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SECRETARY OF LABOR, Complainant, v. GEM INDUSTRIAL, INC., Respondent.	OSHRC Docket No. 93-1122

DECISION

BEFORE: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

At issue is whether Administrative Law Judge Michael J. Schoenfeld erred in granting the motion of GEM Industrial, Inc. ("GEM") to suppress key evidence on the basis that the Secretary violated 29 U.S.C. § 657(a) and (e), section 8(a) and (e) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). These provisions require the Secretary's representative to present credentials prior to conducting a reasonable inspection and to give the employer and employee representatives an opportunity to accompany the representative during the inspection. For the following reasons, we conclude that the judge erred in granting the motion to suppress, and we remand the case to the judge to reopen the record and decide the merits of the two contested citations.

I.

On February 26, 1993, GEM, a steel erection subcontractor, was constructing a building in Holland, Ohio, when Compliance Officer Chris Matthewson ("the CO") from the Occupational Safety and Health Administration ("OSHA") arrived for a programmed

inspection. The CO's following account of the events of that day was unrebutted.[1] From the main road, where he could see people up on the steel in the distance, the CO turned onto an industrial parkway, a road with completed, occupied buildings on it. There was a sign at the beginning of the road that said "Industrial Park" but no gate or guard booth. As he drove along this curving access road, he could see more clearly the people up on the steel. He proceeded to the back of the finished parking lot for the completed, occupied building next to GEM's worksite, where the ironworkers parked. GEM's worksite was not set off by a fence or gate. When he parked his car, the southwest corner of GEM's worksite was "pretty much directly in front" of him. From his car, he took seven photos of the ironworkers up on the steel right in front of him. He described the ironworkers as lacking fall protection. These photos took him a maximum of five minutes. When asked if he had to "sneak around anything, or move anything, or hide behind anything to take those pictures," he responded "[n]o."

Immediately after taking the photos, he got out of the car and proceeded to dress for the cold by putting on his boots, a coat, jacket, and hard hat. He then got his clipboard and headed for the trailer with "GEM Industrial" on the side to find the foreman. On the way he observed a man standing outside of the trailer who watched the ironworkers and then walked into the trailer. The CO continued to the trailer and identified himself. He learned that the man he had just seen outside was the foreman, and he presented his credentials to him. The time that elapsed between the CO's arrival at the parking lot and his presentation of credentials was approximately ten to fifteen minutes. After the CO asked the foreman about the ironworkers, the foreman walked out of the trailer. The CO followed him outside and heard someone say "OSHA's here." While he was outside, the CO observed three ironworkers with no safety belts on, come over to the ladder and climb down from the steel, get safety belts, and then go back up to continue their work. After an opening conference, the CO conducted a walkaround inspection of the site, during which he saw no violations. By that time the ironworkers had put on safety belts and tied off to the steel.

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[1]GEM chose not to call any witnesses at the hearing, and the inconsistencies it alleges in the CO's testimony are not borne out by an examination of the evidence in the record.

II.

Prior to the hearing, GEM filed a motion *in limine* seeking the exclusion of the CO's testimony and the photos that he took regarding the conditions that existed prior to his presentation of credentials to the foreman, on the basis that the CO violated section 8(a)[2] and (e)[3] of the Act by failing, respectively, to present credentials prior to the inspection and to afford employee and employer representatives an opportunity to accompany him.[4] Based on the CO's testimony that, in his personal opinion, he violated section 8(a) and (e) in the ways alleged above in this case and in the majority of his inspections at construction worksites, the judge granted the motion from the bench, and later in writing. The judge

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[2]Section 8(a) provides:

> In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized--
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment . . . .

[3]Section 8(e) provides:

> [A] representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) of this section for the purpose of aiding such inspection.

[4]GEM also contends that the CO did not comply with the OSHA regulations at 29 C.F.R. §§ 1903.7 and 1903.8, and related provisions in (what was referred to at the time of the inspection as) OSHA's *Field Operations Manual* ("FOM"). Regarding the OSHA regulations, the relevant portions mirror section 8(a) and (e) and therefore place no extra responsibilities on the CO that he did not meet here. Concerning the FOM provisions, as the Commission has noted many times the FOM does not give employers particular rights or defenses in adjudicatory proceedings. *E.g., Mautz & Oren, Inc.*, 16 BNA OSHC 1006, 1010, 1991-93 CCH OSHD ¶ 29,986, p. 41,067 (No. 89-1366, 1993). Moreover, the relevant parts of the FOM do not require any more of the CO than section 8(a) and (e).

made what he considered, in his ruling from the bench, a "finding of fact" that the CO had "willfully and knowingly violated" section 8(a) and (e). The judge also concluded in his written decision that "the OSHA investigation in this case was conducted outside reasonable limits and in an unreasonable manner."

To determine whether the judge erred in suppressing the evidence, we must consider the relation between 8(a) and the Fourth Amendment, and, in this particular case, whether GEM established that it was prejudiced in the preparation or presentation of its defense.

III.

The Commission has held that an employer's right under section 8(a) to have the OSHA representative present credentials prior to the inspection is not violated unless a violation of the Fourth Amendment is also shown. *E.g., Laclede Gas Co.*, 7 BNA OSHC 1874, 1877, 1979 CCH OSHD ¶ 24,007, p. 29,153 (No. 76-3241, 1979); *Accu-Namics, Inc.*, 1 BNA OSHC 1751, 1755, 1973-74 CCH OSHD ¶ 17,936, p. 22,233 (No. 477, 1974), *aff'd*, 515 F.2d 828 (5th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976); *see Concrete Constr. Co.*, 15 BNA OSHC 1614, 1616-17, 1991-93 CCH OSHD ¶ 29,681, p. 40,240 (No. 89-2019, 1992). In order for an employer to establish that section 8(a) requires the suppression of evidence obtained before the presentation of credentials, it must show that it had a reasonable expectation of privacy in the worksite. *E.g., Hamilton Fixture*, 16 BNA OSHC 1073, 1078 & n.9, 1993 CCH OSHD ¶ 30,034, p. 41,173 & n.9 (No. 88-1720, 1993), *aff'd without published opinion*, 28 F.3d 1213 (6th Cir. 1994); *Laclede Gas*, 7 BNA OSHC at 1877, 1979 CCH OSHD at p. 29,153; *Accu-Namics,* 1 BNA OSHC at 1754-55, 1973-74 CCH OSHD at p. 22,233. Where an area is outdoors and open to public view, there is no expectation of privacy, and the area is therefore not subject to the Fourth Amendment under the "open fields" doctrine. *E.g., Oliver v. United States*, 466 U.S. 170, 178-79 (1984); *Tri-State Steel Constr., Inc.*, 15 BNA OSHC 1903, 1909-10, 1991-93 CCH OSHD ¶ 29,852, p. 40,733 (No. 89-2611, 1992) (consolidated), *aff'd on other grounds*, 26 F.3d 173 (D.C. Cir. 1994), *cert. denied*, No. 94-921 (Mar. 20, 1995).

The record establishes that GEM had no reasonable expectation of privacy at this worksite. The CO observed the violative conditions from his car parked in the parking lot

of a completed building next to GEM's site, a lot in which any member of the public could park to conduct business in the occupied building. The road that he took into the industrial park was not closed off. There was a sign identifying the park, but there is nothing in the record to indicate that it was intended to exclude the public. Because GEM had no reasonable expectation of privacy, there is no Fourth Amendment violation[5] and thus no violation of section 8(a) regarding the presentation of credentials.[6]

IV.

In *Hamilton Fixture*, the Commission indicated that an employer need not claim a Fourth Amendment violation in order to establish a violation of the part of section 8(a) that requires that inspections be conducted "at . . . reasonable times, and within reasonable limits and in a reasonable manner." 16 BNA OSHC at 1078, 1993 CCH OSHD at p. 41,173. The judge's conclusion that "the OSHA investigation in this case was conducted outside reasonable limits" implicates such a contention here. However, even if an employer were to prove a violation of this part of section 8(a) *or* a violation of section 8(e), to obtain relief it must establish that it was actually prejudiced in the preparation or presentation of its defense on the merits.[7] *E.g., Marshall v. CF & I Steel Corp.*, 576 F.2d 809, 813-14 (10th Cir.

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[5]The judge agreed, noting in his written decision that "the case presents no Constitutional Fourth Amendment search & seizure issue."

[6]As for the CO's testimony that he thought he had violated section 8(a), we note that neither the Secretary nor the Commission is bound by an erroneous interpretation of the Act made by a representative of the Secretary. *Univ. of Pittsburgh of the Commonwealth System of Higher Education*, 7 BNA OSHC 2211, 2218 n. 32, 1980 CCH OSHD ¶ 24,240, p. 29,502 n.32 (No. 77-1290, 1980); *cf. Graham v. Connor*, 490 U.S. 386, 397 (1989) (officer's bad intentions will not make Fourth Amendment violation out of an objectively reasonable act).

[7]Commissioner Foulke would emphasize that GEM can establish that the inspection was unreasonably conducted in violation of section 8(a) even though it does not claim a violation of the Fourth Amendment. As noted above, in *Hamilton Fixture*, 16 BNA OSHC at 1078, 1993 CCH OSHD at p. 41,173, the Commission stated that a cited employer need not raise a Fourth Amendment claim to establish that the Secretary violated the part of section 8(a) requiring that he inspect "at . . . reasonable times, and within reasonable limits and in a reasonable manner." This had been implicitly recognized in *Adams Steel Erection, Inc.*, 13 BNA OSHC 1073, 1079, 1986-87 CCH OSHD ¶ 27,815, p. 36,403 (No. 77-3804, 1987), and

(continued...)

1978); *Marshall v. Western Waterproofing Co.*, 560 F.2d 947, 951 (8th Cir. 1977); *Hoffman Constr. Co. v. OSHRC*, 546 F.2d 281, 282-83 (9th Cir. 1976); *Hartwell Excavating Co. v. Dunlop*, 537 F.2d 1071, 1073 (9th Cir. 1976); *Chicago Bridge & Iron Co. v. OSHRC*, 535 F.2d 371, 376-77 (7th Cir. 1976); *Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828, 833-34 (5th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976); *Concrete Constr. Co.*, 15 BNA OSHC at 1618-19, 1991-93 CCH OSHD at p. 40,240; *Pullman Power Products, Inc.*, 8 BNA OSHC 1930, 1932, 1980 CCH OSHD ¶ 24,692, p. 30,305 (No. 78-4989, 1980), *aff'd*, 655 F.2d 41 (4th Cir. 1981); *Laclede Gas Co.*, 7 BNA OSHC at 1878, 1979 CCH OSHD at pp. 29,153-54; *Electrocast Steel Foundry, Inc.*, 6 BNA OSHC 1562, 1563-64, 1978 CCH OSHD ¶ 22,702, pp. 27,401-02 (No. 77-3170, 1978); *Able Contractors, Inc.*, 5 BNA OSHC 1975, 1980, 1977-78 CCH OSHD ¶ 22,250 (No. 12931, 1977). As the Fifth Circuit explained in *Accu-Namics v. OSHRC*, to not require a showing of prejudice would militate against the manifest purpose of the Act, as stated in section 2(b) of the Act, 29 U.S.C. 651(b), "to assure . . . safe and healthful

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[7](...continued)
follows from case law acknowledging that only certain parts of section 8(a) coexist with the Fourth Amendment. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325 (1978) (section 8(a) is violative of the Fourth Amendment insofar as it purports to authorize warrantless inspections); *Laclede Gas*, 7 BNA OSHC at 1877, 1979 CCH OSHD at p. 29,153 (no violation of section 8(a) insofar as it requires the presentation of credentials prior to the inspection without showing a violation of the Fourth Amendment).

In Commissioner Foulke's view, the best statement of the law applying to a claim that an inspection was unreasonable under section 8(a) is found in *Hartwell Excavating Co. v. Dunlop*, 537 F.2d 1071, 1073 (9th Cir. 1976), where the court declared that "technical violations of the statute, assuming that such violations existed, do not justify any sweeping exclusionary rule in the absence of a showing of substantial prejudice" by the employer. Technical violations occur where there is "substantial compliance" with the statute. *Id.* Commissioner Foulke shares the judge's concern that the conduct exhibited in this case is cause for serious concern and must be very closely monitored by the Commission and the courts. However, he finds that here the Secretary did, albeit *barely*, substantially comply with section 8(a). First, after parking his vehicle, the CO maintained a direct route to an area where he could have reasonably expected to encounter the employer. Second, the evidence indicates that any delay in this case was due to the CO being confronted with circumstances that he believed constituted a violation, and was not the result of his intentional delay for the purpose of gathering evidence. Having found substantial compliance, he agrees with his colleagues that GEM failed to establish that the conduct here resulted in prejudice, and therefore the judge erred in granting GEM's motion to suppress.

working conditions," because otherwise evidence would be excluded no matter how minor or technical the government violation and no matter how harmful the employer's violation. 515 F.2d at 833.

In response to GEM's claim that it was prejudiced because it was denied the opportunity to observe the same evidence as the CO, we note that the CO's unrebutted testimony established that GEM's foreman was looking at the same ironworkers that the CO had just photographed as he approached GEM's trailer. Moreover, in their statements comprising proffered Exhibit C-10 (acquired by the Secretary in discovery), three GEM ironworkers acknowledge that they were not wearing a tied-off safety belt at the time in question. Also, contrary to GEM's contention, there is *no evidence* showing that the CO "hid," nor that GEM's employees thought he looked like another contractor or that the CO sought to deceive them. As in *Accu-Namics v. OSHRC*, 515 F.2d at 833-34, in this case there is "no showing [in the record] that the [CO] looked where he had no right to look, nor that he filched information to which he was not entitled, had he shown his credentials." Moreover, there was no evidence that, had the employer or employee representative accompanied the CO, any further material or mitigating facts would have emerged. *See id.* at 834. While, as GEM argues, the CO acknowledged that he did not observe any violations after presenting credentials, the fact that there was no evidence to corroborate the CO's earlier observations appears to have been the result of the call to GEM's employees that "OSHA's here." This merely demonstrates that working conditions at construction sites may change. *E.g., Western Waterproofing Co.*, 5 BNA OSHC 1496, 1499, 1977-78 CCH OSHD ¶ 21,869, p. 26,367 (No. 9739, 1977), *rev'd on other grounds*, 560 F.2d 947 (8th Cir. 1977); *Environmental Utils. Corp.*, 5 BNA OSHC 1195, 1198 n.6, 1977-78 CCH OSHD ¶ 21,709, p. 26,074 n.6 (No. 5324, 1977).

Although the judge did not specifically find in his decision that GEM proved prejudice,[8] he concluded from the bench that, based on the CO's testimony in this case and

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[8]He concluded that under *Hamilton Fixture* there is no requirement that an employer show prejudice in order to obtain relief where it has proved that an inspection is unreasonable under section 8(a). (Because he based relief on section 8(a), he did not reach the issue of (continued...)

"his testimony under oath in prior cases," the CO "knowingly and willfully" took the photographs in violation of sections 8(a) and (e) in this case. The judge found that such behavior was the CO's "usual manner of doing business," for the CO acknowledged that he had acted the same at the majority of the thirty-five construction sites that he had inspected. However, the judge's reliance on the CO's testimony in prior cases is misplaced as that testimony is not part of the record, and the particular circumstances of the CO's other construction inspections are not known. Moreover, as noted above, the Secretary is not bound by the personal opinions of the CO. See *supra* note 6. Without more than the limited evidence in the record, GEM cannot establish that it was prejudiced in the preparation or presentation of its case. GEM had and took the opportunity to cross-examine the CO as to his inspection procedures, and it had the opportunity, but declined, to present any relevant evidence as to its claimed prejudice. A general claim of prejudice is not enough; the claimant must present specific evidence. *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1822, 1991-93 CCH OSHD ¶ 29,808, p. 40,592 (No. 88-2572, 1992), *rev'd on other grounds*, 25 F.3d 653 (8th Cir. 1994); *see United States v. Hougham*, 364 U.S. 310, 316-17 (1960).

Based on the factors above, we find that the record does not show that GEM suffered actual prejudice in the preparation or presentation of its case. Therefore, we conclude that the judge erred in granting GEM's motion to suppress the evidence obtained by the CO prior to his presentation of credentials.

V.

After ruling from the bench in favor of GEM's motion to suppress, the judge permitted the Secretary to proffer evidence as to the merits of the charges, and the Secretary elicited testimony from the CO and introduced exhibits. At the close of the Secretary's proffer, GEM indicated that it would not present evidence because the Secretary had not proved his case.

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[8](...continued)
prejudice under section 8(e).) In *Hamilton*, 16 BNA OSHC at 1082 n.13, 1993 CCH OSHD at p. 41,178 n.13, the Commission stated that it did not need to reach the issue of prejudice because the employer had failed to prove a violation of section 8(a), and thus no relief could be granted.

We find that, because the judge had granted its motion, GEM was in a difficult position so far as determining whether it needed to present evidence on the merits. Also, the Secretary's proffer of evidence was lacking at least as to the penalty factors in section 17(j) of the Act, 29 U.S.C. § 666(j). Therefore, in fairness to both parties, we remand this case to the judge to reopen the record to determine the merits of the citations charging a repeat violation of 29 C.F.R. § 1926.105(a)[9] (ironworkers were not protected from falling over 25 feet--$25,000 proposed penalty) and a serious violation of 29 C.F.R. § 1926.20(b)(2) (competent person did not conduct frequent and regular safety and health inspections--$5,000 proposed penalty). We order that the proceedings in this case be expedited in accordance with Commission Rule 103, 29 C.F.R. § 2200.103.

It is so ordered.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Velma Montoya
Commissioner

Dated: April 20, 1995

[9]In the citation, the Secretary alternatively charged that GEM violated section 1926.28(a). However, on review, the Secretary states that he relies solely on the section 1926.105(a) charge.

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 93-1122
GEM INDUSTRIAL, INC.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION AND REMAND

The attached Decision and Remand by the Occupational Safety and Health Review Commission was issued on April 20, 1995. The case will be referred to the Office of the Chief Administrative Law Judge for further action.

FOR THE COMMISSION

Ray H. Darling, Jr.

April 20, 1995
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 93-1122

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,
v.
GEM INDUSTRIAL, INC.
Respondent.

OSHRC DOCKET
NO. 93-1122

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 February 25, 1994. The decision of the Judge will become a final order of the Commission on March 28, 1994 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 March 17, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

Executive Secretary
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Petitioning parties shall also mail a copy to:

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

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: February 25, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-1122

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 93-1122
GEM INDUSTRIAL, INC.,	:	
Respondent.	:	

Appearances:

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U.S. Department of Labor
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Michael S. Holman, Esq.
Sarah J. DeBruin, Esq.
Bricker and Eckler
Columbus, Ohio
For Respondent

Before: Administrative Law Judge Michael H. Schoenfeld

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

Gem Industrial, Inc., ("Respondent") had a worksite inspected by a Compliance Officer of the Occupational Safety and Health Administration. Two citations alleging

violations of the Act were issued. Respondent timely contested. Following the filing of a complaint and answer and pursuant to a notice of hearing, the case came on to be heard on October 18, 1993, in Columbus, Ohio. No affected employees sought to assert party status. Both parties have filed post-hearing briefs.

Jurisdiction

Complainant alleges and Respondent does not deny that it is an employer within the meaning of the Act and that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of § 3(5) of the Act.[1] Accordingly, the Commission has jurisdiction over the subject matter and the parties

Discussion

The theme of this case is that administrative due process imposes a requirement of fundamental fairness. The central issue here is whether the Commission will countenance a Compliance Officer's knowing and willful failure and refusal to abide by statutory and regulatory requirements governing the conduct of inspections. The Commission cannot do so.

Complainant has failed to prove by a preponderance of the evidence of record that Respondent failed to comply with the cited standards[2] because evidence which might have

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[1] Title 29 U.S.C. § 652(5).

[2] Cited were 29 C.F.R. § § 1926.105(a), 1926.28(a) and 1926.20(b)(2).

demonstrated such violations cannot be considered by the Commission.[3]

There is no factual dispute as to the way in which the Compliance Officer conducted the inspection. He willfully and knowingly violated the requirements of § § 8(a) and 8(e) of the Act,[4] several OSHA regulations,[5] and instructions contained in the Department of Labor's *Field Operations Manual*[6] in carrying out his inspection. He had routinely done so in the majority of his construction site inspections. The collection of evidence prior to identifying himself or offering an opportunity to participate in the inspection was part and parcel of the compliance officer's usual manner of doing business. It was not a matter of exigent or unforeseen circumstances. In sum, I concluded at the hearing and reiterate here that the OSHA investigation in this case was conducted outside reasonable limits and in an unreasonable manner.

Contrary to the Secretary's theory, because the case presents no Constitutional Fourth Amendment search & seizure issue does not preclude a finding that the search was unreasonable under § 8(a). *Hamilton Fixture*, 16 BNA 1073, 1078 (No.88-1720, 1993) ("*Hamilton*"). The Secretary argues that there can be no suppression of evidence in the absence of a showing of prejudice to Respondent. The argument lacks merit and is rejected. The Commission, in holding in *Hamilton* that a Respondent may prevail on the basis that an inspection was unreasonable under § 8(a), did not require a showing of

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[3] Complainant concedes that the record does not prove the alleged violations. (Sec. Brief, p. 10). His post-hearing brief argues only that the excluded photographs and testimony should have been admitted into evidence and with that evidence included the record would support the alleged violations.

[4] Section 8(a), 29 U.S.C. § 657(a), provides, in part, that the Secretary of Labor may conduct inspections of work places "...within reasonable limits and in a reasonable manner...."

Section 8(e), 29 U.S.C. § 657(e), requires that "...a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany" the inspecting officer.

[5] Title 29 C.F.R. § § 1903.7; 7(a); 8; and 8(a).

[6] Chapter III, D(1)(c) and D(5)(a).

prejudice.[7] Thus, even if a Respondent has to demonstrate prejudice to prevail where the inspection contravened § 8(e), no such showing is required under § 8(a).

The evidence of record fails to show that Respondent failed to comply with the standards as alleged.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent did not fail to comply with the construction standards at 29 C.F.R. § § 1926.105(a), .28(a) or .20(b)(2), as alleged.

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[7] No precedent was cited by Complainant, nor could any be found in which a compliance officer's regular and routine method of inspecting included his or her willful and knowing refusal to follow the requirements of § § 8(a) and 8(e). Such a course of conduct amounts to a finding of lack of good faith and itself renders the investigation unreasonable and fundamentally unfair.

ORDER

1. The citations issued to Respondent on or about March 25, 1993, are VACATED.

MICHAEL H. SCHOENFELD
Judge, OSHRC

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Washington, D.C.