Secretary of Labor,	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. **00-0717**
	:	
Emerson Electric Company,	:	
Motor Division,	:	
Respondent.	:	

Appearances:

Marsha L. Semon, Esquire
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

Julie O'Keefe, Esquire
Armstrong-Teasdale, L.L.P.
St. Louis, Missouri
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Emerson Electric Company, Motor Division (Emerson), is engaged in the business of manufacturing motors for household appliances. In response to a formal complaint about Emerson, Occupational Safety and Health Administration (OSHA) Industrial Hygienist (IH) Priscilla Jordan of the Jackson, Mississippi OSHA area office, inspected Emerson's facility in Oxford, Mississippi, on February 8 to 9, 2000. As a result of this inspection, on March 17, 2000, Emerson was issued an "other" than serious citation alleging three instances of violations of 29 C. F. R. § 1904.2(a), for failing to make entries in its OSHA 200 log (Log and Summary of Occupational Injuries and Illnesses, OSHA No. 200). No penalty was proposed. Emerson timely contested the citation. Prior to the hearing, the Secretary withdrew that portion of Citation No. 1, Instance (a), that alleged an employee illness should have been logged twice in the 1999 OSHA 200 log, and withdrew all of Citation No. 1, Instance (c).

This case was originally designated for E-Z trial procedures under 29 C. F. R. § 2200.200, *et seq.*; however, E-Z procedures were discontinued. The hearing was held in Biloxi, Mississippi, on October 13, 2000. Emerson admits jurisdiction and coverage (Answer). For the

reasons that follow, the violations of 29 C.F.R. § 1904.2(a), Instance (a), as amended, and Instance (b) are affirmed. No penalty is assessed.

Background

OSHA conducted an inspection of Emerson based on a complaint that was filed with the Jackson OSHA area office alleging six items; among these, that Emerson did not allow employees to seek medical treatment for repetitive motion illnesses, and these illnesses were not recorded on the OSHA 200 logs (Tr. 11). IH Jordan conducted a complaint investigation of Emerson on February 8 to 9, 2000, beginning with an opening conference with manager Ron Hoffman and three other employees (Tr. 11-12). Jordan examined the OSHA 200 logs for 1998, 1999, and 2000; conducted a walkaround inspection; observed employees working, including the surge tester operators; and interviewed employees.

The two employees who are the subject of OSHA's allegation are designated as "Employee A" for Citation No. 1, Instance (a), and "Employee B" for Citation No. 1, Instance (b), in order to protect the confidentiality of their medical records (Tr. 4). Both employees worked as surge tester operators which involves picking up a motor from a conveyor belt, hooking six wires to the motor, testing the motor, then unhooking the wires, and placing the motor back on the conveyor belt (Exhs. C-4 at 1, C-6, Tr. 31-32). This work involved repetitive hand and arm movements (Exh. C-4 at 1; Tr. 31). About 30 employees out of 700 employees at the Oxford facility worked as surge tester operators (Tr. 14, 126).

Instance (a)

Employee A worked on the assembly line at Emerson for twenty-eight years (Exh. C-4 at 4). In early February 1999, she was having problems with her right thumb and went to the plant nurse, Moreice Parker, a licensed practical nurse (Tr. 98). Parker, who had been at Emerson for five years, was the occupational health nurse (Tr. 95). Parker sent Employee A to Dr. Cooper L. Terry (Tr. 98). On February 11, 1999, Employee A was examined by Dr. Terry and diagnosed with "right thumb trigger finger," and he gave Employee A a thumb spica splint and anti-inflammatory medication. He ordered a work restriction of no use of the right thumb (Exh. C-4 at 4, 5).

On February 22, 1999, Parker noted on a worker's compensation form that Employee A had sustained a "repetitive type injury" identified as "right trigger thumb" (Exh. C-4 at 1).

On February 25, 1999, Employee A returned to Dr. Terry and he diagnosed "persistent right trigger thumb," treated her with a steroid injection, and prescribed continued splinting and light duty for one week (Exh. C-4 at 8).

On March 4, 1999, Employee A returned to Dr. Terry who found that she had no recent triggering and prescribed continued splinting and return to full duty on March 11, 1999 (Exh. C-4 at 10). Employee A returned to full duty on March 11, 1999 (Exh. C-4 at 30).

The 1999 OSHA 200 log notes that on February 11, 1999, Employee A had right trigger thumb and had eighteen days of light duty (Exh. C-2 at 1).

Six months later on September 9, 1999, Employee A returned to Dr. Terry who diagnosed "bilateral trigger thumbs" and recommended that she undergo surgery for a bilateral trigger thumb release (Exh C-4 at 12).

On December 23, 1999, Employee A visited Dr. Ernest B. Lowe, her personal physician, who found that she had "positive Tinel's and positive Phalen's for carpal tunnel syndrome" and recommended carpal tunnel studies (Exh. C-4 at 13). In addition, he found she had trigger fingers for the long and ring fingers and arthritic changes for both thumbs.

On December 30, 1999, Employee A returned to Dr. Lowe who recommended nerve conduction studies (Exh. C-4 at 13). On January 3, 2000, Employee A underwent a bilateral nerve conduction study of her wrists. The study showed severe slowing of the median nerve impulses for both hands (Exh. C-4 at 18).

On January 6, 2000, Dr. Lowe diagnosed "severe carpal tunnel syndrome, right and left. Certainly, I feel this is secondary to her work." He prescribed physical therapy and no work until January 27 (Exh. C-4 at 13, 20).

On January 7, 2000, Nurse Parker received notice of Dr. Lowe's diagnosis (Exh. C-4 at 14).

On January 11, 2000, Parker sent Employee A to Dr. E. B. Wilkinson for a third opinion (Tr. 100). Dr. Wilkinson agreed with Dr. Terry's recommendation that bilateral trigger thumb release was indicated. He found that Employee A had no triggering of the fingers but definite triggering of both thumbs. He could not rule out carpal tunnel and recommended nerve conduction velocity and EMG testing. He also stated that she could be on full work duty (Exh C-4 at 22-23).

On January 25, 2000, Dr. Wilkinson found that Employee A's EMG/nerve conduction study was "extremely positive for carpal tunnel far beyond what I expected" (Exh. C-4 at 24). He

recommended carpal tunnel surgery with trigger thumb surgery at the same time and "light duty with no repetitive gripping," and "patient should not do any excessive use of the hands" (Exh. C-4 at 24).

On January 26, 2000, Nurse Parker was notified of Dr. Wilkinson's diagnosis by fax (Exh. C-4 at 26). This fax, sent by Nurse Zaino, notes that Dr. Wilkinson feels that even if Employee A's bilateral carpal tunnel was not caused by work, "it was aggravated by work" (Exh. C-4 at 26; Tr. 129-130).

Instance (b)

Employee B worked on the assembly line at Emerson for twenty-three years. On January 6, 1999, she went to Nurse Parker complaining that her right elbow hurt (Exh. C-7 at 1). Parker sent her to Dr. Terry (Tr. 122).

On January 7, 1999, Dr. Terry examined Employee B, diagnosed "right tennis elbow," prescribed medication and hand therapy, and continuation of full duty work (Exh C-7 at 4-5).

On January 28, 1999, Dr. Terry diagnosed Employee B with "improving tennis elbow" and prescribed two more physical therapy visits, continued home exercise program, and medication (Exh. C-7 at 6).

February 9, 1999 is the date of an Emerson Accident/Illness Investigation Report which notes that on January 25, 1999, Employee B sustained a strain to her right elbow which occurred by using her arm to get motors (Exh. C-7 at 2).

On February 22, 1999, Employee B returned to Dr. Terry. He felt that her right tennis elbow was an "overuse syndrome" and prescribed continued anti-inflammatory medication and a job change (Exh. C-7 at 7). He called Nurse Parker and told her of his recommendations.

On March 9, 1999, Director of Hand Therapy, Jimmy Manning, OTR/L, visited the Emerson facility to provide consultation regarding a job change for Employee B. He spoke with the supervisor of the surge board assembly line, the human resource supervisor, Stacy Couch, and Nurse Parker. Manning indicated in his Hand Therapy Discharge Summary dated March 9, 1999, that Employee B's "condition fluctuated," and improvements "appear to be directly related to periods of time when not operating the surge board" (Exh. C-7 at 11-12).

On March 19, 1999, Dr. Terry noted that Employee B was no better on different jobs, that she wanted to go back to her old job, and this was "o.k." with me and "no restrictions" (Exh. C-7 at 13).

During this time period, Employee B never worked in any job other than surge tester operator (Tr. 38, 122-125).

DISCUSSION

The Secretary has the burden of proving, by a preponderance of the evidence, a violation of the standard.

Alleged Violation of 29 C.F.R. § 1904.2(a)

The citation alleges that Emerson's OSHA 200 log was not completed in the detail provided in the form and in the instructions contained therein in that Emerson did not record two instances of injuries and illnesses for two employees. Section 1904.2(a) provides in pertinent part:

> (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.

"Recordable occupational injuries or illnesses" are any occupational injuries or illnesses which result in lost workdays or medical treatment which includes treatment administered by a physician or by registered professional personnel under the standing orders of a physician. 29 C. F. R. §§ 1904.12(c) and (d). On the back of the OSHA 200 log, occupational illness is defined as "any abnormal condition or disorder, other than one resulting from an occupational injury, caused by exposure to environmental factors associated with employment," including disorders associated with repeated trauma (Exh. C-5 at 64). Entries must be recorded on the log "for the year in which the case occurred" (Exh. C-5 at 12).

There is no dispute that the recordkeeping standard applies to Emerson and, in fact, Emerson maintains the OSHA 200 logs. Nevertheless, Emerson contends that it did not know or could have known, with reasonable diligence, of the alleged recordkeeping violations. Emerson further contends that it met the recordkeeping requirements for Employees A and B.

Knowledge

The test for knowledge is whether "the employer either knew, or with the exercise of reasonable diligence, could have known of the presence of the violative condition." *Pride Oil Well Service,* 15 BNA OSHC 1809, 1814 (No. 87-692, 1992). Emerson contends that it did not have

knowledge because Nurse Parker was not an Emerson employee, supervisor, or member of management so as to impute her knowledge to it. Even though Parker, a licensed practical nurse, was employed by Baptist and Physicians, her job was to work as an occupational health nurse at Emerson (Tr. 95). She has worked at Emerson for the past five years. In addition to her nursing duties, she was responsible for maintaining Emerson's OSHA 200 logs at the Oxford facility and spent about 50 percent of her time at Emerson working on OSHA recordkeeping (Tr. 96). She stated that she relied exclusively on the Blue Book[1] to determine whether a case is recordable (Tr. 97). She had OSHA recordkeeping training which included attending about three- or four-day seminars on OSHA recordkeeping requirements (Tr. 97).

"Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corp.,* 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). Parker is Emerson's agent. Emerson was utilizing Parker as its occupational health nurse to provide medical treatment to its employees. Parker had been doing this for Emerson for five years. Emerson had given Parker the responsibility of maintaining the OSHA 200 logs and determining the recordability of a case (Tr. 96). Parker signed the records' annual certification on behalf of Emerson (Exh. C-2). Emerson's nurse was in a supervisory position over Emerson's employees and exercised control over them. Employees A and B went to Parker for their medical complaints, and she evaluated what they did at their jobs and referred them to Dr. Terry (Tr. 98, 122). Parker could arrange for employees to change jobs within the facility based on their medical conditions. "An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer." *Tampa Shipyards, Inc.,* 15 BNA OSHC 1533, 1537 (No. 86-360, 1992). It is the substance of the delegation of authority that is controlling, not the formal title of the employee having this authority; an employee who is empowered to direct that corrective measures be taken is a supervisory employee. *Dover Elevator Co.,* 16 BNA OSHC 128l, 1286 (No. 91-862, 1993).

[1] The Blue Book is the informal name for "Recordkeeping Guidelines for Occupational Injuries and Illnesses" from the Bureau of Labor Statistics dated September 1986. It contains guidelines for recordkeeping requirements of the Act.

Clearly, Parker's knowledge is imputed to respondent. An employer cannot contract away its obligations as a defense to a violation of the Act. *See Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013 (No. 87-1067, 1991) (secondary employer, which directed and controlled loaned employees, cannot avoid responsibility for the employees' actions by claiming that the employees worked for an independent contractor). Other members of Emerson's management had knowledge of these illnesses. Although some of the signatures and dates are not legible, Emerson's Accident/Illness Investigation Reports on Employees A and B were signed by the supervisor, the superintendent, the human resource manager, and the plant manager (Exhs. C-4 at 2, C-7 at 2). These reports were signed within a short time of the diagnosis of illness. This shows that four members of Emerson's management had knowledge of the illnesses of Employees A and B.

The Secretary has established employer knowledge.

Instance (a)

Employee A's right trigger thumb was recorded in the 1999 OSHA 200 log on February 11, 1999. It is undisputed that there was no entry in the 2000 OSHA 200 logs for Employee A's bilateral carpal tunnel syndrome (Exh. C-2; Tr. 36). Emerson asserts that Employee A's right trigger thumb and the carpel tunnel syndrome are the same continuous illness that is not work related. Emerson's assertion is without merit.

All occupational illnesses must be recorded on the OSHA 200 logs. Carpal tunnel syndrome can be considered an occupational illness. Because "work-related carpal tunnel syndrome cases almost always result from repetitious movement, they should be classified as occupational illness." (Exh. C-5 at 38). Employee A worked at a job that required continuous repetitive hand and arm movements, *i.e.*, lifting a motor and hooking and unhooking the surge tester. Nurse Parker admits that working on the surge tester is repetitive work (Tr. 132). On January 6, 2000, Dr. Lowe diagnosed Employee A with severe bilateral carpal tunnel syndrome related to her work (Exh. C-4 at 13). Dr. Lowe recommended that she could not return to work until after January 27 (Exh C-4 at 20). On January 25, 2000, after an EMG/nerve conduction study on Employee A, Dr. Wilkinson also diagnosed Employee A with severe bilateral carpal tunnel syndrome "aggravated" by her work and recommended surgery without delay (Exh. C-4 at 24, 26). Parker admitted that she understood this to be Dr. Wilkinson's opinion (Tr. 130). Employee A had carpal tunnel surgery on February 4, 2000 (Exh. C-4 at 29). The Blue Book states that "(i)f it seems likely that an event or exposure

in the work environment either caused or contributed to the case, the case is recordable" (Exh. C-5 at 32).

Emerson claims that even if the illnesses were work related, there only needs to be one recorded illness for both Employee A's right trigger thumb and carpal tunnel syndrome. The recordkeeping requirements instruct employers "to make new entries on their OSHA forms for each new recordable injury or illness" (Exh. C-5 at 31). Parker admitted that right trigger thumb is not the same illness as bilateral carpal tunnel syndrome, and they are two distinct diagnoses (Tr. 128). Trigger finger is defined as locking of a finger in a bent position caused by inflammation of the fibrous sheath that encloses the tendon of the affected finger and is accompanied by localized swelling of the tendon; treatment can involve surgery to widen the opening of the sheath. *The American Medical Association Encyclopedia of Medicine,* pp. 1010–1011. Carpal tunnel syndrome is defined as numbness, tingling, weakness, and pain in the thumb, index, and middle fingers resulting from pressure on the median nerve where it passes into the hand via a gap (the carpal tunnel) under a ligament at the front of the wrist; treatment can involve surgical cutting of the ligament to relieve the pressure on the nerve. *Id.* at 238-239. Obviously, these definitions are not the same. Neither Dr. Lowe nor Dr. Wilkinson diagnosed trigger thumb and bilateral carpal tunnel syndrome as one and the same illness; they did not diagnose a changed illness (from trigger thumb to carpal tunnel); rather, they diagnosed two different illnesses. Parker cannot substitute her opinion for a medical doctor's diagnosis, in this case, two doctors.

Recording two different illnesses under one illness defeats the purpose of the recordkeeping requirements. The overall purpose of the recordkeeping duty is provided in 29 C.F.R. § 1904.1:

> These sections provide for recordkeeping and reporting by employers covered under the act, for developing information regarding the causes and prevention of occupational accidents and illnesses, and for maintaining a program of collection, compilation, and analysis of occupational safety and health statistics.

"The recordkeeping requirements of the Act 'play a crucial role in providing the information necessary to make workplaces safer and healthier.'" *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2179 (No. 90-2775, 2000) (quoting *General Motors Corp., Inland Div.*, 8 BNA OSHC 2036, 2041 (No. 76-5033, 1980).

Emerson's assertion that Parker intended to update the 1999 OSHA 200 log after Employee A returned to work from her carpal tunnel surgery is also without merit. The OSHA 200 log must be updated within six working days after receiving information that a recordable case has occurred. 29 C. F. R. § 1904.2(b)(1). Employee A's carpal tunnel syndrome should have been recorded by January 18, 2000, which was six working days from January 7, 2000, the date Parker had actual notice of Dr. Lowe's diagnosis. Even if Parker were waiting for another opinion from Dr. Wilkinson, the sixth working day from the date Parker had actual notice (January 26, 2000) of his diagnosis of carpal tunnel syndrome was February 3, 2000. As of the date of the inspection, February 8, 2000, nothing was recorded for Employee A's carpal tunnel syndrome.

The violation of 29 C.F.R. § 1904.2(a) is affirmed.

Instance (b)

It is undisputed that there was no entry in the 1999 OSHA 200 log for Employee B's right tennis elbow (Exh. C-2). Emerson alleges that Parker made a good faith decision not to record Employee B's right tennis elbow. [Parker testified that she originally did record Employee B's right tennis elbow on the logs but later removed it (Tr. 125).] Parker concluded that since Employee B wanted to stay on the surge tester job, the surge tester was not the cause of her right tennis elbow (Tr. 123). Parker's assumption is invalid in light of both of the conclusions of the doctor and physical therapist (both of which Parker was aware) that the cause of Employee B's right tennis elbow was work related.

The Blue Book states that an employer's decision not to record an illness "should be made in accordance with the requirements of the act, regulations, the instructions on the forms, and the guidelines in this report," as well as information from medical and hospital records "along with

other pertinent information" (Exh. C-5 at 25). Employee B had worked on the line for Emerson for years. As surge tester operator, she was engaged in repetitive work (noted above). Dr. Terry diagnosed Employee B with right tennis elbow and recommended anti-inflammatory medicine and hand therapy. After the physical therapy was complete, Employee B revisited Dr. Terry. Noting that Jimmy Manning, physical therapist, correlated Employee B's symptoms with her work as surge tester and recommended a job change, Dr. Terry diagnosed her right tennis elbow as an overuse syndrome and stated a job change would be the best for her (Exh. C-7 at 7). Parker did attempt to change Employee B to a different job, but Employee B wanted to remain at her job as surge tester operator because it paid more, and she was allowed to stay. IH Jordan testified that Employee B told her that even though she would have pain, she wanted to remain as surge tester operator because it paid more (Tr. 42). Parker admitted that she did not take into consideration Employee B's social situation (divorced with four children) and financial need to stay at a higher paying position when she decided not to record Employee B's illness (Tr. 136-137).

Parker's decision not to record Employee B's right tennis elbow was not in accordance with the Blue Book, even though Parker stated that she relied on the Blue Book to determine recordability (Tr. 97). Parker's decision not to record Employee B's right tennis elbow on the 1999 OSHA 200 log based on the fact that Employee B wanted to remain on the surge tester job was inappropriate. The decision as to what is recordable is not made by the injured or ill employee, especially when, as here, there is a diagnosis that the illness is work related according to both a medical doctor and physical therapist. The Blue Book notes that "(i)f it seems likely that an event or exposure in the work environment either caused or contributed to the case, the case is recordable" (Exh. C-5 at 32).

The violation of 29 C.F.R. § 1904.2(a) is affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The preceding decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based on the preceding decision, it is ORDERED that:

1. Citation No. 1, Instance (a), alleging a violation of 29 C. F. R. § 1904.2(a), is affirmed, as amended, and no penalty is assessed.
2. Citation No. 1, Instance (b), alleging a violation of 29 C. F. R. § 1904.2(a), is affirmed and no penalty is assessed.
3. Citation No. 1, Instance (c), is withdrawn by the Secretary, and therefore is vacated.

STEPHEN J. SIMKO, JR.
Judge

Date: February 6, 2001