Gilles* at 2004. Therefore, "[i]f the defective equipment is available for use by the employee and a standard is violated, then a citation should issue." *Gilles* at 2005.[15]

According to Barnard, "Mike Flynn points out in his testimony, the guards and rests are to be adjusted immediately prior to use so the position of those guards and rests is correct." (Resp't's Br. 9) (*citing* Tr. 221, 222). However, the record does not support this assertion. The cited transcript pages reflect Flynn's testimony related to the adjustments of the *guards*, not the *work rest*. Specifically, Flynn testifies that "a tongue guard before use would need to be adjusted so that's one-quarter inch or less" and "before use the tongue guard needs to be adjusted so that it is a quarter inch or less from the grinding wheel." The cited transcript pages do *not* reflect any testimony by Flynn that adjustments were also made to the work rests before their use. Rather, Flynn simply offers his interpretation that work rests were "not a guard" and require "one-eighth of an inch gap so that the work you're grinding cannot get sucked down into the wheel, but it doesn't protect you from a disintegrating wheel." (Tr. 223).

Nonetheless, the Commission has reiterated that where an employer asserts his intention not to use defective equipment until repaired "and his contention is manifested in overt acts which have denied accessibility to the equipment by the employees, then the employer should not be held in violation of the particular safety standard which might apply to that equipment. If the equipment has been effectively removed from accessibility by the employees, the employer

[15] Properly framed, the Commission's rule of access addresses *employee exposure* to the cited hazard, not the *applicability* of a cited standard. That rule cannot disregard section 1926.300(b)(1)'s limitation that guards are required only "when in use," since the Commission "does not possess the policy-making authority necessary to promulgate or amend substantive rules." *Brock v. Cardinal Indus., Inc.*, 828 F.2d 373, 379 (6th Cir. 1987).

has taken positive means to assure safe and healthful working conditions for his employees." *Gilles*, 3 BNA OSHC at 2005.

Doerr testified at trial that the cited grinder has been taken out of service after the guard broke and while the company waited for a replacement guard. (Tr. 166). Jones also testified he was aware of the grinder being taken out of service, although he could not say when. (Tr. 202). Doerr testified he had not seen anyone using the grinder during that period before the parts came in. (Tr. 166). Jones also testified that he had never seen anyone using the grinder without a guard. (Tr. 203). However, neither witness testified as to whether this occurred before or after the inspection. The Court concludes even though Barnard asserts it intended not to use the defective grinder until repaired, it did not take overt acts which denied accessibility to the grinder by the employees. The record does not reflect the cited grinder had been effectively removed from accessibility by the employees. Barnard presented no evidence that the grinder was tagged to alert potential users of the absence of guarding.

The Court therefore concludes the Secretary presented "sufficient evidence about the precise location of the defective equipment and specific duties of employees likely to involve use of such equipment at the particular location to show that some use of the equipment in its defective condition at or around the time of the alleged violation was indeed reasonably predictable." *Pennsylvania Steel Foundry*, 12 BNA OSHC at 2032. Thus, the Secretary has satisfied his burden of proof by demonstrating that the defective equipment was "available for use"—specifically, that the "defective equipment was located where employees could gain access to it and use it in the course of their normal duties." *Id.*

As the Court recognizes, work rests are required to be properly adjusted "to prevent the work from being jammed between the wheel and the rest, which may cause wheel breakage." 29 C.F.R. § 1926.303(e). The Court credits Sotak's testimony that the pipefitters, pipefitter apprentice and welders were exposed to "flying fragments of the wheel if it was to disintegrate" since they would be "located directly in front of the grinder" while using it and "the most likely injury would be a severe contusion or laceration, maybe an eye injury." (Tr. 18, 23, 59). Therefore, the Secretary has established employees access to the hazardous condition. Accordingly, Citation 1, Item 1b must be affirmed.

2. Alleged Other-Than-Serious Violation of 29 C.F.R. § 1926.300(b)(6)

In Citation 2, Item 1, the Secretary alleges Barnard committed an "other-than-serious" violation of OSHA's standard relating to anchoring fixed machinery, which mandates machines "designed for a *fixed* location shall be securely anchored to prevent walking or moving." 29 C.F.R. § 1926.300(b)(6) (emphasis added). The citation read in relevant part that "various pieces of equipment, including but not limited to, a drill press, was not anchored to the floor to prevent movement."

a. Whether Cited Standard Applied

"Two categories of standards exist under the OSHA regulations. … The first type of standard incorporates the existence of a specified hazard as an element of a violation" and "requires the Secretary to show actual exposure to a hazardous condition independent of non-compliance with the regulations[.]" *Mayflower Vehicle Sys., Inc. v. Chao*, 68 F. App'x 688, 692 (6th Cir. 2003). Those standards "require the Secretary to show that a hazard exists and that a reasonably prudent and safety-conscious employer would realize the cited condition is hazardous." *Nat'l Eng'g.*, 928 F.2d at 768 (*citing Ray Evers Welding v. OSHRC*, 625 F.2d 726, 731 (6th Cir.1980). Here, the cited standard "incorporates the existence of a specified hazard as an element of a violation, i.e., "to prevent walking or moving" and the Secretary must show actual exposure to a hazardous condition independent of non-compliance with the regulation. Therefore, to show this standard applies to the cited facts, the Secretary must prove the drill press was "designed for a *fixed* location" and must also prove "actual exposure to a hazardous condition."

Sotak testified the cited Ellis drill press was in the welding shop and "was used to drill holes into pipe that was going to be installed in the turbine house." (Tr. 25, 27). The height of the drill press was "a little over five feet" and although she did not know the exact weight, "it was very heavy" and the base was "probably about one-and-a-half to two feet by two feet." (Tr. 26). According to Sotak, the employee "would place the pipe, whatever length of pipe, into those vise grips. The vise grips would hold the piece and the drill would come down and drill the hole." (Tr. 27). However, Doerr testified "We would augment pipe stands, small pieces of iron. If we had to drill holes in it for whatever reason. If a part came and didn't have the correct holes drilled in it, we would use it for that. It was primarily used for small items." (Tr. 167). The Secretary did not rebut this testimony, which the Court credits.

According to Sotak, on the base, there were two anchor points on each side, and "bolts could be screwed in through those anchor points and into the floor." (Tr. 26-27). Therefore, Sotak opined it was designed for a fixed location "because the base has four anchor parts where it can be fixed to the floor." (Tr. 25; *see also* Ex. C-5). In Sotak's opinion, a struck-by hazard existed "if the drill press was to move." (Tr. 27). According to Sotak, the "vibration of the machine could … cause the drill press to shimmy or to walk." (*Id.*) However, Sotak admitted that "due to the weight of the machine itself," she would not expect significant movement. (Tr. 28).

To determine the meaning of a standard, "the Commission and the courts consider the language of the standard, the legislative history, and, if the drafter's intent remains unclear, the reasonableness of the agency's interpretation." *Oberdorfer Indus., Inc.*, 20 BNA OSHC 1321, 1330 (Nos. 97-0469 & 97-0470, 2003) (*citing Arcadian Corporation*, 17 BNA OSHC 1345, 1346 (No. 93-3270, 1995), *aff'd*, 110 F.3d 1192 (5th Cir. 1997)). "Here, the language of the standard does not define or describe 'machines designed for a fixed location.' Nor does the standard's legislative history provide guidance for interpreting its meaning." *Id.*[16]

"[W]here the meaning of regulatory language is not free from doubt, the reviewing court should give effect to the agency's interpretation so long as it is reasonable." *Kutty v. U.S. Dep't of Labor*, 764 F.3d 540, 547 (6th Cir. 2014) (*citing Martin*, 499 U.S. at 150). Further, "the Secretary's litigating position before [the Commission] is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a ... health and safety standard." N. *Fork Coal Corp. v. Fed. Mine Safety & Health Review Comm'n*, 691 F.3d 735, 742 (6th Cir. 2012) (*citing Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C.Cir. 2003)). Thus, the Supreme Court has held that litigating positions are entitled to deference when they are not "post hoc rationalization[s]" of previous agency actions. *Martin*, 499 U.S. at 156–57.

Although Barnard admits the drill press had "four openings for foundation bolts," it argues the press was "a portable drill press designed to be moved and used in multiple locations for light work." (Resp't's Br. 10). Barnard relies in part on the testimony of Doerr that "we had to augment and rearrange the shop a couple of times, based on our crew sizes and what we were doing. So yes, we had to move it around. Where you saw it there is probably the second or third location inside that area." (Resp't's Br. 10; *see also* Tr. 167). However, as Judge Phillips

[16] *See* 58 FR 35076-01 (June 30, 1993).

noted in *American Recycling*, "[a] temporary work flow configuration does not change the nature of the machine's design." *Am. Recycling & Mfg. Co., Inc.*, 25 BNA OSHC 1709, 1755 (Nos. 13-1101 & 13-1102, 2015), *aff'd in relevant part*, *Am. Recycling & Mfg. Co. v. Sec'y of Labor*, No. 15-3903-AG, --- Fed.Appx. ---, 2017 WL 362702 (2d Cir. Jan. 23, 2017). The Court agrees with Judge Phillips and concludes Doerr's testimony does not change the nature of the machine's *design*. The Court concludes the Secretary has established the drill press was "designed for a *fixed* location."

However, Barnard also relies on page 3 of the Ellis Drill Press Model 9400 Instruction Manual, which states it "is advisable to bolt the machine to the floor when *large* work pieces are drilled." (*Id.*) (*citing* Ex. R-2 p. 3) (emphasis added). "When regulatory language is not specific enough … industry sources may be considered." *Corbesco, Inc.*, 926 F.2d 422, 427 (5th Cir. 1991). Having considered the manual, and taking into account the cited drill press "was primarily used for small items" and "was very heavy," the Court concludes the Secretary's evidence insufficient to establish the "vibration of the machine could … cause the drill press to shimmy or to walk." As indicated *supra*, since the cited portion of the standard incorporates the existence of a specified hazard as an element of a violation," i.e., the cited machine was "walking or moving," to establish the regulation applied, the Secretary was required to prove "actual exposure to [that] hazardous condition independent of non-compliance with the regulations." *Mayflower Vehicle Sys.*, 68 F. App'x at 692. The Secretary failed to meet this burden. Thus, the Court concludes the Secretary has failed to prove the cited portion of the standard applies to the facts. Accordingly, Safety 2, Item 1, must be vacated.

3. Alleged Other-Than-Serious Violation of 29 C.F.R. § 1926.502(i)(3)

Citation 2, Item 2 asserts Barnard committed an other-than-serious violation of OSHA's fall protection standard related to hole covers, which provides "[c]overs for holes in floors, roofs, and other walking/working surfaces shall . . . be secured when installed so as to prevent accidental displacement by the wind, equipment, or employees." 29 C.F.R. § 1926.502(i)(3). The citation read in relevant part that "employees were exposed to tripping or stepping into holes when pipe troughs were not securely covered."

a. Whether Cited Standard Applied

According to Sotak, Barnard was cited for this violation since there were numerous floor holes (referred to by the parties as "troughs") running through the turbine house covered with

two-by-ten scaffold boards, which were not secured. (Tr. 31; *see also* Ex. C-8, Ex. C-9). "Hole means a gap or void 2 inches (5.1 cm) or more in its least dimension, in a floor, roof, or other walking/working surface." 29 C.F.R. § 1926.500(b). Sotak measure the troughs to be one foot six inches by three feet in size and approximately nineteen inches deep. (Tr. 31, 32; *see also* Ex. C-8, Ex. C-9). Barnard does not dispute that the pipe troughs were "holes" as defined by the standard. Therefore, the cited standard applies to the facts.

b. Whether Requirements of Standard Met

There is no dispute that the troughs were covered only with two-by-ten scaffold boards that were not secured. Sotak opined the covers could be secured by drilling something into the cement floor. (Tr. 44). She also testified she had seen a frame used that allowed boards to sit in the frame so they could not be moved, sometimes anchored to the cement, and sometimes not. (Tr. 45, 47). The Court credits this testimony and concludes the requirements of the cited standard were not met by Barnard.

c. Whether Employees had Access to Hazardous Condition

There is no dispute that employees moved through this area carrying materials, ladders and mechanical equipment, including pipefitters, pipefitter apprentices, and welders in the area daily. There were over a hundred employees working in the turbine house and numerous employees move through this area carrying materials, ladders and mechanical equipment, including pipefitters, pipefitter apprentices, and welders working in the area daily. (Tr. 33). Sotak opined, and the Court agrees, those materials being carried could displace the boards themselves." (Tr. 33). Thus, the Court agrees with Sotak that employees were exposed to a hazard of "tripping or stepping into the floor holes or floor troughs." (Tr. 33). Therefore, the Court concludes the Secretary has shown by a preponderance of evidence employees had access to the hazardous condition. Thus, the Court concludes Items 5a and 5b should be affirmed

d. Feasibility of Abatement

Barnard argues the abatement method suggested by Sotak "creates another significant hazard which the regulation itself was intended to prevent, employees tripping on the cover system." (Resp't's Br. 11). The Court finds no merit in Barnard's argument since Sotak testified when she had seen a frame used that allowed boards to sit in the frame so they could not be moved, it "would be flush with the boards themselves." (Tr. 45). Further, contrary to Barnard's assertion, there is no evidence in the record the "fix recommended by [Sotak] creates a tripping

hazard as well as safety hazards by placing anchor bolts in the concrete." (Tr. 46). Therefore, the Court finds the Secretary's proposed abatement method was a feasible and acceptable abatement method to correct the hazard both technologically and economically.

Further, Barnard failed to raise this defense in its answers or at the pretrial conference and has waived it since it was addressed for the first time in its brief. Although not articulated as such, the Court deems Barnard's argument to be the affirmative defense of "infeasibility."[17] "To establish infeasibility as an affirmative defense, an employer must show that: '(1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) there would have been no feasible alternative means of protection.'" *Altor, Inc.*, 23 BNA OSHC 1458, 1471 (No. 99-0958, 2011) (*quoting V.I.P. Structures, Inc.*, 16 BNA OSHC 1873 (No. 91-1167, 1994)). *See also A. J. McNulty & Co.*, 19 BNA OSHC 1121, 1129 (No. 94-1758, 2000).[18] Assuming *arguendo* Barnard has not waived this defense, it failed to prove the means of compliance prescribed by the applicable standard would have been infeasible and failed to show that there were no feasible alternative means of protection. Therefore, Barnard failed to establish the affirmative defense of infeasibility.

e. Controlling Employer

In its answer, Barnard asserts as an affirmative defense it "did not have control over aspects of the work environment which are the subject of these Citations" and that it "notified [the] controlling contractor several times asking for hazards to be remedied." In its brief, Barnard also argues it "took action to correct this issue when it had the authority to do so" during the time that it was the Construction Manager when it "would put up yellow caution tape to warn people of the troughs and their coverings," but "at the time of the inspection May 18, 2016, Barnard was no longer the Construction Manager and did not have the authority to continue to take such measures." (Resp't's Br. 12) (*citing* Tr. 147). Thus, Barnard argues it "did not fail to secure the trough covers, American Municipality Power failed to do so." (*Id.*) The Court

[17] The impossibility defense was changed to an infeasibility defense by the Commission in *Dun-Par Engineering Form Co.,* 12 BNA OSHC 1949 (No. 79-2553, 1986).

[18] *See also*, *Falcon Steel Co.*, 16 BNA OSHC 1179, 1186–87 (No. 89–2883, 1993) (separately analyzing infeasibility of implementation and infeasibility of operations); *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1226–28 (No. 88–821, 1991) (citing cases regarding infeasibility of implementation and infeasibility of operations).

disagrees. Putting up yellow caution tape does not comport with the requirements of the cited standard, which requires covers for holes "be secured when installed so as to prevent accidental displacement by the wind, equipment, or employees." 29 C.F.R. § 1926.502(i)(3). Barnard presented no evidence that it did not have the authority to implement either of the abatement measures suggested by Kotak. And as indicated *supra*, Barnard failed to prove infeasibility of compliance.

"It is well settled that each employer is responsible for the safety of its own employees." *Cent. Florida Equip. Rentals, Inc.*, 25 BNA OSHC 2147, 2180 (No. 08-1656, 2016) (*citing RMS Consulting, LLC*, 20 BNA OSHC 1994, 1997 (No. 03-0479, 2004)). "On a multi-employer work site, OSHA may appropriately cite a subcontractor where employees are exposed to a hazard." *Id.* Here, Barnard controlled its work in the welding shop and the turbine house and was responsible for creating the hazardous situation by covering the troughs with two-by-ten scaffold boards that were not secured and allowed or directed its employees to move through this area carrying materials, ladders and mechanical equipment. As Sotak testified, and the Court agrees, even if Barnard was no longer the Construction Manager, it still had a responsibility to protect its employees.[19] (Tr. 35). Accordingly, Citation 2, Item 2 must be affirmed.

B. HEALTH CITATION

1. Hazard Communication Standard

The Hazard Communication standard, 29 C.F.R. § 1910.1200, requires employers "to provide information to their employees about the hazardous chemicals to which they are exposed, by means of a hazard communication program[.]" 29 C.F.R. § 1910.1200(b)(1). The standard defines a "hazardous chemical" as "any chemical which is classified as a physical hazard or a health hazard, simple asphyixiant, combustible dust, pyrophoric gas, or hazard not otherwise classified." 29 C.F.R. § 1910.1200(c). Health Citation 1, Items 1 and 2 allege serious violations of subsections (e) and (g) of that standard.

[19] Barnard also asserts as affirmative defenses it "did not have control over aspects of the work environment which are the subject of these Citations," that it "notified [the] controlling contractor several times asking for hazards to be remedied," that it "exercised due diligence to protect employees from hazards and any alleged hazard was of short duration, transitory in nature and/or created by and known only to sub-tier contractors or the owner/general," and that it "acted as a reasonably prudent employer and planned for those hazards which it expected its employees to be exposed." The Court finds no merit in these arguments.

Subsection (e) mandates an employer's hazard communication program must include a "list of the hazardous chemicals known to be present," which "may be compiled for the workplace as a whole or for individual work areas[.]" 29 C.F.R. § 1910.1200(e)(1)(i). The citation read in relevant part that "employees were exposed to cutting oil, argon, oxygen, and acetylene compressed gases (eye, skin, and respiratory irritants) when welding stainless steel pipe and the employer did not compile a complete list of the hazardous chemicals known to be present."

Subsection (g) requires an employer to "maintain in the workplace copies of the required safety data sheets for each hazardous chemical, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s). (Electronic access and other alternatives to maintaining paper copies of the safety data sheets are permitted as long as no barriers to immediate employee access in each workplace are created by such options.)" 29 C.F.R. § 1910.1200(g)(8). The citation alleges employees "were exposed to cutting oil, argon, oxygen, and acetylene compressed gases (eye, skin, and respiratory irritants) when welding the stainless steel and the employer did not maintain in the workplace copies of the required safety data sheets for each hazardous chemical."

a. Whether Cited Standard Applied

The purpose of the hazard communication standard "is to ensure that the hazards of all chemicals produced or imported are classified, and that information concerning the classified hazards is transmitted to employers and employees." 29 C.F.R. § 1910.1200(a)(1). The hazard communication standard "applies to any chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency." 29 C.F.R. § 1910.1200(b)(2). Barnard does not dispute that hazardous chemicals, as defined in the standard, were known to be present at the worksite. Therefore, the cited provisions of the standard apply to the facts.

b. Whether Requirements of Standard Met

Provins testified that when completing the walk-through during the inspection, he requested to review Barnard's chemical list, and oxygen, argon, acetylene, and cutting oil were "missing from the chemical list." (Tr. 76, 77, 80). Thus, although Provins admits Barnard did have a chemical list, he asserts it was "a partial incomplete," a "partial list of materials used by employees onsite." (Tr. 77, 83). "The one that Mr. Whitehurst provided to me to review did not

contain [the materials that I had observed] at the time that I was there." (*Id.*) This included oxygen in compressed gas cylinders, argon in compressed gas cylinders, and acetylene in compressed gas cylinders. These gases, which were used in welding, were located at the outside of the mechanical or pipe shop. (Tr. 76, 78, 83; *see also* Ex. C-11, Ex. C-12, Ex. C-13). There were also chemicals inside the mechanical shop, including compressed gas cylinders of argon and oxygen. These gases were used for welding or cutting. Oxygen, argon, and acetylene were not the respondent's chemical list. Cutting oil was also being used, and not on the chemical list. (Tr. 79-80; *see also* Ex. C-14, Ex. C-15).

Barnard argues "the regulation further states that the list may be either compiled for the workplace as a whole or for individual work areas," and Provins "failed to inquire as to whether the identified chemicals were listed in a specific list for the individual work area." (Resp't's Br. 4). Thus, Barnard argues the Secretary "has the burden of proof to show that there was no written list of the specific chemicals the inspector identified" and has failed to show that OSHA asked "for the list in the appropriate work area to verify whether those chemicals were on that list." (*Id.*) The Court agrees with Barnard.

Since subsection (e) of the standard permits an employer to compile a list of the hazardous chemicals known for individual work areas, the Secretary was required to prove that Barnard did not have a required list of the hazardous chemicals known for its individual work areas. However, Provins uncontroverted testimony was that during the inspection he requested to review "the chemical list" of the employer, not that he requested the list of the hazardous chemicals known for the individual work areas. (Tr. 76). Flynn's uncontroverted testimony was that different lists were present in the turbine area compared to the fabrication area. (Tr. 225). Thus, the Court concludes the Secretary failed to establish a violation of subsection (e). Therefore, Citation 1, Item 1 must be vacated, along with the penalty assessment.

Provins also testified that when he requested to review the safety data sheets for some of the materials observed, "gases and stuff," Whitehurst, "basically after an hour of request, brought their safety data sheet book and we looked through the book and could not find safety data sheets for the cutting oil . . . the acetylene, the argon gas or the oxygen compressed gas cylinders." (Tr. 84-85). The missing data sheets were later produced to Provins during the inspection by Patrick Morrison, one of the project engineers, after Morrison "pulled them from a website" but "he did not have them at the time of request." (Tr. 85, 86; *see also* Ex. C-17 – Ex. C-20). However, the

Secretary offered no evidence establishing barriers were present to immediate employee access created by such electronic access.

Since subsection (g) of the standard allows employers to provide electronic access and other alternatives to maintaining paper copies of the safety data sheets, and the Secretary failed to establish any "barriers to immediate employee access in each workplace are created by such options." Therefore, the Secretary failed to establish a violation of subsection (g) of the standard. Therefore, Citation 1, Item 2 must also be vacated.

2. Alleged Serious Violation of 29 C.F.R. § 1926.353(d)(1)(ii)

Under Health Citation 1, Item 3, the Secretary issued a citation to Barnard for an alleged serious violation of OSHA's standard relating to protection in welding, which mandates in relevant part that in inert-gas metal-arc welding, "[e]mployees in the area not protected from the arc by screening shall be protected by filter lenses meeting the requirements of subpart E of this part." 29 C.F.R. § 1926.353(d)(1)(ii). The citation alleges employees "were exposed to arc welding and their eyes were not protected by filter lenses."

a. Whether Cited Standard Applied

Barnard does not dispute that employees were engaged in inert-gas metal-arc welding. Therefore, the cited standard applies to the facts.

b. Whether Requirements of Standard Met

Although Provins did not observe any welding during his inspection, he testified the three or four pipefitters he interviewed told him during their interviews that while welding they wore clear safety glasses and gloves but not tinted lenses, and would simply close their eyes and turn their heads during welding. (Tr. 95, 97-98, 103, 105, 109; *see also* Ex. C-21). The pipefitters interviewed by Provins were not called by the Secretary to testify as trial. However, Provins assertions were directly refuted by testimony from Barnard witnesses. (Tr. 165, 195, 139, 140). Every Barnard employee that testified at trial stated that there was access to safety equipment, including filter lenses, face shields, gloves, etc. (Tr. 138, 162, 193-194; see also Ex. R-11). The Court credits the live testimony of Barnard employees and discounts Provins testimony, which was not based upon his first-hand knowledge. Thus, the Court concludes the Secretary failed to establish a violation of 29 C.F.R. § 1926.353(d)(1)(ii). Therefore, Citation 1, Item 3 must be vacated.

III. PENALTY

In Citation 1, Item 1b, the Secretary proposed a penalty of $2,550.00 for violating section 1926(c)(2). Item 1b was classified as "serious" due to the injuries that could be sustained from the flying fragments of the grinding wheel if it should disintegrate, which could cause eye injuries and severe contusions or lacerations to the face. (Tr. 19, 20). A "serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k). Thus, any violation that makes possible an accident which could result in death or serious injury, even if not probable, is a serious violation. *Everglades Sugar Refinery, Inc. v. Donovan*, 658 F.2d 1076, 1082 (6th Cir. 1981). The Court concludes this violation was properly classified as serious.

Under the Act, any employer who commits a serious violation may be assessed a civil penalty of up to $7,000 for each such violation.[20] 29 U.S.C. § 666(b). The Commission has the authority "to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j). "These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment." *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (*citing Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992)). "The Commission has held that [the Judge] may not routinely affirm the proposed penalty of the Secretary, but must make an independent determination based on factors enumerated in 29 U.S.C. § 666(j)." *Bush & Burchett, Inc. v. Reich*, 117 F.3d 932, 939 (6th Cir. 1997). "The assessment of penalties under this section,

[20] In 2015, Congress passed the Federal Civil Penalties Inflation Adjustment Act Improvements Act (the Inflation Adjustment Act), directs agencies to adjust their penalties for inflation each year and requires agencies to publish "catch up" rules to make up for lost time since the last adjustments. However, the adjusted civil penalty amounts are applicable only to civil penalties assessed after August 1, 2016, whose associated violations occurred after November 2, 2015, the date of enactment of the Inflation Adjustment Act. Thus, as of January 13, 2017, an employer who commits a serious violation after November 2, 2015, may be assessed a civil penalty of up to $12,675 for each such penalty assessed after January 13, 2017. Here, since the penalty was assessed on July 12, 2016, the increased penalties do not apply.

however, is within the sound discretion of the Commission." *Bush & Burchett, Inc. v. Reich*, 117 F.3d 932, 939 (6th Cir. 1997) (*citation omitted*).

Here, the violation was assigned a "low" severity since the probability was less likely--the duration of exposure was short, from five to ten minutes, and the employees usually wore eye protection. (Tr. 19, 23-24). Barnard was given no reduction for size, as it had approximately 313 employees. (Tr. 37). A 15% reduction was given for good faith since there was a safety manager on site who conducted inspections. (*Id.*) No reduction for history was given since Barnard had not been inspected within the past five years. (Tr. 38). After making an independent determination based on the factors enumerated in 29 U.S.C. § 666(j), the Court concludes the appropriate civil penalty for Barnard's violation of 29 C.F.R. § 1926.303(c)(2) is $2,550.00. Accordingly,

IV. ORDER

IT IS HEREBY ORDERED THAT Safety Citation 1, Item 1b is **AFFIRMED** as a "serious" violation of 29 C.F.R. § 1926.303(c)(2) and a civil penalty of $2,550.00 is assessed.

IT IS FURTHER ORDERED THAT Safety Citation 2, Items 2 is **AFFIRMED** as an "other-than-serious" violation of 29 C.F.R. § 1926.502(i)(3), with no penalty assessment.[21]

IT IS FURTHER ORDERED THAT Safety Citation 1, Items 1a, the alleged "serious" violation of 29 C.F.R. § 1926.303(c)(1), and Safety Citation 2, Item 1, the alleged "other-than-serious" violation of 29 C.F.R. § 1926.300(b)(6) are **VACATED** with no penalty assessments.

IT IS FURTHER ORDERED THAT Health Citation 1, Items 1, 2, and 3, the alleged "serious" violations of 29 C.F.R. §§ 1910.1200(e)(1)(i), 1910.1200(g)(8), and 1926.353(d)(1)(ii), are **VACATED** with no penalty assessments.

SO ORDERED.

/s/ John B. Gatto
John B. Gatto
Administrative Law Judge

Dated: March 27, 2017
Atlanta, GA

[21] The Court agrees with the Secretary's determination not to assess a penalty for the "other-than-serious" violation of 29 C.F.R. § 1926.502(i)(3). Therefore, the Court does not address the statutory penalty factors related to this violation, which are required to be considered only when a civil penalty is assessed.