UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
AIR PLASTICS, INC.
Respondent.

OSHRC DOCKET
NO. 92-1883

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on September 9, 1993. The decision of the Judge will become a final order of the Commission on October 12, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before September 29, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: September 9, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-1883

NOTICE IS GIVEN TO THE FOLLOWING:

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John H. Frye, III
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SECRETARY OF LABOR, Complainant, v. AIR PLASTICS, INC., Respondent.	Docket No. 92-1883

Appearances:

Mary Anne Garvey, Esq.
Office of the Solicitor
U.S. Department of Labor
Cleveland, Ohio

For Complainant

Dennis E. Woll, *pro se*
General Manager
Air Plastics, Inc.
Mason, Ohio

For Respondent

Before: Administrative Law Judge John H Frye, III

DECISION AND ORDER

INTRODUCTION

This matter is before the Commission pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970 (29 C.F.R. 651 et seq.), hereinafter referred to as the Act. Respondent is an employer engaged in a business affecting interstate commerce as defined

by Section 3(5) of the Act and has employees as defined by Section 3(6) of the Act and the standards and regulations promulgated thereunder.

This case was heard on March 23, 1993 in Cincinnati, Ohio. Prior to the commencement of the hearing, the parties agreed to the amicable resolution of certain alleged violations on the following terms, which were entered into the record. Accordingly

Item 1 of Citation No. 1 is affirmed as a serious violation with a penalty of $400.00;

Item 2 of Citation No. 1 is affirmed as a serious violation with a penalty of $320.00;

Item 5 of Citation No. 1 is reclassified as an other than serious violation with no penalty;

Item 6 of Citation No. 1 is reclassified as an other than serious violation with no penalty; and

Item 1 of Citation No. 2 is vacated.

Although provided with the opportunity to do so, Respondent, Air Plastics, Inc., did not submit a post-hearing brief. Accordingly, this decision is based largely on the brief submitted by the Secretary.

STATEMENT OF FACTS

On April 28 and 29 of 1992, Mark Snyder, an industrial hygienist with the Occupational Safety and Health Administration in Cincinnati, Ohio, conducted an inspection of Air Plastics, Inc. in Mason, Ohio (Tr. 7, 9-10). Mr. Snyder inspected the company after receiving a referral from Steve Brunette, a safety compliance officer in the Cincinnati Area

Office (Tr. 9-10). Mr. Snyder went to Air Plastics to conduct sampling of a confined space at the facility (Tr 10).

Air Plastics is a manufacturer of fiberglass tanks (Tr. 10). These tanks are fabricated on molds which are attached to hydraulic motor turntables. In order to produce the tanks, employees are required to enter a pit under the floor for the purpose of attaching the turntables to the molds and to collapse and expand the molds (Tr. 13).

At the time of his inspection, Mr. Snyder observed an employee enter the pit below mold turntable No. 1 (Tr. 13). The employee, Robert Bales, was required to crawl through the pit until he reached the area of the mold (Tr.14). Once he reached the mold area, Mr. Bales bolted the turntable to the mold (Tr.13). A shaft powered by a hydraulic motor ran the entire length of the pit from the entrance to the exit under the mold (Tr. 14). The exposed parts of the shaft were not protected by stationary casings nor were they enclosed by troughs (Tr.14-15). In addition to the exposed shaft, the chains and sprockets at the entrance and exit of pit No. 1 were unguarded (Tr. 16). Neither were the chain and sprocket next to the entrance of pit No.2 enclosed (Tr. 16). Both sets of chains and sprockets were seven feet or less above floors or platforms (Tr. 16).

During the production process, Air Plastics (AP) employees used a number of chemicals including styrene, acetone, resin flush and Rexco Purtall Film No. 10 (Tr. 21). Before Mr. Bales entered the pit, the pit was not purged and ventilated. Nor did the employer test the atmosphere in the pit for the presence of vapors or the absence of sufficient oxygen. Furthermore, the employer had not devised means to retrieve an individual from the pit in the event of an emergency (Tr. 34).

OPINION

I FAILURE TO ABATE CITATION - ALLEGED VIOLATION OF SECTION 5(A)(1) OF THE ACT BY FAILING TO FURNISH EMPLOYMENT AND A PLACE OF EMPLOYMENT FREE FROM RECOGNIZED HAZARDS THAT WERE LIKELY TO CAUSE DEATH OR SERIOUS PHYSICAL HARM TO EMPLOYEES.

CSHO Snyder investigated the AP facility following a referral from another compliance officer. The referral related to a confined space at the facility; specifically, the referral related to the pit area which employees were required to enter in order to bolt, expand and collapse the molds. As a result of his inspection, Mr. Snyder concluded that the employer had not developed a confined space entry program which adequately addressed the confined space hazards at the worksite. The compliance officer, therefore, recommended that AP be charged with a violation of Section 5(a)(1) of the Act. The Citation which was issued charges that Respondent's

> [e]mployees entering the #1 mold turntable pit to the production area were exposed to the hazards of potential oxygen deficient atmosheres or atmosheres contaminated with toxic and/or combustible substances such as, but not limited to styrene.

Significantly, it did not charge Respondent with having failed to develop a confined space entry program. Rather, it identified a confined space entry program as "... one feasible and acceptable method to correct this hazard...."

In order to establish a 5(a)(1) violation, the Secretary must prove that: 1) the employer failed to render its workplace free of a hazard, 2) the cited hazard was recognized by the cited employer or generally within the employer's industry, 3) the hazard was causing

or likely to cause death or serious physical harm, and 4) there was a feasible means by which the employer could have eliminated or materially reduced the hazard. Little Beaver Creek Ranches, Inc., 1982 CCH OSHD 26,125 (Rev. Comm. 1982). The Secretary has failed to meet his burden with respect to the first of these elements and has, therefore, failed to prove a 5(a)(1) violation of the Act.

The Hazard Identified by the Secretary.

The Secretary's evidence has been evaluated to determine if he established that the hazard identified in the Citation existed. The Secretary maintains that a hazard existed because the Respondent failed to develop and implement an acceptable confined space entry program with regard to the pit area associated with turntable 1. Unfortunately, this states the remedy for the hazard, not the hazard itself, which the Secretary identified in the Citation as "oxygen deficient atmosheres or atmospheres contaminated with toxic and/or combustible substances."

The Respondent did not dispute the Secretary's contention that employees entered the pit area and did not rebut the contention that employees were exposed to toxic and/or combustible substances such as styrene. Nor does Respondent appear to seriously dispute that the pit is a confined space.[1] It is also clear that there was no direct ventilation of the

[1] Richard Gilgrist, who was called as an expert witness by the Secretary, opined that the pit area was a confined space (Tr. 113, 117). Mr. Gilgrist defined a confined space as an area that is not designed for continuous human occupancy and has unfavorable natural ventilation. Further, a confined space is an area where toxic or flammable levels of substances could accumulate or develop. It is not subject to normal entry or exit, i.e. walking in or out (Tr. 117). Mr. Gilgrist relied on the National Institute for Occupational Safety and Health (NIOSH) criteria document "Working In Confined Spaces" and the American National Standard Safety (ANSI) Requirements for Confined Spaces in formulating his opinion (GX 15 & 16).

pit or underneath the mold and that there was limited entrance to and egress from the pit (Tr.32). The pit was clearly not designed for human occupancy for extended periods of time (Tr.31).

Respondent pointed out at hearing that, although toxic and/or combustible substances were in use, no hazard existed because the concentrations of these substances in the pit were well below hazardous levels. The Secretary countered by noting that this argument ignores the possibility that hazardous or flammable levels of these substances could accumulate.

On the first day of the inspection, CSHO Snyder fitted an employee, Mr. Bales, with a personal sampling device (Tr. 29-30). Mr. Bales entered the pit on three occasions that day and an air sample was obtained for each of those entries (Tr.30). Mr. Snyder submitted the sampling results to OSHA's Salt Lake Technical Center and requested that the samples be analyzed for the presence of styrene (GX 13). Styrene is contained in the resins used at the Respondent's facility (GX. 11 & 12). It is a carcinogen and exposure to styrene can result in narcosis, which is a severe depression of the central nervous system. Styrene can also cause dizziness and exposure to styrene can affect a person's ability to reason (Tr. 118). Furthermore, styrene is flammable and, therefore, presents fire and explosion hazards (Tr. 118). Mr. Gilgrist cited the fire and explosion hazards as the primary cause for OSHA's concern (Tr. 122, 158, 163).

The sampling results disclosed that Mr. Bales was exposed to 76 parts per million (PPM) of styrene during his last two entries and four PPM during his first (Tr. 30; GX 13). The higher level represents three-quarters of the short term exposure level (STEL) for

styrene of 100 PPM allowable under the OSHA standards.[2] Mr. Gilgrist, who is Board Certified in the comprehensive practice of industrial hygiene, testified that the possibility of overexposure to styrene existed because the test results were more than 50% of the STEL (Tr. 139). Mr. Gilgrist did not explain this conclusion.

Since the pit is below floor level, it is subject to the accumulation of heavier-than-air substances, such as organic vapors containing styrene (Tr. 117-118). The presence of heavier-than-air vapors in the pit could also expose employees to the hazards related to oxygen depletion. Organic vapors, such as those present in fiberglass lay-up operations, can displace the oxygen in confined spaces (Tr. 117).

As noted above, Mr. Gilgrist's primary concern relates to exposing the employees working in the pit to atmospheres contaminated with combustible substances. In addition to its other properties, styrene is flammable.[3] Its lower explosive limit (LEL) is 11,000 PPM (Tr. 162). The concentrations of styrene measured in the pit are less than one percent of the LEL. Although Mr. Gilgrist conceded that the measured concentrations of styrene did not pose a hazard (Tr. 165, 167), he explained that the Respondent was cited because the circumstances presented in this matter are similar to those in which accidents have occurred (Tr. 168) and are designed in anticipation of unusual levels that may occur where flammable liquids are used on a routine basis (Tr. 164).

The Secretary has established that styrene, in use at the AP facility, is toxic and flammable in certain concentrations and speculates that such concentrations could

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[2]. The STEL for styrene, which is listed in Table Z-1-A of 29 C.F.R. 1910.1000, is 100 PPM.

[3]In addition to styrene, acetone which is also a flammable, is used in the workplace (Tr. 118).

accumulate in the pit area. However, the Secretary has not established that harmful levels have accumulated or that any published standard related to employee exposure has been violated in the past, nor has he provided an adequate evidentiary basis on which to conclude that such concentrations might in fact so accumulate in the future.[4]

The speculation that harmful concentrations might accumulate is insufficient to establish that the hazard identified in the Citation exists at the AP facility for purposes of § 5(a)(1) of the Act.

> ... [I]n order to prove the existence of a hazard within the meaning of the general duty clause, the Secretary cannot merely show that there may be some degree of risk to employees. He must show, at a minimum, that employees are exposed to a significant risk of harm.

Kastalon, Inc. and Conap, Inc., 12 BNA OSHC 1928, 1932 (Rev. Com. 1986). *See also Waldon Healthcare Center*, 16 BNA OSHC 1052, 1059-60 (Rev. Com. 1993). Mr. Gilgrist's conclusions fall short of showing that AP's employees are exposed to a significant risk of harm. They show only that these employees might be exposed to a significant risk of harm if certain unspecified events were to occur. They amount to no more than speculation

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[4]Perhaps in recognition of this fact, the Secretary argues that, although an employer may not be in violation of a standard, that employer's failure to test in a confined atmosphere before possible exposure of employees to toxic substances is a violation of the Act, citing *Con Agra, Inc.*, 11 BNA OSHC 1141, 1983 CCH OSHD 26,240 (Rev. Comm. 1983).

In contrast to the instant case, *Con Agra* presents a factual situation in which a hazard was clearly demonstrated. There, the Secretary sought to compel the testing of the atmospheres of freight cars loaded with grain prior to exposing workers who were required to sample and test the grain, in part by smelling it. Con Agra argued that the Secretary had not established that any employees had been exposed to concentrations of airborne toxic substances in violation of § 1910.1000 and hence had not shown that a hazard existed. The Commission held that the duty to test was distinct from the duty to avoid exposing employees to concentrations in excess of the limits stated in § 1910.1000. Pointing to the fact that substantial numbers of cars could be expected to contain contaminated atmospheres and that the placard system devised to identify such cars was not reliable, the Commission held that a hazard had been established. In this case, the comparable evidence is Mr. Gilgrist's conclusion that is based largely on anecdotes drawn from his experience with other facilities and the identification, in connection with the confined space rulemaking proceeding, of AP's industry code as one for particular attention (Tr. 118-19, 158-59, 167-69).

informed by Mr. Gilgrist's experience and the confined space rulemaking proceeding.

Unfortunately, the Secretary has proved that the Respondent did not implement the method of abating the hazard identified in the Citation, not that the hazard itself existed. If upheld, this approach would, in effect, force Respondent to establish that the hazard does not exist.[5] While it may be permissible for the Secretary to require affected industries to shoulder such burdens after fully considering the implications of and necessity for such a policy in a rulemaking, he may not, simply on the basis of an informed guess, force individual respondents to show that a particular risk does not exist in order to defeat a § 5(a)(1) citation. In light of the fact that the Secretary has not demonstrated that a hazard exists, it is unnecessary to consider whether the alleged hazard was recognized by AP or AP's industry, whether the alleged hazard was likely to cause death or serious physical harm, and whether there was a feasible means by which AP could abate the hazard. The Failure to Abate Citation is vacated.

II CITATION 1, ITEMS 3 AND 4 - ALLEGED VIOLATION OF 29 C.F.R. 1910.219 (c)(2)(i) AND 1910.219(f)(3) BECAUSE OF UNGUARDED CHAINS, SPROCKETS, AND SHAFT; ALTERNATIVELY, ALLEGED VIOLATION OF 29 C.F.R. 1910.147 (D)(4)(i) BECAUSE LOCKOUT DEVICES WERE NOT USED.

Employees who were required to enter pit No. 1 were exposed to a horizontal shaft as they crawled through the pit (Tr. 18). The shaft was not protected by casings or a trough (Tr. 14-15). The employer's failure to guard the shaft violated the requirements of section

[5]Indeed, the confined space rule, to which Respondent is presumably now subject, has this effect. Section 1910.146(c)(1) requires employers to "... evaluate the workplace to determine if any spaces are permit-required confined spaces." Permit-required confined spaces include those with the potential to contain a hazardous atmosphere. The pit in question appears to fall within this definition.

1910.219(c)(2)(i). As a result of the violation, employees were exposed to a serious hazard which could have resulted in an amputation (Tr. 20). In addition to being cited for a violation of section 1910.219(c)(2)(i), the Respondent was cited for violating section 1910.219(f)(3) because in the production areas of mold turntables Nos. 1 and 2, chains and sprockets which drive the exposed shafts were unguarded (Tr. 14; GX 7).

The Respondent did not dispute that the shaft was unguarded. Rather, the employer relied on the fact that equipment was turned "off" when employees entered the pit. CSHO Snyder, however, testified that while Mr. Bales was in the pit, the equipment was not locked out (Tr. 19). As a result, the equipment could have been activated while Mr. Bales was exposed to the unguarded shaft.

The Secretary argues, in the alternative, that since the equipment could have been activated while Mr. Bales was in the pit, the provisions of the lockout standard apply. That standard requires that employers utilize procedures for the control of potentially hazardous energy whenever employees are engaged in activities covered by 29 C.F.R. 1910.147 et seq.. These activities are defined in the scope provision of the standard which appears at 29 C.F.R. 1910.147(a)(1)(i). Section 1910.147(a)(1)(i) makes the lockout provisions applicable to the "servicing and maintenance of machines and equipment in which the unexpected (emphasis in original) energization (sic) or start up of machines or equipment, or release of stored energy could cause injury to employees."

Servicing and maintenance are defined in the standard as "Workplace activities such as constructing, installing, setting up, adjusting, inspecting, modifying, and maintaining and/or servicing machines and equipment." 29 C.F.R. 1910.147(b). Mr. Bales entered the pit for

the purpose of attaching the mold to the turntable (Tr. 18). This activity constitutes setting up the machine and is subject to the provisions of the lockout standard.

Section 1910.147(d)(4)(i) requires that lockout or tagout devices be affixed to each energy isolating device by authorized employees. A lockout device is defined in the standard as:

> A device that utilizes a positive means such as a lock, either key or combination type, to hold an energy isolating device in a safe position and prevent the energizing of a machine or equipment. 29 C.F.R. 1910. 147(b).

Energy isolating device is defined in 29 C.F.R. 1910.147(b) as:

> A mechanical device that physically prevents the transmission or release of energy, including but not limited to the following: A manually operated electrical circuit breaker; a disconnect switch; a manually operated switch by which the conductors of a circuit can be disconnected from all ungrounded supply conductors, and, in addition, no pole can be operated independently; a line valve; a block; and any similar device used to block or isolate energy.

CSHO Snyder testified that lockout or tagout devices were not affixed to an energy isolating device while Mr. Bales was working in the pit (Tr.19). Since the equipment was not isolated from its energy source before he began working on it, Mr. Bales was exposed to the unexpected activation or start up of the shaft while he was in the pit. In the instant case, the breaker depicted in Complainant's Exhibit No. 1 should have been shutoff and a lockout device applied so that the equipment could not be energized while Mr. Bales was exposed to the shaft (Tr.19).

An exception in the lockout standard exists for work which is being performed using alternative measures which provide protection consistent with that required by the machine guarding standard. The relationship between the lockout and machine guarding standards

was explained at hearing by Dennis Collins, an OSHA employee in the Cincinnati Area Office.[6]

Mr. Collins explained that equipment must be adequately guarded if during normal operations employees would be exposed to a hazard. If equipment would expose employees to a hazard during servicing, it must be disconnected and padlocked by the employee who would be exposed (Tr. 95). If everything were guarded, there would be no need for lockout. Conversely, guarding would not be required if employees locked out the equipment before entering the pit (Tr. 99). In the instant case, the Respondent failed either to guard the equipment or to ensure that lockout devices were being affixed.

The Respondent introduced evidence at hearing to show that a lock was available to employees (Tr. 84). This creates the inference that the employee's failure to use the lock was the result of misconduct. An isolated incident of misconduct is an affirmative defense, and to avail itself of the defense an employer must show that employees acted without its knowledge and contrary to uniformly enforced company work practices. Weatherhead Co., 1976-1977 CCH OSHD 20,784 (Rev. Comm. 1976). Mr. Bales testified that prior to Mr. Snyder's inspection it was not standard practice to lock and tag out equipment (Tr. 76). Mr. Woll admitted that the company did not check to ensure that the equipment was being locked out (Tr. 202) and that the company began physically locking the pits out after Mr. Snyder's inspection (Tr.212). Thus Respondent has failed to establish an affirmative defense, and Respondent has violated 29 C.F.R. 1910.147(d)(4)(i) or alternatively, 29 C.F.R. 1910.219(c)(2)(i). Items 3 and 4 of Citation 1 were properly classified as serious violations

[6]Mr. Collins visited AP's facility on March 9, 1993 specifically to review the alleged guarding/lockout violations at the facility (Tr. 91).

and are affirmed. Respondent has not contested the amount of the penalty proposed by the Secretary. Consequently, a penalty in the amount of $800 for each item is affirmed.

III CITATION 2, ITEM 2 - ALLEGED VIOLATION OF 29 C.F.R. 1910.1200(h) BECAUSE EMPLOYEES WERE NOT PROVIDED INFORMATION AND TRAINING ON HAZARDOUS CHEMICALS IN THEIR WORK AREA.

Pursuant to section 1910.1200(h), employees must be provided with information and training as specified in 29 C.F.R. 1910.1200(h)(1) and (2). This information and training is to be provided when employees are initially assigned to a work area and whenever a new hazard is introduced to the area. The information which must be provided includes the operations in the facility where hazardous chemicals are present, and the location and availability of the employer's written communication program and material safety data sheets. The training which must be provided includes methods and observations that may be used to detect the presence or release of hazardous chemicals, the physical and health hazards of the chemicals, measures employees can take to protect themselves and details of the employer's hazard communication program.

A "hazardous chemical" is defined by the standard as "Any chemical which is a physical or health hazard." 29 C.F.R. 1200(c). At hearing, CSHO Snyder testified regarding the hazardous chemicals in use at the Respondent's facility. These chemicals include styrene, acetone, resin flush, and Rexco Purtall Film No.10. (Tr. 21). Mr. Snyder also explained how these chemicals were used in the workplace and the hazards associated with their use (Tr. 21-22). The material safety data sheets for these chemicals were introduced into evidence (GX. 8-12).

After talking to management and interviewing employees, CSHO Snyder determined that employees had not been provided with the information and training required by section 1910.1200(h) (Tr. 23-24). Specifically, he concluded that employees had not been informed of the hazards associated with the chemicals in use in the workplace (Tr. 24). He concluded that employees had not been informed of the location and availability of the employer's hazard communication program and the material safety data sheets (MSDS).

CSHO Snyder also determined that the employees had not been trained in methods for detecting the presence or release of hazardous chemicals (Tr. 25). At the time of the inspection, employees were not wearing the protective equipment recommended in the MSDS (Tr. 24-25). In fact, they were using acetone, a skin irritant, to wash their hands (Tr. 63).

At the time of the inspection, Mr. Bales had been employed by AP for more than four years. He testified that he worked with styrene, acetone and the Purtall film (Tr. 72-73). He indicated that he had not received training and had not been told of the hazards associated with the chemicals to which he was exposed (Tr. 72-73). Before Mr. Snyder's inspection, he had not seen the employer's hazard communication program and he did not know where the MSDS were located (Tr. 73-74). Neither had he been trained in hazard recognition or how to protect himself from the physical and health hazards of the chemicals (Tr. 74).

On cross-examination, Mr. Bales testified that he knew resin was flammable and could cause a rash (Tr. 80). He explained that he had prior experience in the industry and knew styrene vapors were harmful but he did not know "what it could do to you" (Tr. 80).

Mr. Bales clearly was not aware of all the hazards to which he was exposed. He appeared confused regarding effects of styrene on the central nervous system (Tr. 85-86).

The Respondent called John Hockstok to testify (Tr. 186). Mr. Hockstok is a supervisor at AP and has been delegated the responsibility to coordinate, supervise and train (Tr. 188). Mr. Hockstok testified regarding the type of training which was provided to AP employees. Mr. Hockstok testified that he had discussed the MSDS information with the employees, although he could not remember when this occurred and was vague with regard to when five current new employees would receive such training (Tr. 196-98). Mr. Hockstok indicated that the primary means of training new employees is to assign them to a more experienced employee for a period of time (Tr. 192).

Mr. Hockstok admitted that AP had no formal training program (Tr. 193). The company had no written program (Tr. 192) and made no attempt to determine if employees understood the hazards to which they were exposed (Tr.214). Mr. Hockstok's testimony cannot overcome the evidence presented by the Secretary which clearly shows that employees were not provided the training required by section 1910.1200(h).

Citation 2, Item 2 was classified as "repeat" based on an earlier citation issued to Respondent for a violation of the same standard. On September 9, 1991, the Respondent was cited for violating 29 C.F.R.1910.1200(h). The employer entered into an informal settlement agreement, waiving its right to contest this violation (Tr.26-27). Pursuant Section 10(a) of the Act, the citation became a final order of the Commission.

The word "repeated" is not defined in the Act but the meaning to be accorded to the word was the subject of the Review Commission's decision in Potlatch Corp., 1979 CCH OSHD 23,294 (Rev. Comm. 1979). In Potlatch the Review Commission held that:

> A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. Id. at 28,171.

Citation 2, Item 2, is affirmed as a repeat violation. Respondent has not contested the amount of the penalty proposed by the Secretary. Consequently, a penalty in the amount of $2800 is also affirmed.

CONCLUSIONS OF LAW

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

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

3. Respondent Air Plastics, Inc., committed a serious violation of the standard set out at 29 CFR § 1910.132(a) as charged in the Citation 1, Item 1. A civil penalty of $400 is appropriate.

4. Respondent Air Plastics, Inc., committed a serious violation of the standard set out at 29 CFR § 1910.133(a)(1) as charged in the Citation 1, Item 2. A civil penalty of $320 is appropriate.

5. Respondent Air Plastics, Inc., committed a serious violation of the standards set forth at 29 C.F.R. 1910.219 (c)(2)(i) and 29 C.F.R. 1910.219(f)(3) as charged in Citation 1, Items 3 and 4. Alternatively, Respondent Air Plastics, Inc., committed a serious violation of the standard set forth at 29 C.F.R. § 1910.147 (d)(4)(i). Penalties in the amount of $1600 are appropriate.

6. Respondent Air Plastics, Inc., committed an other-than-serious violation of the standard set out at 29 CFR § 1910.305(g)(2)(iii) as charged in the Citation 1, Item 5. A civil penalty of $00 is appropriate.

7. Respondent Air Plastics, Inc., committed other-than-serious violations of the standards set out at 29 CFR § 1910.1200(f)(5)(i) and (ii) as charged in the Citation 1, Items 6a and 6b. A civil penalty of $00 is appropriate.

8. Respondent Air Plastics, Inc., was not in violation of the standard set out at 29 CFR § 1910.106(e)(6)(ii) as charged in Citation 2, Item 1.

9. Respondent Air Plastics, Inc., committed a repeat violation of the standard set forth at 29 C.F.R. 1910.1200(h) as charged in Citation 2, Item 2. A penalty in the amount of $2800 is appropriate.

10. Respondent Air Plastics, Inc., was not in violation of § 5(a)(1) of the Act as charged in the Failure to Abate Citation.

ORDER

The Failure to Abate Citation and Citation 2, Item 1, are vacated.

Civil penalties in the amount of $5120 are assessed.

JOHN H FRYE, III
Judge, OSHRC

Dated: SEP - 9 1993
Washington, D.C.