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SECRETARY OF LABOR,

Complainant,

v.

ALDEN LEEDS, INC.,

Respondent.

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OSHRC Docket No. 95-1143

### **DECISION**

Before: ROGERS, Chairman; VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

Alden Leeds, Inc. (“Alden Leeds”), operates a wholesale pool chemical business in a number of locations, including South Kearny, New Jersey. Before the Commission on review is a failure to abate notification alleging that Alden Leeds failed to abate a previously-cited violation of 29 U.S.C. § 654, section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (“the Act”) for failure to store its chemicals properly. The issues here are (1) whether the earlier citation gave Alden Leeds adequate notice of the hazard it was required to abate, and (2) whether the administrative law judge’s finding that Alden Leeds had failed to abate the violation is supported by the evidence. For the reasons below, we answer both questions in the affirmative, affirm the administrative law judge’s decision and assess a penalty of \$107,100.

## Background

Alden Leeds purchases its chemicals in bulk from chemical manufacturers then resells them. Because of the nature of its business, Alden Leeds' inventory is constantly changing, with materials being shipped out and new chemicals coming in. Many of the chemicals are class 2 and class 3 oxidizers, which readily react to promote combustion and moderately or severely increase the burning rate of combustible materials. Three of the manufacturers of these chemicals, Monsanto, Olin, and PPG, have jointly compiled a publication called the "Blue Book," which sets out guidelines for safe handling and storage of oxidizing pool chemicals. The Blue Book is based on NFPA 43A, *Code for the Storage of Liquid and Solid Oxidizers* (1990) published by the National Fire Protection Association ("NFPA"), the code on which the Secretary relies to establish that the conditions in Alden Leeds' warehouses were hazardous. Among the requirements in the NFPA code are that incompatible materials shall be stored at minimum distances from each other or shall have some kind of barrier between them. An incompatible material is one that "when in contact with an oxidizer, can cause hazardous reactions or can promote or initiate decomposition of the oxidizer." The NFPA code also establishes maximum quantities of certain classes of chemicals that may be stored in one location and requires piles of different classes of oxidizers to be no more than certain heights or widths. The lack of storage space in Alden Leeds' worksite makes it inherently difficult to follow the guidelines set out by the NFPA.

In January and February of 1990, a compliance officer ("CO") of the Occupational Safety and Health Administration ("OSHA") inspected Alden Leeds' South Kearny worksite. As a result of that inspection, OSHA issued a citation alleging that Alden Leeds had violated section 5(a)(1) of the Act<sup>1</sup> "in that employees were exposed to the hazard of fire from the improper storage of highly reactive oxidizing agents[.]" The 1990 citation set out seven categories of violative conditions found in various locations and listed a number of possible

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<sup>1</sup>Section 5(a)(1) provides, "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

measures that could be taken to abate the violation. Alden Leeds contested that citation and the matter was resolved by a settlement agreement signed by the parties on August 24, 1990, in which Alden Leeds agreed to abate the cited conditions. In June of 1991, Alden Leeds' president wrote to OSHA that "Storage of oxidizers is in conformance with N. F. P. A. guideline, part 43A."

In 1993, a large fire destroyed a substantial portion of Alden Leeds' warehouse. After that fire, OSHA again inspected. On October 8, 1993, it issued the citation that forms the basis for the action before us here. That citation also alleged a violation of section 5(a)(1):

Employer did not furnish employment and a place of employment that were free from recognized hazards that were causing or likely to cause death or serious physical harm to the employee in that: employees were exposed to the hazard of fire from the improper storage of highly reactive oxidizing agents:

. . . .

The citation set out thirteen instances where improper storage of various pool chemicals had been found. The hazardous conditions included the storage of incompatible chemicals too close to each other, oxidizers piled too high, and an excess quantity of an oxidizer in one location. Alden Leeds contested that citation, and that case was also the subject of a settlement agreement in which Alden Leeds agreed to abate the conditions by October 15, 1994.

On December 6, 1994, the CO who had performed the first two inspections conducted a follow-up inspection and found thirty-three instances of improper storage. Consequently, the Secretary of Labor issued a notification of failure to abate under section 10(b) of the Act, 29 U.S.C. § 659(b), and proposed a penalty of \$107,100. Alden Leeds contested that notification, and a hearing was held.

At that hearing, Alden Leeds' president testified that, after he received the October 1993 citation, he had met with the manager and the assistant manager of the warehouse, had given each of them a copy of the Blue Book, and had discussed with them how to correct each of the violations cited. He also testified that he had inspected the warehouse to make sure that each of the cited instances had been corrected, and that he was certain that they had been. The Secretary stipulated that none of the specific instances of violative conditions

found during the reinspection corresponded to the conditions listed in the 1993 citation. The CO testified, however, that he had interviewed the plant manager, the forklift operator, the president, and other employees, and that he had concluded that Alden Leeds had never abated the hazard because its storage practices never changed. For example, the company continued to store certain chemicals three pallets high and others two pallets high, even though this resulted in piles that exceeded the NFPA height maximums.

The judge found that, because the conditions specified in the 1993 citation could not be identified during the 1994 follow-up inspection, the Secretary could not establish a failure to abate violation as contemplated by *Braswell Motor Freight Lines*, 5 BNA OSHC 1469, 1977-78 CCH OSHD ¶ 21,881 (No. 9480, 1977). *Braswell* involved a notification of failure to abate a previously-cited violation of the standard governing flammable and combustible liquids because the company failed to store oily rags in a covered metal container. The judge nonetheless affirmed the notification of failure to abate and assessed a penalty in the amount proposed by the Secretary. He found that the 1993 citation had informed Alden Leeds that its storage practices were the hazard that the Secretary sought to have remedied. The judge noted that, although Alden Leeds argued that it had never agreed to comply with the provisions of NFPA 43A, that fact did not preclude the Secretary from relying on that code to establish the existence of a recognized hazard. He found the testimony that Alden Leeds had corrected each of the thirteen violative instances listed in the citation insufficient to contradict the testimony of the CO that it had never brought its warehouse into compliance with the requirements set out in NFPA 43A. The judge found that Alden Leeds' storage practices had remained unchanged over the relevant period. Alden Leeds petitioned for review of the judge's decision, and the decision has been directed for review pursuant to section 12(j) of the Act, 29 U.S.C. § 661(j).

### **Discussion**

We conclude that Alden Leeds had adequate notice of the hazard to be abated. The Secretary argued, and the judge found, that Alden Leeds' storage practices constituted the hazard that the Secretary sought to have remedied. On review, Alden Leeds renews the

argument it made before the judge that it was the thirteen specific instances listed in the 1993 citation that had to be abated. The citation required Alden Leeds to free its workplace of “the hazard of fire from the improper storage of highly reactive oxidizing agents.” This articulation of the hazard is consistent with the Commission’s precedent disfavoring broad, generic definitions of the hazard cited under section 5(a)(1) and satisfies the requirement that the citation apprise the employer of its obligations and identify the conditions or practices which the employer can reasonably be expected to control. *Davey Tree Expert Co.*, 11 BNA OSHC 1898, 1899, 1983-84 CCH OSHD ¶ 26,852, p. 34,399 (No. 77-2350, 1984). The citation made it abundantly clear to Alden Leeds both that it was required to free its workplace of the fire hazard caused by its storage practices and that it could abate the hazard by instituting proper storage procedures or by adopting any other method that would eliminate or materially reduce the hazard. *See United States Steel Corp.*, 12 BNA OSHC 1692, 1697-98, 1986-87 CCH OSHD ¶ 27,517, p. 35,669 (No. 79-1998, 1986). The 1993 citation clearly stated what hazard was to be abated, and Alden Leeds has never contended that it did not know how to comply with the safety requirements of the NFPA. Indeed, as noted above, in June 1991, Alden Leeds’ president wrote to OSHA that the company’s storage of oxidizers was in conformance with the NFPA requirements. This letter shows that Alden Leeds was well aware, even in the context of the 1990 citation, that its storage practices were at issue and that Alden Leeds knew how to abate the violation. As the judge found:

To limit the citation to specific conditions enumerated in it would be to blink [at] the reality of the hazard. In the context of a storage and processing operation in which inventory is constantly changing, it does little good to correct specific hazardous piles of oxidizers identified by the Secretary if the procedures which permitted those hazardous piles to be created are not corrected. New hazardous piles will be created, and the employees’ risk of death or serious injury will be unabated. Consequently, interpreting the language of the citation to apply only to specific hazards would thwart the remedial purpose of the Act “. . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . . .”

Therefore, we conclude that Alden Leeds had adequate notice of the hazard it was required to abate.

The next question is whether Alden Leeds had failed to remove that fire hazard from its workplace as the Secretary has alleged. Our examination of the Secretary's burden of proof in failure-to-abate cases and the employer's burden to rebut the Secretary's prima facie case establishes that the Secretary has met her burden by a preponderance of the evidence. Under Commission precedent:

[T]he Secretary's prima facie case of failure to abate is made upon showing that: (1) the original citation has become a final order of the Commission, and (2) the condition or hazard found upon re-inspection is the identical one for which respondent was originally cited. . . .

This prima facie case may be rebutted by a showing of actual abatement of the hazardous condition by prevention of employee exposure or correction of the physical condition.

*York Metal Finishing Co.*, 1 BNA OSHC at 1656, 1973-74 CCH OSHD at p. 22,048. Alden Leeds does not really dispute that its workplace contained the hazard, that it recognized the hazard, that the hazard was likely to cause serious harm, or that a feasible means exists to abate that hazard. Instead, it argues that, by eliminating the thirteen specific examples listed in the citation, it had abated. We disagree.

We find that the record fully supports the compliance officer's testimony that the hazard was the same one cited originally. We also find that, despite the testimony by Alden Leeds' president that he had instructed the warehouse employees to follow the Blue Book, Alden Leeds had never changed its chemical storage practices so as to eliminate the hazard. For example, the 1993 citation listed eight instances in which incompatible chemicals were not properly separated. The 1995 failure-to-abate notification listed 25 such instances. In 1993, the Secretary cited two piles of class 3 oxidizer that exceeded the height limit for a pile; there were nineteen of them in 1995. Both the citation and the failure-to-abate notification listed four piles of class 2 oxidizer that exceeded the maximum tonnage for that

class. Four piles of class 2 oxidizer exceeded the maximum permissible pile height in 1993; twenty did in 1995. Where one pile of class 2 oxidizer exceeded the permissible width for a pile in 1993, the 1995 notification listed two such situations. Because of the nature of the business, chemicals were constantly moved in and out and shuffled around, so employees constantly had to find someplace to put the inventory. The compliance officer's conversations with Alden Leeds' employees led him to conclude that, because the combination of limited space and large inventory made it extremely difficult to store its chemicals within the NFPA guidelines, Alden Leeds had never been able to bring itself into full compliance. We find the CO's conclusion to be a reasonable one, based on the record. We therefore conclude that the Secretary has established a prima facie showing of a failure to abate.

The burden is therefore on Alden Leeds to establish that it had, in fact, abated the fire hazard resulting from its improper storage of oxidizers. Alden Leeds' president testified that he had personally assured that the thirteen specific instances listed in the 1993 citation had been corrected. Nowhere, however, did he state that the company had ever -- however briefly -- eliminated the hazard by coming into compliance with the NFPA code or with any other storage guideline. His testimony suggests that Alden Leeds' abatement efforts concentrated on correcting the specific instances in the citation rather than eliminating the cited hazard.

Furthermore, the record raises questions about the president's credibility. As noted above, he represented in a 1991 abatement letter to OSHA that Alden Leeds was in compliance with NFPA 43A, yet he subsequently testified at the hearing that he had not "actually" seen NFPA 43A. In addition, in a conversation with the CO, the warehouse manager effectively contradicted the president, stating that Alden Leeds continued to engage in improper storage practices.<sup>2</sup> On the evidence before us, we find that Alden Leeds has not

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<sup>2</sup>The CO's testimony regarding his conversation with the warehouse manager is described in detail in Commissioner Weisberg's concurring opinion.

rebutted the Secretary's prima facie case. Our review of the record leads us to conclude that Alden Leeds has not established that it had ever abated the hazard of fire from the storage of highly reactive oxidizing agents.<sup>3</sup> Consequently, we affirm the judge's disposition.

### **Penalty**

The Secretary proposed a penalty of \$107,100 for this failure to abate. The judge assessed that amount. On review, Alden Leeds does not argue that the amount of the penalty is inappropriate; its argument is limited to an assertion that no penalty should be assessed

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<sup>3</sup>Past Commission decisions such as *Braswell Motor Freight* do not affect our holding. Since the Act was passed, only a few cases involving failure-to-abate notifications have come before the Commission for adjudication, and most of them arose in the early years of the Act. Those cases presented simple, straightforward problems. For example, in *Braswell Motor Freight*, cited by the judge, the standard required that oily rags be stored in a covered metal container. Although the cover was not on the container during the reinspection, the Commission found that there had not been a failure to abate because it was clear from the record that the cover *had* been in place after the citation became a final order and had subsequently been removed. Those facts are in sharp contrast to those before us, where it is clear that, even though the different piles of chemicals had changed, the overall conditions that constituted the hazard had not changed because of the constantly-changing nature of the inventory. Therefore, the preponderance of the evidence indicates that Alden Leeds had never met the storage guidelines established by the NFPA.

The other cases that came before the Commission presented simple factual questions similar to those in *Braswell*. *E.g.*, *Franklin Lumber Co.*, 2 BNA OSHC 1077, 1973-74 CCH OSHD ¶ 18,206 (No. 900, 1974) (standard governing the outside discharge of sawdust); *Arvin Millwork Co.*, 2 BNA OSHC 1056, 1973-74 CCH OSHD ¶ 18,159 (No. 587, 1974) (standard requiring guardrails on platforms); *York Metal Finishing Co.*, 1 BNA OSHC 1655, 1973-74 CCH OSHD ¶ 17,633 (No. 245, 1974) (various standards).

In a more recent failure-to-abate case, the language of the citation and the standard cited required the use of protective equipment to protect employees against "hazards capable of causing injury and impairment." *United Parcel Serv.*, 12 BNA OSHC 2161, 2163, 1986-87 CCH OSHD ¶ 27,723, p. 36,246 (No. 82-815, 1986) (standard requiring protective equipment). There, the hazard was foot injury resulting from heavy packages falling on employees' feet. The suggested abatement was the use of steel-toed shoes. Whether abatement had occurred did not turn on whether a cover had been placed on a container or a guardrail installed but, as here, on whether a specific underlying hazard had been eliminated.

because it had not failed to abate. Because we have rejected Alden Leeds' underlying argument and the company had not otherwise addressed the amount of the penalty, we see no reason to disturb the judge's assessment. Accordingly, we conclude that a penalty of \$107,100 is appropriate and assess that amount.

### **Conclusion**

For the reasons set out above, we find that Alden Leeds has failed to rebut the Secretary's prima facie showing that it had failed to abate the violation for which it had been previously cited. We assess a penalty of \$107,100 for this failure.

Dated: July 25, 2000

/s/  
Thomasina V. Rogers  
Chairman

VISSCHER, Commissioner, dissenting:

In my view, the lead and concurring opinions have misconstrued the 1993 citation against Alden Leeds, and have ignored Commission precedent by shifting the burden of persuasion to the employer on this notice of failure to abate. In addition, the concurrence urges a new and highly questionable rule regarding abatement of citations: that, even if the violation itself no longer exists, abatement has not occurred unless the action correcting the violation was taken as direct response to OSHA rather than in the course of routine operations. I strongly disagree with both of these opinions, which together work an unwarranted expansion of the failure to abate provisions of the Act.

Alden Leeds operates a wholesale pool chemical business. In 1993, as a result of an inspection that followed a fire, the company received a citation for an alleged violation of section 5(a)(1), the general duty clause of the OSH Act. The wording of that citation is important here:

Section 5(a)(1) of the Occupational Safety and Health Act of 1970:

The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to the employee in that: employees were exposed to the hazard of fire from the improper storage of highly reactive oxidizing agents:

a) 55 Jacobus Avenue - Warehouse 2 and 3B:

Class two oxidizers were not stored in accordance with the National Fire Protection Association (NFPA) document A-1990, Table A-2 (Storage of Class 2 Oxidizers) in that the maximum tonnage requirements were exceeded approximately 120 tons were stored in warehouse 2 and 160 tons were stored in warehouse B. The maximum tonnage allowed for sprinkle red segregated storage is 100 tons of class two oxidizers. Violation observed on or about 8/25/93.

The citation went on to allege twelve additional violative instances on the premises (which were explicitly referred to as “violations” in the citation) regarding storage of chemicals. Alden Leeds contested this citation, and it was eventually settled. The Stipulated Settlement

states that “[a]ll violations alleged in the citations and complaint will be abated by October 15, 1994.” There is no question that the thirteen conditions identified in the 1993 citation no longer existed when OSHA conducted a follow up inspection in December, 1994. That fact alone should require that the Secretary’s failure to abate notice be vacated. *Savina Home Industries, Inc.*, 4 BNA OSHC 1956, 1976-77 CCH OSHD ¶ 21,469 (No. 12298, 1977) (no failure to abate if employees no longer exposed to cited conditions).

The concurring opinion argues that even though the thirteen conditions identified in the 1993 citation no longer existed at the time of 1994 inspection, they had not been abated. My colleague would have the Commission disallow abatements that have occurred through “changing conditions” within the workplace, and establish a requirement that abatement can only be shown by an employer’s “corrective action.” I see no basis for the distinction he now urges. Such a rule leads to the plainly illogical conclusion that, even if a violative condition has ceased to exist, the Commission could still find that violation itself remains unabated. In any event, as I describe below, the evidence of record in this case establishes that the company did take corrective action to abate the thirteen specific violations identified in the 1993 citation.

My colleagues avoid vacating this failure to abate notice by reading the 1993 citation as addressing something more than the thirteen conditions specified on the face of the citation itself. According to their expanded reading of the citation, Alden Leeds was actually cited for the general practice of “improper storage of highly reactive oxidizing agents.” As this theory of the case goes, Alden Leeds could only have established abatement here by proving that all of its chemical storage practices were brought into full compliance with national consensus standards published by the National Fire Protection Association (NFPA).

In my view, the only fair reading of the 1993 citation and settlement agreement is that Alden Leeds was charged with, and therefore required to abate, thirteen conditions specifically identified in the citation. Even if it were possible to read the citation as broadly as my colleagues have, the citation may only be construed against Alden Leeds to the extent

that Alden Leeds was clearly informed of what it must do to correct the violations alleged. When she issues a citation, the Secretary must clearly state in the citation what violation is being charged. Section 9(a) of the Occupational Safety and Health Act requires that:

Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated.

Construing that provision, the U.S. Court of Appeals for the Fifth Circuit, in *Marshall v. B.W. Harrison Lumber Co.*, 569 F.2d 1303, 1308 (5th Cir. 1978), said “[t]he statute does not require that the description of the violation be elaborate or technical or drafted in a particular form. It does require that the description fairly characterize the violative condition so that the citation is adequate both to inform the employer of what must be changed and to allow the Commission, in a subsequent failure-to-correct action, to determine whether the condition was changed.” The 1993 citation did not explicitly inform Alden Leeds that it was being cited for its overall chemical storage practices on an on-going basis, and therefore it cannot be enforced against the company in that manner.<sup>4</sup>

But even assuming *arguendo* that the 1993 citations can be properly read as requiring abatement of Alden Leeds’ overall storage practices, the failure to abate notice must fail under the Commission’s long-standing rule that “[o]nly when a cited condition has continued uncorrected is a failure to abate established. Abatement of a violation is accomplished once the corrective action required by the citation has been taken.” *Braswell Motor Freight Lines, Inc.*, 5 BNA OSHC 1469, 1471, 1977-79 CCH OSHD ¶ 21,881, p. 26,391 (No. 9480, 1977). The Secretary has not shown that the “cited condition has continued uncorrected.” Alden Leeds’ president, the only witness with direct knowledge of the facts, testified that

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<sup>4</sup>The majority’s construction of the citation is especially vague regarding actual abatement requirements. Does abatement mean permanent compliance with every NFPA provision, or with some subset of provisions appropriate to their operations? The majority’s reasoning appears to mean that Alden Leeds could be noticed for failure to abate upon any subsequent allegation that it was not following an undefined set of storage practice requirements.

subsequent to the 1993 citations he instructed the warehouse manager to correct each of the violations specified in the citation. He also testified that he and the manager went over the items one-by-one and determined how to correct them, and that he personally verified that the corrections had been made. Furthermore, he testified that he and the warehouse manager together reviewed the Blue Book, an industry guide that incorporates the NFPA, and that they attempted to store the chemicals in the warehouse in conformity to it. In addition, the local fire marshall had inspected the warehouse and did not identify any hazardous conditions during that inspection. Thus, even if abatement of the 1993 citation required that chemical storage at Alden Leeds be in full compliance with the NFPA, the only record evidence shows that at Alden Leeds was in compliance when it abated the thirteen violative conditions identified in the 1993 citation.

In any event, the ultimate burden may not be shifted to the employer to prove that a failure to abate *did not* occur. Once the Secretary has established a prima facie case by showing a final order for which identical conditions existed on reinspection, the Commission may require an employer to come forward with evidence to rebut the allegations of a failure to abate notice. *See York Metal Finishing Co.*,<sup>1</sup> BNA OSHC 1655, 1973-74 CCH OSHD ¶ 17,633 (No. 245, 1974). In my opinion, the above-summarized testimony of Alden Leeds' president fully rebutted the Secretary's prima facie case. To find that Alden Leeds' rebuttal was insufficient, the lead opinion relies upon the fact that company's president never specifically asserted that his entire warehouse operation was in full compliance with all NFPA standards. I would observe that it is highly unlikely that any witness would make such a broad statement while under oath. Second, as the judge noted, Alden Leeds understandably tried this case on the theory that the 1993 citation only required abatement of the thirteen instances that the Secretary specified. Full compliance with NFPA standards was therefore not relevant to its case.

Furthermore, the conclusions of the concurrence notwithstanding, the president's abatement testimony was neither contradicted nor impeached by the out-of-court statements

the compliance officer attributed to Alden Leeds' warehouse manager. At most, these statements show that the storage of chemicals at Alden Leeds was not in continuous compliance with the NFPA, not that chemical storage at the company was *never* in compliance with the NFPA. Thus, even if abatement of the 1993 citation had required that the entire warehouse be brought into full compliance with NFPA, the Secretary did not prove that Alden Leeds was continuously in noncompliance after the 1993 citation. She has therefore failed to carry her burden of proof for a finding of failure to abate.

What the Secretary instead relies upon is the fact that when Alden Leeds was inspected in December, 1994, there were instances of storage conditions similar to those cited in 1993. Such recurrent violations may be grounds for a "repeat" or even a "willful" citation. But by affirming a failure to abate in this case, the majority has ignored Commission precedent and greatly expanded the circumstances under which a failure to abate notice, which carries the most severe civil penalty process allowed under the OSH Act, may be used.

/s/ \_\_\_\_\_  
Gary L. Visscher  
Commissioner

Date: July 26, 2000

WEISBERG, Commissioner concurring:

While I concur in the decision to affirm Administrative Law Judge John Frye's finding that Alden Leeds had failed to abate the hazards identified in the 1993 citation,<sup>5</sup> I do so for additional reasons.

It is clear under both Commission precedent and OSHA policy guidelines that a failure to abate exists when the condition previously cited has never been brought into compliance. In *Braswell Motor Freight Lines*, 5 BNA OSHC 1469, 1471, 1977-78 CCH OSHD ¶ 21,881, p. 26,391 (No. 9480, 1977), the Commission stated: "Only when a cited condition has continued uncorrected is a failure to abate established. Abatement of a violation is accomplished once the corrective action required by the citation has been taken. This was clearly done when a covered container was placed in service for the rags. While the failure to effectively enforce instructions to keep it covered could constitute a new, repeated violation of the same standard, it does not constitute a failure to abate." The Commission's case law is followed in the Secretary's Field Inspection Reference Manual (FIRM, III-19, section C.2.f.(6)) which states:

**Repeated vs. Failure to Abate.** A failure to abate situation exists when an item of equipment or condition previously cited has never been brought into compliance and is noted at a later inspection. If, however, the violation was not continuous (i.e., if it had been corrected and then reoccurred), the subsequent occurrence is a repeated violation.

In 1990, the employer, Alden Leeds, which operates a wholesale pool chemical business, was issued a citation by OSHA at its Kearny, New Jersey warehouse alleging a violation of Section 5(a)(1), the general duty clause, "in that employees were exposed to the hazard of fire from the improper storage of highly reactive oxidizing agents." The citation alleged numerous instances of improper storage in that incompatible chemicals were stored too close to each other, piles containing an oxidizing agent were too high, and the warehouses contained too high a total tonnage of oxidizers. The 1990 citation was contested

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<sup>5</sup>Noting that the company does not contest the amount of the penalty, I would assess the \$107,100 proposed by the Secretary and recommended by the judge for the failure to abate.

and settled and an abatement letter was sent in which the company's president, Mark Epstein, represented that "[s]torage of oxidizers in conformance with N.F.P.A. [National Fire Protection Association] guideline, part 43A."

In 1993, there was a large fire in the warehouse, which led OSHA to conduct another inspection. OSHA issued a citation alleging a Section 5(a)(1) violation, with the identical wording used in the 1990 citation, "in that employees were exposed to the hazard of fire from the improper storage of highly reactive oxidizing agents." The citation set out 13 instances in which the company failed to follow the provisions of NFPA 43A. The citation was contested and a settlement was agreed to, requiring the company to abate the violations by October 15, 1994.

On December 6, 1994, Robert Garvey, the OSHA compliance officer who had conducted both the 1990 and 1993 inspections, reinspected the warehouse to determine whether abatement had been accomplished. The CO found some 25 instances in which incompatible chemicals were not properly separated, as well as piles of oxidizing agents stored too high and exceeding total weight limits. While these instances were not identical to any of the specific instances cited in 1993, *i.e.*, the exact same pile at the exact same height could not be matched, they were of the same type, involved the same chemicals, and in some cases occurred in nearly the same location. OSHA concluded that the company had not abated the 1993 violations and issued a Notification of Failure to Abate violations.

It is undisputed that the 13 specific instances identified in the 1993 citation no longer existed when OSHA conducted its follow-up inspection in December 1994. As my dissenting colleague points out, in most cases that fact alone would warrant vacating the Secretary's failure to abate notice. However, that does not necessarily hold true in the context of a storage and processing operation in which inventory and individual piles are constantly changing. As Commissioner Visscher notes, "[a]batement of a violation is accomplished once the corrective action required by the citation has been taken," citing *Braswell Motor Freight Lines, Inc.* In my view, the record evidence does not establish that the company took the corrective action required by the citation with respect to the 13 specific

instances, either by correcting the physical conditions or by preventing employee exposure, or that the company ever came in full compliance. The record strongly suggests that the reason the 13 items identified in the 1993 citation did not exist in December 1994 at the time of the OSHA reinspection was because of the nature of the company's business with inventory constantly changing, chemicals constantly moving in and out and individual piles similarly changing, rather than by any conscious effort by the company to take corrective action to bring about abatement. While the heights of the piles changed and the materials were replenished, the evidence does not show that the company ever came in compliance, even for a fleeting moment. At best this appears to be the functional equivalent of rearranging the deck chairs on the Titanic. As the company president testified: "You have to understand that the warehouse changes on a daily basis and anything that he [the CO] would have measured on one specific date by the time the citation was received, most of those piles are of different dimensions, different sizes and only the general locations remain the same."<sup>6</sup>

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<sup>6</sup>Accordingly, it appears that the 13 specific instances observed by the CO during the 1993 inspection did not continue to exist at any time -- either the next day, at the time the 1993 citation issued, when the settlement agreement was entered into, on the October 15, 1994 abatement date agreed to by Alden Leeds in the settlement, or in December 1994 when OSHA conducted its follow-up inspection. The question then becomes what "corrective action" was required by the 1993 citation, and consented to in the subsequent settlement agreement that contained an October 15, 1994 abatement date? My dissenting colleague does not directly address this point. He concludes that the only fair reading of the 1993 citation and settlement agreement is that the company was required to abate the 13 conditions specifically identified in the citation. The fact that these 13 specific instances apparently did not exist either at the time the citation issued or when the settlement agreement was entered into and that this was due solely to the nature of the company's business is apparently of no import to my colleague. Thus, my dissenting colleague's apparent answer to the question of what "corrective action" was required by the 1993 citation and consented to in the subsequent settlement agreement that contained an October 15, 1994 abatement date would be "none."

My dissenting colleague's misstatement of my position notwithstanding, it is not my view that in every case where a violative condition has ceased to exist due to changing conditions  
(continued...)

The CO testified about a conversation he had during the 1994 inspection with the warehouse manager, John Cresho, concerning what changes had been made as a result of the 1993 citation. According to the CO's testimony, Cresho told him that: "He had never seen the citations. He didn't know what the citation said and he was never given any other specifics." Thus, Cresho, the warehouse manager, the person who according to the company president was responsible for correcting each of the 13 specific items in the 1993 citation, had never seen the citation and was unaware of the specifics of those items.

Even assuming *arguendo* that the company is given credit for these 13 "self-abating" items,<sup>7</sup> I would still uphold the failure to abate violation found by Judge Frye on the ground that the company never abated its storage practices for oxidizers which constituted the fire hazard that the Secretary sought to have remedied. In my view, the 1993 citation charging the company with specific conditions which exposed "employees to the hazard of fire from

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<sup>6</sup>(...continued)

there can be no abatement unless corrective action has been taken by the company. It should be noted that this is not a case where the violative conditions no longer existed because the work had been completed prior to the time set for abatement. Nor is this a case where corrective action by the company was foreclosed by "changing conditions" in the workplace. The constant shift in inventory is the very essence of Alden Leeds business. Abatement of a violation is usually accomplished once corrective action has been taken. Alden Leeds took no affirmative corrective action, so the very same violative conditions continued to exist throughout its workplace. In these particular circumstances, I would not credit the company with an abatement based on the serendipitous non-existence of the 13 specific instances of improper chemical storage to use as a shield against an FTA notice.

<sup>7</sup>My dissenting colleague cites *Savina Home Industries, Inc.*, 4 BNA OSHC 1956, 1976-77 CCH OSHD ¶ 21,469 (No. 12298, 1977) for the holding that there is "no failure to abate if employees [are] no longer exposed to cited conditions." In *Savina* the Commission vacated the notification for failure to abate because the employer had, in fact, been in compliance with the cited standards either at the time of the original inspection or at the time of the reinspection. *Savina* was not a case of a violative condition having been corrected, but rather the Commission simply finding that the cited condition was not violative of the Act.

Commissioner Visscher does not cite to any case where the Commission has dealt with the question of a failure to abate notice in the context of violative conditions that are self-correcting in nature, *e.g.*, as a result of a constantly changing inventory, and where the employer has failed to take any corrective action.

the improper storage of highly reactive oxidizing agents” more than adequately informed the company that OSHA was concerned with its overall warehouse storage practices for oxidizing agents and that this was the hazard that the Secretary sought to have remedied. As the judge found:

To limit the citation to specific conditions enumerated in it would be to blink [at] the reality of the hazard. In the context of a storage and processing operation in which inventory is constantly changing, it does little good to correct specific hazardous piles of oxidizers identified by the Secretary if the procedures which permitted those hazardous piles to be created are not corrected. New hazardous piles will be created, and the employees’ risk of death or serious injury will be unabated. Consequently, interpreting the language of the citation to apply only to specific hazards would thwart the remedial purpose of the Act. . . .

Furthermore, the argument that the company was not “clearly informed” of what must be changed in order to correct the violation is less tenable where, as here, the evidence indicates that the company failed to take corrective action even with respect to the 13 items listed in the 1993 citation.

Under Commission precedent, to establish a prima facie case of failure to abate, the Secretary must show that: (1) the original citation has become a final order of the Commission, and (2) the condition or hazard found upon reinspection is the identical one for which respondent was originally cited. An employer may rebut this prima facie case by showing that the condition has in fact been corrected or, if not corrected, that the employer has prevented the exposure of his employees to the violative condition. *York Metal Finishing Co.*, 1 BNA OSHC 1655, 1656, 1973-74 CCH OSHD ¶ 17,633, p. 22,048 (No. 245, 1974).

The CO testified, based on personal observations as well as interviews with the plant manager, the forklift operator, and other employees during the December 1994 reinspection, that the employees continued to be exposed to the recognized hazard of fire from the improper storage of oxidizing pool chemicals and that the company’s practices of improperly storing incompatibles had remained unchanged since the 1993 citation. The company continued to operate as it did at the time of the 1993 citation by storing chemicals anywhere

it could find space for them, apparently without regard for chemical incompatibility. This evidence establishes a prima facie failure to abate.

My dissenting colleague argues that the company rebutted the Secretary's prima facie case based solely on the testimony of the company's president, Mark Epstein. Epstein testified that subsequent to the 1993 citations he instructed the warehouse manager to correct each of the violations specified in the citation. He also testified that he and the manager went over the items one-by-one and determined how to correct them, and that he personally verified that the corrections had been made.<sup>8</sup>

The warehouse manager, John Cresho, did not testify at the hearing. However, the CO testified about a conversation that he had with Cresho during the December 1994 reinspection concerning what changes had been made as a result of the 1993 citation. According to the CO's testimony, Cresho told him that "[t]he only thing he tried to do was to separate the materials. He had never seen the citations. He didn't know what the citation said and he was never given any other specifics." According to the CO, Cresho also indicated that incompatibles were stored within inches of each other because there was not enough space to separate them adequately, even in December, when inventory was low. The fire had reduced the company's warehouse space by some 65,000 square feet and the company continued to operate with reduced storage space. Cresho told the CO that the company continued to store chemicals together by brand names rather than by chemical names in order to fill orders more easily and more quickly. With respect to pile heights, Cresho told the CO that he had always stored the finished product two pallets high. The CO measured with a tape measure and found that two pallets high for a class 2 oxidizer ranged

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<sup>8</sup>The dissenting opinion refers to Epstein as "the only witness with direct knowledge of the facts." It should be noted that following the 1990 citation and settlement, Epstein sent OSHA an abatement letter in which he represented that "[s]torage of oxidizers in conformance with N.F.P.A. Guideline, part 43A." However, at the hearing in the instant case, Epstein testified that he had not actually seen N.F.P.A. 43A.

from approximately 9 feet to 11¾ feet, well above the maximum height restrictions of NFPA 43A.<sup>9</sup>

Thus, even if one views Epstein's conclusory testimony as sufficient to rebut the Secretary's prima facie case, the Secretary presented sufficient evidence to overcome that testimony and satisfied her ultimate burden of establishing by a preponderance of the evidence that the company's storage practices remained unchanged and that a failure to abate did occur. Accordingly, I concur with the decision to affirm Judge Frye's finding that Alden Leeds failed to abate the hazards identified in the 1993 citation.

/s/  
Stuart E. Weisberg  
Commissioner

Dated: July 26, 2000

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<sup>9</sup>My dissenting colleague dismisses the personal observations of the CO and chooses to disregard the statements the CO attributed to the warehouse manager Cresho as "out-of-court statements." Such statements, however, are not hearsay and are admissible. *See* FED. R. EVID. 801(d)(2) (admission by party-opponent not hearsay). My colleague also contends that these statements made by Cresho to the CO "neither contradict nor impeach" Epstein's abatement testimony. Epstein testified that he instructed the warehouse manager to correct each of the 13 violations specified in the citation, and that he and the manager went over the items one-by-one and determined how to correct them. Yet, according to the CO, during the 1994 inspection the warehouse manager told him that he had never seen the 1993 citation and was unaware of the specifics of those items. In my view, Cresho's statement plainly contradicts and impeaches that of Epstein.

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR

Complainant

v.

ALDEN LEEDS, INC.,

Respondent

Docket Nrs. 95-1143 FTA  
95-1143

Appearances

For Complainant  
J. Davitt McAteer, Esq.  
Acting Solicitor of Labor

For Respondent  
Eric Aronson, Esq.  
David Roth,

Esq.

Patricia M. Rodenhausen, Esq.  
Regional Solicitor

Whitman, Breed,  
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U.S. Department of Labor  
New York, New York

Before: JOHN H FRYE, III, Judge, OSHRC

DECISION AND ORDER

I INTRODUCTION

This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. § 651 et seq. (the "Act"). Respondent, Alden Leeds, Inc. ("Alden"), contests a Notification of Failure to Abate violations

<sup>10</sup> (the “FTA”). The violations which the Secretary alleges were not abated were observed by OSHA in 1993 at Alden’s warehouse located at 55 Jacobus Avenue, Kearny, New Jersey, and became the subject of a citation issued on October 8, 1993. Alden contested this citation and a settlement was reached on July 12, 1994. The terms of the settlement required Alden to abate all alleged violations by October 15, 1994. Beginning in December 1994, the Secretary reinspected Alden’s warehouse. The Secretary concluded that Alden had not abated the 1993 violations and issued the FTA which is here at issue. The Secretary proposes an additional penalty of \$107,100. Following an unsuccessful attempt to settle this controversy, trial took place on February 19 and 20, 1997, in New York, New York.

## II BACKGROUND

Alden is a New Jersey corporation engaged in processing, storing, packaging, reformulating, distributing, and selling swimming pool chemicals, significant quantities of which are oxidizers.<sup>11</sup> Oxidizers present a fire hazard in that they increase the burning rate of and may cause spontaneous ignition of combustible materials.<sup>12</sup> The National Fire Protection Association (“NFPA”) groups oxidizers into four classes depending on the degree of hazard, Class 1 being least hazardous and Class 4 most hazardous. Alden stores and processes no Class 4 oxidizers, a small amount of Class 3,

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<sup>10</sup> The Secretary also issued (Inspection # 107658486) serious Citation No. 1 and an other Citation No. 2 which were timely contested by Respondent. At the beginning of the trial, Respondent withdrew its contest to these two citations (Tr. 5, 38). Thus, Citation No. 1 and Citation No. 2 of Inspection # 107658486 will be affirmed as issued and the penalties proposed by the Secretary will be levied.

<sup>11</sup> Tr. 30, 67, 169, 316.

<sup>12</sup> Ex ALJ 7, NFPA 43A (1990), & 1-2, p.43A-5.

and a substantial amount of Class 2. The vast majority of its inventory is made up of Class 1.<sup>13</sup> Class 1 oxidizers slightly increase the burning rate of combustible materials, but do not cause spontaneous ignition.<sup>14</sup> Class 2 oxidizers cause a moderate increase in burning rate and may cause spontaneous ignition of combustible materials.<sup>15</sup> Class 3 oxidizers cause a severe increase in burning rate of combustible materials or will undergo vigorous self-sustaining decomposition if contaminated or exposed to heat.<sup>16</sup>

Both the 1993 citation and the FTA employed the same language in charging Alden:

The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to the employee in that employees were exposed to the hazard of fire from the improper storage of highly reactive oxidizing agents.<sup>17</sup>

Both the FTA and the 1993 citation base this charge on specific instances in which Alden allegedly failed to follow the provisions of NFPA 43A (1990).<sup>18</sup> These alleged violations are set out below.

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<sup>13</sup> Tr. 317.

<sup>14</sup> Ex ALJ 7, NFPA 43A (1990), & 1-6.1, p.43A-6.

<sup>15</sup> *Id.* & 1-6.2, p.43A-6.

<sup>16</sup> *Id.* & 1-6.3, p.43A-6.

<sup>17</sup> Ex ALJ 3 and 5.

<sup>18</sup> Alden argues that it never agreed in the settlement of the 1993 citation to apply the provisions of NFPA 43A (1990). That may be so. However, that fact does not prevent the Secretary from relying on NFPA 43A (1990) in order to demonstrate that a recognized hazard existed in Alden's warehouse. The existence of national consensus standards, such as those established by the NFPA, may be used as evidence of recognition of a hazard.  
(continued...)

1. Piles of Class 2 Oxidizers

a. FTA - Alleged Violations of Table 4-2(a) Governing Nonsprinklered,<sup>19</sup>  
Segregated Storage

<u>Limitation</u>	<u>Alleged Violations</u>
Max Weight = 10 Tons	4: 37.8, 25, 23.8, and 23.1 Tons (Item 1b)
Max Height = 6 Feet	20 ranging from 8.8 to 11.75 Feet (Item 1c)
Max Width = 8 Feet	2: 20x29 and 19x27 Feet (Item 1d)
Min Distance to Next Pile = Pile Height	3 (Item 1e)

b. 1993 Citation - Violations of Table 4-2(b) Governing Sprinklered,  
Segregated Storage

<u>Limitation</u>	<u>Violations</u>
Max Weight per Building = 100 Tons	2: 120 and 160 Tons (Item 1a)
Max Weight = 20 Tons	2: 75 and 54 Tons (Item 1b)
Max Height = 8 Feet	4 ranging from 9 to 13.5 Feet (Item 1c)
Max Width = 16 Feet	1: 75 Feet (Item 1d)

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(...continued)  
*Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 871, (3rd Cir. 1979);  
*Madison Foods, Inc.*, 630 F.2d 628 (8th Cir. 1980).

<sup>19</sup> In the time between the 1993 citations and the FTA, the Secretary changed his classification of Alden's warehouse from "sprinklered" to "nonsprinklered." (Tr. 354.) However, all of the specific deviations of the piles from NFPA 43A (1990) identified by the Secretary exceed the less onerous guidelines for sprinklered storage.

Min Distance to Next Pile = Pile Height \* 2 (Items 1e, 1ee)

Min Distance from Wall = 2 Feet \* ? (Items 1f, 1ff)

2. Piles of Class 3 Oxidizers

- a. FTA - Alleged Violations of Table 5-2(a) Governing Nonsprinklered,<sup>20</sup>  
Segregated Storage

<u>Limitation</u>	<u>Alleged Violations</u>
Max Height = 6 Feet	19 Ranging from 7.2 to 10.25 Feet (Item 1cc)
Min Distance to Next Pile = Pile Height	3 (Item 1ee)

- b. 1993 Citation - Violations of Table 5-2(b) Governing Sprinklered,  
Segregated Storage

<u>Limitation</u>	<u>Violations</u>
Max Weight = 10 Tons	2: 11 and 26 Tons (Item 1bb)
Max Height = 5 Feet	2: 10 and 7.3 Feet (Item 1cc)
Min Distance to Next Pile = Pile Height	1 (Items 1ee)
Min Distance from Wall = 2 Feet	4: 4.5, 20, 10, and 18 Inches (Item 1ff)

In addition, the FTA lists 25 alleged instances in which Class 2 or 3 oxidizers were stored too close to incompatible materials, while the 1994 Citation lists one such violation. (Item 1g in both citations.)

It is evident from a review of the above that none of the FTA alleged violations correspond with any of the 1993 violations. Counsel for the Secretary so stipulated.<sup>21</sup> The Secretary maintains that what was cited in 1993 and again in the FTA were Respondent's storage practices, not specific conditions which violated NFPA 43A (1990). Indeed, the testimony put forward by the Secretary falls far short of

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<sup>20</sup> *Id.*

<sup>21</sup> Tr. 170-71.

establishing that specific hazardous conditions continued from the abatement date set in the stipulation of settlement of the 1993 citation until December, 1994.<sup>22</sup> However, the Secretary did establish that Alden's storage practices remained unchanged over the relevant period.<sup>23</sup> From the outset, Alden's

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<sup>22</sup> See testimony of Compliance Officer Robert Garvey, Tr. 27 *et seq.* The testimony indicates that the nature of Alden's business is such that the inventory is constantly changing and, consequently, individual piles are similarly changing. Thus a pile that exceeded an NFPA 43A (1990) limitation at one moment might well be within that limitations at another. Thus the Secretary cannot establish a failure to abate violations as contemplated by *Secretary v. Braswell Motor Freight Lines, Inc.*, 5 OSHC 1469, 1471 (Rev. Com. 1977).

<sup>23</sup> The Secretary established that there were two major problems with Respondent's storage practices. As illustrated above, Respondent stored chemicals together by brand names rather than by chemical names in order to facilitate the filling of orders (Tr. 61-62, 77, 210). As a result, incompatible chemicals were stored together, increasing the hazard of fire, contrary to NFPA 43A (1990), & 2-4.2 (Tr. 62-64, 71-72, 210). Alden maintains that it did not store incompatibles together, citing the testimony of Mr. Epstein (Tr. 291, 298, 308) and Mr. Garvey (Tr. 71-72, 87-88), but this testimony is insufficient to contradict the statements of Mr. Garvey to the contrary. Alden also relies on a letter from Mr. Jacobsen which states that in March, 1995, he did not find incompatibles stored together. Mr. Jacobsen did not testify. His letter, although admitted, is hearsay and consequently it is also insufficient to contradict Mr. Garvey's testimony. Moreover, it speaks to a  
(continued...)

defense focused on the fact that the specific conditions in its warehouses did change and that consequently the Secretary did not establish a failure to abate the hazards identified in the 1993 citation. Alden did not address the issue of its storage practices.

### III DISCUSSION

It is evident from the above that the parties tried two separate cases and each established what it sought to establish. Thus, although no party addressed it, it is important to determine whether the 1993 citation adequately informed Alden that the Secretary regarded its storage practices to be hazardous. Alden, having refused to consent to the trial of those practices<sup>24</sup> by joining issue with the Secretary's case, may not fairly be charged with a failure to abate unless the 1993 citation placed it on notice that the Secretary was seeking to correct those practices.<sup>25</sup>

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(...continued)  
different time period.

Second, as noted above, Respondent did not come into compliance with the dimensional restrictions of NFPA 43A (1990) by changing its storage practices (Tr. 51, 64, 67, 69-70, 73, 75, 77-80, 86, 111, 118, 169, 209-210, 224; ALJ 17-20). These practices were not changed from the 1993 citation to the FTA.

<sup>24</sup> Alden maintains that ' 5(a)(1) may only be used to cite hazardous conditions and may not be used to cite allegedly hazardous practices. (Brief, p.7.) Such is not the case. *Secretary v. General Dynamics Land Systems Div., Inc.*, 15 OSHC 1275, 1280 (Rev. Com. 1991); *Secretary v. Pelron Corporation*, 12 OSHC 1833, 1835 (Rev. Com. 1986) defining a ' 5(a)(1) hazard as "... practices, procedures or conditions...."

<sup>25</sup> Alden does object that the 1993 Citation was defective in that it failed to identify the corrective measures necessary to abate  
(continued...)

The 1993 citation charges Alden with exposing "... employees ... to the hazard of fire from the improper storage of highly reactive oxidizing agents." The citation does not specifically refer to storage practices, and the violations of listed in item 1 clearly refer to specific conditions, not practices. The 1993 citation is similar to a citation issued to General Dynamics under ' 5(a)(1). The latter citation charged that:

... employees ... were required to spray or pour varying quantities of [freon] into the turret and driver's compartment of M-1 tanks and immediately enter these compartments ... thereby exposing themselves to the hazard of asphyxiation and/or chemical poisoning.<sup>26</sup>

The trial of the citation revealed and the judge found that employees were not required to enter the tanks immediately. Consequently, General Dynamics argued before the Commission that the citation properly had been vacated by the judge. The Commission rejected this argument, noting that, although not required to do so, employees often entered the tanks immediately after pouring freon in them. The

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(...continued)  
the hazard, relying on *Marshall v. B.W. Harrison Lumber Co.*, 4 OSHC 1091, 1092, *aff'd* 569 F.2d 1303, 1307, 6 OSHC 1446, 1449-50 (5th Cir. 1978). Brief p.11. In support of this argument Alden cites Mr. Garvey's testimony in which he seemed to concede that the rigid application of NFPA 43A (1990) dimensional guidelines would not necessarily abate the hazard. Alden's argument fails for two reasons. First, because there is more to NFPA 43A (1990) than simply conforming with dimensional guidelines, Alden reads too much into this testimony. Second, *Harrison* is distinguishable in that the citation there was found to be defective because it failed to adequately describe the ways in which the employer failed to comply with a specific standard.

<sup>26</sup> *General Dynamics, supra*, note 15at 1279.

Commission found that the citation sufficiently described the hazard in that it "... clearly informed General Dynamics that its procedures for the use of freon in tanks and for restricting employee entry into the tanks after the introduction of freon were deemed hazardous by the Secretary."<sup>27</sup>

Is it fair to say that charging Alden with specific conditions which exposed "... employees ... to the hazard of fire from the improper storage of highly reactive oxidizing agents" "... clearly informed [Alden] that its procedures for the [storage of oxidizing agents] were deemed hazardous by the Secretary." While the question is a close one, I believe an affirmative answer is appropriate. To limit the citation to specific conditions enumerated in it would be to blink the reality of the hazard. In the context of a storage and processing operation in which inventory is constantly changing, it does little good to correct specific hazardous piles of oxidizers identified by the Secretary if the procedures which permitted those hazardous piles to be created are not corrected. New hazardous piles will be created, and the employees' risk of death or serious injury will be unabated. Consequently, interpreting the language of the citation to apply only to specific hazards would thwart the remedial purpose of the Act "... to assure so far as possible every working man and woman in the Nation safe and healthful working conditions ...."<sup>28</sup>

It is for this reason that citations are to be liberally construed to achieve the purposes of the Act.

It is well settled that administrative pleadings are to be liberally construed and easily amended. *Brock v. Dow Chemical U.S.A.*, 801 F.2d 926, 12 OSHC 2135 (7th Cir. 1986); *Simplex Time Recorder v. Secretary*, 766 F.2d 575, 585, 12 OSHC 1401 (D.C. Cir. 1985); *National Realty and Construction Co. v. OSHRC*, 489 F.2d 1257, 1 OSHC 1401 (D.C. Cir. 1973). This has been particularly true for citations issued under the Act, which are drafted by non-legal personnel who are required to act with dispatch. To inflexibly hold the Secretary to a narrow construction of the language of a citation would unduly cripple enforcement of the Act. *Dow*

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<sup>27</sup> *General Dynamics, supra*, note 15 at 1280.

<sup>28</sup> Act, ' 2(b).

Chemical, 801 F.2d at 930; *Donovan v. Williams Enterprises, Inc.*, 744 F.2d 170, 11 OSHC 2241 (D.C. Cir. 1984).<sup>29</sup>

I find that the 1993 citation informed Alden that its storage practices were the hazard that the Secretary sought to have remedied. Consequently, the Secretary acted within her authority in charging Alden with a failure to abate a violation.

The Secretary has addressed the other elements of a ' 5(a)(1) violation in her brief and has carried her burden with respect to them. Because Alden has not contested them, they are not further addressed in this decision.

#### IV PENALTY

The Secretary originally assessed a \$7,000 penalty for this item in 1993.<sup>30</sup> She considered this to be a high severity violation, because employees were exposed to fire hazards that could kill them,<sup>31</sup> and that there was a greater probability that an accident would occur.<sup>32</sup> Under ' 17(d) of the Act, the Commission is authorized to assess up to \$7,000 per day for each day that the violation remains unabated.

In making her penalty recommendation, the Secretary took the following into account. Although there are more than fifty days between the final abatement date (October 15, 1994) set by the Review Commission's final order for the 1993 citation<sup>33</sup> and the reinspection conducted in mid-December, 1994, the Secretary assessed a daily penalty for only thirty days.<sup>34</sup> She

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<sup>29</sup> *General Dynamics*, supra note 15, at 1279.

<sup>30</sup> ALJ 3.

<sup>31</sup> Tr. 96.

<sup>32</sup> Tr. 97-98.

<sup>33</sup> Tr. 70; ALJ 4.

<sup>34</sup> Tr. 89.

multiplied thirty days times \$7,000, which yields \$210,000.<sup>35</sup> Because Alden had abated some of the specific conditions found in 1993, she accorded it a 15% credit, reducing the figure to \$178,500.<sup>36</sup> Next, she considered Alden's size, good faith, and history. She further reduced the penalty by 40% for size because Alden had only twenty-eight employees.<sup>37</sup> She gave no reduction for history because of Respondent's prior history of willful, multiple serious, and multiple other violations,<sup>38</sup> and no reduction for good faith because Alden's storage practices had not changed. The Secretary's final additional proposed penalty totaled \$107,100 for the contested FTA.<sup>39</sup>

Alden has not contested the Secretary's penalty recommendation. I have reviewed it and find it to be reasonable. Accordingly, I assess a penalty of \$107,100 for the FTA.

#### IV CONCLUSIONS OF LAW

1. Alden Leeds, Inc., a New Jersey corporation with facilities in New Jersey, is engaged in storing, processing, reformulating, packaging, distributing and selling swimming pool chemicals, a business affecting commerce within the meaning of the Act.
2. The Occupational Safety and Health Review Commission has jurisdiction over the subject matter and the parties pursuant to section 10(c) of the Act.
3. The Secretary has sustained her burden of proving that Alden Leeds, Inc., violated Section 5(a)(1) of the Act as alleged in the FTA as amended in the complaint.

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<sup>35</sup> Tr. 90.

<sup>36</sup> Tr. 90. The OSHA inspector made a mathematical error when he testified at the hearing that this reduction brought the figure down to \$187,100. Once the actual math is performed, the actual reduction in fact brings the figure down to \$178,500.

<sup>37</sup> Tr. 91.

<sup>38</sup> Tr. 95-96; ALJ 1-4.

<sup>39</sup> ALJ 5.

4. This violation is a serious violation within the meaning of section 17(k) of the Act in that there was a substantial probability that death or serious physical harm could result from the storage practices of Alden Leeds, Inc.

5. Alden Leeds, Inc., did not abate this violation between the prior citation's effective final order date of October 15, 1994, and the mid-December, 1994, reinspection of the premises.

V ORDER

1. Alden Leeds, Inc. having withdrawn its notice of contest to serious Citation No. 1 and an other Citation No. 2 (Inspection # 107658486), these Citations are affirmed. A penalty of \$3,000 is appropriate.

2. The Notification of Failure to Abate (FTA) is affirmed. An additional penalty of \$107,100 is appropriate.

3. Total civil penalties of \$110,100 are assessed.

/s/  
JOHN H FRYE, III  
Judge, OSHRC

Dated: JUN 19 1997  
Washington, D.C.