United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR, Complainant, v. KASPAR WIRE WORKS, INC., Respondent.	OSHRC Docket No. 90-2775

DECISION

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

BY THE COMMISSION:

Kaspar Wire Works ("KWW") manufactures formed wire products such as newspaper and magazine racks at its facility in Shiner, Texas. KWW, Kaspar Tool and Die ("KTD"), and Kaspar Electroplating Corp. ("KEC") comprise the three affiliated Kaspar companies located in the Shiner facility. From March 19, 1990 until September 14, 1990, OSHA conducted a scheduled inspection of KWW and, on September 18, 1990, the Secretary cited KWW for over 400 alleged willful and serious violations of various standards under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-687 ("OSH Act" or "Act"), proposing combined penalties of $1,236,000.[1] Administrative Law Judge E. Carter Botkin held a hearing in the case, but died before issuing a decision. The case was transferred to Administrative Law Judge Stanley M. Schwartz who affirmed most

[1]This case is unaffected by the revised penalty amounts prescribed in the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (1990).

of the alleged violations, including 382 recordkeeping items he affirmed as willful, and assessed a combined penalty of $257,700. Our decision is limited to the specific items directed for review. We affirm the judge's decision in part, and reverse in part. We turn first to the recordkeeping items.

I. WILLFUL CITATION

A. OSHA 200 RECORDING - 29 C.F.R. § 1904.2(a) - Items 1-171, 173-189, 191-263, 265-385

BACKGROUND

The recordkeeping requirements of the Act "play a crucial role in providing the information necessary to make workplaces safer and healthier." *General Motors Corp., Inland Div.*, 8 BNA OSHC 2036, 2041, 1980 CCH OSHD 24,473, p.30,470 (No.76-5033,

1980). The cited recordkeeping regulation, section 1904.2(a),[2] requires that employers enter on the OSHA 200 "recordable" injuries and illnesses. OSHA regulations define "recordable" as including those injuries and illnesses resulting in death, lost workdays, transfer to another job, termination of employment and restricted workdays, and those requiring medical treatment. 29 C.F.R. § 1904.12(c). "Medical treatment" includes treatment by a physician or other professional performed under a physician's orders, but excludes one-time first aid and its follow-up care regardless of whether it is administered by a physician. 29 C.F.R. § 1904.12(d). The categories of required information are printed on the front of the OSHA 200, and more detailed instructions and definitions are printed on the back.

KWW failed to properly record approximately 86.5% of the recordable injuries and illnesses that occurred in its facility during 1988 and 1989. Judge Schwartz' finding that these failures violated the act is not at issue on review.[3] Rather, we consider only whether

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[2]29 C.F.R. § 1904.2(a) provides:

> Each employer shall, . . . (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred. For this purpose form OSHA No. 200 or an equivalent which is as readable and comprehensible to a person not familiar with it shall be used. The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

[3]Although only the characterization of the recordkeeping items was directed for review, our examination of the record here revealed a lack of sufficient evidence to establish that twenty-five citation items were recordable. Accordingly, we address the characterization question with regard to the 357 items we affirm, and vacate the following items: 11, 27, 28, 35, 37, 39, 41, 53, 54, 91, 105, 110, 118, 137, 140, 149, 203, 214, 280, 288, 289, 293, 311, 364, and 380. In particular, for items 11 and 35, the sole alleged basis for recordability is medical treatment, which the evidence indicates consisted only of ultrasound therapy. Neither the

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the judge erred in affirming the violations as willful and assessing per instance penalties. Under Commission precedent, a violation is willful when "committed with intentional, knowing, or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Valdak Corp*., 17 BNA OSHC 1135, 1136, 1993-95 CCH OSH ¶ 30,759, p. 42,740 (No. 93-239, 1995), *aff'd* 73 F.3d 1466 (8th Cir. 1996). Our examination of willfulness here focuses on several factors: whether, and to what extent, company personnel were trained and knowledgeable regarding OSHA recordkeeping requirements; KWW's recordkeeping procedures; and the company's recordkeeping history.

KWW employee Jo Ann Knezek has prepared and maintained all of KWW's illness and injury records, including those required by OSHA, since 1970. She originally held the job title "insurance clerk," later became a supervisory level "office coordinator" and, according to her testimony, has been a managerial level employee since approximately 1987. From July 1971 until his retirement in 1989, David Little was personnel manager for all three Kaspar companies and supervised Ms. Knezek's work. Dan Price began working at KWW in September 1988 as assistant personnel manager to David Little, and succeeded Mr. Little as personnel manager in January 1989.

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instructions on the OSHA 200 nor the Bureau of Labor Statistics guide indicate whether ultrasound constitutes recordable medical treatment. For items 27, 39, 41, 110, 149, 214, 288, and 289 the only evidence of alleged medical treatment is the application of steri-strips without any indication of whether they were used in lieu of sutures. The evidence for items 28, 53 and 54 indicates that the employees suffered eye injuries but does not establish that foreign bodies were removed. Although the evidence indicates that prescription medications were used to treat the injuries sustained in items 37 and 140, the record does not indicate whether the medications were administered as more than just a single dose. The evidence for item 203 pertains to a knee injury, which does not match the Complaint allegation of a hand contusion. Finally, for items 91, 105, 280, 311, 364, and 380 the record contains insufficient evidence to establish that any recordable medical treatment was administered, as alleged.

According to Little, an OSHA compliance officer provided training on OSHA recordkeeping approximately six months after Little began working at KWW, and Little followed those procedures. Knezek testified that she received her OSHA 200 recordkeeping instructions from Little, but she was unaware of any instructions on the back of the OSHA 200 form, and relied only on her "best judgment," as instructed by Little, to determine the seriousness and recordability of an injury. Dan Price testified that he had seen an OSHA 200 form prior to the inspection, but did not recall whether he had read either the front or back of the form. He first became aware of his responsibilities regarding OSHA recordkeeping at Kaspar when Knezek asked for his signature on the Form 200-S.[4] Price testified that he'd "assumed that [the] record keeping was all established . . . and didn't see the necessity of getting involved in it."

Little and Knezek described KWW's recordkeeping procedure as a two-step process. Each time an employee sustained an injury, the employee's supervisor would complete an investigation report and send it to Knezek for preparation of the E-1 insurance and workers' compensation claim form. Knezek would then record the injury either on the OSHA 200 or the company's first-aid log, depending on its severity as described in the supervisor's report. Although David Little and Dan Price supervised Ms. Knezek and signed the yearly 200-S forms, neither of them apparently checked the OSHA 200 for accuracy. KWW sent all injured employees to nearby doctors for evaluation and treatment. Knezek, however, did not receive information on the treatment because the doctors' records were sent directly to the insurance companies.[5]

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[4]The OSHA No. 200-S consists of an annual report provided to the Bureau of Labor Statistics in which employers record the previous year's totals with respect to hours worked and recordable injuries and illnesses, but do not list the incidents individually as they do on the OSHA 200.

[5]According to Dan Price, employee medical information was available to KWW upon request when deemed "necessary."

Both Little and Knezek clearly understood that an injury involving lost work days beyond the date of injury should be recorded on the OSHA 200. Knezek acknowledged that recordable cases included "the ones that I felt or knew that would be missing work, restricted work or could not work at all, one day or more, or if it was a serious injury, not just first-aid treatment."[6] Although Knezek's testimony also reveals that she understood that restricted work day cases should be recorded on the OSHA 200, Little was less certain about the recordability of those cases. Both Little and Knezek understood that recordability based on medical treatment involved the more "serious" injuries. Knezek testified that she relied solely on the supervisor's description in evaluating the seriousness of an injury, and described as "serious" injuries such as back injuries, hernias, or amputations, and described as "minor" injuries such as minor cuts or abrasions or minor burns. While admitting that lacerations, mashed fingers, punched hands, and amputations were not first-aid injuries, Knezek stated that the instances of those injuries recorded on KWW's first-aid rather than OSHA 200 logs for 1988 and 1989 were, in her judgment, not serious enough to list on the OSHA 200.

KWW's defense here rests, in large part, on its history of numerous citation-less OSHA inspections[7] combined with its assertion that its recordkeeping practices were

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[6]There was some apparent confusion, however, concerning whether injuries initially thought not to involve lost workdays, which were listed only on the first-aid log, should be added to the OSHA 200 or the 200-S when they ultimately resulted in lost workdays.

[7]OSHA first inspected Kaspar's Shiner facilities in 1982 and conducted eight inspections, three of which involved KWW, between that time and the March 1990 inspection. All of the inspections included a records' review and some were limited to only that. OSHA inspections occurring between 1982 and 1991 included the calculation of a lost workday injury ("LWDI") rate used to exempt from a safety inspection those workplaces whose rate fell below the industry's national average. *See Hamilton Fixture,* 16 BNA OSHC 1073, 1076 n.4, 1993-95 CCH OSHD ¶ 30,034, p. 41,172 n.4 (No. 88-1720, 1993), *aff'd without published opinion*, 28 F.3d 1213 (6th Cir. 1994). Three of the eight Kaspar inspections revealed a LWDI rate below the national average and exempted the company from a

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unchanged from 1971 until the 1990 inspection. Jo Ann Knezek indicated that, from the commencement of her employment with KWW, she consistently maintained KWW's illness and injury records in the manner originally established. A comparison between KWW's recordkeeping statistics for 1983/1984 and those for 1988/1989 bears on the veracity of this assertion.

CO Robert Hudgens reviewed KWW's 1983 and 1984 OSHA 200s during a 1985 health inspection he conducted. Hudgens' notes from that inspection include numerical calculations of the data from the OSHA 200s.[8] The notes indicate that in 1984, when KWW had about 485 employees, it recorded 196 items on its OSHA 200, yielding a rate of reported items to total number of employees of approximately 40%. Hudgens also calculated a combined LWDI rate of 11.2 for 1983 and 1984, a rate significantly above the stipulated national average for manufacturing of 4.7. Hudgens testified that he found no recordkeeping violations and issued no recordkeeping citations as a result of that inspection.[9]

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[7](...continued)
comprehensive safety inspection. We also note that Kaspar's history of no prior recordkeeping citations is consistent with compliance officer testimony that no recordkeeping violations were found during their inspections, and David Little's and Jo Ann Knezek's testimony that they were never advised by OSHA personnel that Kaspar's recordkeeping practices were deficient. We are unable to independently assess whether KWW's records complied with OSHA guidelines for the prior inspected years because the OSHA 200s and first-aid logs for those years are not in evidence.

[8]This 1985 inspection is the only prior inspection for which underlying recordkeeping statistics are in evidence.

[9]Hudgens' inspection notes indicate that KWW did not list on its 1983 and 1984 OSHA 200s any restricted work days, though it recorded approximately 393 injuries for those years combined. For 1988 and 1989 there were about 130 injuries resulting in restricted work days out of a total number of 412 recordable injuries. In view of this data, it seems unlikely that there were no injuries resulting in restricted work days in 1983 and 1984. Accordingly, it appears that despite CO Hudgens' assertion that he found no recordkeeping violations, KWW did not record restricted work days in 1983 and 1984.

KWW's 1988 and 1989 OSHA 200s are in evidence and show that for those two years combined, when KWW had approximately 850 employees, it recorded a total of seventy-four illnesses and injuries. The rate of recorded items to total number of employees was approximately 4.3% for each of the two years. CO Antonio reviewed the OSHA 200 logs at the commencement of the 1990 inspection, from which he calculated a LWDI rate of 4.45 based on the recorded items. That rate barely exceeded the national average rate of 4.2, which was sufficient to compel a comprehensive inspection.

The 1990 records' review ultimately included a review of KWW's OSHA 200s, first-aid logs, E-1s, and doctors' records, and resulted in the recordkeeping violations at issue here. Our review of this evidence shows that KWW made 357 recordkeeping errors during 1988 and 1989 combined, the vast majority of which consisted of complete failures to record. These 357 items, combined with the 55 remaining recorded items that were not alleged as violative, result in a calculation of 412 recordable injuries and illnesses for 1988 and 1989. Based on these numbers, the total recordkeeping error rate is approximately 86.5%. Had KWW correctly recorded injuries and illnesses in 1988 and 1989, its rate of recorded items to total number of employees would have been approximately 24% for each of the two years, rather than the 4.3% actually recorded.

DISCUSSION

The hallmark of a willful violation is the employer's state of mind at the time of the violation -- an "intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee safety." *Valdak Corp*., 17 BNA OSHC at 1136, 1993-95 CCH OSHD at p. 42,740. "[I]t is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation . . . . A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of

conscious disregard or plain indifference . . . ." *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214, 1993-95 CCH OSHD ¶ 30,046, p. 41,256-257 (No. 89-433, 1993)(citations omitted). As articulated by the Fifth Circuit, the court to which this case would be appealable, "the Secretary must show that the employer acted voluntarily, with either intentional disregard of or plain indifference to OSHA requirements." *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 317-319 (5th Cir. 1979). An employer's motive for failing to comply with the Act's requirements, however, need not be evil or malicious in order to find a violation willful. *See 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).

We affirm Judge Schwartz' finding that KWW's failures to properly record illnesses and injuries on its 1988 and 1989 OSHA 200s were willful for all items except those based solely on restricted work day recordability.[10] We conclude that the training and experience of KWW's personnel that resulted in many years of apparent compliance with OSHA recordkeeping requirements, followed by a nearly complete cessation of recording in 1988 and 1989 when hundreds of obviously recordable items went unrecorded, establishes that KWW knowingly and voluntarily failed to comply with OSHA's recordkeeping requirements and shows plain indifference to the requirements of the Act.

The evidence in this record demonstrates that KWW *chose* to ignore its statutory recordkeeping responsibilities during 1988 and 1989. The recordability of most of the cited items was obvious. Virtually all of the items that KWW should have recorded on its OSHA 200 were listed, instead, on its first-aid log. KWW clearly knew that these injuries and illnesses occurred and knew of their severity as indicated, in many instances, by lost work day notations and injury descriptions on the first-aid log. Moreover, as Judge Schwartz found, the recordability of most of these injuries and illnesses could be determined from the

[10]As discussed below, we affirm other-than-serious violations for the restricted work day items.

instructions on the OSHA 200 form itself. While any employer who attempts to enter information on an OSHA 200 has some knowledge of recordkeeping requirements from the instructions on the form, Little and Knezek each had nearly twenty years of experience completing KWW's OSHA logs.[11] We agree with Judge Schwartz that it seems incredible that, regardless of the adequacy of their initial training, these individuals could have believed that they were correctly recording injuries and illnesses in 1988 and 1989.

In fact, the evidence suggests that Ms. Knezek, who was by then a managerial level employee and had principal, if not sole responsibility for KWW's OSHA recordkeeping, knew what was required and simply failed to continue to properly maintain KWW's OSHA 200s in 1988 and 1989. Knezek admitted knowing that injuries and illnesses such as lacerations, mashed fingers, punched hands, and amputations are more than first aid, yet she listed instances of just such injuries on KWW's 1988 and 1989 first-aid logs rather than its OSHA 200, explaining that they were "[i]n [her] judgment," not serious enough. Injuries not serious enough to be recorded included finger amputations suffered by five employees. One of these employees lost three fingers and missed eight weeks of work, another lost two fingers and nine weeks of work. Also not serious enough to record were a broken wrist, a broken finger, a broken toe, second and third degree burns, more than thirty eye injuries, and hundreds of lacerations. Many items involving lost work days were also listed on the first-aid logs rather than the OSHA 200s despite Knezek's acknowledgment that she knew such items were recordable. One such item involved a hand ligament injury for which KWW's first-aid log notes 171 lost workdays. Although Knezek also claimed that her recordkeeping practices

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[11]Our dissenting colleague suggests that any reliance on the OSHA 200 instructions to show willfulness would make every recordkeeping error a willful violation. We emphasize, however, that these instructions do not constitute the sole basis for our willfulness finding. Rather, as the Commission did in *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 1999, 1995-97 CCH OSHD ¶ 31,301 (No. 89-0265, 1997), we rely on the fact that many of the recordkeeping errors reflect a failure to follow the 200 form's instructions *in conjunction* with other evidence showing the employer's state of mind.

remained unchanged from 1970 until 1990, that claim is belied by a comparison, discussed more fully below, between the data from KWW's 1984 OSHA 200 and that on its 1988 and 1989 OSHA 200s.[12]

On review, KWW attempts to turn the facts of its earlier inspection history to its advantage, pointing out that prior to the inspection in this case, OSHA had inspected KWW's OSHA 200s and other recordkeeping documents many times and did not issue any recordkeeping citations nor recommend any changes to its recordkeeping practices. It claims that based on OSHA's failure to issue citations after these inspections it had a good faith belief that it was correctly recording injuries and illnesses and that this good faith belief should defeat willfulness. Although we are unable to independently assess the accuracy of KWW's earlier recordkeeping, the evidence indicates that KWW had substantially complied with the OSHA 200 requirements. Two of the compliance officers who were involved in prior KWW records' reviews testified that they found no violations, that they were required to cite any violations found, and that they issued no recordkeeping citations. Moreover, Hudgens' review of the 1984 OSHA 200 revealed such a large number of recorded items that misrecording or underrecording of any significance seems highly unlikely.

KWW's argument, however, misses the point. Rather than showing good faith in 1988 and 1989, a careful review of KWW's inspection history shows that KWW profoundly changed its recordkeeping practices sometime between 1985 and 1988.[13] KWW recorded

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[12] *Cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 68 U.S.L.W. 4480, 4483-84 (U.S. June 12, 2000) (noting "the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt,'" Court stated in an Age Discrimination in Employment Act ("ADEA") case that "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." (Citations omitted.)

[13]We also note that the Commission has repeatedly held that OSHA is not precluded from issuing a willful citation for previously observed and uncited violations. *See Pepperidge*

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vastly more items in 1984, at a time when it had approximately half as many employees, than it did in 1988 and 1989 combined. In 1984 KWW had 485 employees and recorded 196 injuries, yielding an employee to injury rate of approximately 40%. In 1988 and 1989 KWW had an average of approximately 850 employees and recorded a total of 73 illnesses and injuries, yielding an employee to injury rate of approximately 4.3% per year. Correct recording for those years would have yielded an employee to injury rate of approximately 24%. It is an inescapable fact that KWW virtually stopped recording any injuries and illnesses on the OSHA 200 in 1988 and 1989, as reflected by its error rate for those years of 86.5%. This marked decrease in recorded items clearly constitutes a change from KWW's earlier recordkeeping practices. Moreover, for all the reasons discussed herein, we conclude that the evidence establishes that this change was knowingly made and thus reflects a willful state of mind. *See Monfort of Colorado, Inc.*, 14 BNA OSHC 2055, 1991-93 CCH OSHD ¶ 29,246, p. 39,186 (No. 87-1220, 1990) (finding willfulness dependent on employer's underlying state of mind at time of violation).

We also emphasize that KWW's 86.5% error rate alone is simply overwhelming. This incidence of recording errors far exceeds that of any other case decided by the Commission. KWW's nearly complete failure to enter recordable injuries on the OSHA 200 does not, as KWW claims, resemble in any significant respect the circumstances in *Kohler, Inc.*, 16 BNA OSHC 1769, 1993-95 CCH OSHD ¶ 30,457 (No.88-237, 1994). In *Kohler*, the Commission found no evidence that a single recordkeeping error that resulted in extensive failures to record was other than inadvertent. KWW's recordkeeping problems are of a different order. As Judge Schwartz found, the whole of KWW's recording process was fatally flawed. As underscored by the lack of any follow-up tracking procedures, KWW made no effort to

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[13](...continued)
Farm, 17 BNA OSHC at 2000, 1995-97 CCH OSHD at p. 44,011 (citing *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1223-24, 1991-93 CCH OSHD ¶ 29,442, pp. 39,679-81 (No. 88-821, 1991)).

ensure that the regulation was followed and the OSHA 200 was correctly filled in. *See Georgia Electric Co. v. Marshall*, 595 F.2d 309, 320 (5th Cir. 1979). The failures here, though involving large numbers of hand and finger injuries, included many other types of injuries and illnesses and resulted from an overall disregard of the regulation's requirements. Our dissenting colleague notes that there was no "consistent pattern of misrecording." The point, however, is that a 1-in-8 recording rate during a period in which 412 items should have been recorded either defies consistency or effectively constitutes a consistent failure to record at all.

Contrary to our dissenting colleague's contention that we have "run roughshod over the distinction between willfulness and simple carelessness" by affirming a willful violation in the circumstances of this case, we believe that our decision here securely preserves that distinction. As stated by the Supreme Court, "[t]he word 'willful' is widely used in the law, and although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent." *McLaughlin v. Richland Shoe Co*., 486 U.S. 128 (1988).[14] The evidence here demonstrates that KWW not

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[14]Applying that principle in an ADEA case, the Court found that mere awareness of the statute was insufficient to establish willfulness, noting that such a broad standard would frustrate the intent of the ADEA's two-tiered liability scheme and result in an award of double damages in almost every case. *TWA v. Thurston*, 469 U.S. 111, 128 (1985). The "mere awareness" concept in *Thurston*, however, consisted only of the employer's knowledge of the *potential* applicability of the ADEA; that it was "in the picture." *Id.* In a subsequent case, the Court explained that "the two-tiered liability principle was simply one interpretive tool among several that [it] used in *Thurston* to decide what Congress meant by the word 'willful.'" *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 616 (1993). The Court noted that "[t]he ADEA does not provide for liquidated damages 'where consistent with the principle of a two-tiered liability scheme.' It provides for liquidated damages where the violation was 'willful.'" *Id*. Affirming its belief that the "knowledge or reckless disregard" standard of willfulness was itself sufficient to create two tiers of liability across the range of ADEA cases, the Court emphasized that willfulness would be obviated by a good faith, albeit incorrect, belief that a particular age-based decision was permissible. *Id. See also*

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only knew of the applicability of the OSH Act and the recordkeeping regulations, it substantially complied with them for many prior years. OSHA reviewed Kaspar's recordkeeping compliance eight times prior to the inspection here, alerting Kaspar that its recordkeeping was important. KWW also knew of the existence of all of the cited items, as well as the severity of many, as indicated by the notations on its first-aid logs. It also had to have known that most of the cited items were recordable based on the knowledge and experience of its management-level recordkeeping personnel and the obviousness of recordability in light of the instructions on the OSHA 200 form itself. KWW's pervasive and blatant failures to comply with the statutory recordkeeping requirements in 1988 and 1989 were anything but mistaken or careless. As found by Judge Schwartz, "it is incredible that Little and Knezek, the individuals charged with responsibility for the OSHA 200s for seventeen and twenty years, respectively, could have believed that they were properly recording injuries and illnesses."

Although, in our view, the evidence amply establishes that KWW *chose* to change its recordkeeping practices, we could find no evidence in the record to explain the reason for this choice and the resulting egregious failure to record during the cited years. Thus, we agree with Judge Schwartz that the record does not establish that KWW's recordkeeping errors resulted from an attempt to maintain a low LWDI rate in order to avert a comprehensive inspection. Nonetheless, evidence of KWW's motive is not necessary to support a willful violation. As discussed above, an employer need not have an evil or malicious motive. *Cf. Hazen Paper Co. v. Biggins*, 507 U.S. at 617 (finding that once willful violation of ADEA is shown, employee need not provide direct evidence of employer's motivation). The state

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Woodhouse v. Magnolia Hosp., 92 F.3d 248, 256 (5th Cir. 1996) (upholding willful violation of ADEA where evidence was sufficient for jury to conclude that employer acted willfully and employer offered no evidence that it reasonably believed in good faith that its conduct was permissible).

of mind required for a willful violation need be only knowing, voluntary, or intentional. Based on all of the evidence and circumstances here, we conclude that KWW had such a state of mind when it chose to cease recording the vast majority of illnesses and injuries suffered by its employees during 1988 and 1989.[15] Accordingly, we also conclude that those failures showed plain indifference to the requirements of the Act, and we affirm Judge Schwartz' conclusion that the non-restricted work day items constitute willful violations.

We treat the restricted work day items differently because they present other considerations. CO Hudgens' 1985 inspection notes reveal that KWW recorded no restricted work days in 1983 or 1984 despite recording approximately 393 injuries for those years.

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[15]Commissioner Weisberg notes that his dissenting colleague suggests that Commission precedent requires that a willful state of mind be shown for each separate willful violation, and that "[h]ere there is no evidence connecting a state of mind with the individual recordkeeping violations." It is clearly incumbent upon the Secretary to establish each separate violation cited. While the Secretary must also establish the requisite state of mind for a willful violation, it does not necessarily follow that she must separately show a "heightened awareness" of each individual violation. There may be circumstances, such as here, where an employer's willful state of mind informs a course of conduct with respect to a particular category of hazards or requirements. Consistent with that view is the Commission's decision in *Pepperidge Farm, Inc.*, 17 BNA OSHC at 1999, 1995-97 CCH OSHD at p. 44,009-10, where the Commission affirmed as willful 176 separate recordkeeping violations, most of which derived from a failure to follow the OSHA 200 instructions, where Pepperidge Farm's management officials failed to ensure compliance with a company-wide directive to accurately adhere to OSHA recordkeeping requirements. There was no other individualized evidence relied on in that case to support the willful characterization of each of the violations. Here, KWW's recordkeeping errors bespeak an overall pattern that reflects its willful state of mind. In Commissioner Weisberg's view, evidence of KWW's thoughts during each of the seven out of eight times it chose not to record an injury or illness is not necessary to establish that each of those separate acts was willful. *Cf. Caterpillar, Inc.*, 15 BNA OSHC at 2173, 1991-93 CCH OSHD at p. 41,006 (upholding per instance citation authority, Commission noted that overall changes made to employer's recordkeeping guide that resulted in many recording errors "had no consequences by themselves" -- "[i]t was the separate case-by-case application of those erroneous criteria to employee injuries and illnesses and subsequent decisions not to record them that violated the Act").

Hudgens testified that he found no recordkeeping violations and would have been compelled to issue a citation for any violations uncovered. We think it unlikely that *none* of the 393 recorded injuries would have resulted in restricted work days, especially where we found approximately 130 instances of restricted work orders out of the 412 recordable injuries that occurred in 1988 and 1989. Therefore, there is no evidence of any change in KWW's restricted work day recording between the 1984 and 1988/1989 recording years. Although OSHA's failure to cite KWW for not having recorded restricted work days in 1983-1984 does not provide a basis for KWW to argue that it lacked knowledge of its failures to record, *Columbian Art Works, Inc.,* 10 BNA OSHC 1132, 1133, 1981 CCH OSHD ¶ 25,737 at p.32, 102 (No. 78-29, 1981), it may have lulled KWW into believing that restricted work day information was of no concern to OSHA. Given this uncertainty surrounding the recording of injuries and illnesses that resulted in restricted work days, we find that the evidence as to KWW's failures to record such injuries falls short of establishing willfulness. We affirm the items based solely on restricted work orders as other-than-serious.[16]

PENALTIES

Judge Schwartz assessed an aggregate penalty of $234,000. He calculated the penalty on a per instance basis in the amount of $250 - $1000 per item, depending on the extent to which the basis of recordability exceeds the definition of non-recordable first aid. Although the Commission had requested that the parties address the issue of per instance penalty authorization in their briefs, it is now well-settled Commission precedent that the Secretary has discretion to cite each recordkeeping error as a separate violation, and that the Commission has discretion to assess penalties for such violations on a per instance basis. *Pepperidge Farm, Inc.*, 17 BNA OSHC at 2001, 1995-97 CCH OSHD at p. 44,011; *Caterpillar, Inc*., 15 BNA OSHC 2153, 2173, 1991-93 CCH OSHD ¶ 29,962, p. 41,007 (No.

[16]These other-than-serious violations are item numbers: 10, 15, 22, 34, 36, 44, 72, 104, 114, 206, 223, 228, 296, 308, and 359.

87-922, 1993). Accordingly, we conclude that Judge Schwartz did not err in assessing penalties on a per instance basis.

With respect to penalty amounts, Section 17 (j) compels us to consider the size of the company, gravity of the violations, history of compliance with the Act, and good faith. KWW is a moderate to large size company, employing approximately 850-900 workers at its Shiner facility, and has a history of few previous OSHA violations, none of which pertained to recordkeeping. Moreover, the gravity of recordkeeping violations is generally considered low. We find no basis, however, on which to accord KWW credit for good faith where the bulk of the violations are affirmed as willful, and where the failures to record were largely so obvious. We conclude that the Section 17(j) factors support Judge Schwartz' penalty assessments for the items we affirm as willful, and see no reason to disturb them. Accordingly, after deducting the $17,000 Judge Schwartz assessed for the vacated items, we affirm an aggregate penalty for the willful recordkeeping items of $210,500. With respect to the items based solely on restricted workday recordability that we affirm as other-than-serious, we conclude that a penalty reduction is warranted based on the change in characterization, and assess an aggregate penalty of $4875 for these items.

B. OSHA 200 ANNUAL SUMMARY AND CERTIFICATION - 29 C.F.R. § 1904.5(b) & (c)[17] - Items 386 (a) & (b)

The Secretary alleged that KWW willfully violated section 1904.5(b) by failing to total the data on its OSHA 200s (Item 386(a)), and willfully violated section 1904.5(c) by failing

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[17]The regulation states:

§ 1904.5 Annual summary.

(a) Each employer shall post an annual summary of occupational injuries and illnesses for each establishment. This summary shall consist of a copy of the year's totals from the form OSHA No. 200 . . . .

(b) The summary shall be completed by February 1 . . . .

(c) Each employer . . . shall certify that the annual summary of occupational injuries and illnesses is true and complete . . . .

to sign the OSHA 200s, certifying their accuracy (Item 386(b)). Judge Schwartz affirmed the violations as willful and assessed a combined penalty of $500. The record supports Judge Schwartz' conclusion that KWW neither totaled the incidents recorded on its OSHA 200s for 1988 and 1989, nor certified their accuracy with the requisite signature. The 200s are in evidence and reveal blank spaces in the areas designated for totals and certification. Moreover, CO Jones' testimony that the information was neither totaled nor certified is uncontroverted.

KWW contends that these violations should be vacated because they occurred outside the period covered by the complaint.[18] The Commission has already considered and rejected this argument in *Johnson Controls, Inc.*, 15 BNA OSHC 2132, 2135-36, 1991-93 CCH OSHD ¶ 29,953, p. 40,965 (No. 89-2614, 1993), where, noting that a recordkeeping error violates the Act until it is corrected or until the 5-year retention period expires, it held that the Secretary may cite an employer for a recordkeeping error within six months of the time she discovers, or reasonably should have discovered, the facts necessary to support the citation.[19] Here, the recordkeeping errors were uncorrected and well within the 5-year retention period when the Secretary discovered them during the March 19 to September 14, 1990 inspection. Accordingly, we conclude that the complaint is timely and properly identifies the dates during which the violations occurred.

In contrast to Judge Schwartz, however, we find that the evidence is insufficient to support a willful characterization for either violation. As indicated above, the OSHA 200 contains clearly identified spaces for totaling the information entered on the form and for the signature of the individual certifying its accuracy. Beyond these "instructions" on the form

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[18]The Complaint alleges that all of the cited items occurred "on or about March 19, 1990 - September 14, 1990," and KWW's recording failures here would have commenced on February 2, 1988 and February 2, 1989.

[19]Section 9(c) of the Act provides that "[n]o citation may be issued . . . after the expiration of six months following the occurrence of any violation."

itself, however, we could find no testimony or other record evidence concerning whether Ms. Knezek, Mr. Little, or Mr. Price were aware of, or understood, these requirements. In these circumstances, as with the recordkeeping items based solely on restricted workdays, we conclude that the record establishes other-than-serious violations.

The Secretary proposed a combined penalty of $5,000, and Judge Schwartz assessed $500. We consider the Section 17 (j) factors, as discussed above and, consistent with our treatment of the restricted workday recordkeeping items, we conclude that a penalty reduction is warranted based on the change in characterization. Accordingly, we affirm Items 386(a) and (b) as other-than-serious, and assess a combined penalty of $375.

C. ACCESS TO MEDICAL RECORDS - 29 C.F.R. § 1910.20(e)(3)(i) - Item 387

Section 1910.20(e)(3)(i), the "Records Access" rule provides, *inter alia*, that an employer must, upon request, accord OSHA prompt access to employee exposure and medical records.[20] OSHA cited KWW under this standard for KWW's alleged delay in obtaining and providing its employees' medical records pertaining to workplace injuries and illnesses that occurred in 1987, 1988 and 1989. Judge Schwartz affirmed the violation, characterized it as willful, and assessed a penalty of $2,500. For the reasons discussed below, we find that the Secretary failed to establish the applicability of the standard and vacate this citation item.

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[20]The standard provides:

§ 1910.20 Access to employee and exposure medical records.

. . . .

(e) *Access to records.*

. . . .

(3) *OSHA access.* (i) Each employer shall, upon request, and without derogation of any rights under the Constitution or the [OSH Act] that the employer chooses to exercise, assure the prompt access of representatives of [OSHA] to employee exposure and medical records and to analyses using exposure or medical records.

By its own terms, the Records Access rule applies to an employer that "makes, maintains, contracts for, or has access to employee exposure or medical records, or analyses thereof, pertaining to employees exposed to toxic substances or harmful physical agents." 29 C.F.R. § 1910.20(b)(1). The rule applies to all such records "made or maintained in any manner, including on an in-house o[r] contractual (e.g., fee-for-service) basis." 29 C.F.R. § 1910.20(b)(3). The term "access" is defined as "the right and opportunity to examine and copy." 29 C.F.R. § 1910.20(c)(1). The preamble to the final rule, unchanged in this respect by amendments to the rule made in 1988, states that the rule's applicability provisions are intended to be given a "broad application," as expressed in the preamble to the proposed rule:

> To come within the scope of this . . . rule, the records do not have to be within the employer's physical control as long as the employer has access to them. The concept of employer access encompasses situations in which any of the employer's officers, employees, agents, or contractors (including the corporate medical department) has physical control or access to records, even though they are not generally available to all officers, employees, agents, and contractors.

45 Fed. Reg. 35,259 (1980) (citation omitted). It is also clear, however, that the rule "creates no substantive requirements" (*id.* at 35,214), but "simply requires the preservation and availability of records which employers for one or more reasons have already chosen to create . . . ." *Id.* at 35,253. Accordingly, as the preamble to the final rule points out, "[m]any employers generate neither exposure nor medical records, and thus will experience little or no impact from this rule." *Id.* at 35,254.

Here, OSHA served KWW with a subpoena on April 17, 1990, that included a request for all recordable and non-recordable employee injury, accident and illness records for the years 1987 through 1989. Area Director Hunter recalled that KWW responded to the subpoena by providing some information on April 23, 1990, but that no medical support documents were included. According to Hunter, Dan Price advised him at that time that KWW did not have the requested medical records. Hunter testified that Price later called to

advise him that most of the records were kept at the offices of Drs. Wagner & Wagner and could not be released without employee consent.

In a May 9, 1990 letter to CO Jones from the offices of Drs. Wagner & Wagner regarding an apparent April 28 request from Jones to the doctors for medical reports, the doctors emphasized that they were not employed or retained by KWW to provide medical care for KWW employees who sustained job-related injuries, and that their care of such employees was based on a private doctor-patient relationship. The letter explains that it is the doctors' understanding that they were not the sole care providers to KWW employees, but that their proximity to KWW resulted in their having provided medical care to KWW employees for the majority of job-related injuries during the relevant time period. The letter also indicates that under the Texas Medical Practice Act, all care is confidential and privileged, but that all necessary information under the state Workers' Compensation Law is provided either to KWW or their designated workers' compensation carrier. By approximately June 15, 1990, OSHA received the requested medical records from Drs. Wagner & Wagner pursuant to a June 7, 1990 subpoena served directly on the doctors.

Not included with the records obtained from Drs. Wagner & Wagner were the medical records pertaining to approximately seventy-five cases treated by other medical care providers. From late June through mid-July, KWW sent a series of letters to various doctors requesting the medical records, and sent requests to employees for their authorization to release the records. A letter from one group of doctors advised KWW that, pursuant to the workers' compensation statutes, the doctors would need either patient authorization or a subpoena to release any medical records. One of KWW's insurance carriers advised that due to a perceived "privacy issue" it could provide medical information concerning only open claims. KWW's workers' compensation carrier informed KWW that it would be unable to provide most of the medical records KWW requested from it because those claims were closed and the files were no longer available. They offered to forward copies of the six compensation claim cases still open. It is undisputed that by the time the citation issued on

September 18, 1990, OSHA had received all of the medical records KWW was able to obtain, which comprised approximately 95% of the records OSHA requested.

This evidence establishes that KWW did not "make, maintain, or contract for" the medical records OSHA requested. Under these circumstances, the standard provides that KWW would have had an obligation to obtain the records for OSHA only if KWW had "access" to them. Access is defined as the "right and opportunity to examine and copy." KWW argues that under Texas law it had no such right, as it was precluded from obtaining employee medical records pertaining to job-related injuries without the affected employee's consent. The relevant Texas statute provides, *inter alia*, that the Workers' Compensation Commission will release employee "injury information" to an employer if:

> (1) the claim is open or pending before the commission, on appeal to a court of competent jurisdiction, or the subject of a subsequent suit where the insurance carrier or the subsequent injury fund is subrogated to the rights of the named claimant . . . .

Tex. Civ. Stat. Ann., Art. 8308-2.31(c), (d) (1992).

The record here contains evidence concerning the status of only a few of the workers' compensation claims involving the employees whose medical records are the subject of this citation item. The medical records are for injuries that occurred from 1987 to 1989, but they were not subpoenaed by OSHA until April 1990. The available evidence indicates that most of the compensation claims were by then closed. In these circumstances, the Secretary has failed to establish that KWW had a "right" to examine or copy the requested records. Based on our reading of the regulations and the rulemaking that underlies them, and in the absence of a response from the Secretary concerning the applicability of the access rule here, we conclude on this record that the cited regulation is inapplicable, and vacate this citation item.[21]

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[21]We also emphasize that, as noted above, this regulation applies only to medical and (continued...)

D. PUNCH PRESS POINT OF OPERATION GUARDS - 29 C.F.R. § 1910.217(c)(1)(i)[22] - Items 388 (a) & (b)

Items 388 (a) & (b) allege willful violations for KWW's failure to provide point of operation guards on two punch presses. Judge Schwartz affirmed the violations as willful and assessed a combined penalty of $5,000. With respect to Item 388(a), the record supports, and KWW does not deny, Judge Schwartz' conclusion that at the time of the inspection the

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[21](...continued)
exposure records of employees exposed to "toxic substances or harmful physical agents." *See General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2065 n.5, 1991-93 CCH OSHD ¶ 29,240, p. 39,165 n.5, 19 (No. 82-630, 1991) (consolidated). The preamble to the final rule explains that "coverage is appropriately limited to records relevant to employees currently or previously exposed to toxic substances or harmful physical agents" and that the regulation applies to all "relevant" records. 45 Fed. Reg. 35,215. "[R]ecords of employees who are exposed solely to typical safety hazards (e.g., trips, falls, traumatic injury, etc.) are not covered by this rule. *Id.* at 35,258. The Secretary has made no attempt to establish applicability under this aspect of the access rule. While the evidence indicates that KWW's production process included painting and some employees were exposed to chemicals, the evidence is insufficient to evaluate which employee records might be covered by the rule.

[22]The standard states:
§1910.217 Mechanical power presses
. . . .

> (c) *Safeguarding the point of operation*— (1) *General requirements* (i) It shall be the responsibility of the employer to provide and insure the usage of "point of operation guards" or properly applied and adjusted point of operation devices on every operation performed on a mechanical power press.

punch press was in use and unguarded.[23] In evidence is CO Antonio's photograph of KWW employee Dennis Kopecky operating a press that lacked a point of operation guard. While the record does not indicate whether there was ever a guard on the cited machine or whether one was removed, Kopecky testified that when guards were installed on the machines they were bolted in place and not easily removed. KWW has not alleged, nor is there any evidence to suggest, that it provided removable guards that employees failed to use. Kopecky also testified that the press' function changed frequently, sometimes within the course of a day, and that his supervisor would determine in what mode the punch press would operate.

The record also demonstrates that KWW was well aware of the hazard created by an unguarded punch press prior to the 1990 inspection. In 1988, a Commission administrative law judge affirmed a citation against KWW for its failure to guard a sixty-ton punch press in violation of the same standard cited here.[24] *See Anderson Excavating & Wrecking Co.*, 17 BNA OSHC 1890, 1892-93 n.8, 1991-93 CCH OSHD ¶ 31,228, p. 43,789 n.8 (No. 92-3684, 1997), *aff'd per curiam*, 131 F.3d 1254 (8th Cir. 1997) (previous citation for violation of same standard relevant to question of willfulness). Perhaps the most telling evidence of KWW's awareness of the hazard came from its safety compliance officer, Paul Morkovsky, who testified that in the fall of 1989 he became aware that there had been a "rash" of serious punch press accidents. Moreover, there was evidence of other punch press injuries that had

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[23]KWW seems to argue that it cannot be cited for this condition because CO Donald Jones, who completed the KWW investigation after CO Antonio's transfer to another office, did not know whether the machine was guarded at the time the citation issued. A violation of the Act, however, "'occurs' whenever an applicable occupational safety and health standard is not complied with and an employee has access to the resulting zone of danger." *Gen'l Dynamics Corp.*, 15 BNA OSHC 2122, 2128, 1991-93 CCH OSHD ¶ 29,952, p. 40,957 (No. 87-1195, 1993) (citation omitted). Here, CO Antonio observed Mr. Kopecky working at the unguarded press during the inspection. Any post-inspection abatement does not expunge the original violation.

[24]*Kaspar Wire Works, Inc.*, 13 BNA OSHC 1785, 1786-87, 1987-90 CCH OSHD ¶ 28,198 (No. 85-1060, 1988) (unreviewed judge's decision).

been known to management personnel. For example, on June 12, 1989, employee Gloria Ybarra injured two of her fingers while working on an unguarded punch press, causing the fingers to be amputated to the second joint, and on May 25, 1988, employee William Collins had the nails on two of his fingers torn off while working on an unguarded press. In addition, CO Donald Jones testified that his records' review for 1988 and 1989 revealed eight to twelve instances of hand or finger injuries from unguarded punch presses.

In these circumstances, we conclude that the Secretary has established the existence of the violative condition, employee exposure to the hazard, employer knowledge of the violation,[25] and a heightened awareness of the illegality of the condition. In addition, we conclude that, armed with this information, KWW's failure to install a point of operation guard on the punch press showed "plain indifference" and constitutes a willful violation of the Act. *See, e.g., Caterpillar, Inc.*, 17 BNA OSHC 1731, 1733, 1995-97 CCH OSHD ¶ 31,134, p. 43,483 (No. 93-373, 1996), *aff'd* 122 F.3d 437 (7th Cir. 1997).

Item 388(b) involves an alleged failure to guard a Bassick Department punch press. Judge Schwartz affirmed the violation based solely on employee William Collins' testimony concerning a May 1988 accident involving the cited press. According to Collins, the Bassick Department was newly-formed at the time of the accident, which occurred when Collins used his fingertips to rake a part out of a "fairly old" unguarded press that was prone to double-stroking when cold. He testified that the machine was unguarded, that he never worked on

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[25]Neither the parties nor Judge Schwartz addressed the question whether KWW knew that the punch press was unguarded. Nonetheless, proof of such knowledge is an essential element of the Secretary's case. *Astra Pharmaceutical Prods., Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d. 69 (1st Cir. 1982). Here, KWW knew of the requirement of the standard from the previous citation and knew of the numerous injuries sustained by its employees on unguarded presses. Moreover, its supervisors were closely involved in the operation of the presses, and those guards that were installed on the presses were bolted in place and not easily removed. We, therefore, find that the Secretary has established a *prima facie* case of employer knowledge, which is unrebutted.

that machine after the accident, and that he "vaguely" remembered the 1990 OSHA inspection. Collins provided additional testimony about the condition of the machine and timing of the OSHA inspection, but we are unable to determine from it whether he meant to say that the machine on which he had his accident was unguarded at the time of the inspection. Nor is there any evidence that the machine was available for use at anytime after Collins' accident. *See Fabricated Metal Prods., Inc.*, 18 BNA OSHC at 1073, 1998 CCH OSHD at p. 44,506 ("[t]he Secretary always bears the burden of proving employee exposure to the violative conditions"). In these circumstances, we conclude that there is insufficient evidence to establish that a violation existed within six months of the September 18, 1990 citation, and vacate this item.

Judge Schwartz assessed a combined penalty of $5,000 for the two items.[26] We affirm a violation only with respect to Item 388(a) and, accordingly, we conclude that a penalty amount of $2,500 is appropriate under the Section 17(j) factors for this single willful violation.

E. POWER PRESS INJURY REPORTING - 29 C.F.R. § 1910.217(g)(1)[27]
Items 389, 391, 392, 394-396

Judge Schwartz affirmed willful violations for these six failures to report power press injuries as required by section 1910.217(g)(1), and assessed a penalty of $1,000 for each of

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[26]The Secretary had proposed a combined penalty of $10,000 for Items 388 (a), (b) and (c). Judge Schwartz vacated Item 388(c) and it is not at issue on review.

[27]The standard states:

§ 1910.217 Mechanical power presses.

. . . .

> (g) *Reports of injuries to employees operating mechanical power presses.* (1) The employer shall, within 30 days of the occurrence, report to . . . [OSHA], all point of operation injuries to operators or other employees.

them. At issue is the characterization of the violations and propriety of per instance penalties.[28]

The evidence establishes that KWW failed to report six power press injuries during the period August 24, 1987 to November 15, 1989. The record also shows that KWW knew of the reporting requirement prior to the time the first of these injuries occurred. OSHA issued a citation to KWW for a violation of this reporting standard in 1985,[29] and David Little reported a power press injury on July 15, 1987. Dan Price testified that he was unaware of the reporting obligation until the summer of 1989, and that his single reporting failure subsequent to that time was "inadvertent." Price had reported two power press injuries between the time he learned of the requirement and the time he failed to report the last one.

Chairman Rogers and Commissioner Visscher conclude that these facts do not support a willful characterization. The record contains no specific explanation for KWW's failure to report the injuries for Items 389, 391, and 392. Dan Price's failure to report the injuries for Items 394 and 395 occurred before he became aware of the reporting requirement. In Chairman Rogers' and Commissioner Visscher's view, these failures show a lack of diligence in complying with the OSHA reporting requirement, but they find that KWW's single prior citation, followed by its filing of a single report, is insufficient to establish the heightened awareness required to establish a willful violation of this reporting standard. With respect to Item 396, Price admitted that he was aware by then of the reporting requirement and knew of the injury, but that his failure to report that injury was inadvertent. In fact, Price had reported two power press injuries after learning of the requirement. Chairman Rogers and

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[28]As with the recordkeeping items, the wording of this standard clearly requires a separate action for reporting individual injuries as they occur. Accordingly, Commission precedent supports the judge's per instance penalty assessments for each of KWW's failures to report power press injuries. *Pepperidge Farm, Inc.*, 17 BNA OSHC at 2001, 1995 CCH OSHD at p. 44,011; *Caterpillar, Inc.*, 15 BNA OSHC at 2173, 1991-93 CCH OSHD at p. 41,007.

[29]*Kaspar Wire Works, Inc.*, 13 BNA OSHC 1785, 1987-90 CCH OSHD ¶ 28,198 (citation vacated on timeliness grounds).

Commissioner Visscher conclude that his inadvertent failure to report the third injury was not willful. *See Williams Enters., Inc.*, 13 BNA OSHC at 1257, 1986-87 CCH OSHD at p. 36,589 (willful charge not justified for mere carelessness or lack of diligence).[30]

The Secretary alleged in the Complaint that these items were willful and serious, and section 17(k) of the Act provides that a serious violation is one where "there is a substantial probability that death or serious physical harm could result . . . ." However, we could find no evidence that the parties tried the question of whether these reporting violations were serious. The only testimony remotely related to the issue is that of Area Director Hunter, who

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[30]While Commissioner Weisberg agrees, for the reasons stated by his colleagues, that Dan Price's inadvertent failure to report the third power press injury (Item 396) was not willful, he would find that the other five failures to report (Items 389, 391, 392, 394 and 395) were willful. The record establishes that KWW was aware of OSHA's power press injury reporting requirement prior to the time the first of these injuries occurred. OSHA issued a citation to KWW for a violation of this reporting standard in 1985, which was vacated only on timeliness grounds. *Kaspar Wire Works, Inc.*, 13 BNA OSHC 1785, 1787, 1987-90 CCH OSHD ¶ 28,198 (No. 85-1060, 1988) (unreviewed judge's decision). Moreover, David Little knew of the requirement when he reported a power press injury on July 15, 1987, "pursuant to Title 29, Code of Federal Regulations, Section 1910.217(g)." Although Dan Price testified that he was unaware of the reporting obligation until the summer of 1989, his ignorance did not deprive Kaspar of the knowledge it obtained from the prior citation and that imputed to it through David Little. *Caterpillar, Inc.*, 17 BNA OSHC at 1732-33, 1995-97 CCH OSHD at p. 43,483 (employer's knowledge imputed through former managerial employees remains with corporation despite any turnover in personnel). In addition to KWW's knowledge of the regulation, managerial employee Jo Ann Knezek knew of all six injuries, as evidenced by her signature on the E-1s. Commissioner Weisberg, therefore, would find that the prior citation combined with Little's subsequent injury report establishes the requisite "heightened awareness" for a willful violation. *See Carabetta Enters., Inc.*, 15 BNA OSHC 1429, 1432-33, 1991 CCH OSHD ¶ 29,543 (No. 89-2007, 1991) (finding employer's failure to comply with standard willful where prior citations informed employer of OSHA's application of cited standard). *Cf. Branham Sign Co.*, 18 BNA OSHC 2132, 2134 (No. 98-752, 2000) (finding no heightened awareness regarding alleged fall protection violation absent evidence of prior citations or other warnings regarding the need for safety harnesses in sign erection work). Accordingly, he would conclude that KWW's unexplained failure to submit the injury reports demonstrates "plain indifference," and affirm the judge in finding a willful violation for these five items.

indicated that receipt of numerous such injury reports might prompt notification to the OSHA Area Office and lead to an inspection. The Secretary did not address this issue in her brief. We, therefore, find that the evidence in this case does not show that the failure to file the required injury reports could result in a substantial probability of death or serious physical harm. Accordingly, the violations are affirmed as other-than-serious.

We reevaluate the penalties assessed for these violations in view of the change in their characterization. Based on the penalty factors discussed previously, and the change in characterization from willful to other-than-serious, Chairman Rogers and Commissioner Visscher assess a penalty of $750 for each of the six violations.

F. PRESS WELDER POINT OF OPERATION GUARD - 29 C.F.R. § 1910.255(b)(4)[31] Item 397(d)

The Secretary alleged that KWW willfully failed to provide a point of operation guard on a press welder in violation of section 1910.255(b)(4).[32] Judge Schwartz affirmed a willful

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[31]The standard states:

§ 1910.255 Resistance welding.

. . . .

(b) *Spot and seam welding machines (nonportable)*

. . . .

(4) *Guarding.* All press welding machine operations, where there is a possibility of the operator's fingers being under the point of operation, shall be effectively guarded by the use of a device such as an electronic eye safety circuit, two hand controls or protection similar to that prescribed for punch press operation . . . .

[32]In both the Citation and Complaint, the Secretary mistakenly identified the standard by its former number, 29 C.F.R. § 1910.252(c)(2)(iv), which now covers welder ventilation. Judge Schwartz granted the Secretary's motion to amend the Complaint to allege a violation of the renumbered standard. Although KWW argues that it suffered prejudice from the mistake by failing to adduce evidence to support an infeasibility defense, the judge's ruling was justified in view of the fact that the Complaint correctly describes the violation as a failure to provide point of operation guards. KWW would, accordingly, have had ample

(continued...)

violation and assessed a penalty of $2,500. We find that the evidence pertaining to this item is insufficient to establish a violation.

The Secretary's Complaint alleges that KWW violated the standard based on the following condition:

> Respondent violated this standard because the points of operation on resistance press welding machines were not guarded to protect against the possibility of the operator's fingers being under the point of operation: . . . (d) in the wire welding dept. employee was operating press welders and had his fingers/hands in the unguarded point of operation.

In support of this citation item, Judge Schwartz relied only on the testimony of former KWW employee Stephen Nobles, who worked as a sheet metal welder. Nobles testified that he was injured on November 16, 1989, when his thumb became caught in the jaws of an unguarded press welder and was severed just above the joint. According to Nobles, KWW had about three automatic press welders and approximately thirty manual press welders in the sheet metal welding department. Nobles, who was working in the wire welding department during the 1990 inspection, testified that he knew of no guards or hand restraints on the automatic press welders at that time. Nobles added that the manual press welders also lacked guards and hand restraints, but that he thought they could not be guarded.

Nobles at first acknowledged that the machine on which he had been injured remained unguarded during the inspection. He stated that he thought the inspector had not seen that press welder because "[t]hey had taken a forklift and put pallets around it to where you couldn't see the welder without knowing about it being there." Later, however, Nobles contradicted his testimony by stating that the machine around which pallets were stacked was "an identical machine to the one I was hurt on, *not the exact same machine*." (Emphasis

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[32](...continued)
notice that it was being charged with a violation concerning guarding rather than one concerning ventilation.

added). He then responded "no" when asked whether the machine behind the pallets was in operation during the inspection.

Based on this evidence, the Secretary has failed to prove a violation. Because of the inconsistency in Nobles' testimony, it is not possible to identify the allegedly hazardous press welder as to its size, type, location, or even whether it was a manual or automatic welder, or to determine whether its point of operation was unguarded. Nor is it possible to determine whether any employee was exposed to an unguarded point of operation. We find that the record does not establish even a *prima facie* showing of a failure to comply with the cited standard, or of employee access to any violative condition. *See Astra Pharmaceutical Prods., Inc.*, 9 BNA OSHC at 2129, 1981 CCH OSHD at pp. 31,899-900 (Secretary must show applicability of standard, noncompliance, employee exposure and employer knowledge to establish violation). Accordingly, we vacate this citation item.

II. SERIOUS CITATION

A. PRESS BRAKE POINT OF OPERATION GUARD - 29 C.F.R. § 1910.212(a)(3)(ii)[33]

Item 9

The Secretary alleged that KWW failed to guard the point of operation of a press brake in violation of section 1910.212 (a)(3)(ii). Judge Schwartz affirmed a serious violation and

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[33]The standard states:

§ 1910.212 General requirements for all machines.

(a) *Machine Guarding*

. . . .

(3) *Point of operation guarding.*

. . . .

(ii) The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

assessed a $900 penalty. As with the press welder guarding item discussed above, we find the evidence insufficient to establish a violation.

In support of this item, Judge Schwartz relied solely on the testimony of employee Adolph Koncaba. Koncaba had been injured twice on the press brake, most recently no later than June 5, 1989, and testified that the machine was equipped with a guarded foot pedal but no point of operation guard when he operated it. He hadn't operated the press brake at all, however, since approximately December 1989, and his awareness of the 1990 OSHA inspection was limited to "hear[ing] about some people coming through."

Compliance Officer Jones recommended this citation item based on Koncaba's statement and the evidence of Koncaba's previous injuries sustained while working on the press brake. Jones admitted that he had never seen the press brake himself, and that he had no personal knowledge that the allegedly violative condition existed in 1990.

We conclude that this evidence is insufficient to establish that the press brake was unguarded and available for use within six months of the September 1990 citation. It is undisputed that Koncaba stopped working on the press brake at least nine months prior to the citation. Koncaba's sole testimony concerning the condition of the press brake at the time of the inspection was his affirmative reply when asked whether the press brake was then equipped with two-hand buttons. Although Koncaba's answer might imply the continued existence and use of the machine, he was not working on it at the time and was hardly aware of the inspection. The Secretary contends that Koncaba "was clearly familiar with the current operation of the press brake," but we find that the record does not establish a failure to comply with the cited standard or establish employee access to any violative condition within six months of the citation. Accordingly, we vacate this item.

B. TABLE SAW - "NONKICKBACK FINGERS" - 29 C.F.R. § 1910.213(c)(3) Item 11

The Secretary alleged a serious violation for KWW's failure to have nonkickback fingers on a table saw in violation of section 1910.213(c)(3).[34] Judge Schwartz affirmed the violation and assessed a $100 penalty. We vacate this citation item for the following reasons.

The cited standard applies by its own terms to a ripsaw, yet we could find no evidence in the record regarding the type of blade with which this table saw was equipped. The Citation and Complaint describe the allegedly violative piece of equipment as a "Craftsman Table Saw." Although there is a photograph of the saw entered in evidence, we are unable to determine from it whether the saw is a ripsaw. Employee Kevin Willhoite, who operated the table saw daily, described some of his work on it as "ripping" plywood." Nonetheless, when asked what type of saw was pictured in the photograph, he replied only that it was a table saw. The Secretary acknowledged in her initial brief that KWW contested the applicability of the standard to the cited saw, but she did not respond to that contention either in her initial brief or on reply.

There is also conflicting evidence as to whether the saw lacked nonkickback fingers. CO Antonio was unequivocal in his assertion that the saw did not have nonkickback fingers. According to Willhoite, nonkickback fingers were added to the saw after he had been employed at KWW a little while. When asked whether he remembered if the nonkickback fingers were added after the OSHA inspection, Willhoite replied that he "really [couldn't] remember exactly what period of time that happened." He testified that the nonkickback fingers were present in the photo of the cited saw, but he pointed out that they could not be

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[34]The standard states:

§ 1910.213 Woodworking machinery requirements.

. . . .

(c) *Hand-fed ripsaws.*

. . . .

(3)Each hand-fed circular ripsaw shall be provided with nonkickback fingers or dogs so located as to oppose the thrust or tendency of the saw to pick up the material or to throw it back toward the operator.

discerned in the photo because of their position on the guard. Willhoite also testified that the table saw pictured with nonkickback fingers in another photo appeared identical to the condition of the cited saw at the time of the inspection.

Based on his finding that Willhoite's testimony was equivocal, Judge Schwartz concluded that the nonkickback fingers were installed on the saw after the inspection and affirmed the violation. We agree that Willhoite's testimony was somewhat equivocal concerning the timing of the inspection in relation to the installation of the nonkickback fingers, and that Antonio's testimony, though less detailed, was unequivocal. Nonetheless, in view of this conflicting testimony, and the lack of evidence concerning applicability of the standard to this particular saw, we conclude that the record does not support the existence of a violation and vacate this item.

C. POWER PRESS INSPECTIONS and CERTIFICATION RECORDS 29 C.F.R. § 1910.217(e)(1)(i)and (ii) - Items 16(a) & (b), and 17 (a) & (b)

Judge Schwartz affirmed violations for Items 16 (a) & (b), and 17 (a) & (b) for KWW's alleged failure to have fully implemented any power press inspection program, including the requisite certification records, by the time of the OSHA inspection. He assessed a penalty of $500 each for Items 16 and 17.

Item 16 alleges a violation of 29 C.F.R. § 1910.217(e)(1)(i), which provides:

> It shall be the responsibility of the employer to establish and follow a program of periodic and regular inspections of his power presses to ensure that all their parts, auxiliary equipment, and safeguards are in a safe operating condition and adjustment. The employer shall maintain a certification record of inspections which includes the date of inspection, the signature of the person who performed the inspection and serial number, or other identifier, of the power press that was inspected.

Item 17 alleges a violation of 29 C.F.R. § 1910.217(e)(1)(ii), which provides:

> Each press shall be inspected and tested no less than weekly to determine the condition of the clutch/brake mechanism, antirepeat feature and single stroke mechanism. Necessary maintenance or repair or both shall be performed and completed before the press is operated . . . . The employer shall maintain a certification record of inspections, tests and maintenance work which includes the date of the inspection, test or maintenance; the signature of the person who performed the inspection, test or maintenance; and the serial number or other identifier of the press that was inspected, tested or maintained.

KWW personnel manager Dan Price testified that he developed a written punch press inspection program in August 1989 to identify KWW's inventory of presses and provide for inspections and maintenance of inspection records. Price also testified that at the time of the OSHA inspection in March 1990, KWW had submitted the program to its department supervisors and was "in the process" of "identifying and setting up files on each individual press."

CO Antonio testified that he discussed with Dan Price whether KWW had a power press inspection program and whether it kept records of maintenance on its power presses. According to Antonio, Price told him "no, that they did not have a power press inspection program, that he was working on one trying to identify all the equipment that they had so they could develop that type of program." Antonio also stated that Price informed him that maintenance records were not available.

In response to a September 4, 1990 subpoena, however, KWW did provide copies of mechanical press maintenance records dating from January 1, 1990. While those records provide much of the information required by the standard, many of them do not provide the required work completion date, or any indication that needed maintenance was performed. Along with those records, KWW sent a letter to AD Hunter in which it states that although "mechanical press operators inspect their individual presses at the beginning of each shift and

safety apparatus are inspected more frequently[,] [t]hese inspections have not been formally documented and are not available for reproduction."

The record clearly demonstrates that KWW had not adequately complied with the power press inspection and certification record requirements of the cited standards at the time of the 1990 inspection. In fact, KWW does not contend that it had. Rather, KWW argues that Items 16 and 17 are duplicative, and therefore cannot support two separate violations. We disagree. The standards pertain to different power press components and provide for different inspection frequencies. Section 1910.217(e)(1)(i) provides for "periodic and regular" inspections of "all parts, auxiliary equipment and safeguards" to ensure that the equipment is "in a safe operating condition," whereas section 1910.217(e)(1)(ii) provides for "weekly" inspections of the "clutch/brake mechanism, antirepeat feature and single stroke mechanism" and includes a testing requirement and mandates completion of necessary maintenance or repairs before continued operation of the press. Accordingly, although KWW could design an inspection program broad enough to encompass all of the requirements of both standards, it would be possible for it to fully comply with either one of the cited standards and still fail to satisfy all of the requirements of the other. In these circumstances, we conclude that the judge properly affirmed violations for both citation items.

The judge assessed a penalty of $500 each for items 16 and 17. The Secretary argues that the proposed penalty of $1000 for each item is warranted because of KWW's long delay in implementing its program and because KWW could have avoided numerous power press point of operation injuries had KWW complied with the inspection and maintenance requirements earlier.

We note that a lack of adequate guards more likely contributed to KWW's accident history. We have little basis, however, on which to evaluate whether KWW's pre-inspection development of the power press program warrants a penalty reduction. Thus, while KWW first began to develop a power press inspection program only seven or eight months prior to the OSHA inspection and had still failed to accomplish its implementation, we do not know

how long KWW had power presses in the plant and whether it had ever had the requisite inspection program. In these circumstances, and in consideration of the 17(j) factors discussed above, we affirm the judge's penalty assessment of $500 each for Items 16 and 17.

D. PULLEY AND BELT GUARDS - 29 C.F.R. § 1910.219(d)(1)[35] and (e)(3)(i)[36] Items 18(a) & (b) and 19(a) & (b)

Judge Schwartz affirmed serious violations for Items 18 and 19 for KWW's failure to guard a pulley and belt on each of two pieces of equipment: a wire welding department fan and a maintenance department table saw.[37] He assessed penalties of $100 for each item.

KWW does not dispute that the cited equipment was unguarded in the manner alleged. Rather, it contends that the Secretary failed to establish that the equipment did not fall within an exception to the standard, and failed to establish employee exposure to the hazards. With respect to KWW's first contention, we note that the standard does "except" from its

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[35]The standard states:

§ 1910.219 Mechanical power-transmission apparatus.

. . . .

> (d) *Pulleys*—(1) *Guarding.* Pulleys, any parts of which are seven (7) feet or less from the floor or working platform, shall be guarded in accordance with the standards specified in paragraphs (m) and (o) of this section.

[36]The standard states:

§ 1910.219 Mechanical power-transmission apparatus.

. . . .

> (e) *Belt, rope, and chain drives*

. . . .

> (3) *Vertical and inclined belts.* (i) Vertical and inclined belts shall be enclosed by a guard conforming to the standards in paragraphs (m) and (o) of this section.

[37]The fan pulley is cited as Item 18(a) and the table saw pulley is cited as Item 18(b). The fan belt is cited as Item 19(a) and the table saw belt is cited as Item 19(b). The table saw is the same piece of equipment cited in Item 11.

application specific types of belts when operating below a particular speed. 29 C.F.R. § 1910.219(a)(1) & (2). The Commission has repeatedly held, however, that "the party claiming the benefit of an exception to the requirements of a standard has the burden of proof of its claim." *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1522, 1993-95 CCH OSHD ¶ 30,303, p. 41,759 (No. 90-2866, 1993) (citing *Con Agra Flour Milling Co.*, 15 BNA OSHC 1817, 1823, 1992 CCH OSHD ¶ 29,808, p. 40,593 (No. 88-2572, 1992). *See also Griffin & Brand of McAllen, Inc.*, 4 BNA OSHC 1900, 1903-04, 1996-97 CCH OSHD ¶ 21,338, p. 25,682 (No. 4415, 1976) (respondent bears burden of proving entitlement to exceptions contained in pulley and belt guarding standard at 29 C.F.R. § 1910.219(a)(1)).

Here, KWW has introduced no evidence that the cited equipment conforms to the standard's exception. In addition, the photographic exhibits make clear that the allegedly hazardous conditions are well within the "seven (7) feet or less from the floor" requirement of the pulley guarding standard. The Secretary, therefore, has established that the standard applies to the cited equipment.

EXPOSURE

The evidence pertaining to employee exposure to the cited hazards presents a close factual determination. CO Antonio observed the fan and table saw during his inspection and testified that neither was in use, but that both were plugged in and available for use and that the table saw was covered with sawdust.

With respect to the fan, we note initially that the photographic exhibit clearly shows that the unguarded condition is unobstructed and protrudes out from the body of the fan. Although the motor to which the belt and pulley are attached is located inside the fan's narrow metal framework, it is very close to the edge. CO Antonio stated that although the fan is large and heavy, it is movable. He also observed employees working in the area, and observed that the fan was located close to the edge of an aisle way where he had seen employees walking "approximately two to three feet from it." Antonio admitted that he did

not know "how often, if ever," the fan was used, and knew of no injuries resulting from the unguarded condition.

KWW compliance officer Morkovsky testified that the fan was located fifteen feet from the nearest workstation.[38] Morkovsky, however, did not accompany Antonio during the inspection or visit the wire welding department on the inspection day. He, therefore, admitted that he would not know how close an employee would have come to the fan on that particular day.

With respect to the saw, CO Antonio testified that the belt is located behind the saw below the level of the saw table surface, and admitted that normal operation of the saw would not expose the operator to the unguarded belt or pulley. Antonio also stated that although nothing was stored below the saw and he observed no reason for any employee to get underneath the saw near the belt or pulley during the inspection, an employee might reach underneath the saw table "to pick up something he dropped off the floor."

KWW employee Kevin Willhoite, who operated the table saw daily, testified that he worked from a position behind the saw when ripping large sheets of plywood, but that ninety to ninety-five percent of the time he worked from the front of the table. He also stated that when working from the back, he would stand approximately two feet away and that his hands remained on the wood and never went below the table. In addition, Willhoite indicated that there would be no reason for him to reach down to the level where the pulley and the belt were located. Although he was not sure whether he had ever accidentally dropped something on the floor behind the saw, he did not believe that he would have done so while the table

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[38]The record indicates that employees would not likely come in contact with the unguarded fan pulley and belt in the normal course of their work. Morkovsky testified that he knew of no reason why any employee would need to reach down near the pulley and belt. Antonio testified about employee accessibility by "reach[ing] over the top of the motor into it" but, as we understand his testimony, he was responding to a question positing a situation where the fan would be turned from its unobstructed position to one that would block direct employee access to the belt and pulley.

saw was operating. He also noted that it takes a few seconds for the saw to quit running after the switch is turned off. Willhoite was never injured on the table saw, and Antonio knew of no injuries resulting from its unguarded condition.

DISCUSSION

Commission precedent establishes that the Secretary bears the burden of proving employee exposure to cited hazards, which requires her to "show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods., Inc.*, 18 BNA OSHC at 1073-74, 1998 CCH OSHD at p. 44,506. The circumstances during which employees might be considered within the danger zone include times when they engage in activities in the course of their assigned working duties, their personal comfort while on the job, or their normal means of ingress and egress to their assigned workplaces. *See Giles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, 1975-76 CCH OSHD ¶ 20,448, p. 24,425 (No. 504, 1976).

Here, the cited fan was plugged in and available for use, and was located within two to three feet of where Antonio observed employees walking in an aisle way. Moreover, Antonio's unrebutted testimony that the fan is movable is supported by its appearance in the photo, which also depicts the motor as unobstructed and protruding. Although there is no evidence that any employee has ever been injured by the unguarded fan belt or pulley, the configuration of the fan combined with its location adjacent to an employee walkway establishes the requisite exposure to support a violation. *See ConAgra Flour Milling Co.*, 16 BNA OSHC 1137, 1150, 1993-95 CCH OSHD ¶ 30,045, p. 41,243 (No. 88-1250, 1993), *rev'd in part on other grounds*, 25 F.3d 653 (8th Cir. 1994) (finding exposure despite fact that no injuries had occurred, Commission noted that "occurrence of injuries is not dispositive in determining whether a violation exists[,]" and that "'presence of a hazard is established by the objective facts concerning the configuration and operation of a machine'") (citation omitted). In these circumstances, we conclude that it is "reasonably predictable" that

an employee would come into contact with the unguarded belt and pulley either while attempting to reposition the fan, or inadvertently while passing nearby.

The facts here differ from those in *Miniature Nut and Screw Corp.*, 17 BNA OSHC 1557, 1995-97 CCH OSHD ¶ 30,986 (No. 93-2535, 1996). In that case, the Commission vacated a citation of the same standard, but the cited pulley and belt in that case were partially guarded, the operator came no closer than two feet from the cited area, and the existing guard was adequate to prevent accidental contact. 17 BNA at 1562-63, 1995-97 CCH OSHD at p. 43,180. Here, there is nothing to prevent such accidental contact. *See ConAgra Flour Milling Co.*, 16 BNA OSHC at 1150, 1993-95 CCH OSHD at p. 41,243 ("working in close proximity to unguarded machinery where access is not otherwise impeded or obstructed is sufficient to show exposure to a hazard"). *But see Jefferson Smurfit Corp.*, 15 BNA OSHC 1419, 1422, 1991-93 CCH OSHD ¶ 29,551, p. 39,954 (No. 89-553, 1991) (evidence must show more than a mere possibility that employees walking past cited equipment could come in contact with an unguarded nip point). Accordingly, we affirm serious violations for Items 18(a) and 19(a).

With respect to the table saw, however, we conclude that there is insufficient evidence to establish that it is reasonably predictable that employees would be in the danger zone. Although the photograph of the table saw shows that the unguarded condition protrudes out from the back, employee Willhoite, who used the table saw daily, testified that an operator would be working in that position very seldomly -- approximately five to ten percent of the time. He also testified that when he did work from that position, he stood two feet away from the table and held the wood being cut with both hands.

Accordingly, as CO Antonio admitted, the evidence establishes that normal operation of the saw would not expose the operator to the unguarded belt or pulley. Although Antonio thought an employee might accidentally contact the unguarded belt and pulley when reaching below the saw table for something that had been dropped, Willhoite testified that he believed that he would not have accidentally dropped anything while operating the saw, and that the

saw stops running "a few seconds" after turning off the switch. In these circumstances, we conclude that the Secretary has not established the requisite employee exposure to the table saw belt and pulley, and vacate Items 18(b) and 19(b).

The judge assessed penalties of $100 for Item 18 (a) & (b) and $100 for Item 19 (a) & (b). We affirm only Items 18(a) (fan pulley) and 19(a) (fan belt) and, accordingly, we assess a $100 total penalty for these items.[39]

E. GROUNDING PATH - 29 C.F.R. § 1910.304(f)(4)[40] - Item 22

Judge Schwartz affirmed a serious violation of section 1910.304(f)(4) based on KWW's failure to maintain the ground on a pedestal fan plug in the wire welding department and on a pressure washer cord in the silkscreen area. At issue is whether KWW knew, or with the exercise of reasonable diligence could have known, of the violative conditions.

According to KWW compliance officer Morkovsky, KWW had 1500 to 2000 electrical outlets, and he had not been aware that the grounding plugs cited in Item 22 were broken. Morkovsky also stated that there would be no need to remove a grounding plug because none of its outlets were two-prong, it was KWW's policy that they not be removed,

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[39]Although the Secretary argues that a higher penalty is warranted based on her assertion that Kaspar had been previously cited for violating the same standard, that citation was issued to KEC on September 20, 1990, the same date OSHA cited KWW in this case, and the Commission vacated that item on review because it found that the Secretary did not establish employee access to the hazard. *Kaspar Electroplating Corp.*, 16 BNA OSHC at 1524-25, 1993-95 CCH OSHD at p. 41,761.

[40]The standard states:

§ 1910.304 Wiring design and protection.

. . . .

(f) *Grounding.*

. . . .

(4) *Grounding Path.* The path to ground from circuits, equipment, and enclosures shall be permanent and continuous.

but that when missing grounding plugs were identified, the cord should be cut to prevent its use until it can be replaced.

CO Antonio admitted that he could not tell how long the fan plug had been broken, or even whether it might have broken on the day of the inspection. Antonio also acknowledged that he could not tell whether a supervisor would have had an opportunity to see the broken plug prior to the time he noticed it. Similarly, with respect to the pressure washer plug, we could find no evidence concerning how long the condition had been in existence, whether and when a supervisor might have visited the work area, or even whether and when that particular washer had been used.

We find that the Secretary has failed to establish the requisite employer knowledge. Morkovsky's claim that he did not know of the cited conditions is uncontroverted, and there is no evidence that any other supervisor had such knowledge. While the Commission has held that constructive knowledge may be found where the Secretary demonstrates that an employer's failure to discover violative conditions was due to a lack of reasonable diligence in inspecting its worksite, *Texas A.C.A., Inc*., 17 BNA OSHC 1048, 1050, 1993-95 CCH OSHD ¶ 30,652, pp. 42,525-26 (No. 91-3467, 1995), here there is simply no evidence concerning whether or when KWW inspected the electrical cords on its equipment. Nor has the Secretary offered "evidence to show what would constitute reasonable diligence under the circumstances." *See Centex-Rooney Construc. Co.*, 16 BNA OSHC 2127, 2129, 1993-95 CCH OSHD ¶ 30,621, p. 42,409 (No. 92-0851, 1994) (employer knowledge of faulty electrical switch not shown where record indicated that employer regularly conducted random checks and Secretary did not establish what would constitute reasonable diligence). Finally, in the absence of any evidence indicating how long the violative conditions had been in existence, we are unable to evaluate whether KWW could have known of them even if it had been reasonably diligent in inspecting its equipment. *See Ragnar Benson*, No. 97-1676, slip op. at 7 (September 27, 1999) (constructive knowledge not shown where lack of evidence of violation's duration precluded determination whether employer could have known of

condition with exercise of reasonable diligence). In view of these deficiencies in the evidence, we conclude that the Secretary has not established that KWW had constructive knowledge of the cited conditions, and vacate this item.

F. EQUIPMENT GROUNDING - 29 C.F.R. § 1910.304(f)(5)(v)[41] - Item 23

Judge Schwartz affirmed a serious violation for KWW's failure to ground the metal reflector tops of two lamps in the shipping area and six lamps in the sheet metal welding area as required by section 1910.304(f)(5)(v).[42] He assessed the proposed penalty of $700.

KWW does not deny that the cited lamps were ungrounded, but rather argues that the standard does not apply to them because they are not portable.[43] The record provides little

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[41]The standard states:

§ 1910.304 Wiring design and protection.

. . . .

(f) *Grounding.*

. . . .

(v) *Equipment connected by cord and plug.* Under any of the conditions described in paragraphs (f)(5)(v)(A) through (f)(5)(v)(C) of this section, exposed non-current-carrying metal parts of cord- and plug-connected equipment which may become energized shall be grounded.

. . . .

(C) If the equipment is of the following types:

. . . .

(8) Portable hand lamps.

[42]Judge Schwartz found it clear from the record that the cited lamps were "removable and therefore portable," and that their condition violated the standard. He also noted, however, that the standard "contains nothing to indicate that it applies only to portable equipment." While there are other bases upon which to establish applicability of the standard, the Secretary issued this item based solely on the alleged portability of the cited lamps. Accordingly, we do not consider whether the cited lamps would require the requisite grounding for any other reason.

[43]KWW defines portable as "easily or readily removable," citing *Webster's New Universal*

(continued...)

evidence upon which to assess portability. With respect to the two shipping department lamps, CO Antonio described them as "portable" and testified that they were equipped with ungrounded metal reflectors and two-wire type attachment cords. He added that they were "clamp type lamps," attached to a bracket five or six feet high on a wall, and were used when loading and unloading trucks. Antonio took no photos of the lamps, but his testimony is uncontroverted.

The six sheet metal department lamps were, according to Antonio, the same type as those used in the shipping department, but he admitted that these were attached to welding jigs. He further testified that although he did not handle any of the lamps, he believed that they were screwed on and would have to be unscrewed in order to be removed from the jigs. KWW sheet metal welding department supervisor Michael Moeller testified that he was familiar with the six cited lamps located in his department, and that they were "bolted to a jig." He agreed that the lamps were not portable; that they could not be picked up and moved around.

The portability element of the standard requiring that metal lamp parts be grounded appears to be based on the electrical shock hazard presented when such lamps are handled while plugged in and not otherwise grounded. CO Antonio described the two shipping department lamps as "portable" and "clamp-type." His testimony is unrebutted. The evidence pertaining to the six sheet metal welding department lamps, however, indicates that they were attached by screws to welding jigs. We conclude that the evidence establishes a violation with respect to the two shipping department lamps based on the unrebutted testimony of their portability, and affirm a violation on that basis. We also conclude, however, that the Secretary has failed to meet her burden to establish portability with respect

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[43](...continued)
Unabridged Dictionary, (2d ed. 1979), p. 1403.

to the six sheet metal welding department lamps that were bolted onto welding jigs. Accordingly, we vacate that portion of the citation item that pertains to these six lamps.

The judge assessed the proposed penalty of $700 for all eight lamps. As for the section 17(j) penalty factors, KWW's size and history are discussed above. We have little evidence upon which to assess the gravity of this violation, but note that the ungrounded lamps were fully exposed and located just five or six feet above the floor. The number of exposed employees, however, is significantly reduced based on our finding that the standard applies to only two of the eight cited lamps. Accordingly, we assess a penalty of $200.

III. ORDER

Based on the foregoing, we issue the following order with respect to the citation items addressed in this Decision:

WILLFUL CITATION

Items 1-171; 173-189; 191-263; 265-385

We affirm willful violations for the following Items: 1-9, 12-14, 16-21, 23-26, 29-33, 36, 38, 40, 42-43, 45-52, 55-71, 73-90, 92-103, 106-109, 111-113, 115-117, 119-136, 138-139, 141-148, 150-171, 173-189, 191-202, 204-205, 207-213, 215-222, 224-227, 229-263, 265-279, 281-287, 290-292, 294-295, 297-307, 309-310, 312-358, 360-363, 365-379, 381-385. We assess an aggregate penalty of $210,500 for these items.

We affirm other-than-serious violations for the following Items: 10, 15, 22, 34, 44, 72, 104, 114, 206, 223, 228, 296, 308, 359. We assess an aggregate penalty of $4,875 for these items.

We vacate the following Items: 11, 27, 28, 35, 37, 39, 41, 53, 54, 91, 105, 110, 118, 137, 140, 149, 203, 214, 280, 288, 289, 293, 311, 364, and 380.

Items 386(a) & (b) - We affirm other-than-serious violations for Items 386(a) and (b) and assess a combined penalty of $375.

Item 387 - We vacate this item.

Items 388(a) & (b) - We affirm a willful violation for Item 388(a) and assess a penalty of $2,500. We vacate Item 388(b).

Items 389, 391, 392, 394-396 - We affirm other-than-serious violations for Items 389, 391, 392, 394-396, and affirm a penalty of $750 for each of these six items.

Item 397(d) - We vacate this item.

SERIOUS CITATION

Item 9 - We vacate this item.

Item 11 - We vacate this item.

Items 16(a) & (b) and 17(a) & (b) - We affirm (without characterization) Items 16 and 17, and assess a penalty of $500 for each of them.

Items 18(a) & (b) and 19(a) & (b) - We affirm Items 18(a) and 19(a), for which we assess a combined penalty of $100. We vacate Items 18(b) and 19(b).

Item 22 - We vacate this item.

Item 23 - We affirm Item 23 and assess a penalty of $200.

/s/
Thomasina V. Rogers
Chairman

/s/
Stuart E. Weisberg
Commissioner

Dated: July 3, 2000

VISSCHER, Commissioner, concurring in part and dissenting in part:

I concur except with regard to the finding that Kaspar Wire Works's (KWW's) recordkeeping violations, other than those involving restricted work activity, were willful. I would classify all of KWW's recordkeeping violations in this case as other than serious.

"To prove a willful violation, the Secretary must show that the employer acted voluntarily, with either intentional disregard of or plain indifference to OSHA requirements." *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 318 (5th Cir. 1979).

Although the Secretary claims that KWW intentionally disregarded the recordkeeping requirements in order to evade inspections, the judge concluded that the evidence does not

support this contention.[44] His decision stresses the fact that despite the number of recordkeeping errors made by KWW on its 1988 and 1989 OSHA 200 logs, the 200 logs still yielded a LWDI *above* the national average. He also noted that during previous inspections of KWW and its affiliates subsidiaries, OSHA had reviewed both the 200 logs and the E-1 and first aid logs. As the judge observed, KWW thus had little reason to believe that it could have concealed injuries from the Secretary by recording them only in its first aid log. And, as the judge also concluded, "there is no evidence that Knezek, Little, or Price [the three KWW employees responsible for recordkeeping] had any specific knowledge of OSHA's recordkeeping requirements and consciously disregarded those requirements."

Unlike the judge, the majority now concludes that KWW did intentionally violate OSHA's recordkeeping standards. They do not support this finding with any record evidence of intent, nor do they attempt to explain why, if KWW was intentionally violating the law, it did not do so in a way that would have avoided a comprehensive inspection.

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[44]The Commission's second footnote in *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2155 n.2, 1991-93 CCH OSHD ¶ 29,962, footnote misplaced by publisher on p. 40,966 n.2 (No. 87-922, 1993) is a succinct explanation of the background here as well: "Until 1983, compliance with section 1904.2(a) and other recordkeeping regulations requiring the recording of injuries, illnesses, and lost workdays was generally enforced by grouping a number of failures to record as a single violation and proposed a penalty of $100 or less. In 1983, the Secretary began a practice of inspecting injury and illness records before deciding whether to inspect the workplace. OSHA Field Operations Manual Chapter III, section D.4 (April 18, 1983). If the records inspection showed that the lost-workday injury ("LWDI") rate of a workplace exceeded the national average for the industry, a comprehensive inspection was conducted. If the rate fell below the national average there was no inspection. *Id.* at section D.4.b. In 1986, the Secretary began enforcing the recordkeeping regulations much more aggressively in the belief that some employers were attempting to avoid comprehensive inspections by under-reporting occupational injuries and illnesses. He began issuing willful citations and proposing heavy penalties for failures to record a work-related illness or injury, or lost workday, particularly where substantial numbers of failures to record were alleged."

The majority also concludes that the violations (other than those involving restricted work activity) were willful because KWW was "plainly indifferent." As the Eight Circuit Court of Appeals recently observed, "[t]he point at which conduct becomes 'plainly indifferent' rather than simply negligent defies easy formulation." *McKie Ford, Inc. v. Secretary*, 191 F.3d 853, 856 (8th Cir.1999). Nonetheless, the courts and the Commission have insisted that something more than carelessness or negligence be shown. *Id.* ("There must be evidence of aggravating circumstances, apart from mere lack of diligence or adequate care, in order to satisfy the standard"); *Caterpillar, Inc. v. Herman,* 154 F.3d 400 (7th Cir. 1998) ("Whether it was a willful violation depended on whether it resulted from a conscious disregard of the regulation, or was merely careless"); *Beta Constr. Co.*, 16 BNA OSHC 1435, 1444,1993 CCH OSHD ¶ 30,239, p. 41,652 (No. 91-102, 1993)("In order to establish a willful violation, the Secretary must show more than simple lack of diligence or carelessness on the part of the employer"). "A willful violation is differentiated by a heightened awareness -- of the illegality of the conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference." *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987).

By finding that KWW was plainly indifferent, the majority has run roughshod over the distinction between willfulness and simple carelessness. They claim to find support in the fact that instructions for recording injuries and illnesses were printed on the front and back of the OSHA 200 form. But, even assuming that those instructions were clear regarding each injury, mere knowledge of the requirements of a standard or regulation does not establish that a violation was willful. *See Sal Masonry Contrac., Inc.*, 15 BNA OSHC 1609, 1612, 1991-93 CCH OSHD ¶ 29,673, p. 40,208 (No. 87-2007, 1992); *Wright & Lopez, Inc.*, 8 BNA OSHC 1261, 1265, 1980 CCH OSHD ¶ 24,419, p. 29,777 (No. 76-3743, 1980). To rely on the instructions printed on the OSHA form to prove willfulness is to make every recordkeeping violation willful. *See TWA v. Thurston,* 469 U.S. 111, 128 (1985) (rejecting willfulness based on mere awareness of statute).

The majority finds further support in the rate at which Kasper misrecorded injuries during 1988 and 1989 as compared with 1984. But, as the majority acknowledges, the record itself provides no explanation for this disparity. The majority has simply inferred a willful state of mind from the increased number of recording errors.

Indeed, the record in this case does not contain the type of evidence necessary to show heightened awareness of the illegality of the conduct. The Commission will find heightened awareness "where an employer has been previously cited for violations of the standards in question, is aware of the requirements of the standards, and is on notice that violative conditions exist." *Propellex* Corp., 18 OSHC 1677, 1684, 1999 CCH OSHD ¶ 31,792, p. 46,591-92 (No. 96-0265, 1999), quoting *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2209, 1991-93 CCH OSHD ¶ 29,964, p. 41,029 (No. 87-2059, 1993). KWW and its affiliates had been inspected eight times between 1982 and 1990, including several inspections of injury and illness records, but had not been previously cited for its recordkeeping practices, even though KWW acknowledges that records reviewed by the Secretary in previous inspections did contain errors. While the fact that KWW's recordkeeping was not cited in earlier inspections would not provide a defense to the current violations, the fact that the Secretary did not cite KWW previously no doubt reduced, rather than heightened, KWW's awareness that its recordkeeping did not comply with OSHA's standards.

Nor is this case similar to cases that have found "heightened awareness" from the fact that employees were exposed to visibly dangerous conditions. *See, e.g., Brock v. Morello Bros. Construction*, 809 F.2d 161, 164 (1st Cir. 1987)(referring to "instances in which unsafe conduct is so egregious, so life-threatening" that willfulness can be presumed "from the offender's knowledge of conditions"); *Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419 (D.C. Cir. 1983); (improper handling of highly explosive substances); *E.L. Davis Contrac. Co.*, 16 BNA OSHC 2046, 2052, 1994 CCH OSHD ¶ 30,580, p. 42,342 (No. 92-35, 1994)(untrained employees working in unshored, 22 foot-deep excavation without protective equipment). Unlike these

cases, it can hardly be argued that KWW's recordkeeping violations were somehow highly unsafe working conditions.

The majority decision departs from prior cases in another aspect as well. The Secretary cited KWW for 382 separate violations of section 1904.2(a). The Commission has upheld the Secretary's authority to cite each non-recorded or misrecorded injury or illness required by section 1904.2(a) on an "instance-by-instance" basis, so long as the multiple violations do not result from a single course of action. *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2172-73, 1991-93 CCH OSHD ¶ 29,962, pp. 41,005-07 (No. 87-922, 1993). In order to prove that these violations were willful, the Secretary must establish that KWW displayed a willful state of mind with regard to each violation. *See Monfort of Colorado, Inc.*, 14 BNA OSHC 2055, 2061, 1991-93 CCH OSHD ¶ 29,246, p. 39,185 (No. 87-1200, 1991)(finding willfulness dependent on employer's underlying state of mind at the time of the violation). I can think of no reason why this requirement should be eliminated simply because the Secretary has chosen the cite the violations on an instance-by-instance basis. Had the Secretary shown a consistent pattern of misrecording, then there might have been some basis for finding that a single state of mind - willfulness - characterized each of the individual violations. *See, e.g., Sanders Lead Co.*, 17 BNA OSHC 1197, 1202, 1993-95 CCH OSHD ¶ 30,740, p. 42,694 (No. 87-260, 1995). The record does not show that KWW was pursuing any sort of plan, however, and the random character of KWW's recordkeeping errors belies the suggestion that such a plan existed. Some injuries were recorded, some were not. There simply is no evidence here connecting a state of mind with the individual recordkeeping violations.

I recognize that KWW's recordkeeping practices during 1988 and 1989 resulted in a large number of errors. It is not likely that those errors would have occurred had KWW been reasonably diligent about complying with the recordkeeping regulation. The question, however, is whether the record supports the further finding that those recording errors resulted from something more than carelessness: that they resulted from conduct that can be characterized as willful. By finding KWW's recordkeeping violations here to be willful, the

majority has erased the distinction between carelessness and willfulness, and has allowed proof that establishes no more than constructive knowledge of the violations themselves to sustain a finding that the violations were willful.

Since I have concluded that this group of violations was not willful, it follows that I would assess a more nominal penalty than that assessed by the majority.

/s/
Gary L. Visscher
Commissioner

Date: July 3, 2000

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC DOCKET NO. 90-2775
KASPAR WIRE WORKS, INC.,	:	
Respondent.	:	

APPEARANCES: E. Jeffery Story, Esquire, Terry Goltz Greenberg, Esquire, Dallas, Texas, For the Complainant. Vic Houston Henry, Esquire, Lane Fletcher, Esquire, Dallas, Texas, For the Respondent.

Before: Administrative Law Judge Stanley M. Schwartz[1]

DECISION AND ORDER

This is a proceeding brought before the Occupational Safety and Health Review Commission (``the Commission'') pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (``the Act'').

The Occupational Safety and Health Administration (``OSHA'') conducted an inspection of Kaspar Wire Works, located just north of Shiner, Texas, from March 19, 1990, through September 14, 1990. The inspection resulted in the issuance of one serious citation and one willful/egregious citation; the citations together alleged 422 violations and the proposed penalties totaled $1,236,000.00. The hearing in this matter took place from June 29, 1992, through July 9, 1992, and additional testimony was taken on July 20, 1992. Both parties submitted post-hearing briefs.

Prior to the hearing, Judge Botkin granted Respondent's motion for partial summary judgment regarding the Secretary's citing the willful items on an instance-by-instance basis pursuant to the ``egregious'' penalty policy. The Secretary requested reconsideration of this ruling after the Commission's decision in *Caterpillar, Inc.*, 15 BNA OSHC 2153, 1991-93

[1] Although this case was heard by Administrative Law Judge E. Carter Botkin, it was reassigned to the undersigned for decision after the death of Judge Botkin. The parties were notified of the reassignment and no comment from either was received.

CCH OSHD ¶ 29,962 (No. 87-922, 1993). Based on that decision, the undersigned set aside the ruling as being contrary to intervening Commission precedent in an order dated June 13, 1994.[2] As a result, the penalties as originally proposed will apply to any penalty determination in regard to willful/egregious citation 2.

Willful/Egregious Citation 2 - Items 1-385

These items allege 385 willful violations of 29 C.F.R. § 1904.2(a) for failure to record occupational injuries and illnesses as required on OSHA Form No. 200 or the equivalent for calendar years 1988 and 1989.[3] The Secretary withdrew items 172 and 190 at the hearing, leaving for resolution 383 items. (Tr. 12; 873-74). It is clear from the record that these items were not recorded on the company's OSHA Forms 200 for 1988 and 1989, although they were recorded on its first aid logs for those years. *See* G-388-391, the OSHA 200 and 200-S forms for 1988 and 1989; the first aid logs are attached to the 200-S forms.[4] It is also clear that these items involved injuries or illnesses resulting in medical treatment and/or lost and/or restricted work days such that they were required to be recorded on the OSHA 200 forms.[5] *See* G-1-384, which consist of a Form E-1[6] for each cited instance together with documentation such as doctor and supervisor reports.[7] *See also* G-385-A-B, employee time and attendance records for 1988 and 1989. The issue to be resolved, therefore, is the characterization of the violations.

Background

Kaspar Wire Works (``KWW") makes formed metal products out of wire and sheet metal; most of its products are made to order, and the types of different items produced number in the tens of thousands. KWW employs about 800 workers

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[2]The same order denied the Secretary's request for reconsideration of Judge Botkin's ruling regarding Exhibit G-432 for the reasons stated therein.

[3]1904.2(a) provides as follows: ``Each employer shall ... (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable....For this purpose form OSHA No. 200 or an equivalent which is as readable and comprehensible to a person not familiar with it shall be used. The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200."

[4]Employers are required to provide an OSHA 200-S each year to the Bureau of Labor Statistics to report the recordable injuries and illnesses and employee hours worked for the previous year; the 200-S is used for statistical purposes, and in particular to determine the lost workday injury rate by industry, and while it is intended to show the totals from the OSHA 200 it does not, like that form, reflect individual incidents. *See* G-390-91.

[5]The nature of these instances is set out below, following the penalty determination discussion for these items.

[6]Form E-1, Employer's First Report of Injury or Illness, is a standard form used to report job-related injuries or illnesses for worker compensation purposes.

[7]With three exceptions, each exhibit corresponds to the item with the same number. G-190 corresponds to item 191, which alleges the same violation as withdrawn item 190, and G-172 corresponds to item 385. (Tr. 12; 873-74). In addition, G-264 corresponds to item 274, and as there is no exhibit supporting item 264 it must be vacated, leaving 382 items for resolution.

and is the largest of three sister companies at the Shiner location; Kaspar Electroplating Corporation (``KEC'') and Kaspar Die and Tool (``KDT''), the other two companies, have around forty and fifteen employees, respectively. The companies have grown substantially, from a total of about 250 employees in 1970 to the present number; in 1988, there were approximately 750 shop employees working in the three companies.

Jo Ann Knezek was hired as KWW's insurance clerk in 1970. Her responsibilities included receptionist and secretarial duties, accounts payable, health and worker compensation insurance, and maintaining the OSHA 200 forms and first aid logs. Knezek worked in the personnel department under the supervision of the personnel manager, Bill Chenault, from 1970 until July 1971, when Chenault left and was replaced by David Little. Little supervised Knezek until January 1989, when he retired and was replaced by Dan Price, the present personnel manager. Knezek's title changed to that of office coordinator in 1977 or 1978, although her duties remained the same, and in 1987 she became a part of management; however, until January 1991 she and the personnel manager were the only individuals in that department.[8] In January 1991 an assistant personnel manager was hired and that spring a nurse and assistant were hired to perform various functions, including maintaining the OSHA 200. In addition, Knezek now supervises fifteen employees.

At the time of the inspection, the practice was to send any employee with a work-related injury or illness at any of the three companies to a physician. Knezek used the supervisor's report of the incident, made on a form provided by the worker compensation insurer, to complete a Form E-1; a copy of the E-1 went to the insurer, and another copy was kept in the office. Knezek also used the supervisor's report to determine whether to record the incident on the OSHA 200 or the first aid log, and incidents for all three companies were recorded on the same forms.[9] After the first of each year Knezek used the OSHA 200 and first aid log to prepare an OSHA 200-S, which was reviewed and signed by the personnel manager. The OSHA 200's and first aid logs were kept in one binder and the E-1's in another in the personnel office.

OSHA's Corpus Christi office visited the companies several times from 1982 to 1988 pursuant to their appearance on the establishment inspection lists for those years; KWW was visited in 1982, 1983, 1984 and 1985, KDT in 1983, 1985 and 1988, and KEC in 1984 and 1985. On each visit the OSHA 200's for the two previous years were reviewed and the lost workday injury rate (``LWDI'') was calculated to determine if it was higher than the national average for the industry such that a comprehensive safety inspection was required. None of these visits resulted in a comprehensive safety inspection; however, because the LWDI was not considered in regard to companies appearing on the establishment lists for health inspections, all

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[8]The only exception was the period from September 1988 to January 1989, when Price was preparing to assume Little's duties and held the title of assistant personnel manager.

[9]Employees of KDT and KEC were so identified on the forms.

three companies had a comprehensive health inspection in 1985. KWW and KEC were cited for other conditions pursuant to the 1985 inspections, but none of the visits resulted in citations with respect to the OSHA 200's.

The subject inspection, which consisted of a comprehensive safety inspection of KWW and a comprehensive safety and health inspection of KEC, was the first comprehensive safety inspection to occur at any of the companies. Compliance Officer (``CO'') Nicke Antonio conducted the safety inspections, and, based on his findings, recommended the issuance of serious citations to KWW and KEC. He then transferred to another OSHA office, but, pursuant to his review of the OSHA 200's, referred the matter for further inspection to his area office. Donald Jones, the CO who continued the inspection, found a large number of incidents for 1988 and 1989 which were not recorded on the OSHA 200's, 385 of which were ultimately cited as willful violations. The cited items included eye injuries, lacerations, contusions, fractures, sprains, strains, dermatitis, burns, finger amputations and carpal tunnel syndrome; of these, eye, finger and hand injuries were the most prevalent.

The Contentions of the Parties

The Secretary contends the violations were willful based on the large number and obvious nature of the unrecorded incidents. He asserts that management either knew or should have known of the violations, and that the failures to record in this case were so blatant as to constitute either plain indifference to or conscious disregard of OSHA recordkeeping requirements. The Secretary also suggests that Respondent purposefully omitted injuries and illnesses from its OSHA 200's to evade inspections, especially in view of OSHA's practice up to 1991 to use the LWDI to determine if a comprehensive safety inspection was required.

Respondent contends the violations were not willful. It asserts that management had no knowledge that illnesses and injuries were not being properly recorded, particularly since OSHA had inspected its records a number of times and had had ample opportunity to discover any deficiencies but had never before cited the company or advised it of any problems with the OSHA 200's. It further asserts that although the cited incidents were not recorded on the OSHA 200's they were recorded on the company's first aid logs, and that the facts of this case preclude classifying the violations as willful based on the Commission's decision in *Kohler Co.*, 16 BNA OSHC 1769, 1994 CCH OSHD ¶ 30,457 (No. 88-237, 1994).

Based on the foregoing, the proper characterization of the violations must be determined by a close examination of the relevant evidence in this case, as follows.

The Relevant Evidence

Jo Ann Knezek appeared and testified. Her only experience before working for KWW consisted of a bookkeeping job for two years in which she had no duties relating to recording injuries and illnesses. She was the only person who recorded

injuries and illnesses at KWW up to the time of the inspection, and she had always used the same procedure.[10] Utilizing the supervisors' reports, she used her best judgment to decide how to record incidents; the ones she felt were serious or would result in missed days or restricted duty she put on the OSHA 200, and the rest she put on the first aid log. Knezek found out when incidents resulted in lost days by contacting the supervisor, payroll or the physician the employee had seen, and noted this on the document where the incident had been recorded originally. She did not transfer incidents from the first aid log to the OSHA 200, although she used both forms to a prepare a 200-S each year; the 200-S included the items on the OSHA 200 as well as those on the first aid log that involved lost workdays or that she felt were no longer first aid. Knezek knew the purpose of the OSHA 200, but not the 200-S; she agreed the forms requested basically the same information and did not know why she put all serious and lost workday incidents on the 200-S and not the 200. She said Little was the individual who had instructed her in these procedures and that no one else, including Price, had given her instructions in this regard. (Tr. 1450-57; 1461-62; 1467-76; 1484-89; 1495-97; 1500-02).

Knezek gave the OSHA 200's and first aid logs to Little, and to Price after Little left, to review with the 200-S after the first of each year; neither ever questioned her figures or changed them. She noted the 200-S forms for 1988 and 1989 were signed, while the 200 forms for those years were not, but said she was never told to sign the 200's. Knezek recalled records inspections prior to 1990, at which times she gave Little the binders containing the OSHA 200's, first aid logs and E-1's; she herself did not participate in the inspections. Knezek was never told until the 1990 inspection the OSHA 200's were being kept improperly and was unaware until then of the instructions on the back of the form; she knew there was writing on the back, but was following what Little told her. She did not recall seeing before the inspection anything like the recordkeeping guidebook CO Antonio left her. (Tr. 1457-67; 1474-77; 1484-85; 1489-92; 1496; 1500-09).

Knezek could not recall putting hand injuries on the OSHA 200 before the inspection, but said no one ever told her not to record such incidents. She agreed most of the items on the 200's for 1988 and 1989 were back injuries and that there were many hand, finger and other injuries on the first aid logs she did not put on the 200's. She also agreed that many of these injuries, including finger fractures and amputations, were not first aid, but said that at the time she was using her judgment and the limited information on the supervisor's reports; the doctor reports went directly to the insurer.[11] Knezek noted her worker compensation duties were very time consuming and that no one assisted her in 1988 and 1989. She also noted that after learning of the guidebook and instructions on the OSHA 200 she realized she could look up incidents to determine how to

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[10]The only times someone else might have recorded injuries were the two weeks she took her vacations each year. (Tr. 1485-86).

[11]Knezek stated that in one case in which the injury resulted in loss of fingers, the supervisor's report described the incident as ``squeezed fingers.'' (Tr. 1479-81).

record them, which she began doing after the inspection; she also began recording all incidents on the OSHA 200 and, at the end of the year, deleting those she believed were first aid based on the medical information she received. (Tr. 1457-61; 1465-85; 1492-96; 1503-04; 1507-08; 1511).

Dan Price also appeared and testified. His duties at KWW involve all areas of human resources, including responsibility for insurance and safety; he supervises Knezek and the personnel who currently keep the OSHA 200's. As assistant manager Price did not receive much training from Little; however, he familiarized himself with company policies and operations and gradually assumed Little's duties. Price became aware of the 200-S in January 1989, when Knezek gave him the 1988 form to review. He asked for the previous year's 200-S and compared the figures on the forms, which appeared accurate; he also verified the employee hours worked and then signed the 200-S and gave it to Knezek to mail. He did not verify the other figures on the form, and while he became aware of the OSHA 200's and first aid logs at some point and may have reviewed them before signing the 200-S forms for 1988 and 1989 he could not recall doing so. Price was unaware of any problems with the OSHA 200's until the inspection; at that time he instructed Knezek to begin recording all injuries and illnesses on the OSHA 200. He had not instructed her about the form before because he assumed the recordkeeping was already established and that there was no need for him to be involved in it. (Tr. 1543-45; 1551-53; 1556-60; 1565-71).

Price was a personnel manager for Tandy Corporation from 1970 to 1977, in which position he supervised the insurance clerks who prepared the OSHA 200's; he held vice president and president positions at Tandy from 1977 to 1986 and while he had overall responsibility for the insurance clerks most of this time he had very little involvement with OSHA 200's.[12] Price was aware of the necessity of keeping the OSHA 200's but was never instructed in them, and while he might have he could not recall reviewing or signing the forms at Tandy. He also could not recall reading an OSHA 200 or having specific knowledge about it before March 1990; however, he did read the 200-S forms before signing them in 1989 and 1990 and knew generally the purpose of both forms at that time. He remembered a folder with recordkeeping pamphlets in his credenza, the same credenza Little had used, but did not recall discussing recordkeeping with Little or reading the pamphlets before the inspection. Price noted that Knezek was in charge of worker compensation, that he never signed the E-1's, and that doctor reports went directly to the insurer although Knezek could obtain specific information if she needed it. He also noted the form used by supervisors to report injuries has been expanded, that the company now investigates serious incidents, and that the company nurse maintains medical files on all job-related injuries and illnesses. (Tr. 1545-50; 1554-69; 1577-81).

David Little testified he was responsible for taking care of all personnel needs at KWW during his tenure with the company, and that his prior experience consisted of teaching and serving as principal and superintendent of schools in Shiner;

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[12]From 1986 until 1988, Price was in a small manufacturing business consisting of himself and two others. (Tr. 1550-51; 1574-75).

he further testified that while Knezek took care of the worker compensation and injury and illness records he was ultimately responsible for these matters. Little was initially not very knowledgeable in recordkeeping; however, shortly after he began an OSHA inspector visited the site and told him and Knezek how to keep the records and after that time the same procedure was always followed. Knezek put serious injuries on the OSHA 200 and first aid on the first aid log, and they both participated in deciding the injuries to be reported on the 200-S, although Knezek did most of this; these included all items on the OSHA 200 and those on the first aid log which were no longer first aid. (Tr. 1982-92; 1997-2001; 2006-07; 2026).

Little described as recordable anything beyond first aid, such as lacerations, sprains, broken bones, finger amputations and head injuries. He then indicated that recordability depended on the severity of the injury and lost time, stating that sprains, rashes, punctures or injuries resulting in stitches could be first aid if the employee was medically taken care of and did not lose a full day's work; he further indicated restricted duty cases could also be first aid, depending on the injury, and could not remember if these were ever put on the OSHA 200. Little noted that every injury, even first aid, was treated by a doctor, and that all incidents were recorded. He also noted that the company insisted on follow-up visits when the treating doctor so advised, and that a worker put on a new job due to an injury could stay at the new job if he preferred; in his view, the company took very good care of employees and all incidents were properly recorded. Little indicated he had had some OSHA recordkeeping literature in his office but that he was not very knowledgeable in that literature, and he recalled no specific recordkeeping discussions with Knezek, Price, or Don Kaspar, the company president. (Tr. 1985; 1990-2022; 2034).

Little recalled six to ten OSHA visits to the Shiner location. On each occasion, he asked Knezek for the binder containing the OSHA 200's and first aid logs, which he referred to as the ``anatomy book,'' as well as the binder with the E-1's. All the OSHA inspectors were provided all the records, he answered any questions they had, and no inspector ever recommended any changes or told him his recordkeeping was deficient or that he should not have kept both the OSHA 200 and a first aid log. Little described as ``absurd'' the notion that KWW had concealed its records from OSHA, indicating if such had been the case the company would not have recorded everything and provided the records to the inspectors. He also pointed out that while he was not minimizing the importance of recordkeeping he had many demands on his time while he was with the company, that the volume of work was tremendous, particularly as the number of employees increased, and that he had relied on Knezek, who he considered very competent, to use her best judgment when recording injuries and illnesses. (Tr. 1988; 1999; 2013-15; 2022-35).

Discussion

To prove a willful violation, the Secretary must establish it was committed ``with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). As *Williams* further explains:

> A willful violation is differentiated by a heightened awareness - of the illegality of the conduct or conditions - and by a state of mind - conscious disregard or plain indifference. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Without such evidence of familiarity with the standard's terms, there must be evidence of such reckless disregard for employee safety or the requirements of the law generally that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it. It is therefore not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation.

Id. at 1256-57 and p. 36,589.

Based on the testimony set out above, there is no evidence that Knezek, Little or Price had any specific knowledge of OSHA's recordkeeping requirements and consciously disregarded those requirements. The Secretary nonetheless suggests, as noted *supra*, that Respondent deliberately omitted incidents from its OSHA 200's to evade inspections. Respondent, on the other hand, contends that OSHA's various inspections led it to believe it was in compliance with recordkeeping requirements. There was a plethora of evidence in this regard, all of which has been considered. Some of this evidence is cumulative and other is conflicting; accordingly, only the most significant is summarized below.

OSHA records of its visits to KWW and KEC from 1982 through 1984 reflect LWDI's ranging from .5% to 4.9%, which were below the national averages for the manufacturing industry for those years.[13] *See* R-1-5; R-9. In contrast, the LWDI's calculated during the 1985 inspections of KWW, KDT and KEC were 11.2%, 9.8% and 8.9%, respectively, and the parties stipulated that the 1984 national average LWDI was 4.7%.[14] (Tr. 532-34; 579; 609-12; 1975-76; R-6; R-8; R-21).

In addition to the foregoing, the evidence shows that some CO's had, in fact, looked at the company's E-1's and first aid logs in the previous records reviews, while others apparently looked only at the OSHA 200's. (Tr. 509-45; 579-82; 1200-16; 1225-28; 1239-41; 1292-96; 1384-87; 1796-1809; 1924-50; R-175). It is clear from the testimony of Nicke Antonio and Ann Fox, the CO who conducted the health inspection of KEC, that the E-1's and first aid logs were provided to them during their joint records review. (Tr. 562-67; 1899-1910; R-23-24). Further, Antonio's initial calculation of the LWDI from the 1988 and 1989 OSHA 200's was 4.5%, which was above the 4.2% national average. (Tr. 284-86). Mike Hunter, the area director of OSHA's Corpus Christi office, testified that his own calculation from only the 1988 OSHA 200 resulted in a very

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[13]R-2, an OSHA form letter to KWW dated May 7, 1982, reflects an LWDI for 1980 and 1981 of .5% and a national average of 5.2%; however, R-9, the CO's case file notes dated May, 6, 1982, reflects an LWDI of 4.9% for those same years.

[14]The LWDI calculated during the 1988 inspection of KDT was 2.7%. *See* R-37.

low LWDI.[15] (Tr. 1138; 1247-50). Regardless, there is simply no conclusive evidence that Respondent attempted to evade inspections by omitting incidents from its OSHA 200's. However, there is likewise no reason to conclude that the various inspections of its facilities led the company to believe it was in compliance with OSHA's recordkeeping requirements, as Respondent asserts, such that a willful characterization is unjustified. To the contrary, the record in this case shows the violations were willful. My reasons follow.

I note at the outset that the unrecorded incidents for 1988 and 1989 total 171 and 211, respectively, and that, based on the testimony of Mike Hunter and my own calculations, these incidents represent approximately 20% and 25% of the total number of employees for those years.[16] (Tr. 1182). I note also there are only thirty-two and forty-one incidents recorded on the OSHA 200's for 1988 and 1989, respectively, that these totals include four entries for KEC and two for KDT, and that there are no eye injuries and only one hand injury on the forms. *See* G-388-89. It is evident that the incidents which are recorded are the same types of injuries appearing on the first aid logs, *i.e.*, back strains, burns, pulled muscles, broken toes, a cracked arm, a hernia, a squeezed hand and carpal tunnel syndrome. It is further evident that many of the incidents on the first aid logs were obviously recordable, even from the brief descriptions in the logs, and that recordability was clearer still in light of the treatment received and lost workdays. *See* G-1-384 and G-390-91. Finally, it is evident the information on the supervisor's report from which Knezek prepared the E-1 was often sufficient to determine if the injury was recordable. *See, e.g.*, G-384; both the report and E-1 state three fingers on the right hand were severed.

Pursuant to the testimony of Knezek, Little and Price, none of these individuals had any actual training in OSHA recordkeeping or any specific knowledge of those requirements. Notwithstanding this lack of training, the undersigned finds it incredible that Little and Knezek, the individuals charged with responsibility for the OSHA 200's for seventeen and twenty years, respectively, could have believed they were properly recording injuries and illnesses. Anyone with reasonable intelligence and common sense, even without any training in OSHA recordkeeping, should have been able to determine with little effort the reportability of most of the incidents in this case, especially in view of the pamphlets Little had in his office and the instructions on the OSHA 200 itself. In this regard, it is noted that the front of the form discusses recordable cases and refers readers to the back for definitions and additional instructions. (Tr. 1183-87; G-431). It is further noted that both Knezek and Little appeared to have understood how to complete the 200-S form, and yet, implausibly, did not understand how to complete the OSHA 200.

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[15]Hunter calculated three different LWDI's for 1988, one from the OSHA 200, one from the 200-S and one which included all the omitted incidents; he recalled these LWDI's as being between 2-3%, 7-8% and 11-14%, respectively. (Tr. 1247-50).

[16]My total of the unrecorded incidents takes into account items 172, 190 and 264, noted *supra*.

As stated above, Respondent points to the Commission's decision in *Kohler Co.*, 16 BNA OSHC 1769, 1994 CCH OSHD ¶ 30,457 (No. 88-237, 1994), in support of its contention that the violations were not willful. However, *Kohler* is a very different case. Kohler was a much larger employer, and the 277 violations in that case represented a small percentage of its total employees. Moreover, all of Kohler's injuries and illnesses, including first aid, were recorded on an OSHA-approved computerized log, and most of the cited items had to do with the company's failure to track first aid cases which later became recordable. Significantly, the Commission specifically found that while some parts of Kohler's recordkeeping were flawed, others were excellent. *Id*. at 1776 and p. 42,064. In this case, the whole of Respondent's recordkeeping can only be described as fatally flawed. While the record does not show that injuries and illnesses were intentionally omitted from the OSHA 200's, the company did nothing to ensure the standard was met. Employers must take responsibility for their employees and provide a minimum of supervision to make sure that individuals charged with recordkeeping do not share the views expressed by Little and Knezek. Respondent provided no such supervision, and, based on the record, it is found that the company exhibited plain indifference to the standard.[17] Items 1-385 of citation 2 are affirmed as willful violations, except for items 172, 190 and 264, which are vacated for the reasons given *supra*.

Penalty Determination

The Secretary has proposed a penalty of $3,000.00 for each 1904.2(a) violation in this case. In assessing penalties, the Commission must give due consideration to the four criteria set out in the Act, that is, the gravity of the violation and the employer's size, history and good faith; the gravity of the violation is generally accorded greater weight than the other factors. *See Kohler* at 1777 and p. 42,065, and cases cited therein. The proposed penalties in this case must therefore be considered in light of these factors.

In regard to size and history, Respondent is a medium-sized employer with a relatively negligible history of previous OSHA violations. *See* R-6 and R-22, the citations issued as a result of the 1985 inspections. As to good faith, the record shows a profound neglect of OSHA recordkeeping before the inspection; however, this neglect is somewhat offset by the company's significant efforts to correct the deficiencies in its recordkeeping after the inspection, noted above.

In regard to gravity, the Commission has noted that while recordkeeping ``play[s] a crucial role in providing the information necessary to make workplaces safer and healthier," such violations are generally of low gravity because they bear on elements such as employee exposure to hazards and probability of accidents in only a ``most tangential way." *See Kohler* at 1772-73 and 1777, and pp. 42,060 and 42,065, and cases cited therein. However, the number of violations must be

[17]As stated in my order of June 13, 1994, G-432 has in no way been considered or had any bearing on my reaching this conclusion.

considered, particularly in relation to the number of employees, as well as the extent to which they exceed the definition of non-recordable first aid set out at 1904.12(e). *Id.* at 1777-78 and pp. 42,065-66.

In light of the foregoing, the violations in this case are of higher gravity than those in *Kohler* based on their willful characterization, their large number relative to the number of employees and their obvious nature. In weighing this factor with the others set out above, the undersigned notes that the company changed its entire recordkeeping system after the inspection. The undersigned also notes this is a medium-sized company, not a large corporation such as an automobile manufacturer, and that its resources are obviously limited. Finally, it is noted that the proposed penalty was based on the Secretary's determination that the failure to record injuries and illnesses was deliberate, a conclusion not supported by the record. Taking all these factors into consideration, I have attempted to arrive at a meaningful penalty that will have positive results on the safety and health of this company's employees and that will also meet the criteria of the Act. I have also attempted to follow Commission precedent with respect to arriving at an appropriate penalty; in this regard, I note *Kohler's* requirement that consideration be given to the extent to which the violations exceed the definition of non-recordable first aid. For all of these reasons, it is concluded that the proper range of penalties in this case is $250.00 for less serious incidents, such as sprains, strains, rashes and chipped teeth; $500.00 for more serious incidents, such as contusions, concussions, lacerations, burns and carpal tunnel syndrome; and $1,000.00 for the most serious incidents, such as eye injuries, amputations, punctures, fractures and crushing injuries.[18] This conclusion is based on my review of the E-1's, doctor reports and other documents supporting the citation items.

The 382 items for which violations have been found are grouped below according to the type of incident and body part injured. In this regard, it is noted that where the citation describes the incident more generally, such as a hand injury, and the supporting documentation describes it more specifically or accurately, such as a finger laceration, the item has been grouped according to the supporting documentation. It is also noted, with respect to item 203, that the citation describes the incident as a hand contusion; the supporting documentation describes it as a knee contusion and it has been grouped accordingly. The penalties assessed for each category are shown at the end of that category. The total penalty assessment for these items is $234,000.00.

Eye Injuries - (86 items, $1,000.00 each)

Foreign objects in eyes (including metal particles, sparks, glass, grit); chemical sprays/splashes in eyes; flash burns; being struck/poked in eye - Items 13, 17, 20, 28, 31-33, 37, 47, 51, 53-54, 56, 61-62, 64-65, 67-68,

[18]The Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (1990), dated November 5, 1990, is irrelevant to the penalty determination in this case as the citations were issued on September 18, 1990.

70, 73-74, 79-80, 86-88, 90, 92, 94, 105-06, 116, 120-21, 123-24, 126, 129, 133, 140-41, 143, 151, 157, 159-60, 163, 166, 170, 181, 186-87, 193, 200, 211, 216, 221, 234, 242, 249-50, 254-55, 266, 268, 271, 275-76, 280, 295, 301-02, 304, 311, 321, 323, 338, 347, 368, 372-73, 378-81

86 items x $1,000.00 = $86,000.00

Total - $86,000.00

Facial Area Injuries (5 items, $250.00 - $500.00 each)

Chipped/fractured teeth - Items 165, 314 ($250.00 each)

Facial burn - Item 183 ($500.00)

Facial laceration - Item 96 ($500.00)

Welding burr up nose - Item 46 ($500.00)

3 items x $500.00 = $1,500.00

2 items x $250.00 = $500.00

Total - $2,000.00

Head Injuries (10 items, $500.00 each)

Concussions - Items 19, 299

Contusions - Items 57, 240

Lacerations - Items 30, 43, 127, 214, 217, 362

10 items x $500.00 = $5,000.00

Total - $5,000.00

Back/Neck/Shoulder Injuries (39 items, $250.00 - $500.00 each)

Back contusion - Item 233 ($500.00)

Back sprains/strains - Items 1-2, 4-5, 7-9, 167, 173-80, 220, 237, 247, 265, 283-84, 312-13, 348, 355, 377, 385 ($250.00 each)

Back/neck sprain/strain - Item 246 ($250.00)

Neck sprains/strains - Items 6, 244, 308, 332, 361 ($250.00 each)

Shoulder contusions - Items 325, 349 ($500.00 each)

Shoulder sprains/strains - Items 3, 138 ($250.00 each)

3 items x $500.00 = $1,500.00

36 items x $250.00 = $9,000.00

Total - $10,500.00

Trunk Injuries (15 items, $250.00 - $500.00 each)

Chest/rib cage contusions - Items 15, 122, 218 ($500.00 each)

Chest/rib cage pulled/strained muscles - Items 22, 320 ($250.00 each)

Groin strain - Item 224 ($250.00)

Hernia - Item 366 ($500.00)

Hip contusion - Item 310 ($500.00)

Hip sprains/strains - Items 191, 256, 356 ($250.00 each)

Stomach strain - Item 286 ($250.00)

Trunk burns - Item 81 ($500.00)

Trunk contusion - Item 344 ($500.00)

Trunk laceration - Item 77 ($500.00)

8 items x $500.00 = $4,000.00

7 items x $250.00 = $1,750.00

Total - $5,750.00

Arm/Elbow Injuries (26 items, $250.00 - $500.00 each)

Arm burns - Items 29, 340 ($500.00 each)

Arm sprains/strains - Items 12, 36, 307, 350 ($250.00 each)

Arm/elbow contusions, tendonitis - Items 24, 35, 89, 104, 185, 228, 290, 330, 345 ($500.00 each)

Arm/elbow lacerations - Items 41, 59, 98, 108, 169, 198, 230, 239, 306, 329, 339 ($500.00 each)

22 items x $500.00 = $11,000.00

4 items x $250.00 = $1,000.00

Total - $12,000.00

Hand Injuries (37 items, $250.00 - $1,000.00 each)

Contusions, hematoma - Items 102, 107, 111, 119, 154, 168, 223, 296, 357 ($500.00 each)

Fracture - Item 248 ($1,000.00)

Lacerations - Items 14, 48, 66, 95, 145, 189, 197, 238, 251, 260, 316, 324, 328, 346, 364 ($500.00 each)

Punctures - Items 139, 188, 331, 382 ($1,000.00 each)

Sprains, strains - Items 34, 44, 49, 58, 63, 72, 125, 261 ($250.00 each)

5 items x $1,000.00 = $5,000.00

24 items x $500.00 = $12,000.00

8 items x $250.00 = $2,000.00

Total - $19,000.00

Wrist Injuries (22 items, $250.00 - $1,000.00 each)

Carpal tunnel syndrome - Items 343, 363, 365 ($500.00 each)

Contusion - Item 215 ($500.00)

Foreign body in/abrasion to wrist - Item 337 ($500.00)

Fracture - Item 112 ($1,000.00)

Inflammation, sprains, strains - Items 18, 23, 99, 118, 147, 158, 213, 263, 293, 367 ($250.00 each)

Lacerations - Items 52, 117, 128, 152, 202, 210 ($500.00 each)

1 item x $1,000.00 = $1,000.00

11 items x $500.00 = $5,500.00

10 items x $250.00 = $2,500.00

Total - $9,000.00

Finger Injuries (92 items, $250.00 - $1,000.00 each)

Amputations - Items 84, 225, 243, 269, 278, 384 ($1,000.00 each)

Avulsion - Item 369 ($500.00)

Contusions - Items 11, 146, 206, 226, 235, 267, 359 ($500.00 each)

Crushes - Items 16, 199, 205, 207-08, 258, 294, 298, 309, 317 ($1,000.00 each)

Dislocation - Item 287 ($500.00)

Foreign object in/infection to finger - Items 93, 148, 371 ($500.00 each)

Fractures - Items 55, 142, 144, 153, 171, 196, 222, 227, 281, 360 ($1,000.00 each)

Inflammation, sprains, strains - Items 297, 333-35 ($250.00 each)

Lacerations - Items 21, 39, 42, 50, 69, 71, 76, 97, 100-01, 109-10, 113, 115, 130-31, 134, 137, 149-50, 156, 161, 182, 195, 204, 229, 245, 259, 262, 270, 274, 277, 279, 282, 285, 288-89, 315, 318-19, 322, 326, 351, 358, 374 ($500.00 each)

Punctures - Items 10, 192, 303, 352, 376 ($1,000.00 each)

31 items x $1,000.00 = $31,000.00

57 items x $500.00 = $28,500.00

4 items x $250.00 = $1,000.00

Total - $60,500.00

Knee/Leg/Thigh Injuries (18 items, $250.00 - $1,000.00 each)

Knee contusions, hematoma - Items 82, 114, 132, 203, 209, 236, 327 ($500.00 each)

Knee laceration - Item 291 ($500.00)

Knee puncture - Item 91 ($1,000.00)

Knee/leg injury from standing/walking on concrete - Item 25 ($500.00)

Leg contusion - Item 40 ($500.00)

Leg lacerations - Items 60, 85 ($500.00 each)

Leg strain, pulled muscles - Items 273, 370 ($250.00)

Leg/thigh contusion/abrasion - Item 194 ($500.00)

Thigh laceration - Item 27 ($500.00)

Wood splinter in leg - Item 26 ($250.00)

1 item x $1,000.00 = $1,000.00

14 items x $500.00 = $7,000.00

3 items x $250.00 = $750.00

Total - $8,750.00

Ankle Injuries (6 items, $250.00 - $500.00 each)

Burns - Item 375 ($500.00)

Contusions - Items 155, 231 ($500.00 each)

Laceration - Item 272 ($500.00)

Sprains - Items 212, 336 ($250.00 each)

4 items x $500.00 = $2,000.00

2 items x $250.00 = $500.00

Total - $2,500.00

Foot Injuries (12 items, $500.00 - $1,000.00 each)

Foot contusions, hematoma - Items 45, 164, 232, 341 ($500.00 each)

Foot fracture - Item 162 ($1,000.00)

Foot puncture - Item 83 ($1,000.00)

Fractured/crushed toes - Items 184, 219, 252, 305, 342 ($1,000.00 each)

Toe contusion - Item 292 ($500.00)

7 items x $1,000.00 = $7,000.00

5 items x $500.00 = $2,500.00

Total - $9,500.00

Other Injuries (14 items, $250.00 each)

Insect stings/spider bites - Items 75, 78, 257, 300

Rashes, contact dermatitis - Items 135-36, 201, 241, 253, 353-54, 383

Other reactions to chemical substances - Items 38, 103

14 items x $250.00 = $3,500.00

Total - $3,500.00

Willful/Egregious Citation 2 - Items 386(a)-(b)

These items allege the annual summaries for the company's OSHA 200's for 1988 and 1989 were neither completed as required by 29 C.F.R. § 1904.5(b) nor certified as true and complete as required by 29 C.F.R. § 1904.5(c). It is clear from the record that the OSHA 200's were not completed as required, particularly since the figures on the forms were not totaled, and, more importantly, since the vast majority of injuries and illnesses for those years were not recorded on the forms at all; it is also clear that the OSHA 200's were not certified as true and complete as required. (Tr. 960-63; G-388-89). Items 386(a) and (b) are affirmed as willful violations, for the reasons set out in the preceding discussion. These items were grouped with a single proposed penalty of $5,000.00. In light of the factors above and the nature of this violation, it is concluded that the proposed penalty is excessive and that the assessment of a single penalty of $500.00 for these items is appropriate.

Willful/Egregious Citation 2 - Item 387

This item alleges Respondent did not provide access to medical records for the years 1987, 1988 and 1989 in violation of 29 C.F.R. § 1910.20(e)(3)(i), which states as follows:

> Each employer shall, upon request, and without derogation of any rights under the Constitution or the [Act] that the employer chooses to exercise, assure the prompt access of representatives of [OSHA] to employee exposure and medical records and to analyses using exposure or medical records.

The record shows that after CO Antonio reported a problem with the company's recordkeeping, Mike Hunter told him to make copies of the OSHA 200's, first aid logs and E-1's.[19] Antonio was not allowed to do so, and on April 17, 1990, OSHA served an administrative subpoena and medical access order on KWW to obtain its injury and illness records and supporting documentation, including medical records, for 1987-1989; as a result, Dan Price delivered to Hunter copies of the OSHA 200's, first aid logs, E-1's and supervisors' reports for those years.[20] When Hunter asked about the medical records, Price told him KWW did not have them and that they were kept by the treating physicians, who could not release them without employee authorization as they were confidential; most of the records were at the clinic of the Drs. Wagner, the company's primary medical provider.[21] Hunter told Price OSHA needed the records and to get them by whatever legal means necessary.[22] (Tr. 1100; 1105-06; 1253-60; 1341-45; 1588-94; 1621-22; R-28).

OSHA had not received any medical records by June, and on June 7 a subpoena was served on Drs. Wagner.[23] By about mid-June those doctors had provided the records they had, which comprised most of the incidents; however, there were about seventy-five cases which had been treated by other doctors, and on June 18 Hunter sent a letter to Price listing those incidents and advising him to furnish the records. Price contacted the Industrial Accident Board and learned it could not help him. He also called KWW's worker compensation insurers and followed up with letters on June 20 written by the company's counsel requesting the records; one insurer no longer had them and the other would not provide them. In late June and early July Price wrote to the various doctors, most of whom advised they could not provide the records without employee authorization. Price then wrote the employees shown in Hunter's letter, asking each to sign an authorization; some responded

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[19]This was evidently sometime between March 20 and 23, 1990. *See* R-23-24.

[20]Hunter thought the documents were delivered on April 23, the date shown on the subpoena, while Price believed this occurred two to three weeks later, due to the copying work required; the medical records KWW did have at that time were included with the other documents. (Tr. 1100; 1258; 1342-44; 1377; 1590-92).

[21]Price testified he had visited the clinic and been advised he could not have the medical records within a week of the service of the subpoena. (Tr. 1593-94). CO Jones contacted the clinic on April 28 and also requested the records; the clinic responded that they were confidential and privileged pursuant to the Texas Medical Practice Act. (Tr. 1015-16; 1351-54; 1593-94; 1597-98; R-66).

[22]Hunter repeated this request to the company a number of times. (Tr. 1260-63; 1338).

[23]On this same date OSHA also subpoenaed KWW's 1987-89 time and attendance records, copies of which were provided the agency within about three weeks. (Tr. 1349-41; 1594-96; R-34; R-64).

and others did not, and for those who did their authorizations were sent to the treating doctors. Price advised OSHA of his progress, and as medical records were received they were sent to the agency. Although there were some incidents for which medical records were never received, OSHA had most of those it sought by the time the citations were issued on September 18. (Tr. 1100-02; 1261-63; 1333-36; 1345-49; 1354-65; 1590-93; 1600-17; 1622; R-31-33; R-36; R-42-47; R-49-50; R-58; R-60; R-62-63; R-174).

Based on the foregoing, the record supports the finding of a willful violation of 1910.20(e)(3)(i). Respondent refused to provide copies of the injury and illness records it had at its facility until OSHA subpoenaed them. Moreover, while Price visited the clinic of Drs. Wagner and learned they would not release their medical records without employee authorization he made no further attempt to obtain those records; he also made no attempt to obtain the medical records of other doctors who had treated employees until he received Hunter's letter dated June 18. After that time, Price made reasonably diligent efforts to obtain the rest of the medical records. However, as the Secretary notes, these efforts occurred approximately three months after the beginning of the inspection and two months after the service of the first subpoena and the date by which the company knew that the treating doctors would not release their medical records without further action on its part. (Tr. 1621-22). *See also* the Secretary's post-hearing brief at p. 41. Under the circumstances of this case, a willful violation of the standard has been established.

The Secretary proposed a penalty of $10,000.00 for this item. Although the violation has been characterized as willful, the proposed penalty is excessive in light of the penalty determination factors discussed *supra* and the circumstances of this item. As noted above, the company did not provide any records to OSHA until they were subpoenaed and made essentially no effort to obtain employee medical records until after June 18. After that time, however, the company used reasonable diligence to secure the records in the seventy-five cases set out in Hunter's letter. Further, acquiring the records from the Wagner clinic would have been a very time-consuming undertaking, especially in view of the steps Price took to obtain the records of the remaining cases, and while this does not excuse the failure to act it at least provides a partial explanation. Finally, due to Price's efforts OSHA did receive most of the records it sought. For these reasons, it is concluded that the assessment of a penalty of $2,500.00 is appropriate for this item.

Willful/Egregious Citation 2 - Items 388(a)-(c)

These items allege that point of operation guards or devices were not provided or used on punch presses as required in violation of 29 C.F.R. § 1910.217(c)(1)(i). That standard states as follows:

> It shall be the responsibility of the employer to provide and insure the usage of ``point of operation guards'' or properly applied and adjusted point of operation devices on every operation performed on a mechanical power press.

In regard to 388(a), the record shows this item was based on CO Antonio's observing Dennis Kopecky operating an unguarded Diamond punch press, depicted in G-419, to punch holes in a small piece of sheet metal; Antonio and CO Jones opined the proximity of Kopecky's hands to the point of operation and the fact the press was operated by means of a foot pedal could have resulted in his fingers getting into the operation and being amputated, crushed or lacerated. (Tr. 823-44; 963-66). Dennis Kopecky's testimony indicates R-130-31 depict the same press except for the guard, which was put on after the inspection, and that the smallest items he punched on it measured about 20 by 20 inches. (Tr. 21-22; 29-36; 42-53). G-419 clearly shows the proximity of Kopecky's hands to the point of operation. This proximity and the foot pedal operation convince the undersigned that employees could have sustained finger injuries while using the press, a conclusion supported by the guard put on after the inspection and the warning sign on the guard advising workers to not use the press without the guard in place. *See* R-130-31. This item is affirmed.

In regard to 388(b), William Collins' testimony was that he had worked in the Bassick department since early 1988, and that in May of that year he was injured on a punch press that cycled unexpectedly. Collins had started up the press early that morning, had put a part on a 5 to 6-inch rod with his left hand and, holding the rod with his right hand, inserted the part into the die on the ram. The rod was designed to also remove the part was after it was pressed, which was done by stepping on a foot pedal, but this particular rod would not catch the part and when he tried to rake it out with his left hand the machine cycled again and smashed two fingertips; the injury required a number of stitches and he was off work six to eight weeks. Collins said the Bassick department was just starting up, and that although no one knew it until then the press was subject to double cycling when it was cold. He also said the press was unguarded, and that while it had hand restraints on it he did not know what they were and no one had told him to use them. Collins had not worked on the press since his accident. (Tr. 145-62). Based on the record, a violation is established. This item is accordingly affirmed.

As to 388(c), Leonard Marek testified he had worked on the cited press, a Niagara punch press, for eight years and never been injured. He noted the guard shown on the press in G-414-15, and said that although he used a metal rod to scrape some parts out through the small gap in the guard, as shown in the photos, the guard kept him from sticking his hand into the point of operation when the press was running. He also noted that while the guard was removed to change the die this was always done when the machine was turned off and that to remove the guard it had to be unbolted and the lamp in G-414-15 removed. Marek said that in the manual mode the aluminum buttons on either side of the machine both had to be pushed to operate the press, and that in the automatic mode there was a safety sensor that would cut it off. He also said the present guard on the press is better; it more fully encloses the equipment and is removed by unlocking it. (Tr. 98-127). Based on the record, the cited press was guarded at the time of the inspection, and while it would appear that the current guard is an improvement over the old one, the Secretary, in my view, has not shown the alleged violation. This item is vacated.

Violations have been found as to 388(a) and (b). As to the characterization of these items, I note first that KWW was cited pursuant to the same standard in 1985; the specific allegation was that an employee was working at an unguarded punch press and was exposed to serious finger injuries.[24] *See* R-6. I note also that a number of punch press injuries had occurred at the facility in 1988 and 1989, and that Paul Morkovsky, the company's safety and health compliance officer since February 1988, himself testified that the facility had had a ``rash'' of serious injuries of this type during this period. (Tr. 1722; 1736; 1895). *See also* items 389-396, *infra*. For these reasons, the violations were willful.

Turning to an appropriate penalty, items 388(a)-(c) were grouped with a single proposed penalty of $10,000.00; however, only items (a) and (b) have been affirmed. In considering the factors set out above, the gravity of these violations was high in light of the potential for serious injury and the fact that such injuries actually occurred. On the other hand, Paul Morkovsky testified that point of operation guarding training was given at the facility in January 1990 and that no punch press injuries had occurred since then. (Tr. 1895-96). On balance, I conclude that a single penalty of $5,000.00 is appropriate for items 388(a) and (b).

Willful/Egregious Citation 2 - Items 389 and 391-396[25]

These items allege that the company did not report punch press point of operation injuries occurring during 1987, 1988 and 1989 as required, in violation of 29 C.F.R. § 1910.217(g)(1). That standard provides as follows:

> *Reports of injuries to employees operating mechanical power presses.* The employer shall, within 30 days of the occurrence, report to ... [OSHA], all point of operation injuries to operators or other employees.

It is clear from the record that G-386, G-71, G-84, G-207, G-222 and G-358, copies of E-1's prepared by the company in 1987, 1988 and 1989, establish the punch press point of operation injuries alleged in items 389, 391, 392, 394, 395 and 396, respectively; specifically, G-386 shows an 8/24/87 injury to Veronica Kurtz, G-71 shows a 5/25/88 injury to William Collins, G-84 shows a 6/14/88 injury to Kevin Madden, G-207 shows a 2/24/89 injury to Rosalind Franklin, G-222 shows a 3/27/89 injury to Mary Ann Hubbard, and G-358 shows an 11/15/89 injury to Barbara Koliba.[26] It is also clear, based on the testimony of Mike Hunter and G-423, copies of the company's reports of mechanical press point of operation injuries to OSHA in 1987,

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[24]This citation was affirmed by Judge Botkin on April 11, 1988. *See Kaspar Wire Works, Inc.*, 13 BNA OSHC 1785, 1987-90 CCH OSHD ¶ 28,198 (No. 85-1060, 1988).

[25]The Secretary withdrew item 390 at the hearing. (Tr. 12).

[26]Although the Secretary introduced an Exhibit G-387 in support of item 393, G-387 is not in the record; item 393 must therefore be vacated for lack of proof. (Tr. 1263-71). As to item 396, this item was not addressed at the hearing; however, the record nonetheless establishes the alleged injury. (Tr. 77-86; 1263-80; G-358). *See also* Respondent's post-hearing brief at pp. 101-02.

1988 and 1989, that the injuries described in items 389, 391, 392, 394, 395 and 396 were not reported as required; in this regard, I note that KWW reported only one injury in 1987 and two in 1989. (Tr. 1263-80).

Dan Price testified that he did not know there was a requirement to report mechanical press point of operation injuries until the summer of 1989, that his reports in June and October of 1989 were after he learned of the requirement, and that while he did not report the injury occurring in November 1989 that failure was inadvertent. (Tr. 1892-93; G-423). This testimony is no defense against a finding that the violations were willful; to the contrary, the record shows KWW was cited pursuant to the same standard in 1985.[27] *See* R-6. Items 389, 391, 392, 394, 395 and 396 are affirmed as willful violations, and items 390 and 393 are vacated for the reasons above.

A penalty of $4,000.00 was proposed for each of these items. In light of the factors discussed above, I conclude that the assessment of a penalty of $1,000.00 each for items 389, 391, 392, 394, 395 and 396 is appropriate.

Willful/Egregious Citation 2 - Items 397(a)-(d)

These items allege three instances of spot welders and one instance of a press welder in which the equipment was not guarded to protect against the operators' fingers being under the point of operation in violation of 29 C.F.R. § 1910.255(b)(4).[28] That standard provides as follows:

> All press welding machine operations, where there is a possibility of the operator's fingers being under the point of operation, shall be effectively guarded by the use of a device such as an electronic eye safety circuit, two hand controls or protection similar to that prescribed for punch press operation, § 1910.217 of this part.

As to 397(a), the basis of this item was OSHA industrial hygienist Marianne McGhee's observation of employee Tommy Deberry using a spot welder on July 17, 1990; McGhee was conducting an ergonomics review of the facility, and G-421 is the video she made of her observations. (Tr. 938-42; 1022-24). McGhee testified she looked at spot welders and saw Deberry using one in the sheet metal department, as shown in G-421. He finished welding and then began filing the electrodes, the points that weld parts together, which were about 2 inches apart based on her later measurement; McGhee was about 15 feet away at the time, and estimated the file was 12 to 16 inches long and that Deberry's hands were 3 to 4 inches from the electrodes. She said his foot was near the foot pedal and that she did not see him turn off the welder before beginning filing; however, she did not know where the power source was and said he could have turned it off. (Tr. 1425-47).

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[27]This citation was vacated in Kaspar Wire Works, Inc., 13 BNA OSHC 1785, 1987-90 CCH OSHD ¶ 28,198 (No. 85-1060, 1988); however, this was due to Judge Botkin's finding that while the violation occurred OSHA did not comply with the statute of limitations.

[28]These items originally alleged violations of 1910.252(c)(2)(iv). At the hearing, the Secretary moved to amend the items to allege violations of 1910.255(b)(4) because revisions to the regulations between July 1989 and July 1990 had resulted in the standard being renumbered. Respondent objected, and Judge Botkin reserved on the motion. (Tr. 59-62; 674-86; 816-22; 950-59). It is clear the language of the previous 1910.252(c)(2)(iv) is exactly the same as the current 1910.255(b)(4). There is no prejudice to Respondent, and the motion to amend is granted.

Michael Moeller has worked at KWW since 1979; he began as a spot welder and has been a supervisor in the sheet metal department since 1988. He testified that filing the electrodes on spot welders is a common event which can occur four to five times an hour, depending on what is being welded. He further testified most of the spot welders are operated by foot pedal, that the power switches to such welders are on their fronts or sides, and that the policy since he has been a supervisor is to turn off the power before filing the electrodes. (Tr. 1671-76; 1713-14).

In light of the foregoing, the Secretary has not demonstrated employee exposure to the alleged hazard. McGhee admitted Deberry could have turned the spot welder off before beginning to file the electrodes, Moeller testified this had been the company's policy since 1988, and the Secretary presented no further evidence in support of his allegation. This citation item is vacated.

As to 397(b) and (c), two employees testified in regard to their use of spot welders at the facility and the Secretary indicated their testimony related to item 397. (Tr. 55-65; 131-44). However, the Secretary never specifically identified either at the hearing or in his post-hearing brief the sub-items to which their testimony related. Moreover, it cannot be determined from their testimony and the language of the citation which sub-item relates to which employee. Based on the record, items 397(b) and (c) are vacated for lack of proof.

As to 397(d), the basis of this item was Stephen Nobles' November 16, 1989, injury on a press welder. Nobles testified he was welding a newspaper rack part, specifically, a hinge onto a lid, in a press welding machine. The job required him to place his fingers in between the jaws of the welding equipment to straighten the hinge and then hold the piece in place with his fingers in close proximity to the jaws, and when he inadvertently stepped on the machine's foot pedal the jaws closed on both thumbs; the right was only nicked but the left was broken in several places and required pinning and numerous stitches, which resulted in Nobles being off work for four months and a twenty-five percent disability in the use of his thumb. Nobles said there were no guards or hand restraints on the machine to keep fingers out of the operation and that it was in the same condition at the time of the inspection. (Tr. 244-46; 252-55). The testimony of Nobles and G-360, the E-1 and other supporting documentation regarding his injury, establish the alleged violation.

A violation of the standard has been found as to item 397(d), and the violation is properly characterized as willful in light of the serious nature of the hazard, the fact the welder was still unguarded at the time of the inspection, as well as the fact that Respondent was previously cited pursuant to the same standard in 1985. *See* R-6.[29] A penalty of $10,000.00 has been

[29]Although that citation had to do with spot welders and was vacated after a hearing before a Commission administrative law judge, it is clear Respondent had notice of the applicability of the standard to the subject press welder. *See Kaspar Wire Works, Inc.*, 1986-87 CCH OSHD ¶ 27,788 (No. 85-1060, 1986).

proposed for items 397(a)-(d). Due to the gravity of item 397(d) and the vacation of items 397(a)-(c), it is concluded that a penalty of $2,500.00 is appropriate for item 397(d).

Serious Citation 1 - Items 1(a)-(b)

These items allege violations of 29 C.F.R. § 1910.23(d)(1)(i), which provides as follows:

> Every flight of stairs having four or more risers shall be equipped with standard stair railings or standard handrails ... [o]n stairways less than 44 inches wide having both sides enclosed, at least one handrail, preferably on the right side descending.

The record shows that there were three stairways without handrails at the facility at the time of the inspection; one was in the sheet metal paint department and was basically a ramp with a six-riser stairway in the middle, while the other two were in the wire paint department and were essentially identical four-riser stairways. There are no photos of the sheet metal paint department stairway, but those in the wire paint department are shown in G-404 and R-67-69 and R-71.[30] (Tr. 291-96; 660-70; 701; 1742-46). CO Antonio testified that employees could have fallen and sustained sprains or broken bones when using the stairways. (Tr. 293-95). Respondent presented nothing in defense of 1(a), the sheet metal paint department stairway, and this item is affirmed as a serious violation. In regard to 1(b), the wire paint department stairways, Antonio conceded on cross examination that the stairways were actually 44 inches wide and that the standard did not apply to them. (Tr. 620-28). Based on this testimony, the stairways in the wire paint department did not violate the standard and item 1(b) is vacated. A total penalty of $600.00 was proposed for items 1(a) and 1(b). As 1(b) alleges two violative conditions and has been vacated, a penalty of $200.00 is appropriate for item 1(a).[31]

Serious Citation 1 - Item 2

This item alleges a violation of 29 C.F.R. § 1910.94(a)(6)(iii), which states as follows:

> The air for abrasive-blasting respirators shall be free of harmful quantities of dusts, mists, or noxious gases, and shall meet the requirements for air purity set forth in ANSI Z9.2-1960. The air from the regular compressed air line of the plant may be used for the abrasive-blasting respirator if ... an automatic control is provided to either sound an alarm or shut down the compressor in case of overheating.

CO Antonio testified there was an abrasive blasting booth in the refurbishing area of the facility and that he observed no alarm or automatic shutoff inside or outside the booth or on the air compressor, which was in another room, that would alert employees or shut down the compressor if it overheated; he said the condition was a hazard because the compressor could

[30]The guardrails in R-67-69 and R-71 were not there at the time of the inspection. (Tr. 1746-47).

[31]The penalty determination factors set out above have been considered in arriving at any penalties assessed for serious violations.

overheat and cause its lubricating oils to break down, which could expose the person in the booth using the respirator to carbon monoxide. (Tr. 296-302; 701-14; 827-28; R-405-06).

Jonathan Petru, the maintenance department supervisor at KWW, testified that the compressor that feeds the respirator hood used in the abrasive blasting booth has an automatic shutoff on it so that if the oil heats above a certain temperature the compressor shuts off and has to be manually restarted. He further testified that the compressor was in the same condition at the time of the inspection, and that while the reset button is easily visible the shutoff mechanism is not because it is inside a control box on the compressor. (Tr. 1623-24; 1630-34; 1645-48).

Based on the testimony of Petru, which the Secretary did not rebut, there was no violation of the cited standard. This item is accordingly vacated.

Serious Citation 1 - Item 3

This item alleges a violation of 29 C.F.R. § 1910.106(d)(2)(i), which covers the storage of flammable and combustible liquids and provides as follows:

Only approved containers and portable tanks shall be used.

CO Antonio testified he saw employees in the silkscreen area using unapproved plastic jugs to transport inks, paints and thinners from large storage containers to their work areas; the large containers were identified as holding flammable liquids and two thinners, MEK and MIK, had flashpoints of 24 and 73 degrees Fahrenheit, respectively.[32] Antonio said the containers could have caused spills and, due to ignition sources such as electrical outlets, burn injuries; the containers did not have the spring-loaded enclosures that safety containers have which prevent spills and also could have ruptured if a fire had occurred. (Tr. 302-06; 714-20).

Respondent contends that the subject standard applies only to the storage of flammable and combustible liquids and that it did not violate the standard because of the exception set out at 1910.106(d)(1)(ii)(c), which exempts the following:

> Flammable or combustible paints, oils, varnishes, and similar mixtures used for painting or maintenance when not kept for a period in excess of 30 days.

In support of its contention, Respondent presented the testimony of Linda Mullins, a lead person in the silkscreen department at the time of the inspection and currently the assistant supervisor in that area. She testified that ink, cleaners and thinners were put into small plastic containers and used out on the floor, and that while the cleaners and thinners were used during the day and then disposed of the ink could be stored in the containers for months. (Tr. 1652-63).

[32]MEK is methylethylketone. (Tr. 303).

Based on the record, the Secretary has shown a violation. While paragraph (d) of the standard specifically states that it applies to the storage of flammable or combustible liquids and nowhere discusses the transporting of such materials, Mullins herself testified inks could be stored in the plastic containers for months. Moreover, it is clear from Antonio's observations and the discussion in regard to item 4, *infra*, that the inks were flammable. Finally, while Antonio's primary concern was the transporting and possible spills of flammable materials his testimony indicates he was also concerned about their storage. This item is affirmed as a serious violation.

A penalty of $600.00 was proposed for this item. Since the alleged violation went to both the transporting and storage of inks and other flammable materials and the citation has been affirmed only as to the storage of inks, I conclude that a penalty of $200.00 is appropriate for this item.

Serious Citation 1 - Item 4

This item alleges a violation of 29 C.F.R. § 1910.106(d)(3)(ii), which governs the design and construction of fire resistant storage cabinets and states as follows:

> Storage cabinets shall be designed and constructed to limit the internal temperature to not more than 325 degrees F. when subjected to a 10-minute fire test....Cabinets shall be labeled in conspicuous lettering ``Flammable - Keep Fire Away."

CO Antonio testified that there were approximately 150 gallons of flammable materials stored on top of and inside a wood cabinet in the silkscreen area; the materials included paints, inks and MEK, and the cabinet was unapproved because it had no warning signs and the walls were less than a half inch thick. Antonio said the cabinet was a hazard because if a fire had occurred it could have consumed the cabinet and spread to the contents inside. (Tr. 306-09; 720-28; 828-29).

Based on the foregoing, the cabinet violated the standard. It was used to store flammable materials, did not have any warning signs and was not made of one-inch-thick wood as required. *See* 1910.106(d)(3)(ii)(a)-(b). This item is affirmed as a serious violation. The Secretary proposed a penalty of $600.00 for this item. In view of Linda Mullins' testimony that the wood cabinets had been disposed of and that materials are now stored in metal cabinets such as those shown in R-72-73, a penalty of $500.00 is appropriate for this item. (Tr. 1661-64).

Serious Citation 1 - Item 5

This item alleges a violation of 29 C.F.R. § 1910.107(e)(9), which provides as follows:

> Whenever flammable or combustible liquids are transferred from one container to another, both containers shall be effectively bonded and grounded to prevent discharge sparks of static electricity.

CO Antonio testified that thinners such as MEK and MIK were kept in large drums in both the wire paint and sheet metal paint departments and transferred into other containers for the purpose of mixing paint and cleaning equipment; the drums were not grounded and bonded as required, and there were also no bonding straps for bonding the smaller containers. Antonio said the condition was hazardous because transferring the liquids could have resulted in static electricity and, consequently, a fire and burn injuries. (Tr. 316-23; 728-35; G-404).

Paul Morkovsky testified there was a grounding bar behind the drums shown in G-404, the wire paint department, and that while he thought some of the drums were grounded at the time of the inspection they were not all grounded and bonded. He offered his opinion that the condition did not represent a significant hazard, but noted that all the drums had since been grounded and bonded. (Tr. 1747-52).

Based on the foregoing, a violation of the standard has been established. Morkovsky's opinion that the condition was not a significant hazard is unpersuasive in light of the language of the standard and Antonio's testimony, and this item is accordingly affirmed as a serious violation. The Secretary proposed a penalty of $700.00 for this item. In view of the evidence that the drums are now grounded and bonded, a penalty of $600.00 is appropriate for this item.

Serious Citation 1 - Item 6

This item alleges that Respondent did not have a lockout/tagout program in violation of 29 C.F.R. § 1910.147(c)(1), which provides as follows:

> The employer shall establish a program consisting of an energy control procedure and employee training to ensure that before any employee performs any servicing or maintenance on a machine or equipment where the unexpected energizing, start up or release of stored energy could occur and cause injury, the machine or equipment shall be isolated, and rendered inoperative, in accordance with paragraph (c)(4) of this section.

Respondent does not dispute that it was required to comply with the standard, but contends, rather, that it had a lockout/tagout program at the time of the inspection. In this regard, Paul Morkovsky testified he developed a draft program based on the one set out in the standard and sent it to supervisors around the first of March 1990, and that the program, R-56, was finalized on March 20. He further testified that while he did not know the exact date, the program was in place in the maintenance department sometime in March because John Petru, the maintenance supervisor, had begun working from the draft and educating his employees. Morkovsky said the program was greatly expanded later that year after he and the company's training officer went to a lockout/tagout course offered by the Texas Safety Association. (Tr. 1752-55).

In view of the foregoing, R-56 should have been available during CO Antonio's inspection. However, Antonio specifically testified he did not see R-56 while at the facility and that when he asked Morkovsky if he had developed a

lockout/tagout program Morkovsky told him he had not. (Tr. 323-27; 735; 739-43). Moreover, John Petru testified that while the lockout program was implemented sometime around the inspection he could not remember if it was before or after, and Stephen Nobles, who worked as a welder in the sheet metal department, testified that to his knowledge there was no such program until shortly before he left the company in April 1991. (Tr. 258-60; 1628-29). Finally, while other employees testified about locking out equipment they did not specify when the facility's lockout program was implemented. (Tr. 30-31; 44-45; 111). Based on the record, a serious violation of the standard has been established. The proposed penalty of $700.00 is reduced to $600.00 in light of the evidence that the company now has a lockout program.

Serious Citation 1 - Item 7

This item alleges a violation of 29 C.F.R. § 1910.176(b), which states as follows:

> Storage of material shall not create a hazard. Bags, containers, bundles, etc., stored in tiers shall be stacked, blocked, interlocked and limited in height so that they are stable and secure against sliding or collapse.

CO Antonio testified he saw silkscreens stored on shelving up above the sheet metal office such that they could have fallen and struck employees, resulting in injuries such as lacerations or concussions; the screens were stored vertically side by side, as shown in G-407, and one of them, which Antonio circled, was on the end of the shelving and appeared ready to fall. (Tr. 327-33; 743-48). Linda Mullins testified that employees accessed the area daily to put up and remove screens, that the circled screen in G-407 looked like it was not braced properly, and that the shelves now have wire around them, as shown in R-74-75, to keep the screens from falling. (Tr. 1664-67). Based on the record, a serious violation of the standard has been shown, and this item is affirmed. The Secretary's proposed penalty of $300.00 is reduced to $200.00 in light of the company's correction of the condition.

Serious Citation 1 - Item 8

This item alleges a violation of 29 C.F.R. § 1910.212(a)(1), which provides as follows:

> One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks.

CO Antonio testified he saw an employee operating a Strippit punch press with the interlock switches inside the access doors overridden with rubber bands, as shown in G-408-09; the switches were designed to shut off the press when the doors were opened and if the operator had done so for some reason, such as the machine overheating, he could have gotten his hands into the rotating turret and suffered lacerations, broken bones or finger amputations. Antonio said the broken guard on the foot

pedal shown in G-410 was an additional hazard because the operator could have inadvertently stepped on it and activated the press. (Tr. 333-41; 749-58).

Jonathan Petru testified that although the purpose of the switches is to keep employees from getting into moving parts the press is operated with the doors closed and he was unaware of any problems with it overheating. He further testified the switches on the press are overridden with rubber bands during maintenance so the operation can be observed and indicated this was the reason for the cited condition. He said the rubber bands should have been removed after the maintenance, and that to his knowledge the condition had not recurred since the inspection. (Tr. 1634-40; 1648-50). Paul Morkovsky testified the access doors were opened to maintain the press and change punches, that no one had ever complained about it overheating, and that there was no advantage in operating it with the door open. He further testified that the broken guard on the foot pedal was not a hazard because the pedal's only function is to operate the jaws used to hold parts in place and they open only a quarter of an inch. (Tr. 1755-61; R-79-81).

Based on the record, the Secretary has not demonstrated employee exposure to the cited hazard. It is clear that the purpose of the interlock switches is to keep employees from getting into the rotating turret behind the access doors. However, Respondent's witnesses testified the press was operated with the doors closed and Antonio conceded this was the case when he was there and that the doors themselves acted as barriers. (Tr. 749; 756). Moreover, while Antonio believed the doors could have been opened due to the press overheating Respondent's witnesses indicated this had not occurred. Finally, although the record shows the doors were also opened to change dies there is nothing to indicate this ever happened with the press operating; to the contrary, it would appear based on Petru's testimony that the rubber bands were left on the switches as an oversight after maintenance had been performed on the press, and Antonio conceded this could have been the case. (Tr. 750). In regard to the broken guard on the foot pedal, Morkovsky's testimony must be credited over that of Antonio because other than its operating the clamp Antonio appeared unsure as to its function. (Tr. 753-54). This item is vacated.

Serious Citation 1 - Item 9

This item alleges a violation of 29 C.F.R. § 1910.212(a)(3)(ii), which provides as follows:

> The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

The basis of this item was a press brake in the sheet metal department which injured operator Adolph Koncaba on August 8, 1988 and June 5, 1989. (Tr. 905-20; G-113; G-269). Adolph Koncaba testified that on both occasions he was operating the same press brake to press parts, which involved putting the parts in the press manually and holding them there

and then pushing the foot pedal to operate the press, and inadvertently got his fingers into the point of operation; the 1988 injury resulted in a laceration to one finger which required a number of stitches, while the 1989 injury caused a fingernail on one hand to be mashed off and the index finger on the other hand to be severely mashed, resulting in medical treatment, time off of work and a permanent deformity of the mashed finger.[33] Koncaba said there were no light curtains, hand restraints or point of operation guards on the press brake then, and that guards could not be used due to the way the metal was formed. He also said that within six months of the 1989 injury the press brake was equipped with two-hand buttons that kept the operator's hands out of the point of operation; however, they could not be used for large parts, which required holding onto the part with his hands 4 to 6 inches from the point of operation and using the foot pedal to press the part. Koncaba began working on a punch press shortly after that time and has not worked on the press brake since then. (Tr. 220-42).

Respondent contends that the Secretary has not shown a violation because Donald Jones, the CO who recommended this item, had no personal knowledge of the press brake. Jones did, in fact, testify he had no personal knowledge of the press brake and that the citation was based on Koncaba's statements and the E-1's and other supporting documentation of his injuries. (Tr. 1039-46). I find that Koncaba's testimony together with G-113 and G-269 establishes the alleged violation. Koncaba stated there was no guarding on the press brake before his injuries, that the two-hand buttons installed after his 1989 injury could not be used when pressing large parts, and that during such jobs his hands would be 4 to 6 inches from the point of operation. He also stated the press brake was in the same condition at the time of the inspection. (Tr. 234-42). This testimony clearly demonstrates the press brake violated the standard, and Koncaba's opinion it could not be guarded does not, standing alone, show compliance was infeasible. This item is affirmed as a serious violation, and the Secretary's proposed penalty of $900.00 is assessed.

Serious Citation 1 - Item 10

> This item alleges a violation of 29 C.F.R. § 1910.213(i)(1), which applies to bandsaws and states as follows:
>
> All portions of the saw blade shall be enclosed or guarded, except for the working portion of the blade between the bottom of the guide rolls and the table.

CO Antonio testified he saw a bandsaw in the maintenance department which was not guarded as required; the bandsaw had a guard on it which could be adjusted up and down depending on the thickness of the stock to be cut, but the lower part of the guard was gone, leaving about 2 inches of blade above the guide rollers exposed, as shown in G-411. Antonio said the operator's hand could have slipped while using the saw and been lacerated by the blade. He did not recall seeing a push

[33] Although Koncaba testified these injuries occurred in 1987 and 1988, it is clear from G-113 and G-269, the E-1's and other supporting documentation of these incidents, that they actually took place in 1988 and 1989.

block, but noted the purpose of such a device is to create a barrier between the operator's hands and the exposed portion of the blade below the guide rollers when pushing smaller stock through the blade. (Tr. 341-46; 758-62).

Based on the foregoing, a serious violation of the standard has been shown. In defense of this item, Respondent presented the testimony of Kevin Willhoite, an employee of the company from 1988 until April 1990 who used the saw for carpentry work. However, Willhoite testified only that the same guard had been on the saw when he used it, that he used the push block anytime his hands were close to the blade, and that the saw would not have worked except on very thin materials if the guard had gone all the way to the bottom of the blade. (Tr. 167-79). This testimony does not rebut that of Antonio, and this item is affirmed as a serious violation.

A penalty of $300.00 was proposed for this item. In light of Paul Morkovsky's testimony that a guard was put on the exposed area of the blade after the inspection, as shown in R-83-84, a penalty of $200.00 is appropriate. (Tr. 1761-63).

Serious Citation 1 - Item 11

This item alleges a violation of 29 C.F.R. § 1910.213(c)(3), which provides as follows:

> Each hand-fed circular ripsaw shall be provided with nonkickback fingers or dogs so located as to oppose the thrust or tendency of the saw to pick up the material or to throw it back toward the operator.

CO Antonio testified there was a table saw in the maintenance department without ``kickback fingers'' or ``dogs'' to prevent boards being kicked back at the operator as they were pushed through the saw; G-412 depicts the saw, and R-87 and R-127 show the kickback fingers it should have had. Antonio said the teeth on the fingers work by binding into the board being cut and that without them an operator could sustain lacerations. He also said the risk of kickback on the subject saw was minimized by its guarding and adjustable blade. (Tr. 346-50; 762-64).

Respondent contends that the saw had kickback fingers at the time of the inspection based on the testimony of Kevin Willhoite. Willhoite did, in fact, testify that there were kickback fingers on the saw at that time. (Tr. 182-83; 189-91). However, he also testified they were added to the saw after he had been at the facility for a while and that he could not remember if this was before or after the inspection. (Tr. 171-72). Moreover, while he initially indicated that G-412 showed the kickback fingers, he later stated they were not depicted in that photo. (Tr. 172; 180-81). Based on the equivocal nature of Willhoite's testimony, I conclude the kickback fingers were put on the saw after the inspection. This item is accordingly affirmed as a serious violation.

A penalty of $300.00 was proposed for this item. In view of the abatement of the condition and Antonio's testimony that the hazard was minimized by the guarding and adjustable blade on the saw, a penalty of $100.00 is appropriate for this item.

Serious Citation 1 - Item 12

This item alleges a violation of 29 C.F.R. § 1910.213(h)(1), which applies to radial saws and states, in pertinent part, as follows:

> The sides of the lower exposed portion of the blade shall be guarded to the full diameter of the blade by a device that will automatically adjust itself to the thickness of the stock and remain in contact with stock being cut to give maximum protection possible for the operation being performed.

The record shows there was a Dewalt radial arm saw in the maintenance department at the time of CO Antonio's inspection which did not have a guard on the lower exposed portion of the blade to protect the operator from contacting it, as shown in G-413. (Tr. 170-73; 350-53). Although Respondent contends there was no exposure to a hazard from operating the saw, Antonio's opinion was that the unguarded blade was a hazard and Kevin Willhoite testified his hands were 6 to 12 inches from the blade when he used it. (Tr. 195-96; 352-53; 764-66). I conclude, based on the record and the language of the standard, that a guard was required on the lower exposed portion of the blade. This item is affirmed as a serious violation.

A penalty of $300.00 was proposed for this citation item. In light of the evidence that a guard was installed on the saw after the inspection, a penalty of $200.00 is appropriate for this item. (Tr. 1763-65; R-88).

Serious Citation 1 - Item 13

This item alleges a violation of 29 C.F.R. § 1910.213(h)(4), which provides as follows:

> Installation [of each radial saw] shall be in such a manner that the front end of the unit will be slightly higher than the rear, so as to cause the cutting head to return gently to the starting position when released by the operator.

The record shows that the cutting head on the Dewalt radial arm saw discussed above would not roll back to its starting position at the time of CO Antonio's inspection; Antonio testified this condition was a hazard because of the potential for the operator to contact the blade. (Tr. 353-56; 765-66). Paul Morkovsky testified that the condition was due to sawdust building up around the saw and that after cleaning the sawdust away the cutting head rolled back as required; he also testified that a spring was added to the saw, as shown in R-89, to make sure the head would roll back. (Tr. 1765-66). Based on the record, the saw was in violation of the standard. This item is affirmed as a serious violation.

A penalty of $300.00 was proposed for this item. In light of the evidence that the condition was corrected, a penalty of $200.00 is appropriate.

Serious Citation 1 - Item 14

This item alleges a violation of 29 C.F.R. § 1910.217(b)(6)(i), which applies to mechanical power presses and provides as follows:

> A two-hand trip shall have the individual operator's hand controls protected against unintentional operation and have the individual operator's hand controls arranged by design and construction and/or separation to require the use of both hands to trip the press and use a control arrangement requiring concurrent operation of the individual operator's hand controls.

The basis of this item was CO Jones' viewing of G-421, a video taken of various facility operations during the inspection, and his conclusion that three different mechanical power presses being used in G-421 could have inadvertently operated because their activating buttons were not guarded.[34] The record shows that all three presses required the operator to manually place the part to be pressed into the point of operation and then push with both palms the two activating buttons; the presses would not operate unless both of the activating buttons were pushed at the same time, and in between those buttons were an emergency stop button, which would immediately stop the press when pushed, and a ``stop on top" button, which would stop the press at the beginning or top of its cycle. The activating buttons on one of the presses were on its sides just above the operator's waist level and had metal guards over them, as shown in R-93-95, so that the operator had to reach in between the guards and the buttons to push them. The activating buttons on the other two presses were on their fronts, were 5 to 6 feet off the ground, and had the emergency stop and ``stop on top" buttons between them, as depicted in R-90-91; the metal guards around the activating buttons in R-90-91 were not there at the time of the inspection. (Tr. 640-54; 921-38; 1047-73; 1767-72).

After viewing G-421 again and comparing it with R-93-95, CO Jones admitted that that press did not present a hazard of inadvertent operation. (Tr. 1054-60). As to the other two presses, Jones testified that the height of the activation buttons, the distance between them and the location of the emergency stop and ``stop on top" buttons made inadvertent operation of the presses less likely but that the lack of guards nonetheless rendered the presses hazardous. (Tr. 1061-71). However, his descriptions of the scenarios which could have resulted in inadvertent operation of the presses and accidents were unlikely, and he himself conceded as much. (Tr. 1066-71). Further, CO Antonio testified that even without the guards the likelihood of inadvertent operation of the presses was very low. (Tr. 647). Based on the record, the Secretary has not shown a violation. This item is vacated.

Serious Citation 1 - Item 15

This item alleges a violation of 29 C.F.R. § 1910.217(c)(2)(i)(d), which states as follows:

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[34]As noted in the discussion regarding item 397(a), *supra*, G-421 was taken by another OSHA CO.

> [Every point of operation guard] shall utilize fasteners not readily removable by operator, so as to minimize the possibility of misuse or removal of essential parts.

The basis of this item was the Niagara punch press which was also the basis of item 388(c), *supra*. CO Antonio testified that the plexiglass guard on the press was held in place with the plier-like clamp and the lamp shown in G-414-15. His opinion was that these fasteners were insufficient and violated the standard because they were readily removable; he did not attempt to take them off himself, but said that it was not necessary to unbolt or unscrew the clamp and that the guard could be removed just by pulling on it. (Tr. 356-61; 766-69). However, Leonard Marek, the employee who had worked on the press for eight years without injury, testified that both the lamp and the clamp had to be removed to take off the guard and that the clamp had to be unbolted to be removed. (Tr. 98-127). Marek's testimony was not rebutted by the Secretary, and this item is accordingly vacated.

Serious Citation 1 - Items 16 and 17

These items allege violations of 29 C.F.R. §§ 1910.217(e)(1)(i) and 1910.217(e)(1)(ii), respectively, which provide as follows:

> 1910.217(e)(1)(i) - It shall be the responsibility of the employer to establish and follow a program of periodic and regular inspections of his power presses to ensure that all their parts, auxiliary equipment, and safeguards are in a safe operating condition and adjustment. The employer shall maintain a certification record of inspections which includes the date of inspection, the signature of the person who performed the inspection and the serial number, or other identifier, of the power press that was inspected.
>
> 1910.217(e)(1)(ii) - Each press shall be inspected and tested no less than weekly to determine the condition of the clutch/brake mechanism, antirepeat feature and single stroke mechanism. Necessary maintenance or repair or both shall be performed and completed before the press is operated....The employer shall maintain a certification record of inspections, tests and maintenance work which includes the date of the inspection, test or maintenance; the signature of the person who performed the inspection, test, or maintenance; and the serial number or other identifier of the press that was inspected, tested or maintained.

The record shows these items were based on Dan Price's statements to CO Antonio that although the company had begun working on a power press program it was not yet fully developed and implemented at the time of the OSHA inspection. (Tr. 361-64; 774-80; 824-27; 1083-88). Dan Price testified he developed R-65, a written power press inspection program, in August of 1989 and that it was submitted to all department supervisors; R-65 instructed them to identify all presses and set up a file for each one which would contain weekly inspection reports and any maintenance performed. Price said some of the data had been collected to identify the company's ninety to 100 presses at the time of the OSHA inspection but that he did not know how much information had been completed and had not checked to see how much of the program had been implemented; it was his belief, however, that weekly inspection reports were not being made then. He identified R-61 as copies of the 1990

maintenance records of the company's presses and noted these were sent to OSHA in September 1990 pursuant to a subpoena. (Tr. 1584-88; 1618-21).

Based on the foregoing, it is clear that Respondent was not in compliance with the standards at the time of the OSHA inspection and that items 16 and 17 must be affirmed as serious violations. The Secretary proposed a penalty of $1,000.00 for each of these items. Due to the similar nature of the items, and the evidence that Respondent had a written program and was working on its implementation at the time of the inspection, a penalty of $500.00 each for items 16 and 17 is appropriate.

Serious Citation 1 - Items 18 and 19

These items allege violations of 29 C.F.R. §§ 1910.219(d)(1) and 1910.219(e)(3)(i), respectively, which state as follows:

> 1910.219(d)(1) - Pulleys, any parts of which are seven (7) feet or less from the floor or working platform, shall be guarded....
>
> 1910.219(e)(3)(i) - Vertical and inclined belts shall be enclosed by a guard....

The basis of these two items was an electric fan in the wire welding department and a table saw in the maintenance department, both of which had an unguarded pulley and belt, as shown in G-418 and G-412, respectively.[35] CO Antonio testified the fan and saw were not in use when he saw them but that they were plugged in and available for use and employees were in both areas. He opined that both pieces of equipment were hazardous because employees could have contacted their unguarded parts and sustained lacerations or broken bones; contact with the pulley and belt on the fan could have occurred if an employee had attempted to move or position it or reach over it when it was running, while contact with the pulley and belt on the saw could have occurred if an employee had been picking up material from the floor behind the saw when it was running. (Tr. 364-70; 780-87).

In defense of these items, Respondent contends there was no exposure to the cited hazards. As to items 18(a) and 19(a), Paul Morkovsky testified that the nearest work station to the fan was 15 feet away. (Tr. 1773-75; 1793-94). However, this testimony does not rebut that of Antonio, which clearly establishes employee access to the cited hazard, and items 18(a) and 19(a) are affirmed as serious violations. As to items 18(b) and 19(b), Kevin Willhoite, the saw operator, testified he usually worked in front of the saw but that when a large piece of plywood was cut he would stand about 2 feet from the back of the saw, shown on the left in G-412, and take hold of the wood after it was fed through by another worker; he did not recall dropping anything on the floor in back of the saw while it was running, but said it took a few seconds to quit running after

[35]The table saw is the same one as that cited in item 11, *supra*.

being turned off. (Tr. 175; 179-83; 196-98). This testimony, together with that of Antonio, demonstrates employee access to the cited hazard. Items 18(b) and 19(b) are affirmed as serious violations.

The Secretary proposed a penalty of $200.00 each for items 18 and 19. In view of the similarity of these items, and the fact that guarding was placed on the pulley and belt on the fan after the inspection, it is concluded that a penalty of $100.00 each for items 18 and 19 is appropriate. (Tr. 1773; 1793; R-121).

Serious Citation 1 - Item 20

This item alleges a violation of 29 C.F.R. § 1910.242(b), which provides as follows:

> Compressed air shall not be used for cleaning purposes except where reduced to less than 30 p.s.i. and then only with effective chip guarding and personal protective equipment.

The basis of this item was CO Antonio's observing three compressed air hoses with nozzles that did not reduce the pressure to 30 p.s.i. or less; the hoses were in the wire forming, sheet metal and silkscreen areas, and when he tested them with a gauge he found their pressure to be 80, 60 and 70 p.s.i., respectively. Antonio testified that an employee using one of the hoses to clean parts, equipment or clothing could have gotten the end of the nozzle against his skin, which, based on his training, could have caused an air embolism, especially if there was a cut or abrasion in the skin; he did not see the hoses used but determined they were employed for cleaning due to conversations with employees. (Tr. 370-74; 787-92).

Respondent contends the standard applies only when compressed air is used for cleaning, and that the subject hoses were not employed for this purpose. In this regard, Linda Mullins, the silkscreen area assistant supervisor, testified the hose in her area was used for drying silkscreens. (Tr. 1668-69). This testimony does not rebut that of Antonio with regard to the hoses in the other two areas, and this item is affirmed as a serious violation. Respondent presented no evidence that it abated the condition, and the Secretary's proposed penalty of $300.00 is assessed.

Serious Citation 1 - Item 21

This item alleges a violation of 29 C.F.R. § 1910.304(a)(2), which states as follows:

> No grounded conductor may be attached to any terminal or lead so as to reverse designated polarity.

This item was based on CO Antonio's testing of two duplex receptacles with a three-light circuit tester at the facility and finding that their polarity was reversed; one of the receptacles was attached to a pendant outside the shipping department office, while the other supplied power to a paint gun controller in the wire paint department. Antonio testified the receptacles were hazardous because they exposed workers to the possibility of electrical shock. (Tr. 374-77; 792-93). Jonathan Petru, on the other hand, testified that he had been working with electrical wiring and sockets since 1978 and that the receptacles were not hazardous. He explained that all receptacles have a hot and a neutral wire and the fact that the wires are in the opposite

position and their polarity is reversed is not dangerous; the black wire is still hot and the white wire is still neutral and working on such wiring is not a hazard because the wiring is properly identified, and receptacles and equipment attached to them operate the same with reversed polarity as long as the current is alternating, as it was to the subject receptacles. (Tr. 1640-43; 1650-51).

Based on the foregoing, the evidence does not establish the alleged violation. Although CO Antonio opined that the condition violated the standard and presented a hazard, he did not explain his reasons for this conclusion. Moreover, the Secretary presented nothing to rebut the opinion of Jonathan Petru, the company's maintenance supervisor. In light of the Secretary's failure to present further evidence in support of his position, this item must be vacated.

Serious Citation 1 - Item 22

This item alleges a violation of 29 C.F.R. § 1910.304(f)(4), which states as follows:

The path to ground from circuits, equipment, and enclosures shall be permanent and continuous.

The basis for this item was CO Antonio's observing a pedestal fan in the wire welding department that had an attachment plug with a missing ground conductor, as shown in G-417, and a pressure washer in the silkscreen area that had a three-wire cord but was attached to a two-wire non-grounded extension cord, as shown in G-416. Antonio testified that both of these conditions eliminated the equipment grounding and that had there been a ground fault an employee contacting the equipment could have been exposed to the hazard of an electrical shock, particularly if the floor had been damp. (Tr. 377-83; 793-96).

In defense of the foregoing, Paul Morkovsky testified he was unaware of the missing ground on the fan's plug and that it was the company policy to cut such cords off to ensure they were not used until they were repaired. (Tr. 1776-77). This does not rebut the testimony of Antonio in regard to the condition of and the hazard presented by the lack of grounding on the cited equipment. This item is affirmed as a serious violation, and the proposed penalty of $800.00 is assessed.

Serious Citation 1 - Item 23

This item alleges a violation of 29 C.F.R. § 1910.304(f)(5)(v), which provides as follows:

> [E]xposed non-current-carrying metal parts of cord- and plug-connected equipment which may become energized shall be grounded.

This item was based on CO Antonio's observation of two portable lamps in the shipping area and six portable lamps in the sheet metal welding area that had metal reflector tops which were not grounded; the lamps in the shipping area were clamped to brackets on the wall and were used to light the insides of trucks being loaded, while those in the sheet metal area were attached to welding jigs and were used to light the insides of items being welded. Antonio said the hard usage to which the lamps were subjected could have caused a lamp holder to short out and energize the reflector, which could have resulted

in an employee being shocked. He also said the condition could have been abated by using heavier-duty lamps with ground-type reflectors, or, in the shipping area, more permanent lighting which attaches to the wall and has articulated arms. (Tr. 383-86; 796-98).

Respondent's only defense in regard to this item is that the lamps were not portable because they were either attached to a wall or, as Michael Moeller testified, bolted to a welding jig. (Tr. 1679-80). However, it is clear from the record that the lamps were removable and therefore portable, and the subject standard in any case contains nothing to indicate that it applies only to portable equipment. It is also clear that the cited lamps were in violation of the standard. This item is affirmed as a serious violation, and, since there was no evidence the condition was abated, the proposed penalty of $700.00 is assessed.

Serious Citation 1 - Item 24

This item alleges a violation of 29 C.F.R. § 1910.305(g)(2)(iii), which states as follows:

> Flexible cords shall be connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminal screws.

CO Antonio testified the outer insulation of the flexible cord on the same pedestal fan cited in items 18 and 19 was frayed and pulled back from the clamping device, resulting in tension being transmitted onto the attachment screws rather than the outer insulation, as depicted in G-428. He said the condition was hazardous because the tension could have caused the cord to pull free and short circuit, exposing employees to the possibility of electrical shock. (Tr. 386-94; 798-802).

Based on the foregoing, the Secretary has shown a violation of the cited standard. Although Respondent contends that the condition did not represent a hazard, based on the testimony of Paul Morkovsky, Morkovsky himself conceded that the outer insulation on the cord was pulled away such that the inner wires could be seen. (Tr. 1777-78; 1791-93). This item is accordingly affirmed as a serious violation, and, as there was no affirmative evidence that the condition was corrected, the Secretary's proposed penalty of $300.00 is assessed.

Serious Citation 1 - Item 25

This item alleges a violation of 29 C.F.R. § 1910.1200(f)(5)(i), which provides as follows:

> [T]he employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with the following information: Identity of the hazardous chemical(s) contained therein.

The record shows that two plastic one-gallon bottles containing machine oil were labeled as containing a hand cleaner and that a five-gallon container holding a rust inhibitor was unlabeled, as shown in G-420. CO Antonio testified that the condition was hazardous because employees would not have known what was in the containers or the hazards presented by

using their contents; he said that using the machine oil could have resulted in dermatitis but could identify no hazard relating to the rust inhibitor. (Tr. 394-97; 802-06). Paul Morkovsky testified that neither substance was hazardous and that the rust inhibitor, which was in diluted form, contained sodium nitrite. (Tr. 1778-80). Based on the foregoing, no hazard has been established with respect to the rust inhibitor. In regard to the machine oil, it is clear an employee could well have used the oil to clean his hands; however, as the only hazard described by Antonio that might have resulted from such use was dermatitis, this item is affirmed as an ``other'' violation and no penalty is assessed.

Conclusions of Law

1. Respondent, Kaspar Wire Works, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. §§ 1910.23(d)(1)(i), 1910.106(d)(2)(i), 1910.106(d)(3)(ii), 1910.107(e)(9), 1910.147(c)(1), 1910.176(b), 1910.212(a)(3)(ii), 1910.213(i)(1), 1910.213(c)(3), 1910.213(h)(1), 1910.213(h)(4), 1910.217(e)(1)(i), 1910.217(e)(1)(ii), 1910.219(d)(1), 1910.219(e)(3)(i), 1910.242(b), 1910.304(f)(4), 1910.304(f)(5)(v) and 1910.305(g)(2)(iii).

3. Respondent was in ``other'' violation of 29 C.F.R. § 1910.1200(f)(5)(i).

4. Respondent was not in violation of 29 C.F.R. §§ 1910.94(a)(6)(iii), 1910.212(a)(1), 1910.217(b)(6)(i), 1910.217(c)(2)(i)(d) and 1910.304(a)(2).

5. Respondent was in willful violation of 29 C.F.R. §§ 1904.2(a), 1904.5(b), 1904.5(c), 1910.20(e)(3)(i), 1910.217(c)(1)(i), 1910.217(g)(1) and 1910.255(b)(4).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, all of the citation items are hereby affirmed or vacated, and penalties assessed therefore, as set forth above. All Findings of Fact and Conclusions of Law with respect to the alleged violations are specifically adopted herein and incorporated by reference by this Order.

/s/
Stanley M. Schwartz
Administrative Law Judge

Date: MAR 17 1995