

but reduced the characterization of the citation from willful to other than serious. The Secretary petitioned for review of the judge's decision on the grounds that the judge erred by reducing the characterization of the violation. On review, respondent does not dispute the violations, but argues that the judge properly found the violations to be nonwillful.² For the reasons that follow, we find that the judge erred in reducing the characterization of the violation and that the violation was willful.

Background

Great Lakes maintains a facility in Germantown, Wisconsin where it manufactures cardboard packaging, point of operation displays, and large cardboard signs, using printing, laminating and rotary die cutting equipment, and bailers. Great Lakes' workman's compensation policy is carried by Casualty Insurance (Casualty), which works with the company to detect and abate hazards in the workplace. Prior to the 1997 inspection in this case, Great Lakes received five letters from Casualty, which discussed or mentioned the need for a hearing protection program. The first letter, dated September 28, 1994, was sent to Kenn Ferron, Great Lakes' Vice President of Finance and Chief Financial Officer. It informed him that noise level monitoring conducted by the insurance company revealed that employees in four areas of the facility were exposed to noise levels of 85-90 decibels (dba), while employees at the bandsaw area were exposed to noise levels exceeding 90 dba. The letter further advised Great Lakes that the results triggered

²On review, the Secretary also argues that the judge erred by denying, at the commencement of the hearing, the Secretary's motion to amend the citation to allege, in the alternative, that the violation was serious. Because we find that the citation was properly characterized by the Secretary as willful, we do not reach this issue.

OSHA requirements for a formal hearing conservation program and that such a program must include baseline and annual audiograms, a written program, employee training, and various types of hearing protection. Finally, the letter stated that Casualty had a videotape on hearing conservation which would be useful for employee training and invited Ferron to contact the company if he had any questions. The letter was forwarded to Bruce Peterson who, at the time, was in charge of safety at the plant. Peterson was succeeded as Great Lakes' safety coordinator by Robert Harmant on Jan. 16, 1995.

On November 18, 1994, Ferron received a second letter from Casualty which was concerned primarily with an accident investigation not relevant to this case. However, at the end of the letter, Casualty noted that it had discussed with Ferron how to implement a hearing conservation program. According to the letter, during this discussion, Casualty pointed out that the first step was to require the use of hearing protection, and that the second step was to provide baseline audiograms with annual updates. The letter also reiterated the availability of the videotape.

Because of a good safety record for the year, Casualty paid Great Lakes a substantial premium rebate or "dividend." The company used that dividend to conduct, on December 15, 1994, a "health fair" for its employees. At the health fair, employees were given cholesterol and vision tests, had their blood pressure checked and were given audiograms. The decision to provide these audiograms was not prompted by Casualty's noise sampling. However, having been informed by Casualty about its noise problem, respondent decided that the audiograms would serve as baseline audiograms. These audiograms were not compared to pre-employment audiograms the company routinely gave to its employees as part of its hiring process.

On March 31, 1995, Casualty sent Ferron another letter summarizing topics discussed during a meeting between the company and its insurer. Casualty noted its understanding that a written hearing conservation program, though not ready, was being developed by Great Lakes, and that the use of ear protection needed to be more strictly enforced.

In a fourth letter, dated November 20, 1995, Casualty outlined the details of a loss control visit

conducted earlier that month. In that letter, Casualty again pointed out that Great Lakes had yet to implement a hearing conservation program. That reminder was finally repeated in a fifth letter, dated a week later, on November 27, 1995.

As a result of these communications, employees in the bandsaw area were required to wear hearing protection. Hearing protection was optional in other areas of the facility. However, no annual audiograms were given, no written program was established, no formal training for employees on the use of hearing protection was provided, and employees were not taught about the hazards of noise exposure in excess of 85 dba.

Ferron testified that he believed that safety coordinator Harmant was working with Casualty on a hearing conservation program, but he had never spoken to Harmant on the topic. Ferron further testified that his only purpose in dealing with Casualty was to discuss the terms of renewal for the company insurance policy. According to Ferron, there never was a conscious decision by management not to implement the required hearing conservation programs. He testified that the subject was never brought up or discussed by management.

Harmant, who succeeded Peterson as safety officer in January 1995, had no formal training in safety and health. He testified that he had read the correspondence from Casualty and spoke with the insurer about a hearing conservation program approximately three times in the two years he was safety officer. However, he did not familiarize himself with the relevant OSHA occupational noise exposure requirements, nor did he ever consider drafting a hearing conservation program until after the 1997 OSHA inspection. Harmant testified that hearing conservation was not his safety priority. Rather, he was primarily concerned about reducing lost-time accidents that were affecting the company's workman's compensation rates. His efforts were successful and since a 1995 accident, the company had 600 days without a lost-time accident. In January, 1997 the company began awarding employees \$15 for each quarter the company went without a lost-time accident. As a result, safety improved and the company won an industry safety award. Harmant characterized his failure to act on a hearing conservation program as an oversight; as something that "fell through the cracks." Harmant also testified that, because he did not know how to implement such a program, he was waiting for Casualty to specifically tell him what to do.

Harmant noted that although Casualty noted the need for a hearing conservation program, it never actually told him how to go about implementing the program.

Compliance officer Galen Lemke conducted an OSHA inspection in July 1997. Lemke testified that Ferron told him that the reason employees were not given audiograms in 1995 and 1996 was because dividends were lower and management determined that employees “would rather have 50 bucks than an audiogram.” However, Lemke never talked to any employee who claimed to have received this bonus, and he never asked to see any records that would establish that such bonuses were ever given. Also, during his discussions, Lemke concluded that both Ferron and Harmant were familiar with the OSHA hearing conservation regulations. During the inspection, Lemke found respondent to be cooperative as it readily provided the records and information he requested. Lemke also testified that Great Lakes had a clean safety record and an active safety committee system run by employees. He also found that Great Lakes was “very responsive” to the implementation of a proper hearing protection program.

As a result of the OSHA inspection, Great Lakes was issued a willful citation alleging a failure to comply with the hearing conservation standards at 29 C.F.R. §§ 1910.95(g)(6) (failure to provide annual audiograms) and 1910.95(g)(7)(failure to compare audiograms given at the health fair to baseline audiograms given at the beginning of employment). A single penalty of \$44,000 was proposed.

Judge's Decision

Judge Schwartz held that respondent violated the hearing conservation standard, but he concluded that the violations were not willful. He found that Harmant's failure to take appropriate action was due primarily to his inexperience and that Harmant was negligent in believing that Great Lakes' insurer, Casualty, would step in and ensure the company's compliance. The judge concluded that this constituted a lack of due diligence, but found that it did not establish that the violations were willful.

The judge concluded that the Secretary's decision to charge the violations as willful was largely based on her belief that Great Lakes made a deliberate decision to award \$50 cash bonuses rather than provide the required audiometric testing. He found nothing in the record to support the proposition. Rather, the judge found Ferron to be a "truly credible witness" and credited his explanation of the company's incentive program which had nothing to do with offering employees a choice between cash bonuses and audiograms. The judge agreed with Ferron's observation that it would not make economic sense to give employees a choice between a \$50 bonus and a \$10 audiogram, and he concluded that Lemke simply misunderstood the substance of his conversation with Ferron³. The judge also found that there was abundant evidence to establish Great Lakes' concern for employee safety.

In assessing a penalty of \$3000, he found that the gravity of the violation alleged by the Secretary was overstated. He noted that, while nine employees demonstrated standard threshold shifts between either their prehire or 1994 audiogram and the 1997 audiograms, none of these employees worked in areas where noise exposures were measured in excess of 85 decibels and, therefore, they would not have been required to utilize hearing protection.⁴

³The Secretary does not dispute this finding on review.

⁴Lemke testified that two employees measured a standard threshold shift (STS)(ten decibel loss in an employee's hearing threshold), between the 1994 and 1997 audiograms. One of the employees showed no hearing loss on a retest, the other employee has worn a hearing aid since childhood. Seven additional employees registered an STS between their prehire and 1997 audiograms. However, no employee with an STS worked in an area where they were exposed to 85 decibels over an 8 hour period. Therefore, the hearing protection requirements would not have been triggered in any of the reported STS cases.

Discussion

A willful violation is one “committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety.” *Falcon Steel Co.*, 16 BNA OSHC 1179, 1181, 1993-95 CCH OSHD ¶ 30,059, p. 41,330 (No. 89-2883, 1993)(consolidated); *A.P. O’Horo Co.*, 14 BNA OSHC 2004, 2012, 1991-93 CCH OSHD ¶ 29,223, p. 39,133 (No. 85-0369, 1991). A showing of evil or malicious intent is not necessary to establish willfulness. *Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1891, n.3, 1995-97 CCH OSHD ¶ 31,228, p. 43,788, n.3 (No. 92-3684, 1997), *aff’d*, 131 F.3d 1254 (8th Cir. 1997). A willful violation is differentiated from a nonwillful violation by an employer’s heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees. *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHD ¶ 29,240, p. 39,168 (No. 82-630, 1991)(consolidated). *See also Caterpillar, Inc. v. Herman*, 154 F.3d 400, 402 (7th Cir. 1998); *U.S. v. Ladish Malting Co.*, 135 F.2d 484, 490 (7th Cir. 1998). A willful violation is not justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer’s efforts were not entirely effective or complete. *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). The test of good faith for these purposes is an objective one--whether the employer’s belief concerning a factual matter or concerning the interpretation of a rule was reasonable under the circumstances of the case. *Falcon Steel*, 16 BNA OSHC at 1181, 1993-95 CCH OSHD at p. 41,330; *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC at 2068, 1991-93 CCH OSHD at p. 39,168; *Williams Enterp., Inc.*, 13 BNA OSHC at 1256-57, 1986-87 CCH OSHD at pp. 36,589.

Although the Secretary issued a single willful citation, that citation alleged violations based on the employer’s noncompliance with two separate provisions of the hearing conservation standard. Reviewing the circumstances with respect to each of the cited provisions independently, we find that Great Lakes’ failure to provide annual audiograms was willful, but that the Secretary did not prove willfulness with regard to Great Lakes’ failure to compare the health fair audiograms to the pre-employment audiograms.

We first conclude that the letters from Casualty to Great Lakes that the Secretary relies on did not give Great Lakes heightened awareness that § 1910.95(g)(7) required it to compare the health fair audiograms to the pre-employment audiograms it administered to its employees. The testimony of Ferron establishes that, based on Casualty’s letters, the company planned to treat the audiograms it had already decided to give at the health fair as a baseline rather than compare them with the pre-employment

audiograms it had already given. The Secretary alleges that the standard required that the health fair audiograms be compared to the pre-employment audiograms in the circumstances of this case, and Great Lakes does not contest the violation. We note, however, that while the standard requires that a “baseline audiogram” be administered within six months of an employee’s first exposure at or above the action level, 29 C.F.R. § 1910.95(g)(5)(i) and that the pre-employment audiograms here met that criteria, the standard does not make any specific reference to pre-employment audiograms. Also, the letters from Casualty did not clearly define a baseline audiogram or state that the pre-employment audiograms had to serve as the baseline to which any subsequent audiograms had to be compared. The first letter from Casualty, dated September 28, 1994, informed Great Lakes only that it was required to implement a hearing conservation program which must include: “*baseline & annual audiograms, a written program, employee training, and various types of hearing protection*” (emphasis added). In the November 18, 1994 letter from Casualty, the insurer stated that “[t]he first item is to offer and require hearing protection to be worn. *The second step is to have baseline audiograms given with annual updates.* You mentioned you intend to include these exams in a yearly physical” (emphasis added).

Based on these letters, we cannot find that Great Lakes had a heightened awareness that § 1910.95(g)(7) required it to treat the pre-employment audiograms as the baseline. We therefore find that the Secretary failed to prove that the violation was the result of either “intentional disregard” or “plain indifference” to the standard and that Great Lakes’ failure to compare the health fair audiograms to the pre-employment audiograms was not willful.

On the other hand, we find that Great Lakes had a heightened awareness of its obligations under § 1910.95(g)(6), sufficient to characterize its failure to provide annual audiograms as willful. Unlike the situation with the baseline audiograms, the evidence establishes that both the September 28, 1994 and November 18, 1994 letters from Casualty, clearly informed Great Lakes of the requirement of the standard, that an adequate hearing conservation program required that employees be given annual audiograms. Although it is not clear whether Ferron, to whom the letters were addressed, read them, Harmant testified that he read the letters after taking over as safety director in January, 1995.⁵

⁵Commissioner Weisberg takes issue with the view expressed in Commissioner Visscher’s concurring opinion that it is improper to cite or rely on the letters sent to Great Lakes from Casualty Insurance, the company’s workers compensation insurer, as evidence of Great Lakes’ state of mind with respect to willfulness. He questions his colleague’s reasoning in seeking to exclude these letters as evidence of Great Lakes’ knowledge or heightened awareness of the requirements of the OSHA hearing

Harmant attempted to excuse the failure to administer annual audiograms as something that just “fell through the cracks.” However, not only does the record contain five separate letters from Casualty in little more than a year specifically advising Great Lakes to implement a hearing conservation program, Harmant also testified that within a span of two years, he had three discussions with Casualty regarding implementation of a hearing conservation program. Moreover, a month before the anniversary date of the health fair audiograms, when the company should have been preparing to administer the annual audiograms, Casualty sent two letters reminding Great Lakes that it had not formally adopted a hearing conservation program. Thus, the record clearly shows that Great Lakes knew of OSHA’s requirement to conduct audiometric testing and its own failure to do so. Despite this, Harmant testified that prior to the OSHA inspection, the company never considered drafting a hearing conservation program.

While Great Lakes tries to place part of the blame on its insurer, upon whom it claims it was relying, it never heeded Casualty’s warnings or took advantage of the opportunities Casualty provided for assistance in meeting its obligations under the hearing conservation standards. For example, Safety Director Harmant testified that he relied heavily on Casualty to help him implement a hearing conservation program. Yet, Vice-President of Finance Ferron, testified that in its letter of November 18, 1994, the insurer mentioned that it was enclosing a copy of a sample hearing conservation program, but that, in fact, he never received such a sample. Yet, the company failed to seek a replacement for the missing prototype hearing conservation program offered by Casualty and it never requested the hearing conservation videotape offered by the company. To the contrary, rather than taking advantage of the offers from its insurer, both Ferron and Harmant testified that they never even discussed implementation of a hearing conservation program with other members of management. Indeed, Harmant’s testimony

conservation standards while at the same time relying on the testimony by Great Lakes’ safety director Robert Harmant at the hearing that he knew of OSHA’s requirement for annual audiometric testing, where Harmant’s knowledge of the OSHA requirement came *exclusively* from Casualty! Harmant, who had no formal training in safety and health prior to becoming safety director in January 1995, testified that he had read the letters from Casualty and spoke with the insurer about a hearing conservation program approximately three times, but did not familiarize himself with the relevant OSHA hearing conservation requirements. The concept that it is improper to rely on these letters from Casualty, but that it is otherwise okay to rely on the knowledge gained from reading the letters, does little to advance the policy advocated by Commissioner Visscher of not penalizing employers for their voluntary efforts to identify conditions that threaten safety and health.

makes it clear that hearing conservation was given a low priority in favor of efforts designed to abate safety violations that could result in immediate injury.

Harmant's lack of safety knowledge is no excuse for the company's failure to comply. Indeed, Great Lakes appointed Harmant as Safety Director with full knowledge of his limited safety credentials. Certainly, being aware of Harmant's limitations, it might have been reasonable for the company to take the often repeated advice of Casualty. Yet, the evidence establishes that the company never took or even considered taking steps to implement a hearing conservation program. Under these circumstances, Great Lakes' failure to respond to the numerous admonitions and offers of assistance from its insurer establishes that the company intentionally disregarded its obligation to conduct annual audiometric testing.

Judge Schwartz found the violation to be nonwillful essentially because of the good-faith displayed by Great Lakes in other areas of safety. While Great Lakes' overall good-faith may be relevant when determining an appropriate penalty, it does not dispel the evidence that the company consciously disregarded its obligation to conduct annual audiometric testing.

Although the Secretary cited two separate standards, she exercised her prosecutorial discretion to cite them as a single willful violation for penalty purposes. *See H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046, 1981 CCH OSHD ¶ 25,712, p. 32,056 (No. 76-4765, 1981). The Secretary's proposed penalty of \$44,000 assumed that Great Lakes willfully violated both standards. For this reason alone, we find that a substantial penalty reduction is in order. We have found that the violation was willful only on the basis of Great Lakes' failure to provide annual audiograms. In addition, Chairman Rogers finds that Great Lakes is entitled to credit for good-faith. *Aviation Constructors, Inc.*, 18 BNA OSHC 1917, 1922, 1999 CCH OSHD ¶ 31,933 , p. 47,379 (No. 96-0593, 1999). Although it failed to follow-up the effort, the company did begin to implement a hearing protection program with the administration of the health fair audiograms. The record also demonstrates that, beyond its failure to implement a hearing conservation program, the company has made extensive efforts to provide its employees with a safe workplace and that it has a good safety record. Great Lakes worked closely with its insurance carrier to reduce lost time accidents, has a solid in-house safety program, and has won industry safety awards. When the company earned a rebate from its insurer, it used the proceeds to conduct a health fair for its employees. It also mandated the use of hearing protection in all areas of the plant where employees were exposed to noise levels exceeding 85 decibels, and provided pre-employment audiograms to its employees. Chairman Rogers also agrees with the compliance officer that the gravity of the violation is low, especially since all employees exposed to noise levels of 85 dba or above were required to wear

hearing protection. Finally, we find the company to be of moderate size with a little over 100 employees. Considering these factors, Chairman Rogers finds that a penalty of \$6000 is appropriate.⁶

⁶Commissioner Weisberg takes issue with his colleagues' decision to impose but a \$6,000 penalty for a willful violation of the hearing conservation standard that was based on the employer's willful noncompliance with one provision of the standard and its nonwillful failure to comply with another provision of the standard. The Secretary, alleging that the employer's noncompliance with both provisions was willful, had proposed a single penalty of \$44,000. The judge, finding the employer's noncompliance as to both provisions to be nonwillful, assessed a single penalty of \$3,000. Noting that his colleagues do not explain how they calculated the penalty for this willful violation, Commissioner Weisberg assumes that they imposed \$5,000, the statutory minimum, for the willful portion of the violation and \$1,000 for the nonwillful portion. While Commissioner Weisberg agrees with his colleagues that a substantially lower penalty than that proposed by the Secretary is appropriate based on the Commission's finding that the employer willfully violated one, but not both, of the cited provisions, he believes, for the reasons discussed below, that the reduction in penalty assessed by his colleagues in this case is excessive rather than merely substantial.

Commissioner Weisberg would find that the gravity of this violation is moderate rather than low. The annual testing provides a basis for evaluating whether an exposed employee has suffered a "standard threshold shift" in hearing (29 C.F.R. §1910.95(g)(10)) that would invoke the standard's "follow-up procedures" (29 C.F.R. §1910.95(g)(8)). Absent such testing, therefore, any need for interventions, such as refitting and retraining regarding the proper use of hearing protectors or providing hearing protectors that offer greater attenuation, would be impossible to detect. 29 C.F.R. § 1910.95(g)(8)(ii)(B). In *Trinity Industries, Inc.*, 15 BNA OSHC 1579 (No. 88-1545, 1992), 1991-93 CCH OSHD ¶ 29,662 (consolidated), the Commission found that the employer's hearing conservation program, which included requiring all exposed employees to wear approved hearing protection, did not relieve the employer of complying with the audiometric testing provisions of § 1910.95(g). The Commission there agreed with the Secretary that audiometric testing is necessary to verify the "propriety and efficacy of [the employer's] hearing protection program. Without testing, [the employer] can only assume that its employees have been properly fitted with personal hearing protection, that its training and enforcement programs are adequate, and that its employees have suffered no hearing loss." 15 BNA OSHC at 1584, 1991-93 CCH OSHD at p. 40,187. Consequently, on remand from a reversal of its nonwillful characterization of the violation by the Court of Appeals (16 F.3d. 1149 (11th Cir. 1994)), the Commission assessed a penalty of \$3000 each for the employer's failures to

Conclusion

For reasons given above, we affirm the violation of § 1910.95(g)(6) as willful and find that the violation of § 1910.95(g)(7) was not willful. A penalty of \$6000 is assessed.

provide baseline and annual audiometric tests at a time when the statutory maximum for a willful violation was \$10,000. 17 BNA OSHC 1003, 1004, 1993-95 CCH OSHD ¶ 30,643, p. 42,513 (No. 88-1545, 1994). In light of the subsequent increase in the penalty range for a willful violation to \$5,000 - \$70,000, Commissioner Weisberg believes that the reduction in penalty assessed by his colleagues in this case is excessive. Moreover, by imposing the bare statutory minimum penalty of \$5,000 for an employer's willful failure to provide annual audiograms, he believes that his colleagues have undermined the important goals and purposes embodied in the hearing conservation standards.

While Commissioner Weisberg is generally reluctant to accord credit for good faith for willful violations, he believes that such good faith credit is particularly inappropriate in this case where the employer's otherwise laudable efforts to reduce injuries in the workplace appear to have come directly at the expense of its compliance with the hearing conservation standards. Great Lakes safety director Harmant testified that hearing conservation was not a safety priority because it did not involve lost work time and that he was primarily concerned with those injuries that had a more immediate impact on the company's workman's compensation rates. Commissioner Weisberg notes that this is like robbing Peter to pay Paul and then receiving good faith credit on the robbery charge for prompt payment. Moreover, Great Lakes was repeatedly and unambiguously notified by Casualty over a three-year period that it needed to implement a hearing conservation program, including providing annual audiograms. Casualty informed Great Lakes that noise level monitoring conducted by the insurance company revealed that employees in four areas of the plant were exposed to noise levels of 85-90 dba and employees in another part of the plant, the bandsaw area, were exposed to noise levels exceeding 90 dba, and advised the company that the results triggered OSHA requirements for a hearing conservation program. However, Great Lakes did not even consider implementing a full hearing conservation program as required by OSHA standards until after the July 1997 OSHA inspection. In these circumstances, the employer's other efforts to provide a safe workplace (such as awarding employees \$15 for each quarter the company went without a lost-time accident) cannot offset its willful failure to comply with the cited standard.

_____/s/_____

Thomasina V. Rogers
Chairman

_____/s/_____

Stuart E. Weisberg
Commissioner

Dated: April 28, 2000

VISSCHER, Commissioner, concurring:

Though I agree with the majority that Great Lakes' violation of 1910.95(g)(6) was willful, I would base the finding of willfulness on different factors.

In finding that the violation was willful, my colleagues emphasize the letters from Casualty Insurance, Great Lakes' workers compensation insurer, which were written to Great Lakes in the context of providing loss control services. Each of these five letters, with varying specificity, mentions the requirement for a hearing conservation program. All of the letters also address other issues, either individual workers compensation claims or recommendations for safety and health programs. Most of the letters primarily focus on issues other than hearing conservation.

The Commission has in some cases considered the recommendations of an employer's safety consultant or insurance carrier in determining whether a violation was willful. In *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2211-12, 1991-93 CCH OSHD ¶ 29,964, p. 41,030-31 (No. 87-2059, 1993), the Secretary argued that the testimony of an engineering supervisor from employer's insurance carrier, together with his written reports, supported its argument that a violation for failure to have an appropriate safety program was willful. Though the Commission did consider this evidence, it concluded that the company had a general practice of addressing deficiencies identified by its insurer which helped the Commission determine that the violation was not willful. In *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2009, 1995-97 CCH OSHD ¶ 31,301, p. 44,019-20 (No. 89-0265, 1997), on the other hand, the Commission majority considered memoranda from the company's insurance carrier concerning injuries from lifting activities, along with other communications from the company's own employees, in determining that a violation of section 5(a)(1) was willful.

In *Falcon Steel Co.*, 16 BNA OSHC 1179,1182, 1993-95 CCH OSHD ¶ 30,059, p. 41,331 (No. 89-2883, 1993)(consolidated), however, the Commission declined to consider recommendations made in a comparable safety consultant's report as evidence of willfulness. There the Commission recognized that:

[i]n most cases, the hiring of a safety consultant will help to establish that an employer was making a good faith effort at compliance. However, we find no basis for extending such credit here because we are uncertain how seriously Falcon took the consultant's advice. At the same time, we recognize that penalizing employers for their response (or lack thereof) to their own consultant's warnings might discourage employers from creating and developing their own safety programs. Consequently we will ascribe neither credit nor blame for the results of Falcon's self audits.

Id. at 1182, 1993-95 CCH OSHD at p. 41,331. The Commission then went on to find the violation willful on other grounds.

I would follow the Commission's practice in *Falcon Steel* in this case. Penalizing an employer on the basis of records generated by that employer's voluntary efforts to identify conditions or practices that may threaten employees' safety and health might discourage employers from conducting such evaluations, or at least from conducting evaluations in the thorough and open manner that will be most effective. I believe this applies whether the employer is aided by a safety consultant or, as here, by their insurer's loss control representatives.¹ As a further point of concern, I note that the Secretary acquired the Casualty Insurance letters by a subpoena that was served during the OSHA inspection.² Presumably the information in these letters was then used by OSHA as a "road map" for the completion of the inspection. Taking all of these circumstances into consideration, I would follow the lead taken by the Commission in *Falcon Steel*, and exclude Casualty's letters to Great Lakes from my determination of whether Great Lakes' violations of section 1910.95 were willful.

That being said, I do agree with my colleagues that Great Lakes' violation of section 1910.95(g)(6) was willful. The test for a willful violation in the Seventh Circuit Court of Appeals, to which this case is appealable, is whether the violation involves "a conscious disregard of the regulation." *Caterpillar, Inc. v. Herman*, 154 F.3d 400, 402 (7th Cir. 1998). In *Caterpillar*, the Court of Appeals wrote that "[i]f Caterpillar (which is to say its managers or supervisors, whose knowledge, Caterpillar does not deny, is imputed to the company) knew about the violation and could have corrected it but

¹See also *Donovan v. General Motors Corporation, GM Parts Division*, 764 F. 2d 32, 36 (1st Cir. 1985) (employer's safety recommendations to employees held not the basis for employer knowledge of a hazard, as such a rule "would needlessly discourage an employer from taking every possible safety precaution," quoting *Cape & Vineyard Div., New Bedford Gas & Edison Light Co. v. OSHRC*, 512 F.2d 1148, 1154 (1st Cir. 1975)); and *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1338 (6th Cir. 1978)("If employers are not to be dissuaded from taking precautions beyond the minimum regulatory requirements, they must be able to do so without concern that their efforts will later provide the sole evidentiary basis for and adverse finding"). I would also note that the Secretary has recently responded to similar concerns by issuing her Proposed Policy Statement Concerning the Occupational Safety and Health Administrations's Use of Voluntary Employer Safety and Health Audits. 64 Fed. Reg. 54,358 (1999).

²The inspection that resulted in these citations began on July 28, 1997. The record indicates that on August 20, 1997, the Secretary issued a subpoena for these documents to Steven Buck of the Fremont Compensation Insurance Group. The inspection then continued until October 16, 1997.

failed to do so, then the violation was willful." *Id. See also U.S. v. Ladish Malting Co.*, 135 F.3d 484, 490 (7th Cir. 1998)("willfulness means knowledge that the conditions violate the statute or regulations-actual rather than imputed knowledge").

The record in this case shows that Great Lakes' supervisors and managers knew of the requirement to conduct annual employee audiograms, and also knew that the company was not conducting audiograms. The record indicates that Great Lakes knew, in the fall of 1994, that it was required to conduct baseline and annual audiograms, and understood that it was initiating such testing with what it considered baseline testing at the December, 1994 health fair. Furthermore, Harmant, Great Lakes's safety director beginning in January 1995, testified that while he knew of OSHA's requirement for audiometric testing, he gave no serious consideration to establishing such a program prior to the 1997 OSHA inspection. Harmant's admissions, made on the record at the hearing, are sufficient to meet the requirements the Seventh Circuit Court of Appeals has established for a willful violation. The record does not show that Great Lakes similarly knew that it was required to compare the 1994 health fair audiograms with pre-employment audiograms. In fact the evidence suggests it did not know, since it treated the 1994 audiograms as baseline audiograms, and as my colleagues point out, the standard itself is not specific as to the requirement that Great Lakes violated. I therefore agree with my colleagues that the violation of 1910.95(g)(7) for which the company was cited was not willful.

Having concurred in the majority's conclusion that Great Lake's violation of section 1910.95(g)(6) was willful and that the violation of section 1910.95(g)(7) was not willful, I also agree with Chairman Rogers' view that \$6000 is an appropriate combined penalty for these violations.

/s/
Gary L. Visscher
Commissioner

Date: April 28, 2000

SECRETARY OF LABOR,

Complainant,

v.

GREAT LAKES PACKAGING CORP.,

Respondent.

OSHRC DOCKET NO. 97-2030

APPEARANCES:

For the Complainant:

Lisa R. Williams, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

For the Respondent:

Jeffrey P. Clark, John G. Pawley, Reinhart, Boerner, Van Deuren, Norris & Rieselbach, SC, Milwaukee, Wisconsin

Before: Administrative Law Judge: Stanley M. Schwartz

DECISION AND ORDER

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

Respondent, Great Lakes Packaging Corp. (Great Lakes), at all times relevant to this action maintained a place of business at W190 N11393 Carnegie Drive, Germantown, Wisconsin, where it was engaged in cardboard processing. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On July 28, 1997 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Great Lakes' Germantown worksite. As a result of that inspection, Great Lakes was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice contesting Willful citation 2, items 1a and 1b, which allege violations of 29 CFR §1910.95(g)(6) and (g)(7), Great Lakes brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On April 15, 1998, a hearing was held in Milwaukee, Wisconsin, on the contested items. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violations

Willful Citation 2, item 1a alleges:

29 CFR 1910.95(g)(6): New audiograms were not obtained annually for each employee exposed to noise at or above an 8-hour time-weighted average of 85 dBA:

- (a) Employees exposed at or above the 8-hour time-weighted average of 85 dBA (documented during monitoring performed by Casualty Insurance on September 8, 1994) were given audiograms on December 15, 1994, but have not been given annual audiograms since that time.

Willful Citation 2, item 1b alleges:

29 CFR 1910.95(g)(7)(i): Each employee's audiogram was not compared to that employee's baseline audiogram to determine if the audiogram was valid and if a standard threshold shift had occurred:

- (a) Employees who were given an audiogram on December 15, 1994 did not have their audiograms compared to a baseline as determined by their pre-employment audiograms to determine if a standard threshold shift had occurred.

The cited standards provide:

(6) *Annual audiogram.* At least annually after obtaining the baseline audiogram, the employer shall obtain a new audiogram for each employee exposed at or above an 8-hour time weighted average of 85 decibels.

(7) *Evaluation of audiogram.* (i) Each employee's annual audiogram shall be compared to that employee's baseline audiogram to determine if the audiogram is valid and if a standard threshold shift as defined in paragraph (g)(10) of this section has occurred. . . .

Facts

In the summer or fall of 1994 a noise survey was conducted in the Great Lakes facility by its insurance carrier, Casualty Insurance (Tr. 19). In September, Casualty Insurance notified Kenneth Ferron, Great Lakes' chief financial officer (Tr. 15), that the noise survey showed that five Great Lakes' employees were exposed to a TWA [time weighted average] of above 85 decibels. The work areas where the over exposures were found were: FNE printing press; Flexo-dye cutter; Flexo-folder/gluer; baler (Tr. 22; Exh. C-1). One employee, in the band saw area, was exposed to noise levels in excess of 90 decibels (Tr. 22; Exh. C-1). Casualty insurance notified Great Lakes that the levels surveyed trigger OSHA requirements

for a formal hearing conservation program, which must include baseline and annual audiograms, a written program, employee training and the provision of hearing protection (Tr. 23).

Ferron testified that copies of the Casualty report were distributed to Bruce Peterson, who was manager for safety and health at Great Lakes at that time, and to Robert Harmant, who became Great Lakes' manager of quality and safety in January 1995 (Tr. 15-17, 24, 44).

Hearing protection was provided by Great Lakes, on a voluntary basis, to all its employees prior to September, 1994 (Tr. 40). Ferron testified that following receipt of Casualty's report, Great Lakes made the use of hearing protection in the band saw area mandatory (Tr. 23). Voluntary hearing protection remained available to all other employees (Tr. 174). Great Lakes also added audiometric testing to its December 1994 health fair, during which baseline audiograms were obtained (Tr. 23, 70).

In a November 18, 1994 letter, Casualty acknowledged Great Lakes' intention to implement a hearing conservation program, and informed Kenneth Ferron that it could supply Great Lakes with a training video on hearing conservation (Tr. 29; Exh. C-2). The November letter indicates that a sample written hearing conservation program was attached; however, Ferron testified that he did not receive the written sample (Tr. 29-32; Exh. C-2).

In a March 31, 1995 letter, Casualty notes that during a February 16, 1995 loss control service call, Ferron told them that baseline audiograms had been obtained, and that a hearing conservation program was being developed (Tr. 36; Exh. C-4).

Ferron testified that Harmant was introduced to the Casualty representative as the new Great Lakes safety contact during the February service call (Tr. 37). Ferron testified that he believed Harmant was working with Casualty on the program, though he had never spoken to Harmant about hearing conservation (Tr. 50-52). Ferron stated that his sole purpose in dealing with Casualty was to discuss the terms of renewal for Great Lakes insurance policy (Tr. 42). Ferron testified that he was not then, and never had been in charge of safety and health issues at Great Lakes and so had no role in the implementation of a written hearing conservation program (Tr. 42, 46). Ferron stated that there was no conscious decision not to implement the required program; the topic simply was never brought up or discussed by management (Tr. 38, 47).

Ferron admitted that no regular audiometric testing was performed at Great Lakes prior to 1994, though an audiogram was taken during a prospective employee's pre-employment physical (Tr. 35, 39). Great Lakes provided no audiometric testing after the 1994 audiograms until after the initiation of the 1997

OSHA inspection (Tr. 25-26, 35). A written hearing conservation plan was not implemented; employees received no training in the use of hearing protection (Tr. 25). The employees' 1994 audiograms were not compared to those taken during their pre-employment audiograms to determine if a standard threshold shift had occurred (Tr. 39).

Bruce Peterson, now vice president of manufacturing (Tr. 57), recalled the correspondence with Casualty Insurance, and Great Lakes' response, *i.e.* making hearing protection mandatory in the band saw area (Tr. 61). Peterson testified that following receipt of the noise survey results he tried to obtain a copy of the relevant OSHA standards for review, but otherwise took no action to implement a hearing conservation program (Tr. 63-64). Peterson testified that Bob Harmant, who took over Peterson's safety responsibilities in January 1995, was responsible for developing that program (Tr. 66). Peterson testified that he had Harmant read the correspondence from Casualty (Tr. 67). Peterson stated that there was no conscious decision made not to provide annual audiograms (Tr. 75).

Bob Harmant testified that he had worked in shipping and warehousing at Great Lakes prior to his appointment as quality and safety coordinator in January 1995 (Tr. 85). Harmant stated that he received no training in safety and health, but did work with Casualty Insurance, which offered him a selection of instructional videos on how to organize a safety committee (Tr. 86). Representatives from Great Lakes' three shifts participated in monthly safety meetings with Harmant and the vice president of marketing (Tr. 86). The committee discussed safety concerns, utilizing a plant-wide safety checklist, and drafted employee safety rules (Tr. 87, 139).

Harmant was familiar with the Casualty correspondence concerning hearing conservation; moreover, he spoke with the Casualty representative about a hearing conservation program perhaps three times in the two years he was safety coordinator (Tr. 89-95). Harmant did receive the occasional memo about hearing conservation; *see* Casualty memos of November 20 and 27, 1995 (Tr. 123, 150-52; C-3, R-6). Nonetheless, Harmant did not familiarize himself with the relevant OSHA requirements, or ever consider drafting a written hearing conservation program until the OSHA inspection in 1997 (Tr. 89-90, 95). Harmant stated that hearing conservation was not his number one priority (Tr. 90). Great Lakes and Casualty were more concerned about lost-time accidents, which were affecting their workmen's compensation rates (Tr. 123-24, 140). Harmant stated that he put his effort into reducing those numbers; his failure to arrange for annual audiograms was simply an oversight on his part (Tr. 115, 123). Harmant

put the hearing conservation program on the “back burner,” while waiting for the Casualty loss control representative to provide him with direction (Tr. 108).

Galen Lemke, an OSHA Compliance Officer (CO), testified that during the 1997 inspection Kenneth Ferron told him that the 1994 health fair was provided to employees out of funds provided by Casualty Insurance; because no lost-time accidents had been posted that year, the insurance company was refunding a portion of Great Lakes’ premiums (Tr. 167). Lemke stated that Ferron told him no audiometric testing was provided in either 1995 or 1996 because dividends were lower, and because management determined that the employees would rather have any dividends refunded in a cash payment (Tr. 167-68, 192, 199-202).

Kenneth Ferron testified that Great Lakes never made any conscious decision not to conduct audiograms, or to pay cash dividends in lieu of providing audiograms (Tr. 258). Ferron stated that there was never any relation between audiometric testing and insurance dividends (Tr. 261). Ferron denied making any such statement to CO Lemke (Tr. 264-65). According to Ferron, Great Lakes did implement a program whereby a \$15 cash prize is awarded to employees for every calendar quarter during which there are no lost time accidents (Tr. 249). Ferron stated that the program was not implemented until 1997, and was not related to the hearing conservation program (Tr. 249). Ferron stated that it would make no economic sense to give a cash award in lieu of a \$10.00 audiogram (Tr. 265).

Great Lakes cooperated with OSHA in its 1997 investigation, providing records and correspondence to the OSHA Compliance Officers (Tr. 77-78, 219). CO Lemke admitted that Great Lakes had made some effort to comply with OSHA hearing protection requirements, in providing and mandating the use of hearing protection in the band saw area (Tr. 214). Great Lakes has an active safety committee, and has developed OSHA required safety programs on chemical hazard communications and fire and lock-out/tag-out hazards (Tr. 227-28). A hearing conservation program was drafted and implemented prior to the conclusion of the OSHA inspection (Tr. 232).

Great Lakes has no history of serious or willful OSHA violations within the last three years (Tr. 197).

Discussion

Great Lakes admits that the cited standards were violated. It denies, however, that those violations were willful in nature.

A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. It is differentiated from other types of violations by the employer's heightened awareness of the illegality of the conduct or conditions. Because the issue of willfulness focuses on the employer's state of mind, its general attitude toward employee safety is relevant to the determination. *Seward Motor Freight, Inc.*, 13 BNA OSHC 2230, 1987-90 CCH OSHD ¶28,506 (No. 86-1691, 1989).

Based on the evidence in the record, I cannot find that Great Lakes either intended to violate the Act, or that it was indifferent to employee safety. The cited violation, therefore, was not willful. My reasons follow.

The evidence establishes that Great Lakes' safety coordinator, Harmant, knew that some kind of hearing conservation program was required, but Harmant was inexperienced and failed to take the necessary action to implement the program. Harmant failed to exercise due diligence, believing that Great Lakes' insurance carrier would step in and assure Great Lakes' compliance with OSHA requirements. Absence of due diligence, or neglect, however, is insufficient to establish willfulness.

The record shows that CO Lemke believed, based on his conversation with Kenneth Ferron, that Great Lakes made a deliberate decision not to provide annual audiograms, and to give employees cash prizes rather than the required audiometric testing. His recommendation to classify the cited violations was based largely on that belief. If this were true, a willful violation bordering on criminal would be found. However, I find no support for Lemke's position in the record. Based on the observation of the witnesses, I have concluded that CO Lemke misunderstood the substance of his conversation with Ferron.

Having had the opportunity to observe Kenneth Ferron's testimony and demeanor at the hearing, I find him a truly credible witness. Ferron provided a reasonable and plausible explanation of Great Lakes' safety incentive program, and most importantly pointed out that Lemke's interpretation of events made no economic sense. This judge agrees, and finds that the safety incentive program was unrelated to Great Lakes' failure to provide audiograms, and shows only Great Lakes' concern with safety issues.

There is abundant evidence establishing Great Lakes' concern with employee safety. Great Lakes had developed required safety programs in hazard communication, fire safety and lock-out/tag-out. Great Lakes worked with its insurer's loss control coordinator in an effort to reduce accidents and to comply with OSHA regulations. During his tenure as safety coordinator, Bob Harmant initiated and served on a plant wide safety committee, which drafted safety rules for the company. Great Lakes responded to a noise

survey by conducting audiograms and making hearing protection mandatory in those areas of the plant where employees were exposed to noise levels requiring such protection.

I find that Great Lakes' failure to implement a hearing conservation program including annual audiograms resulted from a lack of diligence, and was not intentional. I also find that Great Lakes is not indifferent to employee safety. Based on these findings, I find that the cited violations were not willful.

Penalty

Where the Secretary alleges that a violation is willful but fails to prove willfulness, an other-than-serious violation may be affirmed. A serious violation will not be found unless the parties have expressly or impliedly consented to try the issue of whether the violation was serious. *Atlas Industrial Painters*, 15 BNA OSHC 1215, 1991-93 CCH OSHD ¶29,439 (No. 87-619, 1991). The Commission has clear authority to assess an appropriate penalty based on the gravity of the violation, however, regardless of their classification as serious or nonserious. *R & R Builders, Inc.*, 15 BNA OSHC 1383, 1991-93 CCH OSHD ¶29,531 (No. 88-282, 1991).

Prior to the hearing, Complainant moved to amend the citation to allege, in the alternative, a "serious" violation of the Act (Tr. 10-11). That motion was denied, and the violation will be affirmed as "other than serious."

CO Lemke testified that annual audiograms are designed to measure the standard threshold shift (STS), *i.e.* any ten decibel change in the employee's hearing threshold. Where an employee is exposed to noise levels above 85 decibels, and regular testing shows such a hearing loss, hearing protection is required to avoid permanent loss of hearing. Without access to regular audiograms, employees are unable to track whether they are sustaining such hearing loss, and take appropriate precautions (Tr. 196-98). Lemke testified that two Great Lakes' employees sustained such a standard threshold shift between 1994 and 1997 (Tr. 129, 197). Seven additional employees showed a standard threshold shift between their prehire audiograms and 1997 (Tr. 197). None of the employees showing an STS, however, worked in areas where noise exposures were measured in excess of 85 decibels: *i.e.* band saw; FNE printing press; Flexo-dye

cutter; Flexo-folder/gluer; baler (Tr. 22, 242-45; Exh. C-1). Therefore, the hearing protection requirement would not have been triggered in any of the reported STS cases.

None of the employees showing an STS worked in areas of excessive noise; none should have been required to utilize hearing protection. Great Lakes' employees working in areas where noise levels were above 90 decibels, however, did use required hearing protection. The record establishes that the gravity of the cited violation was overstated, and the proposed penalty excessive. A penalty of \$3,000.00 is appropriate and will be assessed.

ORDER

1. Citation 2, item 1a and 1b, alleging violations of §1910.95 (g)(6) and (g)(7) are **AFFIRMED** as “other than serious” violations, and a penalty of \$3,000.00 is **ASSESSED**.

Stanley M. Schwartz
Judge, OSHRC

Dated: