

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
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SECRETARY OF LABOR,

Complainant,

v.

DILLARD TEXAS OPERATING LIMITED  
PARTNERSHIP, and its successors,

Respondent.

OSHRC DOCKET NO. 98-0869

**APPEARANCES:**

For the Complainant:

Ernest A Burford, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas

For the Respondent:

David M. Moore, Esq., Jacqueline L. Wood, Esq., Wilson, Grosenheider, Moore & Jacobs, L.L.P.,  
Austin, Texas

Before: Administrative Law Judge: James H. Barkley

**DECISION AND ORDER**

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Dillard Texas Operating Limited Partnership, and its successors (Dillard's), at all times relevant to this action maintained a place of business at 1504 Harvey Road, College Station, Texas, where it was engaged in retail sales. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On March 4, 1998 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Dillard's College Station, Texas work site. As a result of that inspection, Dillard's was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Dillard's brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On September 9, 1998, a hearing was held in Austin, Texas. At the hearing the Secretary withdrew citation 1, item 3(b). The parties have submitted briefs on the remaining issues and this matter is ready for disposition.

### **Alleged Violation of 1910.22(b)(1) & 1910.141(a)(5)**

Citation 1, item 1a and 1b were grouped because they involve similar and/or related hazards.

Those items state:

#### **Citation 1, item 1a**

29 CFR 1910.22(b)(1): Aisle(s) or passageway(s) were not kept clear and in good repair with no obstructions across or in aisles that could create a hazard:

- (a) In the dock area, repair to the foundation did not provide a level walking working surface.
- (b) At the Dresses entrance, damage to the foundation caused gaps in the floor tile which presented a tripping hazard.

#### **Citation 1, item 1b**

29 CFR 1910.141(a)(5): Enclosed workplace(s) were not so constructed, equipped, and maintained to prevent the entrance or harborage of rodents, insects, or other vermin:

- (a) At entranceways and on outside walls of the building, the brick wall's structural integrity was compromised, causing openings and cracks where pests may enter.

#### **Facts**

Compliance Officer (CO) Elizabeth Slatten testified that cracks in the foundation in Dillard's dock area created a ½ - ¾" change in elevation on which employees could trip or stub their toes as they maneuvered merchandise through the area on mechanical hand trucks and Z-racks (Tr. 9-10, 12, 54; Exh. R-29). Debbie Hoffman, Dillard's operations manager, acknowledged the existence of the cracks (Tr. 14, 76). Hoffman testified that Dillard's had attempted to level out the crack with a concrete patch (Tr. 76). Slatten stated that Dillard's attempts to patch the cracks with concrete had not abated the hazard (Tr. 11). Approximately four employees were exposed to the hazard throughout their shifts (Tr. 12). The dock area was congested and cluttered (Tr. 13).

Slatten testified that in the dress entrance a parquet tile floor had separated, creating a similar tripping hazard (Tr. 11, 54-55). Employees told Slatten that they had themselves slipped or tripped on the cracked floor, or knew of others who had fallen there (Tr. 13). Hoffman testified that stock was not moved over the parquet flooring (Tr. 77).

Dillard's admits, that the brick veneer of the store was cracked (Tr. 14). CO Slatten testified that the cracks were between one and four inches; at one point there was a six inch crack in a door (Tr. 21-22). Hoffman stated that the cracks were due to a shifting foundation. Though old cracks were caulked, new cracks have appeared since (Tr. 77). Slatten admitted that Dillard's had repaired or attempted to repair some of the cracks, *i.e.* in the dock area (Tr. 22). Slatten did not know whether the cracks penetrated both the exterior and interior walls of the store (Tr. 56). Hoffman testified that

Dillard's had no problem with rodents, and that Dillard's exterminates monthly (Tr. 78). One employee told Slatten she had seen roaches in the store (Tr. 57). Slatten looked for, but did not observe any pests in the area (Tr. 22-23).

### Discussion

#### **Citation 1, item 1a**

Section 1910.22(b)(1) provides, in relevant part:

. . .Aisles and passageways shall be kept clear and in good repairs, with no obstruction across or in aisles that could create a hazard.

The cited standard is applicable to the dock area and dress entrance. Those areas are passageways, used for foot traffic and/or the movement of stock. The areas were not in good repair, in that cracks in the flooring created a tripping hazard.

Dillard's argues that correction of the cited conditions is infeasible in that nothing short of demolition of the building would solve the problem. Dillard's unsupported assertion is insufficient to establish the affirmative defense. *See; V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1994 CCH OSHD ¶30,485 (No. 91-1167, 1994).

The Secretary has established the violation.

#### **Citation 1, item 1b**

Section 1910.141(a)(5) provides:

Every workplace shall be so constructed, equipped, and maintained, so far as reasonably practicable, as to prevent the entrance or harborage of rodents, insects, and other vermin. A continuing and effective extermination program shall be instituted where their presence is detected.

The record establishes that Dillard's maintains its exterior insofar as it is reasonably practicable, caulking cracks which appear as a result of a shifting foundation. Moreover, Dillard's has a monthly extermination program to eliminate any pests which may be detected. The Secretary has failed to prove the cited violation by a preponderance of the evidence.

Citation 1, item 1b is vacated.

### Penalty

A combined penalty of \$1,350.00 was proposed for the violations alleged at item 1a and 1b. Item 1b was vacated. CO Slatten testified that the gravity of item 1a was low. Slatten stated that if any of the employees in the area tripped, they could suffer a knee injury such as a strain or sprain (Tr. 18). Slatten believed that approximately 20 employees were exposed to tripping hazards (Tr. 18); however,

Hoffman testified that four to six employees work in the dock area at any given time, and only three employees total work in the dresses area (Tr. 76).

The violation was improperly classified as “serious” in that the violative condition or practice does not give rise to a substantial probability of death or serious physical harm as required by §17k of the Act. In addition, the number of employees exposed to the violation was overstated for purposes of the gravity based penalty calculation. Finally, Slatten wrongly believed that Dillard’s was not entitled to any reduction of the penalty for good faith because of deficiencies in its emergency action plan (Tr. 19-20). Rather, Dillard’s should be given credit for good faith because it made substantial efforts to protect employees, as set forth in its emergency action plan. The shortcomings in the action plan are the subject of citation 1, item 3, and Dillard’s should not be penalized twice for those deficiencies.

A 10% reduction was recommended for history; Dillard’s had no record of prior citations (Tr. 20).

Taking into account the relevant factors, I find that a penalty of \$50.00 is appropriate.

**Alleged Violation of 1910.36(d)(2) & 1910.37(k)(2)**

Citation 1, items 2a and 2b were grouped because they involve similar or related hazards. Those items allege:

**Citation 1, item 2a**

29 CFR 1910.36(d)(2): Automatic sprinkler system(s) fire detection and alarm system(s), exit lighting, fire door(s), or other item(s) of equipment, were not maintained continuously in proper operating condition:

(a) At the Dresses entrance discharging to the parking lot, the doors did not properly fit the door frames.

**Citation 1, item 2b**

29 CFR 1910.37(k)(2): Means of egress were not continuously maintained free of obstructions or impediments to full instant use in the case of fire or other emergency:

(a) At the exits discharging to the parking lots and into the mall, the doors were locked before business hours, without provision for unhindered use of the exits.

**Facts**

CO Slatten stated that once the doors at the dress entrance were closed, they would not open without the use of considerable force (Tr. 25). Slatten could see that Dillard’s had attempted to shave down and round off the doors, but had not alleviated the problem (Tr. 59). Slatten stated that the doors are normally left ajar for customers; however, outside of store hours the doors are closed (Tr. 24-25).

Slatten believed that employees attempting to exit the store would be impeded by the doors sticking in their frames (Tr. 26). The cited doors are signed as exits, but are not fire doors (Tr. 26, 58).

Slatten testified that Dillard's management admitted they locked the glass doors to the parking lot, and the sliding doors to the mall outside of business hours (Tr. 27-28). Keys for the doors are kept at the service desk; salaried managers have keys, as does the maintenance engineer (Tr. 30, 79). When the parking lot and mall doors are locked, one door at the dock remains available for emergency egress (Tr. 28-29). The dock door is equipped with a panic bar which, if pressed for 15 seconds, will unlock the door (Tr. 29). The door can also be opened by means of a fire pull near the door, or with a buzzer by personnel who monitor the door by video camera (Tr. 85). Finally, the door opens automatically when the alarm system sounds (Tr. 85). Employees are exposed to the cited hazard for 15 to 30 minutes before opening, and approximately an hour after closing, as well as during inventory (Tr. 60).

Hoffman testified that it is necessary to keep the store doors locked outside of business hours to protect the employees and the inventory (Tr. 79, 81). Slatten stated that the hazard can be abated by installing at least one door in each series of doors which is capable of being outfitted with panic equipment (Tr. 31).

### Discussion

#### **Citation 1, item 2a**

Section 1910.36(d)(2) provides:

Every automatic sprinkler system, fire detection and alarm system, exit lighting, fire door, and other item of equipment, where provided, shall be continuously in proper operating condition.

The cited standard applies to equipment that is installed in workplaces to control heat sources, or to detect fuel leaks or excessive temperatures. *See* Appendix to subpart E, ¶5. Because the doors at the dress entrance are not fire doors, the cited standard is inapplicable.

Citation 1, item 2a is vacated.

#### **Citation 1, item 2b**

Section 1910.37(k)(2) provides:

Means of egress shall be continuously maintained free of all obstructions or impediments to full instant use in the case of fire or other emergency.

The locked main and mall doors are normally utilized as exits. Locking the doors outside of business hours limits employee's escape routes to only one of four customary exits. The Commission has held, in *Gould d/b/a/Gould Publications*, 16 BNA OSHC 1925, 1994 CCH OSHD ¶30,502 (No. 89-2033), that a locked door in a 60' x 60' room "could prevent the quick escape of any of the four employees who regularly work in the room and would be accustomed to the door being unlocked." *Id.*

at 1925. The Commission found that the availability of two other routes to the outside did not eliminate the hazard posed by the locked door.

Based on Commission precedent, I find that the locked doors do impede employees' full and instant use of the means of egress during non-business hours. Because locking the doors prevents immediate emergency egress, the facts support the cited violation. As cited, however, any abatement of the violation will either conflict with, or duplicate items 3(a) and 3(b). Items 3(a) and 3(b) require Dillard's to provide for unhindered emergency exit during non-business hours, while the doors are locked for security reasons (as well as to inform employees how to override the time delay lock on the dock door). Citation items 3(a) and (b) suggest that Dillard's current practice of locking the main and mall entrances, as well as the presence of a time delay on the dock door panic bar, are acceptable so long as provisions are made for ensuring unhindered emergency egress through the main doors during hours that the doors are locked, and the procedures for exiting through the dock door are explained. If OSHA is requiring that the cited doors be unlocked to abate item 2b, items 3(a) and 3(b) are in conflict; if Dillard's can abate item 2b by making other provisions for employees' use of the exits, items 3(a) and 3(b) are duplicative.

I am mindful that the Commission Rules provide for the pleading of alternative and conflicting theories of a case. In OSHA litigation, however, the citation must inform the cited employer of the precise nature of the cited hazard, and provide some guidance as to the abatement necessary to eliminate that hazard<sup>1</sup>. Accordingly, at some point between the issuance of the citation and conclusion of litigation, inconsistencies in the citation and pleadings must be resolved, so that the employer knows what is required of it under the Act. While it is preferable that the Secretary resolve such conflicts, in this case she has not done so, either at the hearing, or in her brief, and that task falls to this judge.

Should citation 1, item 2(b) be affirmed, Dillard's would be constrained to replace the glass main and mall exit doors with doors that can be equipped with panic bars, and remove the time delay from the panic bar on the dock doors, a solution which will place a significant financial burden on Dillard's<sup>2</sup>. Citation 1, items 3(a) and (b), however, suggest that the cited hazard may also be abated by making other provisions for employee emergency access, including such provisions in the emergency action plan and providing adequate safety instruction signage. The abatement will, apparently, eliminate the cited

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<sup>1</sup> Under §17(d) of the Act, an employer is liable for additional penalties of up to \$1,000 per day for failure to correct cited violations.

<sup>2</sup> A second Dillard's store has been cited with similar inconsistent citations in the companion case at Docket Number 98-0867. Affirmation of this citation could result in OSHA's inspection of Dillard's stores nationwide, seeking to exact the same abatement.

hazard at considerably less cost to Dillard's. For the reasons cited above, citation 1, item 2(b) will be vacated.

**Alleged Violation of 1910.38(a)(1) and 1910.145(c)(3)**

Items 3a through 3c were grouped for penalty assessment because they involve similar or related hazards that may increase the potential for injury resulting from an accident.

**Citation 1, item 3a**

29 CFR 1910.38(a)(1): The emergency action plan required by 29 CFR 1910.157(a) or (b) when the employer has elected to partially or totally evacuate the workplace in the event of a fire emergency, or required by 29 CFR 1910.160(c)(1), did not cover the designated actions that the employer or employees must take to ensure employee safety from the fire and other emergencies:

(a) At the workplace, the plan did not provide for unhindered emergency egress procedures during hours when doors are locked for security reasons.

(b) In the dock area, the plan did not explain that the dock exit door can be opened by steady pressure for 15 seconds in emergencies.

**Citation 1, item 3b**

29 CFR 1910.145(c)(3): Safety instruction sign(s) were not used where there was a need for general instructions and suggestions relative to safety measure(s):

(a) Adjacent to the release device, the dock exit door did not have a placard or sign containing instructions as follows:

“PUSH UNTIL ALARM SOUNDS.  
DOOR CAN BE OPENED IN 15 SECONDS.”

**Facts**

CO Slatten testified that Dillard's emergency action plan contained no reference to procedures to be followed outside of business hours (Tr. 31). Slatten stated that because the nearest exit could be locked, the plan should have spelled out for employees how and where to most rapidly exit the structure (Tr. 32). The plan did not alert employees that the dock door could be opened by exerting steady pressure on it (Tr. 32).

Dillard's dock supervisor told Slatten that employees were not aware that the dock door could be opened by pressing the panic bar continuously for 15 seconds (Tr. 33). Employees were not informed that the door automatically opens in the event of a fire alarm, or that the door can be opened with an emergency pull by the side of the door (Tr. 62-63). Slatten stated that employees might abandon the door to look for another way out (Tr. 35). Dillard's told Slatten that the door was constantly attended by means of a video camera, and that the attendant could buzz the door open in

case of emergency (Tr. 36-37). The attendant was not mentioned in the emergency action plan (Tr. 37). Four dock employees were exposed to the hazard, as well as any floor employees in the store outside of business hours (Tr. 36).

Discussion

**Citation 1, item 3a**

§1910.38(a)(1) provides in relevant part that the employer must have a written emergency action plan which covers those designated actions employers and employees must take to ensure employee safety from fire and other emergencies.

As discussed above, because the practice of locking the usual main and mall exits hinder's employee emergency exit during non-business hours, Dillard's must develop a plan, designating the steps which must be taken to ensure those employees' unimpeded exit from the store during those periods while the doors are locked for security reasons. Dillard's must include such provisions in its emergency action plan.

In addition, because employees are expected to exit through the dock door, they should be informed of the delay on the panic bar, so that they are aware that that exit route is open and available in the event of an emergency.

**Citation 1, item 3(b)**

§1910.145(c)(3) requires that Safety instruction signs shall be used where there is a need for general instructions and suggestions relative to safety measures.

CO Slatten's un rebutted testimony establishes that employees did not know how to open the dock door in the event of an emergency, and that there was a need for signage spelling out the means of egress.

The Secretary has proven the cited violations. For penalty purposes, items 3a and 3b were grouped with item 3c, discussed below.



## **Alleged Violation of §1910.157(g)(1)**

### **Citation 1, item 3c**

29 CFR 1910.157(g)(1): An educational program was not provided for all employees to familiarize them with the general principles of fire extinguisher use and the hazards involved with incipient stage fire fighting:

(a) At the workplace, where the employer's emergency action plan calls for employees to extinguish incipient stage fires, initial and annual training was not conducted.

### Facts

CO Slatten testified that pursuant to Dillard's emergency procedures, store managers may direct employees to use fire extinguishers to put out a fire (Tr. 37). The emergency plan does not exclude the possibility of all employees using the portable extinguishers (Tr. 39). Slatten interviewed an employee, Valerie Allie, who stated that she was not trained, and did not know how to use a fire extinguisher (Tr. 38). Dillard's had an instructional sheet adequately addressing the use of fire extinguishers, which was distributed to employees as part of their orientation; nonetheless, Debbie Hoffman admitted that not all employees received the required annual training in the use of the extinguishers (Tr. 39, 66, 73, 85, 95; Exh. R-4).

### Discussion

**§1910.157(g)(1)** provides:

Where the employer has provided portable fire extinguishers for employee use in the workplace, the employer shall also provide an educational program to familiarize employees with the general principles of fire extinguisher use and the hazards involved with incipient stage fire fighting.

The record establishes that not all Dillard's employees received annual training in the use of fire extinguishers, and the hazards involved with incipient fire fighting. Complainant has established the cited violation.

### Penalty

A single penalty of \$1,350.00 was proposed for the violations at citation 1, items 3a, 3b and 3c.

The gravity of the cited items is low. Dillard's has alarm, sprinkler, and public address systems. The main and mall exits are locked only outside of business hours, 15 to 30 minutes before opening, and an hour after close, when a skeleton staff is in the store. Keys to the locked exits and a monitored emergency exit in the dock area are available to employees in the store. Dillard's emergency action plan, directs store management to exercise discretion in assigning fire extinguishers to employees. It is unlikely, therefore, that an untrained employee would be assigned such duty, or be exposed to the anticipated hazard.

Taking into account the relevant factors I find that a combined penalty of \$100.00 is warranted, and will be assessed.

**Alleged Violation of §§910.219(d)(1), (e)(1)(i) & 1910.303(g)(1)(ii)**

Citation 1, item 4a alleges:

29 CFR 1910.219(d)(1): Pulley(s) with part(s) seven feet (2.13 m) or less from the floor or work platform were not guarded in accordance with the requirements specified at 29 CFR 1910.219(m) & (o):

- (a) In the boiler room near the work table, compressor with Century motor had an opening in the frame that allowed access to the spoke-type tail pulley.

Citation 1, item 4b alleges:

29 CFR 1910.219(e)(1)(i): Horizontal belts which had both runs 42 inches or less from the floor level were not fully enclosed by guards conforming to requirements specified in 29 CFR 1910.219(m) and (o):

- (a) In the boiler room near the work table, compressor with Century motor had an opening in the frame that allowed access to the belt passing over the tail pulley.

**Facts**

CO Slatten testified that the belts and pulleys of a compressor in the boiler room, which were approximately 32 inches off the floor, were not completely enclosed (Tr. 39-40, 67; Exh. R-35). Slatten stated that the maintenance engineer's work station was immediately beside the compressor, and that the engineer could be exposed to the pinch point hazard (Tr. 39-40). Hoffman testified that none of Dillard's employees work in the area of the compressor, and that the chair that was near the compressor was an old cosmetic chair that was being stored there (Tr. 86-87). Slatten testified that an employee would have to trip, fall, and place his or her hand into an opening measuring approximately 4 x 5 inches in order to be injured (Tr. 40-43).

**Discussion**

Two standards address the unguarded pulley, and the Secretary has cited both.

**§1910.219(d)(1)** provides:

Pulleys, any parts of which are seven (7) feet or less from the floor or working platform, shall be guarded in accordance with the standards specified in paragraphs (m) and (o) of this section.

§1910.219(e)(1)(i) provides, in relevant part:

. . . where both runs of a horizontal belt are 42 inches or less from the floor, the belt shall be fully enclosed in accordance with paragraphs (m) and (o) of this section.

The Commission has held that in order to establish employee exposure to a machine guarding violation the Secretary must show, not that exposure is theoretically possible, but that an employee's entry into the zone of danger is "reasonably predictable." *Fabricated Metal Products Inc.*, 18 BNA OSHC 1072, 1997 CCH OSHD ¶31,463 (No. 93-1853, 1997)[Likelihood of employees working one to two feet away inadvertently slipping or falling into unguarded camshaft too remote to support a finding of employee exposure].

In this case, the evidence does not establish that any Dillard's employees worked in the area of the compressor. The 4 x 5 inch opening in the pulley guard is recessed above the body of the compressor and sandwiched between a full guard and other motor parts. It is unlikely that any employee could inadvertently access the zone of danger.

The Secretary failed to prove, by a preponderance of the evidence, that any employees were exposed to the cited hazard. Citation 1, items 4a and 4b are vacated.

#### **Alleged Violation of §1910.303(g)(1)(ii)**

Citation 1, item 5 alleges:

29 CFR 1910.303(g)(1)(ii): Working space about electric equipment rated 600 volts, nominal, or less was used for storage:

(a) In the boiler room, Gould disconnects by the stairs, by the chemical storage and in the corner had obstructions in front of them.

#### **Facts**

CO Slatten testified that she observed aluminum framing, boxes and a chair stored in front of the cited electrical box, which Slatten was told controlled the lights (Tr. 44-45, 71; Exh. R-33). Slatten stated that the materials impinged upon the work area required by the cited standard (Tr. 44-45). Slatten did not know whether any of Dillard's employees worked on the store's electrical equipment (Tr. 70).

Debbie Hoffman testified that the items Slatten saw were not in storage, but were being discarded. Hoffman stated that trash from the penthouse storage area had been moved near the door the previous day in preparation to being taken down the stairs (Tr. 87).

Discussion

§1910.303(g)(1)(ii) provides that “[w]orking space required by this subpart may not be used for storage. . . .”

The evidence establishes that the trash pile described by Slatten was a temporary condition. Because the items were not being stored, there is no violation of the cited standard. Two other locations are listed in the citation; however, no evidence concerning those locations was introduced by the Secretary.

The Secretary has failed to demonstrate the cited violations by a preponderance of the evidence, and this citation must be vacated.

**Alleged Violation of §1910.305(b)(1)**

Citation 1, item 6 alleges:

29 CFR 1910.305(b)(1): Unused openings in boxes, cabinets, or fittings were not effectively closed:

(a) In the boiler room, open knockout holes in Gould disconnect boxes for the overhead heaters.

Facts

CO Slatten testified that Dillard’s had not guarded unused knockout holes in an electrical box used for heaters that were not in use (Tr. 46). CO Slatten admitted that she could not reach any energized parts through the cited holes, but believed that when the heaters were in use, there might be a hazard (Tr. 46-47).

Discussion

§1910.305(b)(1) requires that “. . . unused openings in cabinets, boxes, and fittings shall be effectively closed.

Complainant admits there is no access to any energized parts through the unused openings. Because there is no employee exposure, this item will be vacated.

**ORDER**

1. Citation 1, item 1a, alleging violation of 29 CFR §1910.22(b)(1) is AFFIRMED as an “other than serious” violation, and a penalty of \$50.00 is ASSESSED.
2. Citation 1, item 1b, alleging violation of 29 CFR §1910.141(a)(5) is VACATED.
3. Citation 1, item 2a, alleging violation of 29 CFR §1910.36(d)(2) is VACATED.
4. Citation 1, item 2b, alleging violation of 29 CFR §1910.37(k)(2) is VACATED.

5. Serious citation 1, item 3a, 3b and 3c, alleging violations of 29 CFR §§1910.38(a)(1), 1910.145(c)(3), and §1910.157(g)(1) are AFFIRMED, and a combined penalty of \$100.00 is ASSESSED.
6. Citation 1, item 4a, alleging violation of 29 CFR §1910.219(d)(1) is VACATED.
7. Citation 1, item 4b, alleging violation of 29 CFR §1910.219(e)(1)(i) is VACATED.
8. Citation 1, item 5, alleging violation of 29 CFR §1910.303(g)(1)(ii) is VACATED.
9. Citation 2, item 1, alleging violation of 29 CFR §1910.305(b)(1) is VACATED.

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James H. Barkley  
Judge, OSHRC

Dated: