SECRETARY OF LABOR, Complainant, v. CATERPILLAR, INC., Respondent. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, U.A.W. AND ITS LOCAL NO. 145, Authorized Employee Representative.	:	OSHRC Docket No. 87-0922

DECISION

BEFORE: FOULKE, Chairman, WISEMAN and MONTOYA, Commissioners.

BY THE COMMISSION:

At issue is the Secretary's practice of citing separate violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (``the Act'') for each failure to comply with the same standard or regulation. In this case, the Secretary's practice involved substantial separate penalties for each violation, and the characterization of each as willful.[1] This practice has grown out of changes the Secretary made to his enforcement policy in the mid-1980's.[2] We now consider whether:

[1]The Occupational Safety and Health Administration (''OSHA'') of the Department of Labor, originally referred to this practice as its ''egregious willful'' policy.

[2] Until 1983, compliance with section 1904.2(a) and other recordkeeping regulations requiring the recording of injuries, (continued...)

(1) the cited conditions violate the Act; (2) each individual violation may be cited separately; and (3) the violations, if any, are willful. We finally consider what penalties, if any, are appropriate under section 17(j) of the Act, 29 U.S.C. § 666(j).

This case developed out of a lengthy inspection of medical records and OSHA No. 200 forms (``the OSHA 200") at the facility of Caterpillar, Inc. (``Caterpillar"), near Aurora, Illinois. At the close of the inspection, the Secretary issued to Caterpillar a citation alleging that by failing to record 194 occupational injuries and illnesses on its OSHA 200 during 1986, Caterpillar had committed 194 ``egregious willful" violations of 29 C.F.R. § 1904.2(a).[3] The Secretary later withdrew a number of the items, leaving 170 failures to record at issue. He proposed a $4,000 penalty for each alleged violation. After a lengthy hearing, Commission Administrative Law Judge Ramon Child affirmed 167 of the items, characterized each as willful, vacated 3 of them, and assessed a $1,000 penalty for each item.

Former Chairman E. Ross Buckley directed review of the case on the following issues:

> (1) Whether the Secretary established by a preponderance of the evidence, as to each of the 167 items affirmed by the Administrative Law Judge, that the Respondent had failed to record an injury or illness that it was required to record under 29 C.F.R. 1904.2(a);

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[2](...continued)
illnesses, and lost workdays was generally enforced by grouping a number of failures to record as a single violation and proposed a penalty of $100 or less. In 1983, the Secretary began a practice of inspecting injury and illness records before deciding whether to inspect the workplace. OSHA Field Operations Manual (''FOM") Chapter III, section D.4. (April 18, 1983). If the records inspection showed that the lost-workday injury (''LWDI") rate of a workplace exceeded the national average for the industry, a comprehensive inspection was conducted. If the rate fell below the national average, there was no inspection. *Id.* at section D.4.b. In 1986, the Secretary began enforcing the recordkeeping regulations much more aggressively in the belief that some employers were attempting to avoid comprehensive inspections by underreporting occupational injuries and illnesses. He began issuing willful citations and proposing heavy penalties for failures to record a work-related illness or injury, or lost workday, particularly where substantial numbers of failures to record were alleged.

[3] Section 1904.2(a) provides that:

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

(2) Whether the Administrative Law Judge erred in finding the Respondent's failures to properly record injuries or illnesses to have been willful violations of 29 C.F.R. 1904.2(a); and

(3) Whether the Administrative Law Judge erred in assessing separate penalties for each violation of 29 C.F.R. 1904.2(a).

For the reasons that follow, we find that: (1) the Secretary established by a preponderance of the evidence that Respondent failed to record 167 injuries or illnesses as required by section 1904.2(a); (2) the judge erred in characterizing each failure to record as willful; and (3) the judge did not err in assessing separate penalties for each violation. We assess a total penalty of $25,625.00.

I.

WHETHER THE SECRETARY ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE, AS TO EACH OF THE 167 ITEMS AFFIRMED BY THE ADMINISTRATIVE LAW JUDGE, THAT THE RESPONDENT HAD FAILED TO RECORD AN INJURY OR ILLNESS THAT IT WAS REQUIRED TO RECORD UNDER 29 C.F.R. 1904.2(a)

A. BACKGROUND

The citations that the Secretary issued in May 1987 alleged that Caterpillar failed to record injuries and illnesses as required by section 1904.2(a) in six general categories: lacerations, dermatitis and burns, tuft fractures, eye injuries, contusions, and strains and sprains. Caterpillar defends against the citations on two grounds. It claims that section 1904.2(a) is too vague to provide adequate notice of what injuries and illnesses must be recorded and that the attempts by the Secretary to clarify the standard did not succeed. It further claims that it did comply with the regulation. Our resolution of both of these defenses involves consideration of two conflicting approaches to the recording of occupational injuries and illnesses: the way that the Secretary believes they should have been recorded and the way that Caterpillar actually recorded them in 1986.

The Secretary's recording method is based on the cited regulation, section 1904.2(a), which requires employers to ''enter each recordable injury and illness" on the OSHA 200 or an equivalent. A recordable occupational injury is defined in section 1904.12(c) as any occupational injury or illness which results in:

> (1) Fatalities, regardless of the time between the injury and death, or the length of the illness; or
>
> (2) Lost workday cases, other than fatalities, that result in lost workdays; or
>
> (3) Nonfatal cases without lost workdays which result in transfer to another job or termination of employment, or require medical treatment (other than first aid) or involve loss of consciousness or restriction of work or motion. This category also includes any diagnosed occupational illnesses which are reported to the employer but are not classified as fatalities or lost workday cases.

Also defined in section 1904.12, as well as on the back of the OSHA 200, are Medical Treatment and its nonrecordable counterpart, First Aid:

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

According to the Secretary, section 1904.2(a) and the definitions in section 1904.12, particularly the term medical treatment in section 1904.12(c)(3), receive further clarification in various publications of the Bureau of Labor Statistics (''the BLS''). The Secretary relies primarily on a 30-page pamphlet published in 1978, *What Every Employer Needs To Know About Recordkeeping*, (''BLS Report 412-3'')[4]. Its preface provides in part:

> The Bureau of Labor Statistics of the U.S. Department of Labor is charged with the responsibility for the recordkeeping system and reporting requirements under the Occupational Safety and Health Act. This pamphlet provides answers to questions employers most frequently ask about recordkeeping and reporting of occupational injuries and illnesses.

BLS Report 412-3 at 1.

[4] Pursuant to a delegation of authority from the Secretary of Labor, the BLS first issued a version of this pamphlet in 1972. Revisions were published in 1973, 1975, 1978, and 1986. The regulation itself, section 1904.2(a), was issued jointly by the Assistant Secretary for OSHA and the BLS Commissioner in 1972. 37 Fed. Reg. 736 (1972).

BLS Report 412-3 is not referred to in section 1904.2(a) or in the OSHA 200. However, the Secretary considers it to contain enforceable interpretative rules that require recording of all the workplace injuries and illnesses he has cited Caterpillar for failing to record in 1986. In his brief to the Commission, the Secretary describes page 2 of BLS Report 412-3, as containing a ''detailed summary of the Secretary's interpretation of the employer's recordkeeping obligation . . . that mirror[s] the recordability standard of the Act and regulations." He considers the list of recordable medical treatments on page 2 of BLS Report 412-3 to be the final authority for what is recordable.[5]

In 1985, the BLS published a request for comment in the Federal Register. 50 Fed. Reg. 29,102 (1985). In that request he asked for comments on BLS Report 412-3 and on revised guidelines, *Recordkeeping Guidelines for Occupational Injuries and Illnesses*, which the BLS had proposed to the public a year earlier. 49 Fed. Reg. 29,484 (1984). The BLS described BLS Report 412-3 ''as providing" the Secretary of Labor's interpretation of the ''requirements of the OSH Act and regulations," and stated that they are considered supplemental instructions to the recordkeeping forms. 50 Fed. Reg. at 29,133. In 1986, the BLS published *Recordkeeping Guidelines for Occupational Injuries and Illnesses* (''1986 Guidelines''), which ''replace[d] all previous editions of the BLS recordkeeping guidelines.'' *Id.* at p. i.

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[5] Page 2 lists the following treatments and injuries involving ''medical treatments" which ''must be recorded for a workplace injury'':

> Antiseptics applied on a second or subsequent visit to a doctor or nurse.
> Burns of second or third degree.
> Butterfly sutures.
> Compresses, hot or cold, on second or subsequent visit to a doctor or nurse.
> Cutting away dead skin (surgical debridement).
> Diathermy treatment.
> Foreign bodies, removal if embedded in eye.
> Foreign bodies, if removal from wound requires a physician because of depth of embedment, size or shape of object(s) or location of wound.
> Infection, treatment for.
> Prescription medications used.
> Soaking, hot or cold, on second or subsequent visit.
> Sutures(stitches).
> Whirlpool treatment.
> X-ray which is positive.

1. Caterpillar's Procedures for Filling Out the OSHA 200

During 1986, the determination of which injuries and illnesses to record on the OSHA 200 at Caterpillar's Aurora facility was the responsibility of Dr. Matthew Thomas Neu (''Dr. Neu"). Dr. Neu, who is board-certified in occupational safety and health, supervised three nurses during this time. The nurses entered into Caterpillar's records certain information given to them by employees who visited Caterpillar's first aid stations.[6] In addition to eventually instructing the nurses as to which injuries or illnesses to record on the OSHA 200, Dr. Neu was also responsible for developing criteria for the nurses to use in selecting injuries or illnesses for possible inclusion on the OSHA 200. Although he had not been trained in filling out the OSHA 200, shortly after becoming medical director in June 1983, Dr. Neu began formulating the recording criteria that he and Caterpillar ultimately relied on in 1986. Dr. Neu's criteria evolved from a page that is similar in most respects to page 2 of BLS Report 412-3, the page the Secretary views as the final authority of what is recordable. Dr. Neu believed the page was from an OSHA or BLS publication that preceded BLS Report 412-3. He testified that it may have been the criteria Caterpillar followed in filling out the OSHA 200 before he took over that duty. Dr. Neu modified Caterpillar's criteria in a series of memoranda to the nurses who were responsible for entering the injury data. The first of these

[6] Under Caterpillar's procedure, each employee seeking treatment for an injury or illness went to a first-aid station, where the employee's badge number would be typed into a computer by a nurse. This generated a file on the employee to which the nurse added a brief narrative stating the reasons for the visit, the date seen by a physician, and codes for the type of injury and the body part injured. There were 21,000 such visits in 1986. If the nurse considered the injury more serious, she may have generated from the computer a hard copy of the entered information, called a ''Medical Report of Injury." The three nurses who testified did not have a common standard for generating these reports. Nurse Reinboldt would prepare a Medical Report of Injury for any injury that would have to be seen by a doctor, or that involved an X-ray or required sutures. Nurse Cosma testified that if the employee was going to be referred to a doctor, or complained of a back injury, she always generated a report. Nurse Klomhaus generated a Medical Report of Injury if the employee was to have an X-ray, had a back injury, required sutures, needed to see a doctor, or needed to be sent to another facility for treatment.

These Medical Reports of Injury were reviewed by McCuskey, the Aurora Safety Security Manager, to determine whether they were recordable under Caterpillar's internal recordkeeping system and by Dr. Neu to determine whether the injuries or illnesses were recordable on the OSHA Form 200. From the medical reports of injury generated during 1986, Dr. Neu chose to record 144 injuries and illnesses on the OSHA 200. The Secretary alleges that Caterpillar should have recorded 167 additional injuries.

memos, which was dated June 15, 1983, stated that the ''changes are a result of company-wide efforts to record injury cases consistently at every plant.''[7]

Over a two-year period, Dr. Neu made numerous changes to Caterpillar's criteria. The deletions he made during this time are lined out; additions are shown in italics:

> 1) Antiseptics applied on second or subsequent visit to a doctor or nurse. *Not recordable if only for infection purposes.*
>
> 2) Burns of second or third degree. *[R]equires a series of treatments including soaks, use of whirlpools and surgical debridement. Most second or third degree burns require medical treatment.*
>
> 3) Butterfly sutures. *If used instead of surgical sutures.*
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> 4) Diathermy treatment. *If more than one treatment ordered by doctor. Bruises--requires multiple soakings, draining of collected blood, or other extended care beyond observation.*
>
> 5) Compresses, hot or cold, on second or subsequent visit to a doctor ~~*or nurse*~~. *Sprains and Strains--require a series of hot and cold soaks, use of whirlpool, diathermy treatment, or other professional treatment.*
> Recordable only if multiple whirlpool, ultrasound, hydrocollator, cold pack ordered by a doctor. (Emphasis in original)
>
> 6) Foreign bodies, removal if embedded in eye. *Those removed by irrigation or easily by cotton swab are nonrecordable.*
>
> 7) Infection, treatment for. *If antibiotic used for infection--recordable for prevention then nonrecordable.*
>
> 8) Prescription medications used. *Even one dose.*
>
> 9) Whirlpool treatment *ordered by doctor. If more than one treatment.*
>
> 10) Work-related injuries involving restriction of work or motion *if 1 full shift or more*.

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[7] Dr. Neu's first revision of the criteria came less than two months after the Secretary announced the practice of conducting an inspection of injury and illness records before deciding whether to conduct a comprehensive inspection of the workplace. *See*, *supra* note 2.

Dr. Neu further refined Caterpillar's criteria in three other respects. In a 1984 memo he stated that:

> In line with new directives from Safety G.O. (who has had discussion with the Regional OSHA officer) we will record tuft fractures [the tuft bone is at the tip of the finger and toe] and dermatitis only if there is a restriction and transfer to another job for one (1) full shift or more, or if medical treatment by a doctor is ordered.

Dr. Neu testified that he wrote this memo ''to establish equivalency" with recording practices in other Caterpillar plants. He testified that Ralph Allsop (''Allsop"), then assistant corporate safety engineer, was not concerned with ''overrecording" tuft fractures but with establishing the correct criteria for recordability. Dr. Neu testified that he had made the changes because he thought that they were the changes that had been communicated to him from OSHA. Dr. Neu also followed two criteria that he did not write down. he recorded a recurring injury to a body part only if the employee was lifting over 60 pounds of weight. Dr. Neu considered such a lift a ''new event" for recordability purposes. He also did not record injuries that were treated with prescription medication if he later determined that the medication was, in his medical opinion, unnecessary.

In addition to the goal of achieving company-wide consistency in recording, Dr. Neu testified that he had based his changes to Caterpillar's existing criteria on conversations he had with Allsop and McCuskey, the plant's safety security manager. Dr. Neu testified that he had made some of the changes because Allsop told him that OSHA had stated that those types of occurrences were not recordable. Dr. Neu conceded that the ''new event" criteria played no part in recordability decisions before his conversation with Allsop and was not covered in either BLS Report 412-3 or Caterpillar's criteria. Dr. Neu agreed that the criteria were rather rigid but again explained that he ''was trying to make sure that we were . . . recording similar to the other Caterpillar plants." In one of the memos, Dr. Neu stated that the policy change reflected in the memo should cause a significant decrease in recordable cases. At the hearing, he explained that this was not a goal or objective, but a simple statement of what he thought would occur as a result of the change in recording practices. Dr. Neu testified that he had never been instructed to reduce the number of injuries that would be recorded and did not believe that McCuskey or Allsop purposefully sought this result.

2. Caterpillar’s Internal Recordkeeping Guidelines

Dr. Neu's modifications to Caterpillar's then existing criteria derive in part from a document that contains instructions on filling out Caterpillar's Injury Severity Index (''ISI") Recordable Cases form. This document is entitled *Standards For Recording & Reporting Occupational Injuries & Illnesses* (''ISI Guidelines"). This recordkeeping system, which involves ''[a]n objective weighing of each occupational injury or illness based on its nature and its severity," is partially derived from two American National Standards Institute (ANSI) recordkeeping standards, ANSI Z16.1 and ANSI Z16.4. The ISI Guidelines require certain Caterpillar officials to list each recordable injury and assign points from the ISI. Although the format of the ISI Guidelines is somewhat similar to that in BLS Report 412-3, an injury or illness generally requires more extensive treatment for it to be recorded and given a point value under the ISI Guidelines. The ISI Guidelines require that all injuries or illnesses listed on the OSHA 200 be recorded on the ISI Recordable Cases form, but that they be given a point value of zero if they do not meet the ISI recordability criteria.

3. Testimony of Caterpillar's Corporate Safety Engineer

During 1986, the year this citation covers, James C. Busche (''Busche"), Caterpillar's corporate safety engineer, headed Caterpillar's safety program. Busche, who had been with Caterpillar for 17 years, had been corporate safety engineer since December of 1985. He was responsible for coordinating regulatory compliance, including completion of the OSHA 200, as well as for safety and accident prevention programs. At that time, Busche's job involved auditing safety programs, monitoring new OSHA developments and disseminating information to Caterpillar's plants. At the corporate level, he was the only person responsible for distributing information about changes in, and compliance with, recordkeeping requirements. Busche also responded to any question regarding OSHA recordability. Busche testified that although he occasionally audited recordkeeping procedures and made recommendations based on the results of those audits, no one was required to follow his advice.

Busche testified that he first saw BLS Report 412-3 in 1979. He thought that the basic requirement for filling out the OSHA 200 came from the regulation and the OSHA 200 itself, with additional clarification from other sources, including BLS publications. Busche opined that if a particular fact situation was covered by BLS Report 412-3, it should be followed. Busche thought that this had been Caterpillar's position since 1978. He testified that he would use the BLS Report

412-3 as a reference in advising plants on OSHA recording requirements. Busche stated that he never issued instructions on how to fill out the OSHA 200, but that Caterpillar occasionally issued copies of BLS Report 412-3 to its facilities. When they became available in January of 1987, Busche distributed the 1986 Guidelines because he thought Caterpillar's facilities should be aware of the latest ''interpretations'' provided by the BLS.

Busche testified that Caterpillar's own ISI Guidelines, which he described as a management tool to prevent accidents, required each Caterpillar facility to submit a monthly listing of statistical factors to the head office. According to Busche, the ISI was not used to evaluate anyone at the corporate level. But he conceded that it was possible that Caterpillar might look more closely at plants with poor ISI records and might recognize plants or areas with good ISI records were doing a good job. Busche testified that the ISI Guidelines were not intended to be used to determine whether an injury or illness was recordable on the OSHA 200. If the ISI Guidelines were used to determine recordability on the OSHA 200, Busche concluded that it would be an abuse of the intent of the ISI Guidelines, but not a violation of company policy since there was no policy against it. Although Busche was aware that the ISI Guidelines were not intended to meet OSHA requirements, he saw no particular inconsistency between the ISI Guidelines and the material covered in BLS Report 412-3.

B. WHAT IS THE STATUS OF THE BLS REPORT 412-3?

Caterpillar claims that section 1904.2(a) is too vague to support the alleged violations. It argues that BLS Report 412-3, relied on by the Secretary in this case, to cure the vagueness of section 1904.2(a), does not contain regulations and that there is no basis for the mandatory effect the Secretary claims for it.[8] Caterpillar points out that BLS Report 412-3 was published by the BLS,

[8] Caterpillar's arguments may give the impression that if the Commission accords little significance to BLS Report 412-3, then any basis for the 124 violations is eliminated. (Caterpillar admitted that it should have recorded but failed to record 43 of the 167 injuries affirmed as willful by the judge.) This is not the case. The judge found that 41 of the remaining 124 injuries were recordable because they involved lost workdays, restricted work or motion or both. According to section 1904.12(c) and the OSHA 200 form, the presence of either of these two factors makes an injury recordable. There is no need to refer to BLS Report 412-3 to find this out. Nor does Caterpillar claim that the meaning of either of these two factors is unclear, or challenge most of the judge's findings that one of these factors was present in the 41 cases.

an agency with no enforcement authority, and was never published in the Federal Register or described by the Secretary as his ''official interpretation.''

Caterpillar also argues that it did not have actual notice that the contents of BLS Report 412-3 were mandatory requirements and claims that it was free to follow its own ISI Guidelines to fill in the gaps in the regulation. It contends that neither section 1904.2(a), nor the OSHA 200 make any reference to BLS Report 412-3. Caterpillar further argues that neither the 1978 or 1986 BLS publications state explicitly that severe penalties will be imposed if the answers to questions appearing in the text are not strictly followed.[9]

The Secretary argues that this is a situation where his interpretation is entitled to controlling deference by the Commission. He relies on *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984)(''Chevron''), and *Udall v. Tallman*, 380 U.S. 1, 16 (1965), and claims that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. The Secretary further contends that even more deference is owed an agency's interpretation of its own regulations than is owed its interpretation of a statute. He relies on *Roy Bryant Cattle Co. v. United States*, 463 F.2d 418, 420 (5th Cir. 1972) which held that an agency's interpretation is controlling even though it is one of several reasonable interpretations and may not appear as reasonable as some other interpretations. He also relies on *Texas Eastern Products Pipeline Co. v. OSHRC*, 827 F.2d 46 (7th Cir. 1987), a case in which the Seventh Circuit, to which this case is appealable by Caterpillar and the Secretary, deferred to the Secretary's interpretation of a standard because it was reasonable.

The Secretary submits that his interpretations do not have to be published in the Federal Register because they are not the legislative-type rules that require notice and comment rulemaking, but are interpretative rules, *i.e.*, statements of what the administrative officer thinks the recordkeeping regulations mean. The Secretary relies on *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952).

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[9] In support of its vagueness argument, Caterpillar points to testimony by OSHA officials that its claims suggest a number of areas in which the vagueness of section 1904.2(a) entitles employers to make good faith judgments as to what was recordable. However, as the Deputy Assistant Secretary for OSHA, Frank A. White testified, these concessions to recordability judgments made in good faith generally assume that ''the employer has knowledge of and purports to apply the . . . [BLS] guidelines. . . .'' Caterpillar does not argue that it was attempting to comply with BLS Report 412-3.

1. Judge's Decision

In his decision, Judge Child found that the guidance provided in BLS Report 412-3 were interpretations of the Secretary's own regulations which merited deference and should be followed by employers because they are reasonable and consistent with the Act. The judge relied primarily on *Chevron* and *Texas Eastern*. The judge found that it was ''clear that . . . [Caterpillar] was aware of and had possession of" BLS Report 412-3. He further found that ''Busche not only had knowledge of the recordkeeping regulations, but also of the contents and significance of [the Secretary's]official interpretations of the recordkeeping regulation set forth in the BLS Guidelines." The judge described the material in BLS Report 412-3 as the Secretary's official interpretation of the recordkeeping regulations based on language in the 1985 request for comment. He stated that the significance of BLS Report 412-3 and the authority of the BLS to interpret the recordkeeping regulations was made clear from the preface to BLS Report 412-3 and the cover of the 1986 Guidelines, which stated that ''[t]his booklet contains guidelines . . . necessary to fulfill your recordkeeping obligation under the . . . Act.''

2. Analysis

Caterpillar is arguing that, based on the mandatory effect that the Secretary claims for his interpretations contained in BLS Report 412-3, particularly the definition of the term medical treatment, it should have been promulgated pursuant to the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. § 553(a)(1) (``the APA"). The Secretary contends, however, that the material contained in BLS Report 412-3 falls within the interpretive rules exception to the APA's notice and comment requirements in 5 U.S.C. § 553(b)(A) because it is what the agency administrator thinks the term medical treatment means.

Caterpillar's first claim, that the Secretary should have gone through notice and comment rulemaking in issuing the BLS Report 412-3, is premised on what Caterpillar claims is the mandatory effect of this purported interpretation. Although the Secretary claims that the guidance in BLS Report 412-3 is entitled to controlling deference, Caterpillar argues that the duty to record occupational injuries and illnesses flows from section 8(c) of the Act and from section 1904.2(a). Thus, Caterpillar argues, BLS Report 412-3 imposes no mandatory requirement. We agree. Had the 1978 version of BLS Report 412-3 been issued pursuant to the notice and comment procedures

of the APA, it would have the force and effect of law. Since the Report was clearly not issued in this manner, it is not entitled to the same deference as norms that derive from the Secretary's lawmaking powers. *Martin v. OSHRC (CF & I Steel Corp.*), 111 S.Ct. 1171, 1179 (1991)(''*CF & I Steel*'').

As we noted in *Simpson, Gumpertz & Heger, Inc.*, 15 BNA OSHC 1851, 1862, 1992 CCH OSHD ¶ 29,828, pp. 40,675-76 (No. 89-1300, 1992), *petition for review filed*, No. 92-2237 (1st Cir. Oct. 23, 1992) in evaluating arguments like those made here, there are two lines of authority. One approach determines what the rule really does. It requires a rule substantively affecting a legal right to have been promulgated by notice-and-comment rulemaking or be declared invalid. The other approach involves taking the agency at its word, accepting the characterization of the rule, but then deciding what weight to assign it.

In our view, the definition of ``medical treatment" in BLS Report 412-3 is not an agency action requiring notice and comment rulemaking under either approach.[10] In this 1978 report, the BLS, the agency to which the Secretary delegated recordkeeping responsibilities under the Act, provided its view of how the recording requirements of section 1904.2(a) apply in certain factual situations. The report includes a list of the kinds of treatment that the BLS believed constituted medical treatment consistent with the distinction drawn in section 1904.12(c), (d), and (e) between nonrecordable first aid and recordable medical treatment. The weight given such an interpretation by the Commission depends on the thoroughness evident in its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements, *i.e.*, its power to persuade rather than to control. *Simpson, Gumpertz.* Taking into consideration the circumstances presented here, we conclude that the Secretary's interpretation of what constitutes medical treatment in BLS Report 412-3 is a reasonable interpretation of the regulation, which is grounded in the language of the regulation. *See American Hospital Assn. v. Bowen*, 640 F. Supp. 453, 456 (D.D.C. 1986). It deserves appropriate weight.

In addition to its problems with the Secretary's failure to promulgate BLS Report 412-3 through notice and comment rulemaking, Caterpillar claims that in order to cure the vagueness of

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[10] Both BLS Report 412-3 and the 1986 Guidelines purport to be interpretative guidelines. Webster's New World Dictionary 621 (2d College ed. 1972) edition defines ''guidelines" as ''a standard or principle by which to make a judgment or determine a policy or course of action." Using this definition, a guideline is not a rule but instead is a method to achieve a desirable uniformity in the application of a regulation.

section 1904.2(a), it could have looked to its own ISI Guidelines rather than BLS Report 412-3. It further claims that it lacked notice that the answers to questions in BLS Report 412-3 were mandatory recording requirements. We reject both arguments.

According to Busche, Caterpillar's corporate safety engineer, Caterpillar's ISI Guidelines were not intended to be used to determine what should be recorded on the OSHA 200 log. Nor is there any evidence that Caterpillar made an attempt, in good faith or otherwise, to fill the gaps in section 1904.2(a) by following the ISI Guidelines. Instead, it appears that Dr. Neu was largely left alone to determine what was recordable on the OSHA 200, and after some communication with Caterpillar personnel and acquaintance with the ISI Guidelines, he started to follow the ISI Guidelines rather than the previous Caterpillar criteria that he was given. As Caterpillar pointed out in its reply brief, over time plant recordkeepers tended to follow these Caterpillar ISI Guidelines in resolving questions of application. What we are left with then, is the interpretation in BLS Report 412-3 of the term medical treatment in section 1904.12(d), which had remained unchanged since at least 1978 and was issued by one of the two agencies that issued that regulation. *See supra* n.4. In contrast, Caterpillar relies on its internal ISI Guidelines that were not intended to govern entries on the OSHA 200, which Caterpillar's recordkeepers, including Dr. Neu, fell into the habit of following in filling out the OSHA 200. Clearly, Caterpillar has advanced no plausible basis why it should be allowed to rely on its ISI Guidelines as a means of complying with section 1904.2(a).

We also find no merit in Caterpillar's contention that it was not aware of the mandatory nature of the contents of BLS Report 412-3. We again emphasize that BLS Report 412-3's contents are not legislative rules having the force and effect of law. We do, however, accord the contents great weight in determining which injuries cited by the Secretary are required to be recorded on the OSHA 200. We believe that taken as a whole, the cited regulation, the definitions accompanying the regulation, the OSHA 200, and the copromulgating agency's view of what the regulation means embodied in BLS Report 412-3, provide a fair and reasonable warning of what injuries and illnesses must be recorded on the OSHA 200. *Gibson Wine*, 194 F.2d at 331. Caterpillar, whose safety director testified that since 1978 it had been Caterpillar's practice to follow the guidance in BLS Report 412-3, has not provided us with any basis to conclude that it lacked such a warning of section 1904.2(a)'s requirements.

If Caterpillar, as it claims, felt that it needed to fill the gaps in a vague regulation, it could have asked OSHA what criteria it should apply. *Corbesco, Inc. v. Secretary of Labor*, 926 F.2d 422, 428 (5th Cir. 1991); *Fluor Constructors, Inc. v. OSHRC*, 861 F.2d 936, 941-42 (6th Cir. 1988); *Texas Eastern*. The preface to BLS Report 412-3 states that ''[f]or questions not covered in this publication, employers may contact the Bureau of Labor Statistics' Regional Offices serving their areas.''

The argument that few copies of the 1986 Guidelines were circulated and that, despite strenuous efforts, a copy of the 1986 Guidelines was not received by Caterpillar until 1987, might have some merit if the Secretary were relying on the 1986 Guidelines. However, the Secretary relies on BLS Report 412-3. The 1986 Guidelines are referred to only insofar as they are consistent with BLS Report 412-3. The 100,000 copies of the 1986 Guidelines that were printed would clearly not be enough for every employer, but Caterpillar has never claimed that it lacked a copy of BLS Report 412-3.[11]

Caterpillar is arguably correct that it cannot be charged with knowledge that the Secretary's official interpretation of section 1904.2(a) was contained in BLS Report 412-3 because of a statement in the 1985 request for comment. We conclude that to expect employers to heed one sentence buried in 30 pages of an interim rulemaking document is unreasonable and hardly consistent with fair notice.[12] The statement on the cover of the 1986 Guidelines, which Caterpillar

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[11] We do not reach the issue of whether an employer who did not have a copy of the BLS publications still would be required to follow them. We note, however, that a lack of knowledge of BLS Report 412-3 or the 1986 Guidelines does not, by itself, permit an employer to skirt its recordkeeping responsibilities. The language of the regulation, the definitions in section 1904.12, and the instructions on the OSHA 200 itself provide sufficient information to answer most questions about what is recordable on the OSHA 200. We also note that the Secretary appears to have anticipated such gaps in employer awareness of the Guidelines. In the FOM, the Secretary has indicated that ''[i]f the employer has not received a copy of the ['Recordkeeping Requirements"] booklet and did not have knowledge, [of the requirements], citations without proposed penalties will be issued." FOM, Ch. VI A.8.a.(1), reprinted in text of Manual Reissued by OSHA, *supra*, note 2, at VI-14.

[12] Caterpillar argues that if it is found to have had knowledge of the mandatory nature of the 1986 Guidelines because of the official interpretation language in the 1985 request for comment, then the Secretary ''must accept all of what was in the notice, including the pre-citation procedure." The pre-citation procedure proposed in the 1985 request for comment but not adopted in the 1986 Guidelines outlined a different process for resolving failures to record than the process now in place. Caterpillar claims that the citations should be dismissed because the citation in this case was not handled according to that different process.

(continued...)

did not receive until 1987, can hardly have provided notice to Caterpillar in 1986. The consequences of these dubious efforts at providing notice of the effect of the 1986 Guidelines would be much greater if Caterpillar were unaware of the regulation and BLS Report 412-3, but Caterpillar was not. Its corporate safety engineer testified that Caterpillar had been using BLS Report 412-3 to answer OSHA 200 recording questions since 1978.

We also fail to discern any merit in the claim that the failure of both BLS Report 412-3 and the 1986 Guidelines to state explicitly that heavy penalties could result from failures to comply with section 1904.2(a) could somehow render defective the interpretations of that regulation provided by these BLS publications. The OSH Act provides for substantial penalties for failures to comply with the standards and regulations promulgated under it. Caterpillar has not contended that it was unaware of this.

II.

DID CATERPILLAR COMPLY WITH SECTION 1904.2(a)?

A. Preliminary Arguments

In contending that it did comply with BLS Report 412-3, Caterpillar makes the preliminary argument that OSHA has conceded that Caterpillar's ISI Guidelines are equivalent to the guidelines in BLS Report 412-3. It relies on a statement by the area director in the North Aurora, Illinois OSHA office that if Caterpillar had been in compliance with its own internal policies, it would have been in compliance with OSHA requirements in most, if not all, cases. Caterpillar further relies on an OSHA briefing paper sent from OSHA's North Aurora area office to the Deputy Secretary shortly before the citation was issued in May of 1987. According to that document, in determining recordability Dr. Neu used the 1986 Guidelines ''supplemented by" Caterpillar's ISI Guidelines. The

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[12](...continued)

Although we need not address the question of whether Caterpillar received notice from the 1985 request for comment in the Federal Register that BLS Report 412-3 was the Secretary's official interpretation, the filing of a document for publication in the Federal Register is sufficient to give notice of the contents of the document to a person subject to or affected by it. 44 U.S.C. § 1507. *See Phoenix Forging Co.*, 12 BNA OSHC 1317, 1322 n.12, 1984-85 CCH OSHD ¶ 27,256, p. 35,214 n.12 (No. 82-398, 1985). Caterpillar's claim that it is entitled to the benefits of a procedure that was merely proposed in the request for comment is without merit.

document also stated that Caterpillar's ''guidelines were compared to OSHA/BLS regulations and were found to be essentially the same.''

Close scrutiny of the documents and statements on which Caterpillar relies indicates that they provide no support for Caterpillar's claim of equivalency. Keeping in mind that Caterpillar is charged with failing to record injuries and illnesses that occurred during 1986, we note that although Dr. Neu may have been using the 1986 Guidelines in 1987, during the inspection of Caterpillar's 1986 injury records, he could not have used the 1986 Guidelines in 1986 because Busche, Caterpillar's corporate safety director, did not distribute them to Caterpillar's plants until January of 1987. Although there are similarities in the recordability criteria of BLS Report 412-3, the 1986 Guidelines, and Caterpillar's ISI Guidelines, they are by no means identical. Most importantly, Dr. Neu's testimony establishes that the recording criteria followed at the Aurora plant during 1986 were based on the series of memoranda that he gave the nurses in 1983 and 1984 as well as on certain other unwritten criteria. These criteria differ greatly from BLS Report 412-3. Further, since the area director's statement and the opinion in the briefing paper occurred after 1986, Caterpillar could not have relied on either when it made recording decisions in 1986.

We next turn to Caterpillar's argument that it was in compliance with the Secretary's interpretation of section 1904.2(a) as set forth in BLS Report 412-3. We consider Caterpillar's arguments as they relate to each type of injury.

B.

1. Lacerations

The Secretary alleges that twenty laceration injuries should have been recorded because butterfly sutures were used to treat the injuries. These lacerations ranged from .75 to 4 cm. in length. In addition to the application of butterfly sutures, these cuts received an average of seven wound care visits. (Items 1-12, 14, 15, 21-25.). According to page 2 of BLS Report 412-3, the use of butterfly sutures is considered recordable medical treatment. The 1986 Guidelines, which became effective

in April 1986,[13] modified this requirement to make a wound recordable if butterfly sutures were used in lieu of surgical sutures.

In his first memorandum to the nurses, Dr. Neu modified his version of page 2 of the BLS Report 412-3, which required the recording of injuries treated with butterfly sutures, by adding the phrase ''[i]f used in lieu of surgical sutures." Caterpillar's three nurses testified that, based on this memorandum, they issued a Medical Report of Injury, *see supra* n.6, or recorded a laceration on the OSHA 200 only when the injury would have required sutures if a steri-strip had not been applied. However, the nurses testified that they applied steri-strips when sutures were not required because they stayed on better than other small bandages and gave the worker a sense of security. The nurses stated that they sent patients to a doctor if sutures were required. Dr. Neu testified that when he reviewed the Medical Reports of Injury he decided not to record some lacerations because the nurses had entered the incorrect codes for surgical or cosmetic suturing when no sutures were applied.

The judge found that the injuries were recordable because they were treated with butterfly sutures. He found that Dr. Neu did not record the injuries because he assumed butterfly sutures were used in lieu of small bandages despite his written directions to nurses that injuries treated with butterfly sutures were recordable when used in lieu of surgical sutures.

Caterpillar claims that the judge erred in finding that its failure to record non-sutured laceration-type injuries violated the regulation. It claims that it used butterfly sutures for minor cuts that could have been treated with small bandages, not to treat wounds that needed surgical suturing. Caterpillar relies on the provisions of its own ISI Guidelines and the 1986 Guidelines. Under both of these Guidelines the use of butterfly sutures is medical treatment only if the sutures are used in lieu of surgical sutures.

As we have found, Caterpillar had fair notice of the Secretary's reasonable interpretation that lacerations severe enough to be treated with butterfly sutures were recordable under section 1904.2(a) because they involved ''medical treatment" as defined in section 1904.12(d), rather than

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[13] Craig Henderson, an industrial hygienist for OSHA, testified that as a result of this change in policy, OSHA did not cite Caterpillar for failing to record injuries treated with butterfly sutures that occurred after April 1986, unless there was other evidence of the seriousness of the injury, including the number of visits made by the employee for wound care and the use of preventative medicine. Henderson testified that OSHA deferred the ultimate decision on whether to cite for lacerations that occurred after April 1, 1986 to the BLS, the author of the guidelines. Caterpillar's own ISI Guidelines provide that ''closures used in lieu of sutures are recordable.''

''first aid" as defined in section 1904.12(e). Nevertheless, Caterpillar chose not to record the injuries cited here because it decided that lacerations treated with butterfly sutures were severe enough to require recording only if the butterfly sutures were used in lieu of surgical sutures. Although this view was subsequently incorporated in the 1986 Guidelines, there is no basis for our finding that Caterpillar was not required to record lacerations treated with butterfly sutures that occurred before April 1, 1986. For lacerations occurring after April 1, 1986, we do not consider the use of butterfly sutures the sole index of recordability. Moreover, the evidence demonstrates that the lacerations that occurred after April 1, 1986, as well as those occurring in the preceding three months, involved on the average more than seven visits for wound care. Caterpillar contends that the number of times an employee returned for treatment is not related to the seriousness of the injury. However, we find that the use of butterfly sutures before April 1, 1986 and the extensive number of wound care visits needed to treat the cited lacerations, both those that occurred before and after April 1, 1986, establish that these twenty injuries received medical treatment and were recordable under section 1904.2(a).

2. Tuft Fractures

Tuft fractures are fractures of the bone at the tip of the finger or toe. The Secretary alleges that Caterpillar failed to record 10 tuft fractures. (Items 32-41). (Caterpillar concedes that it should have recorded 2 tuft fractures.) The judge found that Caterpillar should have recorded the fractures because they yielded a positive X-ray, which page 2 of BLS Report 412-3 lists as involving recordable medical treatment. In some cases, the judge found additional reasons for recording the injuries. The judge also found that Caterpillar did not record the tuft fractures because of its policy of not recording such fractures unless the injury involved a work restriction or medical treatment performed by a doctor rather than by a nurse.

Caterpillar contends that the judge's finding that tuft fractures are recordable because they involve positive X-rays is contrary to logic. Although it concedes that BLS Report 412-3 lists positive X-rays as involving medical treatment, Caterpillar points to Question and Answer (''Q and A'')56 in BLS Report 412-3, which states that diagnostic X-rays are not medical treatment. Caterpillar contends that this is more logical since an X-ray is not medical treatment.

Although diagnostic X-rays do not by themselves demonstrate that an injury has received medical treatment, an X-ray that discloses a fracture establishes that an injury requiring medical

treatment has occurred. Caterpillar's difficulties with the alleged illogical approach of the judge are not credible. Page 2 of BLS Report 412-3 is quite clear on this point. If an X-ray is positive, the injury is recordable. If an X-ray is negative, it is not recordable unless some other criterion is met. Q and A 56 states that giving an employee a diagnostic X-ray does not make an injury or illness recordable. This is not inconsistent with page 2 of BLS Report 412-3, which explains that it is the evidence of the fracture disclosed by the X-ray that makes an X-ray recordable. The 1986 Guidelines do not suggest a contrary result. In the 1986 Guidelines, the summary of injuries and treatments that are generally considered medical treatment and ''are almost always recordable" includes ''POSITIVE X-RAY DIAGNOSIS (fractures, broken bones, etc.)." Q and A F-7 in the 1986 Guidelines, which Caterpillar also relies on, suggests that injuries resulting in fractures, including a hairline fracture that does not require treatment or interfere with an employee's work activities, ''should be recorded because they are not minor in nature and ordinarily require medical treatment and involve restrictions on work or motion.''

The evidence suggests that tuft fractures are at the margins of what is considered a fracture. However, based on Caterpillar's efforts to determine whether its employees suffered tuft fractures and the treatment it gave them, we conclude that the tuft fractures cited here should have been recorded on the OSHA 200.

3. Eye Injuries

The Secretary alleged that Caterpillar failed to record five eye injuries. (Items 42-46). Caterpillar contends that the judge erred in finding violations for its failure to record two injuries, Items 43 and 45, in which foreign bodies were removed from the eye, but a surgical instrument was not used for the removal.

In two cases, employees injured during welding had objects removed from their eyes by nurses using cotton swabs. BLS Report 412-3 states that if foreign bodies are embedded in the eye, their removal involves medical treatment and must be recorded. If the foreign body is removable by irrigation, the removal is considered first-aid treatment and is not recordable. There is no requirement in BLS Report 412-3 that surgical instruments must be used for removal of an object from the eye before the event is recordable. BLS Report 412-3 does require recording of the removal of a foreign body from a wound (apparently other than an eye wound),''if removal . . . requires a

physician because of depth of embedment, size or shape of objects, or location of wound." However, under page 2 of BLS Report 412-3, it is the embedding of the object in the eye that makes the removal recordable, not who performs the removal. The record clearly establishes that these five injuries are recordable under BLS Report 412-3. They involve removal of a foreign body, use of a prescription drug, treatment with hot or cold compresses, and work restriction. Even if BLS Report 412-3 played no part in our consideration of whether these eye injuries are medical treatment, the injuries would still be recordable. They involve the eye and required treatment that went beyond first aid.

4. Burns

The Secretary alleged that Caterpillar failed to record 4 burns suffered by its employees. (Items 47-50). The burns were relatively small second degree burns. Page 2 of BLS Report 412-3 directs that burns of second or third degree involve medical treatment and are recordable. The judge also found the injuries to be recordable for these reasons. Caterpillar claims that the judge erred in affirming violations for its failure to record what it describes as borderline first and second degree burns. Caterpillar claims that its policy of not recording such burns is not contrary to BLS Report 412-3, unless a burn is regarded as treatment, which is contrary to common sense.

Caterpillar'sfailure to record first and second degree burns in two instances is consistent with Dr. Neu's application of his own medical treatment test and Caterpillar's claim that those factors listed in BLS Report 412-3 as involving medical treatment are not all descriptions of medical treatment. However, BLS Report 412-3 states quite clearly that ''Burns of second or third degree" are considered to involve medical treatment. In his June 13, 1983 memorandum, Dr. Neu modified that simple statement by also requiring that a burn receive a *series* of treatments, including soaks, use of whirlpools and surgical debridement before it would be recordable. This has the effect of requiring the presence of four of the fourteen factors listed on page 2 of BLS Report 412-3 before Caterpillar would consider a burn to have received recordable medical treatment. Based on the descriptions of the burns cited here and the treatment they were given, we conclude that they should have been recorded on the OSHA 200.

5. Contusions

The Secretary alleged that Caterpillar failed to record thirty-four contusions, three lacerations, one abrasion, and one avulsion suffered by its employees. (Items 5, 13, 16, 18-20, 51-82, 121). Dr. Neu described a contusion as a blow to any part of the body that generally results in a swelling or bruise. Caterpillar admitted in its answer that twelve of these injuries ''met the criteria for recordability, but alleges that its failure to record . . . resulted from 'non-willful administrative oversight.'" Judge Child found that Caterpillar should have recorded thirty-eight out of the thirty-nine injuries. He found the injuries recordable because ''[c]ompresses, hot or cold [were administered] on [a] second or subsequent visit to a doctor or nurse." BLS Report 412-3, p. 2. The judge also found that these injuries should have been recorded because Dr. Neu's toleration, encouragement, and acceptance of the type of care the nurses gave amounted to a standing order that such care continue, and therefore that the care given by the nurses was recordable medical treatment within the meaning of section 1904.12(d).[14]

Caterpillar contends that an injury is not recordable just because it is treated with two or more treatments with hot or cold compresses. It argues that the statement on page 2 of BLS Report 412-3 that injuries are recordable if they require multiple compresses and soaking, as well as diathermy and whirlpool treatments, is ambiguous. It claims that the term ''medical" implies that such therapy must be directed by a physician. Caterpillar also relies on Q & A 56 in BLS Report 412-3 at 11-12, which states:

> 56. Q. By themselves, are the following considered ''medical treatment" or ''first aid?''
>
> 1. Microthermy treatments if offered only minimum times.
> 2. Two heat treatments or more.
> 3. Prescriptions, when no other form of treatment is offered.
> 4. Whirlpool treatments.
> 5. Second visit for observation of small puncture.
> 6. Nonprescription medication for pain.

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[14] Section 1904.12(d) states that:

> (d) ''Medical Treatment" includes treatment administered by a physician or by registered professional personnel under the standing orders of a physician. Medical treatment does not include first-aid treatment even though provided by a physician or registered professional personnel.

> 7. Simple removal of foreign body from eye with no complications.
>
> A. Because BLS is committed to simple definitions interpreted by the employer, generalizations cannot be made which could be used in a variety of circumstances. As with tetanus shots and diagnostic X-rays, these procedures may not be the only criteria for recordability and are covered under Guidelines for Determining Recordability [page 2] earlier in this report. Medical treatment is only one criterion for determining recordability. An injury which required only first-aid treatment but involved loss of consciousness, restriction of work or motion, or transfer to another job is recordable.

The language of Q and A 56 is not clear, but we conclude that it does not dilute the force of page 2 of BLS Report 412-3, as Caterpillar suggests. Q 56 can be read to suggest that some of the criteria of recordability on page 2 of BLS Report 412-3 are not absolute. A 56 responds to this by: 1) cautioning against generalizations; 2) noting that the medical/first-aid treatments mentioned in Q 56 may not be the only factors to consider in deciding whether to record an injury; and 3) giving the example of an injury that required only unrecordable first-aid treatment, but involved loss of consciousness which is recordable. The thrust of Q and A 56 is difficult to judge, but it ultimately refers the employer to page 2 of BLS Report 412-3.

Caterpillar claims that it sought to maintain compliance and consistency by recording only when two or more treatments were ordered by a doctor. It claims that what is medical treatment is for a doctor to determine. At oral argument, Caterpillar expressed strong disagreement with the judge's finding that Dr. Neu's acceptance and encouragement of the type of care given by the nurses amounted to ''standing orders'' within the meaning of section 1904.12(d). Caterpillar claimed that if a nurse sees a patient and adopts certain therapies or conducts medical treatment within the meaning of the regulation, the nurse is not necessarily working pursuant to ''standing orders.''

Caterpillar's objections to Judge Child's discussion of ''standing orders'' lack merit. We first note that the judge did not suggest that a nurse is dispensing medical treatment within the meaning of section 1904.12(d) when the nurse is acting on her own. The judge interpreted standing orders ''to cover orders of a physician to nurses working in a first-aid station under his supervision and direction.'' He found that Dr. Neu's acceptance and toleration of certain types of treatment as appropriate for certain types of injury or illness became, in effect, a standing order that such care continue. He noted that under BLS Report 412-3, medical treatment given by Dr. Neu remained

medical treatment for purposes of compliance with section 1904.2(a), if it was routinely given by one of the nurses with the knowledge or acquiescence of Dr. Neu.

Caterpillar's restrictive reading of section 1904.2(a) conflicts with the realities of its own workplace. The record establishes that the nurses at Caterpillar routinely treated, with hot or cold compresses, contusions exactly like those Caterpillar was cited for failing to record. Caterpillar has provided no basis for us to conclude that Dr. Neu's toleration of this treatment does not amount to a standing order. Caterpillar's contention that medical treatment can only be administered by a doctor finds no support in the regulations or BLS Report 412-3. Page 2 of BLS Report 412-3 describes conditions and treatments that ''are considered to involve medical treatment and must be recorded for a work-related injury." For some of those treatments, administration by a doctor or nurse makes the treatment recordable under BLS Report 412-3. For example, when an injury is treated with hot or cold compresses or soakings on a second or subsequent visit to a doctor or nurse, it is the involvement of the doctor or nurse in the treatment that indicates the injury is recordable. Caterpillar's policy of recording an injury only if a *doctor* ordered two or more treatments finds no support in BLS Report 412-3. The ''doctor or nurse" language cannot be read as ''doctor." Nor can the ''physician" or ''registered professional personnel" language in section 1904.12(d) be read only as ''physician.''

6. Sprains and Strains

The Secretary alleges that Caterpillar should have recorded eighty-eight sprains and strains received by its employees. (Items 82-119, 120-170) Dr. Neu described a strain as a muscular injury and a sprain as an injury to a ligament that stabilizes a joint. Caterpillar conceded that it should have recorded twenty-eight of the eighty-eight sprains and strains. The judge found fifty-nine of the remaining sixty injuries recordable, either because the injury involved a lost workday or work restriction or because the treatment received was listed as involving medical treatment on page 2 of BLS Report 412-3.

Caterpillar claims that it did not record the majority of sprains and strains because the injuries were symptoms of earlier injuries and there was no evidence to suggest that the questioned injuries were caused by any slip, trip, fall, or overexertion. Caterpillar relies on Q and A 2 of BLS Report 412-3 which states that:

> If the latest period of disability resulted from an incident, such as a slip, trip, fall, or blow to the back, the case should be recorded as a new injury on [the next] year's log. If there was no such incident, there was no new injury and no new entry should be made. The number of lost workdays should be added to any lost workdays shown on last year's log when the injury was originally recorded.

BLS Report 412-3 at 6.

Caterpillar points out that there are no special requirements for back and hernia cases, relying on Q & A 12 & 63 of *BLS Report 412-3*. It suggests that the testimony given by OSHA's officials that there must be an incident before a duty to report is triggered is consistent with criteria it adopted in order to determine whether such an event occurred. Caterpillar also points to the 1986 Guidelines, which, it claims, repeatedly refer to the need for a slip trip, fall or blow to the back to justify recording injuries where the employee had a preexisting problem.

The judge did not address Caterpillar's overall argument that it was not required to record injuries that were merely symptoms of earlier injuries, nor did he consider the claim as it applied to individual injuries.

The record evidence suggests that Caterpillar's practice of not recording injuries to previously injured body parts was not consistent with BLS Report 412-3. Relying on Q and A 2 of BLS Report 412-3, Caterpillar claims that it is not required to record when the evidence does not show that the injury to a previously injured body part is the result of a slip trip, etc. The evidence, particularly Dr. Neu's testimony, suggests that Caterpillar practiced a far more restrictive approach. Dr. Neu presumed that a new symptom involving a body part that had been injured in the past was not recordable unless the strain or sprain was received when overexerting, and he decided that overexerting involved lifting more than 60 pounds. However, Dr. Neu generally made little or no inquiry into how long ago the previous injury occurred, and he *always* assumed the present complaint to be a symptom of the earlier condition. Q and A 1 of BLS Report 412-3, which Caterpillar does not discuss, suggests a different approach to pre-existing injuries:

> 1. Q. What are the reporting requirements of pre-existing physical deficiencies so far as the OSH Act is concerned?
>
> A. None. However, each case which involves aggravation of pre-existing physical deficiency must be examined to determine whether or not the employee's work was a contributing factor. If a work accident or exposure in the work

> environment contributed to the aggravation, the case is work related. It must be recorded if it meets the other requirements of recordability.

Q and A 1 looks to whether the employee's work was a contributing factor, not whether there was overexertion with 60 pounds or more. It provides a perspective from which Caterpillar's recording practice appears to be flawed.

Contrary to Caterpillar's claims, Dr. Neu's restrictive practice receives no particular support from the Secretary's witnesses or from the 1986 Guidelines. Henderson, an industrial hygienist for OSHA, testified that a previous injury to the same body part and evidence of an event are legitimate factors to consider when making a recordability decision. Deputy Assistant Secretary Frank White testified that if no causal connection were shown between the work environment and the injury or aggravation of that injury, then there would be no violation for not recording. The 1986 Guidelines, which, as has been noted earlier, Caterpillar was not cited for violating, states that ''[e]mployers should record each case resulting from a new event . . . and each exposure that results in a recordable work injury or illness regardless of the employee's preexisting condition.'' 1986 Guidelines at 31. The 1986 Guidelines also note that:

> [u]sually, there will be an identifiable event or exposure to which the employer or employee can attribute the injury or illness. However, this is not necessary for recordkeeping purposes. If it seems likely that an event or exposure in the work environment either caused or contributed to the case, the case is recordable, even though the exact time or location of the particular event cannot be identified.

(*Id.* at 32).

The evidence regarding these injuries demonstrates that by failing to record them on the OSHA 200, Caterpillar failed to comply with section 1904.2(a). Caterpillar turned a reasonable concern about injuries that might be recurrences of previous injuries into a presumption against recording any injury that had a predecessor, however remote or dissimilar. Dr. Neu's ''60-pound test,''which was at the heart of Caterpillar's failure to record strain and sprain injuries, was merely a variant on this approach. Caterpillar also failed to record strains and sprains suffered by its employees because the treatment, generally hot or cold compresses, was not ordered by a doctor. As noted earlier, Caterpillar's decision not to record certain injuries because they were not treated by a doctor finds no support in either BLS Report 412-3 or in section 1904.12.

7. Injuries Caterpillar Considered Not Work-Related

The Secretary alleged that Caterpillar did not record ten otherwise recordable injuries because it did not find the employee's explanation of how the injury occurred to be credible. (Items 96, 107, 116, 124, 147, 149, 151, 153, 161, 162) BLS Report 412-3 suggests that doubtful cases should be presumed recordable. It advises employers to be prepared to defend decisions not to record and ''to record a doubtful case on the OSHA No. 200, and if it is later determined not to be work related, line it out." Q and A 6, *BLS Report 412-3* at p. 6. It is difficult to evaluate Dr. Neu's determinations that certain employees were not credible. However, although we would not challenge the proposition that some employee injuries do not have an occupational origin, the cited injuries have all the earmarks of occupational origin. Moreover, at the very least, these injuries and illnesses appear to fall into the ''doubtful cases category." According to BLS Report 412-3, such cases should be recorded and lined out later if they are determined not to be work related. Here, Caterpillar relied entirely on the judgment of Dr. Neu as to the credibility of the employees. It did not record doubtful cases with a view to determine whether the injury was work- related, but decided on the spot that the injury or illness was not recordable. A summary of these injuries and the treatments given is as follows:

96. ELAM -- Employee Elam was eventually diagnosed as suffering from carpal tunnel syndrome. He lost a workday and had to wear a hand brace. He was also given thirty tylenol 3, motrin 600 for ten days, and naprosyn 375 for two weeks.

107. MARES -- Employee Mares suffered a sprain. He lost a workday and was given motrin 400, and numerous ice treatments over several weeks.

116. REINER -- Employee Reiner strained his back while operating a radial drill. He lost a workday and had his work activity restricted for two weeks.

124. STEMEN -- After suffering a back strain, employee Stemen made ten visits for treatments with ice, heat, and whirlpool. She was also given naprosyn 250 for four days and had her work activity restricted.

147. WARD -- After experiencing numbness in his hands, employee Ward lost one workday, had his work activity restricted, wore a wrist brace, was given seventy-six motrin 600, and eventually required surgery for carpal tunnel disorder.

149. FIGUEROA -- Employee Figueroa experienced sharp pains in his shoulder three days after beginning a new job. He lost one workday, had his work activity restricted, received two weeks of physical therapy, and was given tylenol 3 with codeine and naprosyn 375 and 500.

151. MANTZKE -- After experiencing an ache/numbness in his back and legs, employee Mantzke had his work activity restricted, lost a workday, and was given fourteen naprosyn 500 and ten tylenol 3 as well as heat and ice treatments.

153. BREESE -- Breese was given motrin for pain in his shoulder that he attributed to throwing a wooden block the day before he reported it to the nurses.

161. FISCHER -- After complaining of weakness and pain in his arm from the continuous lifting of 20-pound parts, employee Fischer was given naprosyn 500 and had his work activity restricted.

162. BRANDON -- After he experienced a stabbing pain in his left elbow while pulling a bar, employee Brandon lost workdays, had his work activity restricted, and was given flexible support for his elbow.

Based on the evidence in the record, we find that Caterpillar should have recorded these 10 injuries on the OSHA 200.

8. Prescription Medication

The judge found that eighty-one of the injuries suffered by Caterpillar's employees should have been recorded because prescription medicine was prescribed as part of the treatment. (Items 19, 20, 27-30, 33, 39, 43-44, 46-47, 49-51, 64, 66-73, 78, 82-85, 87, 90, 93, 96, 100-01, 103, 105-07, 109, 112, 114, 117-18, 121-22, 124-25, 128-29, 131-33, 135-41, 144, 147-53, 155, 157-59, 161, 163-70). He further found many of these injuries to be recordable for one or more other reasons. The judge relied on the language on page 2 of BLS Report 412-3 which states that the use of prescription medicine involves medical treatment and must be recorded for a workplace injury. The judge found that thirty-five of these eighty-one injuries were also recordable because they resulted in either lost workdays or restrictions in work. BLS Report 412-3 states that the application of antiseptics on a first visit to a doctor or nurse is considered first aid and is not recordable, but on a second or subsequent visit, the application of antiseptics is considered recordable.

Caterpillar contends that the judge erred in relying on the use of prescription medication when that medication was used for preventive purposes rather than for treatment of an injury.

Caterpillar contends that BLS Report 412-3 states that medicine must be used for treatment of an injury, that antiseptics are not considered medical treatment, and, quoting Q and A 56, BLS Report 412-3 at pp. 11-12, that ''generalizations cannot be made" about ''[p]rescriptions, when no other form of treatment is offered." Caterpillar also relies on an OSHA instruction published in the Bureau of Labor Statistics *Program Bulletin* No. 42, October 1979. According to this document, measures such as negative X-rays and precautionary tetanus shots are not recordable for OSHA occupational injury and illness recordkeeping purposes because they are prophylactic treatment. The bulletin distinguished these two measures from medical treatment following a positive tuberculosis test and injections of antirabies serum, both of which were considered recordable because they were absolutely necessary and far more extensive than first aid procedures.

Caterpillar attempts to depict BLS Report 412-3 as requiring recording only when prescription medicine is used for other than preventive purposes. It also suggests that BLS Report 412-3 does not absolutely require recording when prescription medicines are used. However, Caterpillar has not established that the preventive nature of a medicine is a threshold to be crossed before recording is required. Under BLS Report 412-3, the first application of an antiseptic, which is certainly a prophylactic measure, is considered non-recordable. However, it appears that this is not because it is being used to prevent infection, but because of the preliminary nature of the treatment. Page 2 of BLS Report 412-3 states that the application of antiseptics on a first visit to a doctor or nurse is not considered to be medical treatment, but a second application of antiseptics is considered to be medical treatment when applied on a second visit.

The instruction relied on by Caterpillar indicates that prophylactic measures, like negative X-rays and precautionary tetanus shots are not recordable because of their precautionary nature. However, page 2 of BLS Report 412-3 groups these two factors along with hospitalization for observation into a separate category of procedures which are considered to be neither first aid nor medical treatment. There is little basis for extending the rule of these three exceptions to a factor like the use of prescription medicine that is defined as recordable medical treatment on the very same page.

As we noted earlier, the meaning of Q and A 56 is not clear, but it cannot be interpreted as diluting the requirements of page 2 of BLS Report 412-3, as urged by Caterpillar.

Of the eighty-one injuries or illnesses that the judge found recordable because they were treated with prescription medicine, thirty-eight injuries also were recordable because they involved either lost workdays or work restrictions, and seventeen injuries also were recordable because they required compresses on a second or subsequent visit. The judge found the remainder of the injuries and illnesses recordable solely because they involved the use of prescription medicine. Although these conditions varied in their severity, the need for prescription medicine indicates that they required more than first aid and should therefore have been recorded.

Summary

In sum, we find that the Secretary has established by a preponderance of the evidence that the injuries and illnesses received by Caterpillar's employees at the Aurora plant during 1986 (that are still contested by Caterpillar) should have been recorded on the OSHA 200, and that by failing to record these injuries, Caterpillar violated section 1904.2(a). We next consider whether each injury and illness that Caterpillar failed to record may be cited as a separate violation of the Act with a separate penalty.

III.

WHETHER THE JUDGE ERRED IN ASSESSING SEPARATE PENALTIES FOR EACH VIOLATION

A. Background

At the time that the citation in this case was issued, section 17(a) of the Act stated that:

> (a) Any employer who willfully or repeatedly violates the requirements of section 5 of this Act, any standard, rule, or order promulgated pursuant to section 6 of this Act, or regulations prescribed pursuant to this Act, may be assessed a civil penalty of not more than $10,000 for each violation.[15]

The Secretary's long standing practice under section 17(a) of the Act had been to issue a single citation and a single proposed penalty regardless of how many separate violations of the same

[15] At the time this case arose, penalties for willful violations were limited to $10,000 and for serious or nonserious violations, $1000. Those amounts have subsequently been raised to $70,000 and $7000, respectively. Section 17 of the Act, 29 U.S.C. § 666, *amended by* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (1990).

standard or regulation were involved.[16] He had rarely departed from this practice. The Secretary took a similar approach in citing recordkeeping violations. Generally, no matter how many failures to record or mistakes in recording were discovered, the Secretary issued a single citation. The penalty proposed tended to be fairly nominal, and consistent with OSHA's FOM, rarely exceeded $100. In 1983, however, the Secretary began to conduct more detailed recordkeeping inspections in order to determine whether comprehensive workplace inspections were warranted. Subsequently, in 1986, the Secretary initiated a practice of proposing separate penalties for each failure to record. The first citations under this policy were issued on April 1, 1986. Four days earlier, on March 27, 1986, the Secretary codified this policy by publishing in the FOM a procedure for assessing separate, per-instance penalties. (The citation in this case was issued in May of 1987.) The procedure states:

> In egregious cases; i.e., willful, repeated and high gravity serious citations and failures to abate, an additional factor of up to the number of violation instances . . . may be applied to the gravity-based penalty calculated in accordance with A.2.i.(2)(c) or the regulatory penalty assigned in accordance with A.8.b. and c. and adjusted in accordance with A.2.j, A5, A6, A7 and A8, as described in each of the subsections. Penalties calculated with this additional factor shall not be proposed without the concurrence of the Assistant Secretary.[17]

OSHA Instruction CPL 2.45A, FOM, Chapter VI, section A.2.i.(4), p. VI-8 (September 21, 1987) *amended by* OSHA Instruction CPL 2.45B CH-1, December 31, 1990.

B. Arguments of Caterpillar

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[16] The Secretary has stated that the ''practice of citing each violative instance as a separate violation has been utilized by the agency only since 1986 . . . .'' *OSHA Instruction CPL 2.80, Handling of Cases to be Proposed for Violation-by-Violation Penalties*, 1 BNA OSHR Ref. File 21:9649, 9650, 1990 CCH ESHG New Developments, ¶ 10,662, pp. 13,589-90 (Transfer Binder) (October 1, 1990).

[17] In *OSHA Instruction CPL 2.80*, the Secretary also took steps to establish more detailed procedures for identifying and handling ``egregious'' cases for which the additional penalty factor is to be proposed. He outlined proposed procedures for identifying egregious violations and separate violations of the same standard. The instruction included a method of developing a gravity-based penalty for recordkeeping violations. The equation involves a number of variables, including: the percentage of unrecorded injuries, whether the injury was not entered at all or was entered improperly, the injuries' relationship to health and safety conditions at the plant, the effect of not recording the injuries on the LWDI, and the company's overall safety program. 1 BNA OSHR Ref. File at 21:9651, 1990 CCH ESHG New Developments at pp. 13,590-91.

In its reply brief, Caterpillar points out that it ‘‘has not argued in this case that the Commission lacks the naked authority to assess separate penalties for separate, even concurrent, violations of a single standard.” However, Caterpillar attacks the policy and its application here in three areas. Relying on *RSR Corp.*, 11 BNA OSHC 1163, 1180-82, 1983-84 CCH OSHD ¶ 26,429, pp. 33,558-60 (No. 79-3813, 1983) (consolidated) and *United States Steel Corp.*, 10 BNA OSHC 2123, 1982 CCH OSHD ¶ 26,297 (No. 77-3378, 1982), it contends that assessing separate penalties for each violation of the same standard is inconsistent with Commission precedent. Caterpillar also claims that the Secretary's proposed penalty is contrary to various provisions in the FOM.[18] It argues that the FOM and section 17(e) of the Act indicate that the number of times a single standard was violated goes to the gravity of the violation, one of the factors considered in assessing a penalty under section 17(j) of the Act.[19] Caterpillar claims that the Secretary's witnesses admitted that the citations were issued as non-gravity based and notes that in previous cases in which the Commission affirmed citations for recordkeeping violations, the penalties assessed had been modest.

Caterpillar contends that there is no basis for treating the judge's penalty assessment as a ``surcharge" consistent with the Secretary's ``egregious" violation theory. Should the judge's

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[18] These provisions state as follows:

> Violations of the posting and recordkeeping requirements which involve the same document; e.g., OSHA-200 Form was not posted or maintained, shall be grouped for penalty purposes, FOM Chapter V C.3.a.(4), *reprinted in* Text of Manual Reissued by OSHA *supra* note 1, IV-19.
>
> If the employer does not maintain the Log and Summary of Occupational Injuries and Illnesses, OSHA 200 Form . . . an other-than-serious citation shall be issued. There shall be an unadjusted penalty of $100 for each OSHA form not maintained. FOM Chapter VI A.8.(d), *reprinted in* Text of Manual Reissued by OSHA, *supra* note 1, at VI-15.
>
> Violations of the posting and recordkeeping requirements which involve the same document (e.g., summary portion of the OSHA-200 Form was neither posted nor maintained) shall be grouped as an other-than-serious violation for penalty purposes. The unadjusted

penalty for the grouped violations would then take on the highest dollar value of the individual items. FOM Chapter VI, 8.c.(2), *reprinted in* Text of Manual Reissued by OSHA *supra* note 1, at VI-17.

[19] That section states:

> (j) The Commission shall have 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.

proposed assessment be treated as a surcharge consistent with the Secretary's egregious violation theory, Caterpillar contends that there is no provision in the Act that allows for the multiplication of penalties except for the failure to abate provisions of section 17(d) of the Act. Caterpillar contends that the per instance penalty assessment is inconsistent both with the alleged violation (failure to keep a log)--and the theory of liability (failure to follow BLS publications).

C. Arguments of the Secretary

The Secretary contends that he is permitted to issue separate citations and propose penalties for each violation of the same standard where each violation of the standard depends upon entirely different and separate facts: different injuries, illnesses, dates, methods of treatment, and separate decisions not to record. He relies on *Pratt and Whitney, Inc.*, 9 BNA OSHC 1653, 1981 CCH OSHD ¶ 25,359 (No. 13401, 1981) and *Hoffman Constr.*, 6 BNA OSHC 1274, 1977-78 CCH OSHD ¶ 22,489 (No. 4182, 1978). He further relies on *RSR Corp.* and *United States Steel*, both of which are also relied on by Caterpillar. The Secretary claims that this interpretation is consistent with the plain language of the Act and regulations and clearly effectuates the purpose of the regulations.

The Secretary argues that the FOM excerpts cited by Caterpillar are inapplicable and claims that the FOM has specifically provided for separate penalties since 1986. The Secretary notes that this 1986 provision in the FOM, *see supra* p. 32, requires the Assistant Secretary to approve the imposition of separate per-instance penalties, and that such approval was given in this case. The Secretary claims that the Commission has permitted such citations since at least 1978. Assuming *arguendo* that the FOM was not followed, the Secretary argues that he cannot be faulted for failing to follow the FOM because the FOM is merely a statement of internal agency procedure and does not confer rights or impose obligations. He contends that the express language of the Act unquestionably controls over the provisions of the FOM, citing *H.B. Zachary Co. v. OSHRC*, 638 F.2d 812 (5th Cir. 1981). Thus, according to the Secretary, the language of section 17(a) expressly permits the issuance of a citation ``for each violation'' regardless of the FOM.

At oral argument, the *amicus curiae*, the American Federation of Labor and Congress of Industrial Organization, noted that although there may be other cases that present more difficult issues, the language of the regulation and common sense all point to treatment of these violations as separate violations.

D. The Judge's Decision

The judge found that although the Secretary's departure from his previous practice of grouping recordkeeping violations together for penalty purposes was done without rulemaking, it was not improper. He also found that the Secretary was not barred from applying the penalties retroactively. He rejected Caterpillar's claim that it should have the opportunity to prevent its exposure to the new theory of liability. The judge concluded that Caterpillar should have recognized that its burden of reporting had remained constant and that the cost of compliance remains the same regardless of the penalty that might be assessed for noncompliance. He further found that the separate penalty policy did not impose a new liability theory. Relying on *Hoffman Constr.*, the judge held that the Secretary is within his discretion as the prosecutor under the Act in issuing separate citations where the circumstances disclose distinct and separate violations of the same standard.

E. Analysis

We conclude that the Commission has the authority to assess separate penalties for separate violations of a single standard or regulation. The test of whether the Act and the cited regulation permits multiple or single units of prosecution is whether they prohibit individual acts, or a single course of action. *Blockburger v. United States*, 234 U.S. 299 (1934).[20] In *Blockburger*, the Court found that separate, illegal drug transactions were separate violations of a statute that forbade purchasing or selling the drug, despite the purchases being closely spaced in time. *See also Ladner*

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[20] In determining whether multiple units of prosecution are permissible, the courts also look to the legislative history for evidence of Congress' intent. The OSH Act's legislative history indicates that an early House version of the Act, H.R. 16785, once contained the following provision:

> Sec. 15. (a) Any employer who (1) receives a citation . . . shall be assessed by the Secretary . . . a civil penalty of not more than $1,000 for each violation. Each violation shall be a separate offense. When the violation is of a continuing nature, each day during which it continues after a reasonable time specified in an initial decision . . . shall constitute a separate offense . . . .

H.R. Rep. No. 1291, 91st Cong. 2d Sess. 22 (1970), *reprinted in* Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 744-45. This separate offense language was deleted without explanation from the next House version of the Act. Although it suggests that some consideration was given to putting in specific language allowing each violation to be treated as a separate violation, it does not indicate whether Congress considered and rejected per-violation penalty assessment. However, since most administrative statutes leave the precise unit of violation undefined, Driver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum. L. Rev. 1435, 1441 (1979), we cannot find sufficient reason to accord controlling significance to the presence of the language or its absence.

v. United States, 358 U.S. 209 (1958) (wounding of two federal employees with single shotgun blast is a single offense); *Bell v. United States,* 349 U.S. 81 (1955)(simultaneous transportation of two women only one offense under the Mann Act); *United States v. Universal C.I.T. Credit Corp.,* 344 U.S. 218 (1952)(failure to pay minimum wage to several employees constituted one offense because all overpayments resulted from single managerial decision). Here, the language of section 17(a) does not mandate separate penalties with respect to each instance of a recordkeeping violation, nor does it prohibit separate penalties.[21]

The Secretary claims that the express language of section 17(a) allows the issuance of a citation for each violation of section 1904.2(a),[22] which requires employers to ''enter each recordable injury or illness on the log.'' Section 1904.2(a) requires employers to do three things: (1) maintain a log and summary of injuries, (2) enter each recordable injury or illness on that log, and (3) complete the log in the detail provided on the OSHA 200. The citation follows the language of requirement (3) but also implicates requirement (2):

> The log and summary of occupational injuries and illnesses (OSHA Form No. 200 or its equivalent) was not completed in the detail provided in the form and the instructions contained therein:
>
> (a) Cases involving medical treatment or restricted work activity or days away from work due to laceration injuries [and six other types of injury] were not recorded or were improperly recorded.

Prior to March 1986, the Secretary had enforced the three requirements of section 1904.2(a) as a broad prohibition against failing to maintain the OSHA 200. According to the FOM, he would allege a single violation and a maximum $100 penalty for each OSHA 200 that was not maintained properly. Nevertheless, section 1904.2(a)'s requirement to ''enter each recordable injury'' can

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[21] Separate offense language is not rare in statutory penalty provisions. As Caterpillar noted at oral argument, a statute as close in purpose to the Act as the Federal Coal Mine Health and Safety Act of 1969 states that ''[e]ach occurrence of a violation of a mandatory health or safety standard may constitute a separate offense." 30 U.S.C. § 820(a). Similarly, the Consumer Product Safety Act specifies that violation of any one of a number of that Act's sections ``shall constitute a separate offense with respect to each consumer product involved, except that the maximum penalty shall not exceed $500,000 for any related series of violations." 15 U.S.C. § 2069. The Federal Trade Commission Act, 15 U.S.C. § 45(l) (1976), provides a civil penalty of up to $10,000 for each violation of the order of the Commission after it has become final. It provides that ``[e]ach separate violation of such an order shall be a separate offense . . . ."

[22] *See supra* note 3.

reasonably be read to involve as many violations as there were failures to record, particularly when the injuries took place over a period of time and involved different employees and different types of injury and treatment. Not all violations of the Act, standards, or regulations lend themselves to multiple citations, however.

In a case such as *Ladner v. United States*, what might have appeared to be a multiple violation (wounding two government employees) actually involved only a single act (discharging a shotgun) and thus a single unit of prosecution, even though the act had multiple effects. The changes made by Dr. Neu that resulted in Caterpillar not using the correct criteria for recording bear a superficial similarity to this type of act or violation. However, the numerous modifications that Dr. Neu made to the Caterpillar version of page 2 of BLS Report 412-3 had no consequences by themselves. It was the separate case-by-case application of those erroneous criteria to employee injuries and illnesses and subsequent decisions not to record them that violated the Act.

Commission decisions addressing the issue of whether separate citations may be imposed for multiple violations of a single standard are rare, largely because the Secretary has rarely proposed such citations. With few exceptions,[23] the Commission has not affirmed multiple violations for violations of the same standard, or affirmed separate violations or penalties on a per employee exposed basis.

However, in *Hoffman Constr.*, the Commission affirmed two distinct violations and held that the Secretary was within his discretion as prosecutor under the Act in issuing a separate citation for each violation of the scaffolding standard for each scaffold, despite provisions of the FOM that the Commission determined did not have the force and effect of law.[24] Although the two items in

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[23] In *Morrison-Knudsen & Assocs.*, 8 BNA OSHC 2231, 2236, 1980 CCH OSHD ¶ 24,953, p. 30,783 (No. 76-1992, 1980), the Commission affirmed separate violations of the same standard and separate penalties, after the Secretary amended an item alleging that two electrical wires constituted a single violation to one alleging that each wire was a separate violation with a separate penalty. The Commission did not specifically address the propriety of assessing separate penalties.

[24]Caterpillar places a good deal of reliance on certain provisions of the FOM. Although the Secretary is somewhat cavalier in rejecting any suggestion that he is bound to follow the manual, especially in light of the fact that he has in a number of cases cited the FOM as support for his actions, the Commission has consistently held that the FOM is an internal manual that provides guidance to OSHA professionals, but does not have the force and effect of law, nor does it confer important procedural or substantive rights or duties on individuals. *H.B. Zachary Co.*, 7 BNA OSHC 2202, 1980 CCH OSHD ¶ 24,196 (No. 76-1393, 1980), *aff'd*, 638 F.2d 812 (5th Cir. 1981). We therefore conclude that there
(continued...)

Hoffman Constr. and the 167 items in this case make the connection between the cases seem tenuous, we believe that the principle enunciated in *Hoffman Constr.* that it was within the Secretary's discretion to issue separate citations for each scaffold applies to the facts of this case. We, therefore, conclude that it was within the discretion of the Secretary to cite each failure to record as a separate violation.

Although Caterpillar points out that section 17(j) of the Act already provides for the inclusion of employee numbers in penalty assessment by considering the number of employees exposed to the violation *i.e.* the gravity of the violation, and that the FOM provides that a determination of gravity be based at least in part on the number of employees exposed, we do not believe this fact precludes the issuance of separate penalties in this case. These factors can be applied to citations that involve numerous failures to comply with a standard or to just one failure to comply.

The key question for penalty purposes is not how many errors or omissions there were, but what penalty is appropriate. Thus, although the Secretary may cite separate omissions to record injuries as separate violations, he may not exact a total penalty that is inappropriate in light of the four factors listed in section 17(j) of the Act: the gravity of the violations, the employer's good faith, its size, and its history of violations.

IV.

WILLFULNESS

A. DID CATERPILLAR CONSCIOUSLY DISREGARD THE RECORDKEEPING REQUIREMENTS OF THE ACT?

1. Introduction

A willful violation is differentiated by a heightened awareness of the illegality of the conduct or conditions, and by a state of mind--conscious disregard or plain indifference. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition, and consciously disregarded the standard. Without such evidence of familiarity with the standard's or the provision's terms, there must be evidence of such reckless disregard for employee

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[24](...continued)
is no reason to examine the Secretary's actions in this case to determine whether they conformed to the procedures outlined in the FOM.

safety or the requirements of the law generally, that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it. It is therefore not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation on the part of the employer, nor is a willful charge justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts are not entirely effective or complete. *Williams Enterp.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). A good faith reasonable belief by an employer that its conduct conformed to the requirements of the law also negates a finding of willfulness. *Keco Indus.*, 13 BNA OSHC 1161, 1169, 1986-87 CCH OSHD ¶ 27,860, p. 36,478 (No. 81-263, 1987).

2. Argument of the Secretary

The Secretary contends that Caterpillar willfully violated section 1904.2(a) because Busche and Dr. Neu consciously disregarded the requirements of the Act, the regulations, and the instructions on the log; and consciously disregarded or were plainly indifferent to BLS Report 412-3. The Secretary contends that this ``pattern of disregard" ``extends to all of the items at issue." He relies on Busche's acknowledgement that Caterpillar's supervisors were required to follow BLS Report 412-3 even though he failed to implement them, and on the decision of Dr. Neu and Busche to consciously disregard unambiguous regulatory requirements. The Secretary also alleges that Caterpillar simply did not care whether supervisors complied with the appropriate guidelines. He points out that Busche knew that BLS Report 412-3 was to be used in filling out the log, but never bothered to communicate this information to Dr. Neu or to monitor Dr. Neu's compliance with recordkeeping practices, and that Dr. Neu had never been trained to apply BLS Report 412-3 nor given any written instructions in filling the log out.

The Secretary particularly relies on Caterpillar having placed its restrictive recording policy over the unequivocal command to report injuries involving lost workdays or restrictions in motion, and on what he describes as Dr. Neu's deliberate disregard of the definition of first aid as a single treatment with a follow-up for observation.

3. Argument of Caterpillar

Caterpillar contends that there is no evidence that it exhibited plain indifference to employees or consciously disregarded the standard. It points instead to Dr. Neu's correct maintenance of the log in hundreds of cases and thousands of first aid visits, his adoption of policies and procedures for recordkeeping in the good faith belief that they were consistent with the regulation, his full cooperation with the OSHA inspection, and his candor in admitting oversights that were brought to his attention. Caterpillar claims that its corporate officials issued guidelines that ''OSHA repeatedly insisted [were] consistent with BLS," promptly distributed the 1986 Guidelines when they became available, and voluntarily maintained a computerized database of all injuries.

4. Judge's Decision

The judge characterized each of the 167 items he affirmed as willful. He held that Caterpillar'supper-level management personnel, who had knowledge of the Act's requirements, had failed to insure that lower level personnel with the authority to effect compliance with the Act were equally informed. He relied on *Duane Meyer*, 7 BNA OSHC 1560, 1979 CCH OSHD ¶ 23,742 (No. 16029, 1979), and on *Georgia Electric Co. v. Marshall*, 595 F.2d 309, 320 (5th Cir. 1979).

The judge found that Busche had knowledge of the Act's requirements and of the significance of the interpretations set forth in BLS Report 412-3, but lacked the authority to require compliance and did not issue any directives outlining OSHA's recordkeeping requirements. The judge further found that Dr. Neu, the person at the lower level with the authority to effect compliance with the Act, had not been trained to perform his OSHA recordkeeping duties, nor had he been advised that they were part of his overall duties as medical director. The judge found that Busche made no effort to ensure that Dr. Neu correctly filled out the OSHA 200 log and that two other upper-level Caterpillar officials had taken overt steps to discourage Dr. Neu from making entries on the OSHA 200 form in order to avoid additional entries on Caterpillar's ISI records.

The judge found that Dr. Neu's memos to the nurses caused deviations from the BLS Report 412-3 in ten areas and resulted in fewer cases being recorded. He concluded that Dr. Neu's push to reduce the number of recordings made on the OSHA 200 forms was a reflection of the careless disregard and indifference of Caterpillar's officials, and the ``calculated negative interference'' of the corporate and plant safety managers. He held that Caterpillar's admission that forty-three of the items were not recorded through administrative oversight, together with ``the conscious interference

. . . with the judgment of an inadequately trained . . . medical director [established] that Caterpillar's failure to record each recordable incident set forth in the items . . . [was] willful.''

5. Discussion/Analysis

The judge relied heavily on the theory articulated in *Duane Meyer* that puts a substantial burden on supervisory employees to provide appropriate guidelines and instructions. Although it has not been explicitly overruled, the test of willfulness in *Duane Meyers* is no longer followed.[25] In more recent cases, the Commission has required more evidence of the supervisor's conscious disregard of, or reckless indifference to, the requirements of the standard. In *Mosites Constr. Co.*, 9 BNA OSHC 1808, 1813, 1981 CCH OSHD ¶ 25,357, pp. 31,494-95 (No. 78-50, 1981), the superintendent knew of the requirements of the standard from previous citations for violating it, but the Commission found that a failure to install guardrails was not willful because it was not shown that the superintendent knew of the noncomplying conditions or that his efforts to discover the conditions were so inadequate as to constitute careless disregard of employee safety. In *A.C. Dellovade, Inc.*, 13 BNA OSHC 1017, 1986-87 CCH OSHD ¶ 27,786 (No. 83-1189, 1987), a superintendent ignored detailed instructions from a compliance officer on how to provide fall protection for his employees and instead let the employees improvise a means of protection. The employees and lower-level supervisors improvised half-measures that protected poorly and fell short of the measures required by OSHA standards. The Commission found that such an abdication by an employer of its final responsibility under the Act for compliance with safety standards was a willful violation of the Act. *Id.*, 13 BNA OSHC at 1020, 1986-87 CCH OSHD at p. 36,342. In *Williams Enterp.*, the Commission affirmed a number of willful violations because the company president was aware of the requirements of the cited standards as the result of a number of previous citations, but chose to devise his own methods of fall protection that clearly did not meet the standard's requirements. 13 BNA OSHC at 1257, 1986-87 CCH OSHD at p. 36,589.

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[25] In addition, the present case appears factually distinguishable from *Duane Meyer*. In *Duane Meyer*, the proprietor learned of the requirements of the standard from an earlier citation for a violation of the same standard; the earlier citation involved a closing conference at which the same compliance officer gave the proprietor a copy of the standards and discussed the standards with him. In this case, Busche had read BLS Report 412-3 and thought it should be followed where applicable but had never spoken to anyone at OSHA about it, nor considered it to be mandatory.

Here, the Secretary claims that Caterpillar had the same type of actual notice of his interpretation of a regulatory obligation as did the employers in *Dellovade*, *Duane Meyer*, and *Caldwell Lace Leather Co.*, 1 BNA OSHC 1302, 1973-74 CCH OSHD ¶ 16,410 (No. 520, 1973), but ``chose to depart from that interpretation." We disagree. In *Dellovade* and *Duane Meyer*, the supervisor discussed the requirements of the standard with a compliance officer. In *Caldwell* the Commission summarily affirmed a judge's assessment of a penalty in a failure-to-abate case because the employer president failed to read a copy of the standard the compliance officer left with him after a prior citation. Here, in contrast, no Caterpillar employee ever received that type of notice of the requirements of section 1904.2(a) or of the role of BLS Report 412-3. There is no evidence that Busche ``chose to depart" from BLS Report 412-3. Busche, the only Caterpillar official who was familiar with BLS Report 412-3, never filled out the OSHA 200, or instructed Caterpillar employees to fill it out contrary to BLS Report 412-3. Dr. Neu consciously departed from a facsimile of page 2 of BLS Report 412-3, but the evidence does not establish that he believed that the facsimile, which had a Caterpillar heading, was the Secretary's detailed explanation of the recordkeeping obligation.

B. WAS CATERPILLAR INDIFFERENT TO THE RECORDKEEPING REQUIREMENTS?

The Secretary argues that Caterpillar's indifference to employee safety is established by the failure of its supervisors to direct Dr. Neu to follow BLS Report 412-3 or to take any steps to monitor compliance with the recordkeeping requirements of the Act. However, in these circumstances, such failure to monitor is not as significant as the Secretary claims. Although Busche might, with the exercise of reasonable diligence, have discovered that Dr. Neu was recording injuries incorrectly on the OSHA 200, a lack of diligence that might support a finding of constructive knowledge sufficient to establish a serious, or other-than- serious, violation does not necessarily establish indifference rising to the level of willfulness. *See Marmon Group, Inc.*, 11 BNA OSHC 2090, 2092, 1984-85 CCH OSHD ¶ 26,975 (No. 79-5363, 1984); *Mobil Oil Corp.*, 11 BNA OSHC 1700, 1983-84 CCH OSHD ¶ 26,699 (No. 79-4802, 1983).

There are a few other factors to consider in assessing how diligent Caterpillar was in recording injuries. According to Busche, all Caterpillar plants were supplied with copies of the

applicable regulations and the OSHA 200's, which plant employees filled out. He distributed a copy of the 1986 Guidelines in 1987, which is when he obtained them, and would have relied on the BLS publications where they were applicable. Busche thought that since Caterpillar supplied the different plants with the same materials for filling out the OSHA 200, the possibility that different plants would record differently was fairly remote. Neither Busche nor anyone else at Caterpillar thought that the guidance in BLS Report 412-3 was the final authority, so the Caterpillar employees at individual plants such as Aurora had a good deal of freedom in recording injuries on the OSHA 200 form. As Caterpillar's counsel acknowledged in its reply brief, Caterpillar's own ISI Guidelines were not intended to be used as bases for OSHA recording but ''[o]ver time, apparently, plant recordkeepers tended to follow these Caterpillar guidelines in resolving questions of application."

When Dr. Neu began his job at Aurora, he was confronted with two sets of criteria for recording workplace injuries and illnesses. What appears to be a facsimile of page 2 of BLS Report 412-3 is clearly concerned with filling out the OSHA 200, but Caterpillar never directed Dr. Neu to follow it when filling out the OSHA 200. Dr. Neu did not keep the records required under the ISI Guidelines, but those Guidelines were much more comprehensive than the single page concerning the OSHA 200 and even had a place for the recording of items that had been recorded on the OSHA 200. It is not surprising then, particularly when he received no firm direction from Caterpillar, that Dr. Neu would modify that single page until it was relatively consistent with the ISI Guidelines. Although Dr. Neu's errors in complying with section 1904.2(a) are clearly the result of the neglect of Busche and other Caterpillar officials, we cannot say that their omissions or their misdirections, or the actions of Dr. Neu himself, demonstrate intentional disregard or plain indifference.

In concluding that the Secretary did not establish willfulness, we are troubled by two circumstances. First, we are struck by how closely OSHA's announcement in April 1983, that the lost workday injury rate derived from an employer's OSHA 200 would determine whether OSHA conducted a comprehensive inspection, coincided with the beginning of Dr. Neu's alterations to Caterpillar's recording criteria two months later. There is no evidence, however, that this is more than a coincidence. Dr. Neu stated to the nurses in one of his memoranda that certain of his modifications to the recording criteria would result in fewer injuries being recorded, but claimed that

this was not a goal or objective only a simple statement of what he thought would occur. At oral argument, the Secretary conceded that ''there was no confession on the record . . . that [Caterpillar] was trying to avoid an inspection.''

Second, the extent to which Dr. Neu acted on suggestions from Caterpillar's management in making additional changes in recording injuries on the OSHA 200 and the motives of those managers raises some doubts in our minds. Dr. Neu claimed that he was told by Allsop, then Caterpillar's corporate safety engineer, that some of these changes were approved by OSHA. However, neither Allsop nor the unidentified OSHA official(s) who allegedly approved some of the modifications to Caterpillar's recording criteria were called to testify. Although Caterpillar's failure to have Allsop testify casts doubt on the basis for some recording changes and suggests that Caterpillar could have used Dr. Neu as the innocent vehicle to reduce injuries recorded on the OSHA 200, there is no solid, reliable evidence to support this theory.

When the Secretary alleges that violations are willful in nature, but, as here, fails to establish willfulness, the Commission may find an other-than-serious violation. A serious violation may not be found unless the parties have expressly or impliedly consented to try the issue, *Crawford Constr. Co.*, 10 BNA OSHC 1522, 1526, 1982 CCH OSHD ¶ 25,984, p. 32,607 (No. 79-928, 1982), *aff'd*, 718 F.2d 1098 (6th Cir. 1983), or the seriousness of the violation was evident, *Simplex Time Recorder Co.*, 12 BNA OSHC 1591, 1597, 1984-85 CCH OSHD ¶ 27,456, p. 35,572 (No. 82-12, 1985). Here, the Secretary has not alleged that each violation was serious nor is there any evidence of seriousness. Accordingly, we affirm the violations as other-than-serious.

V. PENALTIES

A. Arguments of the Parties

In the citation, the Secretary proposed a penalty of $4,000 for each failure to record. The judge lowered the penalties to $1,000 for each item because he found the $4,000 amount to be arbitrary. He also concluded that the underrecording that occurred in this case resulted in part from the Secretary's practice of deciding whether to conduct a full-scope inspection based on the lost-work day injury (``LWDI'') rate. He concluded that this practice created an incentive for employers to

underrecord and that the high penalty proposed against Caterpillar resulted from OSHA's ''overreaction'' to extensive underrecording by employers.

Caterpillar claims that even if there was a provision authorizing an increase in penalties for egregious violations, evaluation of the circumstances of this case pursuant to the four penalty factors of section 17(j) of the Act, size, gravity, good faith, and past history, do not warrant an increased penalty. Caterpillar suggests that not more than $100 would be an appropriate penalty in view of its good faith and history of compliance with the Act and the Secretary's practice of assessing a penalty of $100 for other-than-serious failures to maintain the OSHA. *See supra* n.17.

The Secretary contends that the amount of the penalty was not directed for review and is not properly before the Commission. However, he does address the issue, arguing that the $1,000 penalty per item affirmed by the judge was justified and claiming that the original $4,000 penalty per item was also justified, for the reasons stated by Deputy Secretary Frank White at the hearing and discussed below *infra*.

The Secretary claims that the judge properly considered the grave effect the violations had on the purpose of the Act. He contends that such violations threaten the Act's core purpose of providing safer and healthier workplaces through the creation of an information system for research, enforcement and employee self-protection. The Secretary claims that the sheer magnitude of Caterpillar's disdain for its obligations, notably its wholesale delegation of unmonitored authority to inadequately trained supervisors, merits the penalty imposed by the judge.

In support of his proposed penalty amounts, the Secretary cites language in *General Motors Corp., Inland Div.*, 8 BNA OSHC 2036, 2038-40, 1980 CCH OSHD ¶ 24,743, pp. 30,469-70 (No. 76-5033, 1980), in which the Commission stated that the recordkeeping requirements in section 1904 play a ``crucial role" in making workplaces safer and healthier. He points to a $1,000 penalty assessed by the Commission in *RSR Corporation* for an employer's failure to continue paying employees removed from work under the lead standard, claiming that the payments to employees facilitate safety in the workplace as does the providing of information to them.

The authorized employee representative, the United Auto Workers and its Local No. 145, characterized the penalties proposed by the Secretary as remedial because they ``send Caterpillar a message and [they] send a message to other employers."

B. Discussion

The Commission ordinarily will not decide an issue not directed for review. *See John T. Brady & Co.*, 10 BNA OSHC 1385, 1386, 1982 CCH OSHD ¶ 25,941, p. 32,502 (No. 76-2894, 1982). However, the Commission has the discretion to review the entire judge's decision once it is directed for review. Commission Rule 92(a), 29 C.F.R. § 2200.92(a); *Hamilton Die Cast, Inc.*, 12 BNA OSHC 1797, 1986-87 CCH OSHD ¶ 27,576 (No. 83-308, 1986). Here, where we have changed the characterization of the violations from willful to other-than-serious, it is necessary for us to consider the amounts of the penalties to be assessed for those violations.

Section 17(j) of the Act states that the Commission is to give ``due consideration to the appropriateness of the penalty with respect to the size of the business of the employer charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." There is a wealth of evidence in the record that is relevant to the four penalty factors. Caterpillar's size and its history of previous violations are undisputed. It is a large employer with more than 3,900 employees at this plant alone. Favoring Caterpillar is the fact that this plant has a good history of compliance, having been inspected more than 20 times and assessed a total of just under $6,000 in penalties, which would indicate a high level of attention to safety and health.

Caterpillar did fully cooperate with the Secretary during the extensive inspection. This included having a large number of compliance officers on its premises for a number of weeks and providing copies of hundreds of medical records to them. However, Caterpillar's neglect in handling its OSHA recordkeeping responsibilities at the same time it was so meticulous in adhering to its own recordkeeping system mitigates, somewhat, this good faith. Moreover, the failure to record injuries that were clearly recordable based on the language of the regulations alone, *i.e.*, recordable because they involved either lost workdays or restriction of work, *see* section 1904.12(c), or because the injuries so greatly exceeded the definition of nonrecordable first aid in section 1904.12(e), is also a mitigating factor.

The gravity of the offense, which is generally the principal factor to be considered, *see Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972) presents more problems. The Secretary has had some difficulty determining whether there is any gravity to measure. Frank White, then Deputy Assistant Secretary for OSHA, referred to the penalties as non-

gravity based. In OSHA Instruction CPL 2.80 *Handling of Cases to be Proposed for Violation-by-Violation Penalties, supra* n.15 which was published after briefs were received in this case, the Secretary proposed a method of calculating the gravity of a per instance recordkeeping violation. This method took into account a number of factors including the extent of the problem, the reason the entry was not made, and the seriousness of the unrecorded injury. In his brief, the Secretary refers to the ''grave" effect of the violations, which he contends threaten the ''core purpose of the Act--to provide safer and healthier workplaces for the future." In support, the Secretary cites and has attached to his brief, a recent Government Accounting Office report, *Here's the Beef: Underreporting of Injuries, OSHA's Policy of Exempting Companies from Programmed Inspections Based on Injury Records and Unsafe Conditions in the Meatpacking Industry*, H. Rep. No. 542, 100th Cong., 2d Sess. (1988), which outlines some of the deception by employers that OSHA has experienced in enforcing the Act.

However, neither the language of CPL 2.80, which the Secretary has not cited to us, nor the alleged ''grave" effect of the violations, takes the place of evidence that goes to what the Commission has generally considered under the heading of gravity, *i.e.*, (1) the number of employees exposed to the hazard, (2) the duration of the exposure, (3) whether any precautions have been taken against injury, and (4) the degree of probability that an accident would occur. *Turner Co.*, 4 BNA OSHC 1554, 1976-77 CCH OSHD ¶ 21,023 (No. 3635, 1976), *rev'd on other grounds*, 561 F.2d 82 (7th Cir. 1977). Since recordkeeping violations, in general, only bear on these factors in the most tangential way, we are constrained to characterize the gravity of these recordkeeping violations as low.

The Secretary also relies on the explanation for the high penalties that White gave at the hearing. White testified that OSHA relies heavily on the injury and illness data generated by employers in scheduling the programmed inspections required by the Supreme Court's decision in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978),[26] and in focusing its resources on the most hazardous industries. White stated that Caterpillar's noncompliance with section 1904.2(a)

[26] In *Barlow's*, the Supreme Court held that nonconsensual OSHA inspections can only be made pursuant to a warrant. The Court suggested that warrant requirements could be satisfied if inspections were based on ''an administrative plan containing specific neutral criteria." 436 U.S. at 321-22. The Secretary uses injury and illness data from the OSHA 200 to develop ''neutral criteria.''

warranted the size of the penalty OSHA proposed because it ‘‘was definitely and clearly aware of its obligations and the specific requirements of the Act, the regulations and the appropriate guidelines with respect to keeping records”but chose not to properly record and significantly reduce its LWDI rate. White stated that Caterpillar’s failure to record was particularly egregious because the regulation and the OSHA 200 clearly indicated that the injuries were recordable without reference to the Guidelines.

White conceded that the FOM states that $100 is an appropriate penalty for recordkeeping violations and that such violations would be grouped, but pointed out that those provisions of the FOM do not concern willful violations of the recordkeeping requirements. White explained that the penalties at issue here were not gravity-based, so OSHA was less constrained about how it arrived at a formula. He referred to the provision on page VI-8 of the FOM that was added in March 1986, *supra* pp. 32-33, which indicates, that in egregious cases involving willful, repeated, or high gravity serious citations, an additional factor of up to the number of violation instances may be applied to the gravity-based or regulatory penalties.

Although White’s depiction of Caterpillar as making a deliberate choice to violate section 1904.2(a) would provide some support for the penalties proposed by the Secretary, we have, as noted *supra* in our discussion of willfulness, determined that Caterpillar’s failure to record the injuries and illnesses cited by the Secretary was not the result of a deliberate choice by Caterpillar but was instead the result of Caterpillar’s neglect. We would also note that the reasons White gives to support the imposition of the higher penalties, particularly the practice of focussing resources on the most hazardous industries, while laudable, are not factors the Commission usually considers in assessing penalties.

Accordingly, having considered Caterpillar’s large size, its history of previous violations, which is minimal for a company of this size, the gravity of each violation, which is low, and Caterpillar’s showing of some good faith, we assess the following penalties:

1. ADAMS -- Received a 2 cm laceration. The cut also required 5 wound care visits, a butterfly suture, neosporin and betadine. A penalty of $100 is assessed.
2. BUNDY -- Received a 1.5 cm laceration. A steri-strip was applied to his cut and 4 wound care visits were also required. A penalty of $100 is assessed.

3. BURT -- Received a 1.5 cm laceration and steri-strips were applied and the employee required 14 visits for a tape bridge, preventative medicine and wound care. A penalty of $125 is assessed.
4. CARTER -- Received a laceration which required 6 visits for wound care, preventative medicine and a tape bridge. A penalty of $100 is assessed.
5. CHRISTENSEN -- Received a laceration, a contusion and an abrasion, which required 13 wound care visits, including ice and heat treatments. A penalty of $125 is assessed.
6. COOK -- Received a .75 cm laceration which required 3 visits for wound care and a tape bridge. A penalty of $100 is assessed.
7. DISHMAN -- Received a laceration which required the application of steri-strips, 7 visits for wound care and preventative medical treatment. A penalty of $125 is assessed.
8. EDMONDS -- Received a laceration which required preventative medical treatment, a tape bridge, and 5 visits for wound care. A penalty of $100 is assessed.
9. HENN -- Received a laceration which required preventative medical treatment, the application and reapplication of steri-strips, an inflexible support and 7 visits for wound care. A penalty of $125 is assessed.
10. HENZE -- Received a laceration, which required 9 visits for wound care and preventative medical treatment, including the application of steri-strips. A penalty of $125 is assessed.
11. KNOTTS -- Received a laceration which required 16 visits for wound care and preventative medical treatment, including the application of steri-strips. A penalty of $125 is assessed.
12. OLSEN -- Received a 1.5 cm laceration which required 9 visits for wound care and preventative medical treatment, including the application of steri-strips and inflexible support. A penalty of $125 is assessed.
13. RABOINE -- Received an avulsion which required 22 visits for wound treatment, including preventative medical treatment, multiple applications of heat and the application of a splint. A penalty of $125 is assessed.
14. SCHUMAKER -- Received a laceration, which required 8 visits for wound care and preventative medicine, including the application of steri-strips. A penalty of $125 is assessed.

15. SLAUGHTERBACK -- Received a laceration, which required 6 visits for wound care and preventative medicine, including the application of steri-strips. A penalty of $100 is assessed.

16. VALLE -- Received a laceration, which required 7 visits for wound care, including preventative medical treatment and multiple heat applications. A penalty of $125 is assessed.

17. WAKEFIELD -- Received a laceration which required 6 visits for wound care visits, including the application of steri-strips. A penalty of $100 is assessed.

18. WETZEL -- Received a laceration which required 3 visits for wound care, including preventative medical treatment and heat applications. A penalty of $75 is assessed.

19. WINDISCH -- Received a contusion which required wound care, including hot soaks, preventative medical treatment and prescription drugs. A penalty of $150 is assessed.

20. ALSIP -- Developed cellulitis which required 6 visits for treatment, including debridement of the wound, a prescription drug for 10 days, and multiple hot soaks. A penalty of $150 is assessed.

21. OLESON -- Received a 1.5 cm laceration which required 6 visits for wound care and preventative medical treatment including the application of steri-strips. A penalty of $100 is assessed.

22. CLAUSEL -- Received a 3 cm laceration which required 11 visits for wound care and preventative medicine including the application of steri-strips. A penalty of $125 is assessed.

23. EGAN -- Received a 1.5 cm laceration which required 12 visits for wound care and preventative medicine treatment, including the application of steri-strips. A penalty of $125 is assessed.

24. ELLINGTON -- Received a 1.5 cm laceration, which required 8 visits for wound care and preventative medicine treatment including the application of a tape bridge. A penalty of $125 is assessed.

25. FAUL -- Received a 1.5 cm laceration which required 9 visits for wound care including the application of steri-strips and a splint. A penalty of $125 is assessed.

26. FOSTER -- Received a 2 cm laceration which required 3 wound care visits including the application of steri-strips. A penalty of $100 is assessed.

27. BAIN -- Developed a rash on his hands. He was given lidex cream, a prescription drug, and his work was restricted as a result of the rash. A penalty of $100 is assessed.

28. KIRK -- Developed a rash on his face and arms, and was given a prescription drug. A penalty of $100 is assessed.

29. SMITH -- Developed dermatitis on his hands, was given a prescription drug, and had his work restricted. A penalty of $100 is assessed.

30. CLARK -- Developed dermatitis and was treated with a prescription drug. A penalty of $100 is assessed.

32. CRIM -- Received a tuft fracture, which was confirmed by positive x-ray. A penalty of $100 is assessed.

33. LONG -- Received a tuft fracture, which was confirmed by a positive x-ray. Long also received cold compresses and a prescription drug. Caterpillar conceded that the injury should have been recorded. A penalty of $150 is assessed.

34. SMITH -- Received a tuft fracture, which was confirmed by a positive x-ray. Smith's injury required splinting and trephining. A penalty of $100 is assessed.

35. THIELE -- Received a tuft fracture, which was confirmed by a positive x-ray, which required a visit to an emergency room to have it aligned. A penalty of $100 is assessed.

36. UTSCH -- Received a tuft fracture, which was confirmed by a positive x-ray. A penalty of $100 is assessed.

37. WHITE -- Received a tuft fracture, which was confirmed by a positive x-ray. A penalty of $100 is assessed.

38. ROBBIN -- Received a tuft fracture, which required 4 visits to have his nail trephined by a nurse and the application of an inflexible support. A penalty of $125 is assessed.

39. LUNN -- Received a tuft fracture, which was confirmed by a positive x-ray. Lunn also received a prescription drug and made 2 visits for treatment. A penalty of $150 is assessed.

40. McCOY -- Received a tuft fracture, which was confirmed by a positive x-ray. A penalty of $100 is assessed.

41. COPP -- Received a tuft fracture which was confirmed by positive x-ray and treated with ice and a splint was applied. A penalty of $100 is assessed.

42. ALLRED -- Suffered a flash burn which required 6 visits for heat treatment and preventative medicine. A penalty of $75 is assessed.

43. BARRY -- Received a flash burn which was treated with a prescription drug. Barry also lost one day of work. A penalty of $175 is assessed.

44. WESBY -- Received an eye abrasion. The metal was removed from Wesby's eye and he was given a prescription drug. A penalty of $125 is assessed.

45. BETSINGER -- Had a foreign body in his eye which was removed with a cotton swab. A heat pack and preventative medicine were also administered. A penalty of $75 is assessed.

46. STEWART -- Suffered corneal abrasions. Stewart was given prescription medicine and his work was restricted. A penalty of $125 is assessed.

47. FRANKLIN -- Received a burn which required 9 wound care visits and preventative medicine. A penalty of $125 is assessed.

48. LEHNERT -- Received a 3 cm second degree burn which required 2 visits for preventative medical treatment. A penalty of $150 is assessed.

49. READY -- Received a second degree chemical burn and was given a prescription drug. Four visits for treatment were also required. A penalty of $200 is assessed.

50. BLACKWELL -- Received a second degree burn which required 5 visits for treatment. Blackwell was also given a prescription drug. A penalty of $200 is assessed.

51. BROWNING -- Received a contusion which required 4 visits for wound care treatment. The treatments included heat packs and multiple doses of a prescription drug. A penalty of $150 is assessed.

52. WAALEN -- Received a contusion which required 11 visits for heat packs. A penalty of $100 is assessed.

53. BROWN -- Received a contusion which required 2 visits for hydrocollator, wound care and preventative medical treatments. A penalty of $100 is assessed.

54. ALLEGRIA -- Received a contusion which required 7 visits for the application of heat packs. A penalty of $100 is assessed.

55. GONZALEZ -- Received a contusion which required 4 visits for treatment. A penalty of $100 is assessed.

56. VICKERY -- Received a contusion which required 6 visits for wound care including preventative medical treatment and the application of heat packs. A penalty of $100 is assessed.

57. KIERCZNYSKI -- Received a contusion to his toe which required 4 visits for heat and ice treatments. A penalty of $100 is assessed.

58. HUGHES -- Received a contusion which required 10 hydrocollator treatments. A penalty of $125 is assessed.

59. DANIELS -- Received a contusion which required 7 visits for heat treatments. The wound was also treated with non-prescription medication and ace bandages. A penalty of $125 is assessed.

60. CRUM -- Received a contusion which required 4 visits for heat treatments. A penalty of $100 is assessed.

61. GARCIA -- Received a contusion which required 15 visits for treatment that included ice, heat packs, and hot soaks. A penalty of $125 is assessed.

62. HESTER -- Received a contusion which required 2 visits for treatment. It also required a restriction of work for 2 weeks. A penalty of $150 is assessed.

64. DRAWHON -- Received a contusion which required 2 visits for treatment with heat packs, incision, drainage, and application of a splint. Multiple doses of a prescription drug were also provided. A penalty of $175 is assessed.

65. ARENDT -- Received a contusion which required 5 visits for the application of ice. A penalty of $100 is assessed.

66. HUNTON -- Received a contusion which required 10 visits for treatment. The treatment included application of a splint and a 2-week supply of a prescription drug. A penalty of $175 is assessed.

67. HYLTON -- Received a contusion which required 1 visit for treatment. He also received a prescription drug and lost 1 workday. A penalty of $200 is assessed.

68. MARKS -- Received a contusion and lost several workdays. The wound was treated with ice, heat and a prescription drug. A penalty of $200 is assessed.

69. WESBY -- Received a contusion which required 2 visits for heat and ice treatment. He also received 2 prescription drugs. A penalty of $150 is assessed.

70. THORSON -- Received a contusion which was treated with a prescription drug. A violation of $150 is assessed.

71. GERMAN -- Received contusions which required 5 wound care visits including preventative medicine, ice and a prescription drug. A penalty of $150 is assessed.

72. WETHINGTON -- Received a contusion which required 2 visits for treatment which included the application of a splint and ice and he received prescription medicine. The employee's work was also restricted. A penalty of $200 is assessed.

73. BURDITT -- Received a contusion which required treatment including the application of an inflexible support and he received two prescriptions. His work activity was also restricted for 5 days. A penalty of $200 is assessed.

74. SCHULZ -- Received a contusion which required 10 wound care visits. Treatment included multiple heat applications, and wearing a splint for 6 weeks. A penalty of $125 is assessed.

75. DWIRE -- Received a contusion which required 2 visits for heat treatments. A penalty of $100 is assessed.

76. REGER -- Received a contusion which required 3 visits for ice and 2 heat treatments. A penalty of $100 is assessed.

78. HILL -- Received a contusion and avulsive laceration which were treated with ice, steri-strips, a splint, and prescription medicine. A penalty of $100 is assessed.

79. DUNLOP -- Received a contusion which required 4 visits for treatments with heat packs and hot soaks. He also lost 2 work days. A penalty of $150 is assessed.

80. VALLE -- Received a contusion to right arm, right leg and back, which required 6 visits for heat treatments. A penalty of $100 is assessed.

81. MIDNIGHT -- Received a contusion which required 5 visits for heat and ice treatments. It also required the application of an inflexible support. A penalty of $100 is assessed.

82. MARKS -- Received a contusion which required 3 visits for treatment. He also received a prescription drug. A penalty of $150 is assessed.

83. ALVARADO -- Had work activity restricted, lost workdays, and was given a prescription drug to treat his back pains. A penalty of $200 is assessed.

84. ALOISIO -- Was given a prescription drug for his neck pain. A penalty of $150 is assessed.

85. ATKINSON -- Claimed to have ''felt such a sharp pain in my lower back I fell forward onto plate.'' Although he received 3 heat treatments and a prescription drug, Dr. Neu did not record the injury because Atkinson had a past back problem and there was no evidence he was overexerting, *i.e.*, lifting over 60 pounds (Dr. Neu assumed that the object weighed less than 60 pounds). A penalty of $150 is assessed.

86. BEMIS -- Experienced the symptoms of a hernia after pushing a 300-pound part into a fixture. The judge found that the injury was not recorded because Caterpillar had a policy of not recording a hernia unless it was: 1) the result of impact, sudden effort or severe strain; 2) there was an actual or immediate pain in the hernial region at the time of the accident that caused the employee to draw the attention of foreman or fellow employees to the accident; and 3) the employee reported the accident to a doctor rather than a nurse within 12 hours. A penalty of $300 is assessed.

87. BENEDICT -- Experienced pain in his back while lifting pieces of tar which required 5 visits for heat treatment. He received motrin, a prescription drug, and had his work activity restricted. A penalty of $200 is assessed.

88. BROWN -- Injured his knee which required 3 visits for treatment. A penalty of $100 is assessed.

89. CANTU -- Strained his lower back which required aspirin or advil and 3 visits for heat treatments. A penalty of $100 is assessed.

90. CHAPMAN -- Slipped and hurt his back which required 2 heat treatments, a prescription drug, and 3 visits for additional treatment. A penalty of $150 is assessed.

91. COUNTS -- Strained his lower back which required 3 visits for heat treatments. A penalty of $100 is assessed.

92. CRABBLE -- Suffered inguinal pain as a result of having to twist out of a small space. A penalty of $100 is assessed.

93. CRAMER -- Experienced pain in his elbow while lifting steel out of a tub which required 2 visits for heat treatments and three different prescription drugs. A penalty of $150 is assessed.

94. CRISSIP -- Experienced pain in his lower back while lifting a part which resulted in one lost workday and restricted work activity for 2 weeks. A penalty of $200 is assessed.

95. CRUZ -- Experienced sharp back pain while performing various tasks. According to Dr. Neu, Cruz said he must have twisted wrong and felt a sharp pain in his lower back. His work was restricted. Because Cruz had a history of lower back problems and there was no evidence that he was overexerting, Dr. Neu did not record the injury. Dr. Neu testified that he did not know how far in the past the injury had occurred. A penalty of $100 is assessed.

96. ELAM -- Reported symptoms consistent with carpal tunnel syndrome. He was given a hand brace and 3 different prescription drugs. He also lost one workday. A penalty of $200 is assessed.

97. FLAMMANG -- Twisted his knee which required 9 visits for heat treatment. A penalty of $125 is assessed.

98. FOSTER -- Experienced pain in his right shoulder which he attributed to hanging hoister doors. He made 4 visits for heat treatments. A penalty of $75 is assessed.

99. GALLOWAY -- Had stiff back which was treated with 10 heat treatments. He also lost one workday. A penalty of $200 is assessed.

100. GARCIA -- Suffered back pain while lifting 30-pound weights. He received tylenol 3 and roboaxil, both prescription drugs, and his work was restricted for one day. Caterpillar did not record because of Garcia's previous back injury and because the weights being lifted were under 60 pounds. A penalty of $200 is assessed.

101. GREEN -- Had swollen right hand and index finger which were treated with prescription drugs. A penalty of $150 is assessed.

102. GUYER -- Had surgery for carpal tunnel release on both hands. Lost a workday and had his work activity restricted. Caterpillar conceded in its answer that the injury and 44 others should have been recorded. A penalty of $300 is assessed.

103. HOLTMAN -- Experienced sharp back pain when he turned and twisted while holding 20-25 pound air gun. He lost one workday and received prescription medicine. He had suffered from back problems two years earlier. A penalty of $200 is assessed.

104. HOUGAS -- Suffered shoulder pain which required heat treatment and resulted in restricted work. A penalty of $150 is assessed.

105. INGRAM -- Sprained his back while lifting a disk which required a prescription drug and resulted in one lost day of work. A penalty of $200 is assessed.

106. LEON -- Twisted knee which required motrin 800, a prescription drug, and resulted in one lost workday and restricted work activity. A penalty of $250 is assessed.

107. MARES -- Suffered groin pain while lifting 40-pound parts which required motrin 400, a prescription drug, and numerous ice treatments and resulted in one lost workday. A penalty of $200 is assessed.

108. McILQUHAM -- Received a contusion which required 7 visits for treatment, including hot soaks. A penalty of $125 is assessed.

109. MITCHELL -- Suffered pain in lower back while picking up a machine part weighing 30-50 pounds which required prescription medicine and heat treatments. He also lost several weeks of work. A penalty of $200 is assessed.

110. MELICK -- Suffered a sprain to his lower back which required ice and a series of heat treatments. A penalty of $100 is assessed.

111. MONTOYA, B.M. -- Suffered back strain which required 4 visits for heat treatments. A penalty of $100 is assessed.

112. MONTOYA, J.M. -- Felt back pain while carrying a brake reservoir which required heat treatment, a prescription drug, and resulted in a lost workday and restricted work. A penalty of $250 is assessed.

113. NAVARRO -- Suffered a hernia while attempting to lift a gas tank. He lost several days from work. Dr. Neu diagnosed the hernia 11 days after the event but did not record it because of Caterpillar'spolicy of not recording hernias if a doctor was not informed within 12 hours. A penalty of $550 is assessed.

114. OLIVA -- Experienced pain in his lower back while moving a part. His work activity was restricted and he lost one workday. A penalty of $200 is assessed.

115. PERRY -- Complained of a backache after carrying propane tanks weighing 100 pounds. He made 2 visits for heat treatments and had his work activity restricted. A penalty of $150 is assessed.

116. REINER -- Complained of back pain while operating a radial drill. He lost one workday and had his work activity restricted for 2 weeks. A penalty of $200 is assessed.

117. RIDGE -- Experienced chest pain while lifting parts which required a prescription drug for 2 weeks, lost one workday and restricted work activity for 3 months. A penalty of $250 is assessed.

118. RUIZ -- Experienced back pain which required 4 visits for heat treatments and prescription drugs, and resulted in restricted work activity for 1 week. A penalty of $200 is assessed.

119. RENALDI -- Suffered a contusion to his left hand. He made 3 visits for heat treatments. A penalty of $100 is assessed.

120. ROMERO -- Strained his back which required 3 visits for ice and heat treatments. A penalty of $100 is assessed.

121. SHELTON -- Received a contusion which required 13 visits for heat and ice treatments. He also received a prescription drug. A penalty of $200 is assessed.

122. SMITH -- Felt pain in his back while lifting. He lost numerous workdays, and was hospitalized 10 days in traction. He was also given prescription medicine. A penalty of $300 is assessed.

123. STANGL -- Suffered back pain while picking up a piece of iron. He made 14 visits for heat treatments. A penalty of $100 is assessed.

124. STEMEN -- Suffered a strain or sprain to her right arm. She made 10 visits for ice, heat, and whirlpool treatments, was given a prescription drug and had her work activity restricted. A penalty of $200 is assessed.

125. STEWART -- Suffered back pain while moving material. He was given two prescription drugs, multiple heat packs, lost one workday, and had a restriction on his work activity. A penalty of $250 is assessed.

126. TAYLOR -- Felt back pain when lifting a part. He made 3 visits for heat treatments, 1 visit for an ice pack. A penalty of $100 is assessed.

127. THILL -- Strained his left thumb. He received 5 visits for treatments, received inflexible and flexible support, two heat treatments and nonprescription medicine. A penalty of $75 is assessed.

128. TWAIT -- Experienced back pain while climbing. He made 2 visits for heat treatments, lost more than one workday; had his work activity restricted, and received a prescription drug. A penalty of $250 is assessed.

129. UNDERWOOD -- Suffered back pain. He made 6 visits for multiple heat treatments, lost one workday, had his work activity restricted, and was given two types of prescription drug. A penalty of $250 is assessed.

130. WALTER -- Sprained his left knee. He made 3 visits for heat treatments. A flexible support was also supplied. A penalty of $100 is assessed.

131. WILLIAMS -- Strained his knee. He received 9 visits for heat treatment, had his work activity restricted, and was given a prescription drug. A penalty of $225 is assessed.

132. YOUNGER -- Experienced soreness in his arm. He was treated with a prescription drug. A penalty of $125 is assessed.

133. BROOKMAN -- Twisted his ankle. He lost a workday, had his work activity restricted, and was given three prescription drugs. A penalty of $225 is assessed.

134. MARTINEZ -- Suffered a strain to his back. He made 2 visits for heat treatments. A penalty of $100 is assessed.

135. SCHROEDER -- Twisted his knee, and lost 1 workday, his work activity was restricted and he was given prescription medicine. A penalty of $250 is assessed.

136. MANTZKE -- Had surgery for carpal tunnel syndrome. He lost numerous workdays and received prescription medicine. A penalty of $350 is assessed.

137. CARLSON -- Lost a number of workdays as a result of the strain he suffered to his right knee. He was also given two types of prescription drug. A penalty of $125 is assessed.

138. MURPHY -- Suffered a sprain to the right knee which was treated with prescription medicine. A penalty of $125 is assessed.

139. WILSON -- Pulled his back while lifting, which required 2 visits for heat and ice treatments, and was given motrin 600, a prescription drug. A penalty of $150 is assessed.

140. LOONEY -- Experienced back pain while picking up a 60-70 pound weight. His work activity was restricted and he was given prescription medicine. A penalty of $200 is assessed.

141. TAYLOR -- Experienced pain after bending down. She lost more than one workday, and was given a prescription drug. A penalty of $200 is assessed.

142. HICKEY -- Strained his lower back, which required 5 visits for heat treatments, and one visit for ice treatment. A penalty of $100 is assessed.

143. HICKEY -- Suffered a sprained left knee. He received 6 visits for heat treatments. A penalty of $100 is assessed.

144. SPITZ -- Experienced back problems and was given prescription medicine. A penalty of $150 is assessed.

145. CRISSIP -- Experienced neck and shoulder pain. He made one visit for an ice treatment and one for heat treatment. A penalty of $100 is assessed.

146. BASSETT -- Strained his lower back after falling off a bucket. He made one visit for heat treatment, one for an ice treatment. A penalty of $100 is assessed.

147. WARD -- Experienced carpal tunnel syndrome which resulted in a lost workday and restriction of work activity. He was treated with a wrist brace, motrin 600, and finally with surgery. A penalty of $350 is assessed.

148. HERREID -- Experienced wrist pain which resulted in restriction of his work activity for 1 week. The injury was treated with a wrist splint and prescription drugs. A penalty of $200 is assessed.

149. FIGUEROA -- Experienced sharp pains in his shoulder 3 days after beginning new job. He lost one workday, had his work activity restricted, received 2 weeks of physical therapy, and was given prescription drugs. A penalty of $250 is assessed.

150. JONES -- Received a sprain or strain to his lower back, which resulted in 14 visits for heat treatments. His work activity was restricted and he was given prescription drugs. A penalty of $150 is assessed.

151. MANTZKE -- Experienced aching and numbness in his back and legs, which resulted in restricted work activity, a workday lost, and required prescription drugs and heat and ice treatments. A penalty of $250 is assessed.

152. CADIE -- Experienced a sharp pain in his back and received prescription medicine. A penalty of $150 is assessed.

153. BREESE -- Experienced back pain and was given prescription medicine. A penalty of $150 is assessed.

154. GONZALEZ -- Suffered contusions to his lower back, arms, and legs while falling into pit . He lost one workday and had his work activity restricted. A penalty of $200 is assessed.

155. GARCIA -- Experienced back pain which required 3 ice treatments and prescription drugs. He lost one workday and had his work activity restricted. A penalty of $250 is assessed.

156. DELGADO -- Experienced back pain which resulted in the loss of a number of workdays and restriction of work activity. A penalty of $200 is assessed.

157. ARENDT -- Experienced back pain which required treatment with prescription drugs. A penalty of $150 is assessed.

158. LOPEZ -- Experienced back pain which was treated with heat twice, his work activity was restricted and he was given prescription medicine. A penalty of $200 is assessed.

159. KELLY -- Experienced back pain which required 12 heat treatments and a prescription drug. A penalty of $200 is assessed.

160. QUIRIN -- Experienced back pain which resulted in the loss of a number of workdays and the restriction of work activity. A penalty of $200 is assessed.

161. FISCHER -- Experienced weakness and pain in his arm from continuous lifting of 20-pound parts. He was given prescription drugs and his work activity was restricted. A penalty of $175 is assessed.

162. BRANDON -- Experienced a stabbing pain in his left elbow while pulling a bar which required the application of a flexible support. Also, his work activity was restricted. A penalty of $150 is assessed.

163. NICHOLS -- Twisted his wrist which was treated with an inflexible support and prescription medicine. A penalty of $125 is assessed.

164. GORDON -- Experienced carpal tunnel symptoms. He lost a workday, had his work activity restricted and was given prescription medicine. A penalty of $250 is assessed.

165. BIANIONI -- Experienced tendonitis while using an impact gun. His work activity was restricted, and he was given prescription medicine. A penalty of $200 is assessed.

166. McCOY -- Sprained his back which required 3 visits for heat treatments as well as prescription medicine. A penalty of $150 is assessed.

167. OLSEN -- Suffered from back injury which required prescription medicine as well as ice and heat treatments. A penalty of $150 is assessed.

168. HOOVER -- Suffered from injured shoulder which required heat treatment and prescription medicine. A penalty of $150 is assessed.

169. PARIS -- Experienced shoulder pain which was treated with prescription medicine. A penalty of $150 is assessed.

170. BOEHMKE -- Experienced shoulder pain which was treated with prescription medicine and resulted in his work activity being restricted. A penalty of $200 is assessed.

VI. ORDER

Accordingly, items 1 through 170, with the exception of items 31, 63 and 77, are affirmed. A total penalty of $25,625.00 is assessed.[27] The willful characterization is vacated.

/s/
Edwin G. Foulke, Jr.
Chairman

/s/
Donald G. Wiseman
Commissioner

/s/
Velma Montoya
Commissioner

Dated: February 2, 1993

[27] In Commissioner Montoya's view, consideration of the penalty factors in section 17(j), particularly Caterpillar's minimal good faith and large size, should have resulted in higher penalties.