



nation’s workforce,” there are other federal agencies with authority “over specific industries” that have the authority to promulgate employee health and safety standards; Congress, by enacting section 4(b)(1), sought “to avoid duplication of effort and resources.” *In re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526, 1530 (11th Cir. 1986), *cert. denied*, 479 U.S. 883 (1986). For the following reasons, we conclude that OSHA, not the DOD, had authority over the cited conditions.<sup>1</sup>

### **Preemption Issue**

The Commission evaluates an employer’s section 4(b)(1) argument by considering (1) whether the other federal agency has the statutory authority to regulate the cited working conditions, and (2) if that agency has that authority, whether the agency has exercised it over the cited conditions by issuing regulations having the force and effect of law. *See, e.g., Rockwell International Corp.*, 17 BNA OSHC 1801, 1803, 1995-97 CCH OSHD ¶ 31,150, p. 43,531 (No. 93-45, 1996) (consolidated) (National Aeronautics and Space Administration --agency at issue); *Yellow Freight Systems, Inc.*, 17 BNA OSHC 1699, 1700, 1995-97 CCH

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<sup>1</sup>The record shows that MEI waited to raise its section 4(b)(1) claim until the beginning of the hearing, arguing that the issue is jurisdictional and can be raised at any time, citing *U.S. Air, Inc. v. OSHRC*, 689 F.2d 1191, 1193 (4th Cir. 1982), and *Columbia Gas of Pennsylvania, Inc. v. Marshall*, 636 F.2d 913, 918 (3d Cir. 1980). We note that neither of those decisions is controlling here because this case can be appealed only to the Eleventh Circuit by both parties (site of alleged violations and MEI’s principal office) or to the D.C. Circuit by MEI. *See* section 11(a) and (b) of the Act, 29 U.S.C. § 660(a) and (b). No Eleventh or D.C. Circuit support for MEI’s contention has been brought to our attention.

In his decision, the judge observed that the Commission has held that a section 4(b)(1) claim is an affirmative defense that the employer has the burden of proving, citing cases including *Pennsuco Cement and Aggregates, Inc.*, 8 BNA OSHC 1378, 1379 & n.2, 1980 CCH OSHD ¶ 24,478, p. 29,888 & n.2 (No. 15462, 1980). Noting that the Commission Rule of Procedure at 29 C.F.R. § 2200.34(b) requires that affirmative defenses be pleaded in the answer (or as soon as practicable), the judge deemed the argument waived because MEI did not raise it before the hearing.

As discussed *infra*, even assuming that MEI timely raised the section 4(b)(1) claim, MEI’s preemption argument must be rejected.

OSHD ¶ 31,105, pp. 43,415-16 (No. 93-3292, 1996) (Department of Transportation); *American Airlines, Inc.*, 17 BNA OSHC 1552, 1553-54, 1995-97 CCH OSHD ¶ 30,992, p. 43,192 (No. 93-1817, 1996) (consolidated) (Federal Aviation Administration); *Alaska Trawl Fisheries, Inc.*, 15 BNA OSHC 1699, 1703-04, 1991-93 CCH OSHD ¶ 29,758, p. 40,449 (No. 89-1017, 1992) (consolidated) (Coast Guard).

MEI contends that the DOD both has the statutory authority to regulate the cited working conditions and exercised authority over the cited conditions by issuing regulations having the force and effect of law. Particularly, MEI points us to the *DOD Contractors' Safety Manual for Ammunition and Explosives*, DOD 4145.26M (March 1986, as amended through 1988) (“the *Manual*”) and the DOD acquisition regulation at 48 C.F.R. § 252.223-7002 (1994), which requires all contractors to comply with the requirements of the *Manual*. Consistent with Commission practice, the Commission invited the DOD to give its position on the preemption issue. In its response, the DOD<sup>2</sup> asserts that, although it believes it has the authority (under 10 U.S.C. § 172 “Ammunition storage board”) to regulate the cited conditions, it has not taken action to preempt OSHA’s authority over the activities at issue here. Specifically, the DOD declares: “None of the violations was directly related to ammunition production, but rather dealt with failure in areas of simple industrial safety, i.e., failure to provide for adequate fire protection when working with flammable materials.” The DOD also asserts that the “DOD safety requirements for explosive and ammunition manufacture, as set out in [the *Manual*], do not meet the test” set forth in such decisions as *Rockwell*, 17 BNA OSHC at 1803, 1995-97 CCH OSHD at p. 43,531. The DOD states that it “has never taken the position that the DOD Explosive Safety Manual preempts OSHA’s overall jurisdiction in this area.” The DOD adds that the standards in the *Manual* “are not broad enough to support a credible argument that they could readily replace OSHA safety standards, particularly in the area of simple industrial safety.” The DOD concludes: “While the standards address specific safety problems directly related to ammunition/explosive

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<sup>2</sup>The responsive letter articulating the DOD’s views was authored by the primary recipient of the “Briefing Invitation,” the General Counsel of the Department of the Army, who noted the DOD’s “express concurrence” with the General Counsel’s position.

manufacture, they do not specifically address more general safety problems, the likes of which are under consideration by the Review Commission.”

The Commission gives considerable weight to the other federal agency’s representation, but the Commission reviews the statutory and regulatory provisions at issue, as well as the evidence, to determine whether that agency’s view is reasonably supported by the record. *E.g., Rockwell*, 17 BNA OSHC at 1803-04, 1995-97 CCH OSHD at p. 43,532. Having reviewed the *Manual* and all of the regulations upon which MEI relies, we agree with the DOD that DOD regulations were not intended to displace OSHA regulations on the working conditions cited here.<sup>3</sup>

Indeed, the two portions of the *Manual* upon which MEI particularly relies tend to support finding no preemption. MEI cites the first page of the “Foreword” to the *Manual*, which reads: “This revision includes basic principles of A&E [Ammunition and Explosives] safety, reduces mandatory requirements to the minimum, *excludes safety requirements of other Federal regulatory agencies*, and provides sufficient information to enable the contractor to make appropriate and reliable decisions affecting his or her facilities and operations. . . .” (MEI’s emphasis) A reasonable reading of this sentence is that the safety requirements of other federal agencies are not included in the text of the *Manual*; the sentence is not, as MEI suggests, an affirmative representation that *all* other federal safety rules do not apply.

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<sup>3</sup>The particular conditions in the citation items affirmed by the judge are: working with highly flammable materials in a structure built primarily of wood (Citation 1, Item 1, violation of section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1)); having only one exit from the building (Citation 1, Item 3, violation of 29 C.F.R. § 1910.36(b)(8)); having an obstruction in the way of travel from the exit to an open space (Citation 1, Item 4, violation of 29 C.F.R. § 1910.36(d)(1)); working with magnesium composition for at least 90 minutes without wearing fire retardant laboratory coats and coveralls (Citation 1, Item 5, violation of 29 C.F.R. § 1910.132(a)); lack of training in personal protective equipment where its use is required (Citation 1, Item 6a, violation of 29 C.F.R. § 1910.132(f)); lack of initial training for each employee involved in the operating process (Citation 1, Item 6b, violation of 29 C.F.R. § 1910.119(g)(1)(i)); and lack of a written process safety management plan that included the participation of employees (Citation 1, Item 7a, serious violation of 29 C.F.R. § 1910.119(c)(1)).

MEI's position is also inconsistent with another part of the *Manual* itself, as well as contractual and regulatory provisions. MEI points to the "Introduction" to the *Manual* at page 1-1, which provides: "This Manual applies to contractors performing work or services on DoD contracts . . . for ammunition or explosives as defined within the contract. *These safety standards are minimum requirements and shall be accepted as final authority over applicable A&E contractor operations and their locations*, whether inside or outside of the establishment." (MEI's emphasis) A reasonable reading of this passage would be that it acknowledges that the safety standards in the *Manual* are minimum requirements and are not intended to be exclusive in the field of employee safety.

Further support for rejecting MEI's preemption argument can be found in the contract between the DOD and MEI. The "Amendment of Solicitation, Modification of Contract" signed by MEI's Director of Contracts on August 9, 1994, an exhibit in the case, provides under section 6.0 "Safety/Environmental" that "[t]he contractor shall comply with *all Federal, State, Local, and Dept of Army safety/environmental requirements of issue on the date of receipt of this scope of work.*" (emphases added) Additional support is offered by the DOD acquisition regulation at 48 C.F.R. § 222.102-1, referred to by MEI, which provides: "The Department of Labor is responsible for the administration and enforcement of the Occupational Safety and Health Act . . . . Contracting officers shall . . . [d]irect all inquiries from contractors or contractor employees regarding the applicability or interpretation of the OSHA regulations to the Department of Labor; and . . . [u]pon request, provide the address of the appropriate [OSHA] field office[;]" and "any application for the suspension or relaxation of labor requirements" may not be initiated "without prior coordination with the labor advisor."

Based on the above, we conclude that the record supports the DOD's statements that it did not seek, in its *Manual* or otherwise, to regulate "simple industrial safety" like the fire safety and training items at issue, and it considered the *Manual* and related DOD regulations to be restricted to "specific safety problems directly related to ammunition/explosive

manufacture.” Consistent with controlling circuit court precedent in this case,<sup>4</sup> we conclude that there is no preemption because the record and the DOD’s statements make clear that the DOD did not seek to comprehensively treat the general problem of industrial safety such as the fire protection, means of egress, personal protective equipment, training, and process safety matters at issue here.

For the reasons above, we conclude that the DOD did not exercise authority over the working conditions in this case by issuing regulations having the force and effect of law. We therefore reject MEI’s preemption argument.<sup>5</sup>

### **Penalties**

Under section 17(j) of the Act, 29 U.S.C. § 666(j), the Commission has the authority to assess appropriate penalties giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer’s “history of previous violations.” The judge assessed the penalties proposed by OSHA for the items that he affirmed, which totaled \$27,600.<sup>6</sup> The judge correctly stated that gravity is the principal

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<sup>4</sup>See *Southern Pacific Transportation Co. v. Usery*, 539 F.2d 386, 391-92 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977), *quoted in In re Inspection of Norfolk Dredging Co.*, 783 F.2d at 1531 (“comprehensive treatment [by another agency] of the general problem of . . . fire protection will displace all OSHA regulations on fire protection, even if the [agency’s] activity does not encompass every detail of the OSHA fire protection standards”). As mentioned in note 1 *supra*, this case may be appealed to the Eleventh Circuit, which stated in *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), that it adopted then-existing Fifth Circuit precedent. See also *Ensign-Bickford Co. v. Occupational Safety and Health Review Commission*, 717 F.2d 1419, 1421 (D.C. Cir. 1983), *cert. den.*, 466 U.S. 937 (1984) (“[p]reemption is appropriate only if a federal agency implements the regulatory apparatus necessary to replace those safeguards required by the Act”). As discussed in note 1 *supra*, this case may be appealed by MEI to the D.C. Circuit.

<sup>5</sup>In light of our determination that the DOD has not regulated the cited working conditions so as to preempt OSHA, we need not address the question of whether the DOD had the statutory authority to regulate the conditions. See *Rockwell*, 17 BNA OSHC at 1803, 1995-97 CCH OSHD at pp. 43,531-32.

<sup>6</sup>The judge assessed the penalties proposed by OSHA for the serious violations alleged in  
(continued...)

factor to be considered, and he found that it was “extremely high” in this case. Regarding MEI’s size, he noted that it employed approximately 250 employees, and he agreed with the twenty percent reduction in penalty that the Secretary proposed for that size of employer. He gave MEI no reduction for history of violations, nor for good faith.

MEI contends that the penalties assessed by the judge were excessive because “[n]o reduction was given for the safety history of MEI or its good faith.”<sup>7</sup> Section 17(j) of the Act provides that the employer’s “history of previous violations” is one of the four factors to consider in penalty assessment. MEI was cited in 1994 for exit signs that were not illuminated, an inoperative horn on a forklift, too much pressure on an air hose, and drill presses that were not bolted to the floor. MEI settled the case with the payment of a penalty. MEI contends that it should receive a reduction because these violations were “relatively minor,” noting the testimony of its loss prevention manager. However, we note that MEI acknowledged these violations in a settlement agreement and paid a penalty, and the prior violations occurred only a few years before the ones in this case.

MEI suggests that an additional reason for giving it a reduction for “safety history” is that “[b]efore the accident, MEI had operated 775 days without a lost time accident, and over 900,000 man hours, a milestone for the industry.” We note that this evidence does not concern the “history of previous violations” factor; rather, evidence of an employer’s safety record in general has been considered under the “good faith” factor. *See, e.g., Wheeling-Pittsburgh Steel Corp.*, 16 BNA OSHC 1780, 1785, 1993-95 CCH OSHD ¶ 30,445, p.42,041 (No. 91-2524, 1994). However, any basis for giving that good faith effect to reduce the penalty is diminished by MEI’s failure to adequately prepare and train two

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

Citation 1 that he affirmed: \$ 5,600 for Item 1, \$5,600 for Item 3, \$5,600 for Item 4, \$4,000 for Item 5, \$4,000 for Item 6a and 6b together, and \$2,800 for Item 7a.

<sup>7</sup>MEI also contends in its “penalty” argument that the items should be characterized as *de minimis* because they had no direct or immediate relationship to safety or health (see section 9(a) of the Act, 29 U.S.C. § 658(a)) and thus warrant no penalty, citing *Reich v. Occupational Safety and Health Review Commission (Erie Coke Corp.)*, 998 F.2d 134,138-39 (3d Cir. 1993), *aff’g* 15 BNA OSHC 1561, 1991-93 CCH OSHD ¶ 29,653 (No. 88-611, 1992). We reject MEI’s argument because the record supports finding that the violations at issue had a direct and immediate relationship to safety.

inexperienced teenage employees involved in this case, which demonstrates a lack of good faith. *See, e.g., Access Equipment Systems, Inc.*, 18 BNA OSHC 1718, 1728-29, 1999 CCH OSHD ¶ 31,821, p. 46,784 (No. 95-1449, 1999) (no reduction for good faith where there was evidence for and against good faith). The only bases that MEI mentions on review for giving it a reduction for good faith is that “[a]s articulated above, these violations were not the sort with the potential or probability of a severe accident. MEI officials believed that they were in compliance with applicable safety regulations.” However, these assertions do not address the good faith factor.

Based on the discussion above, we conclude that the penalties assessed by the judge were appropriate.

### Order

For the reasons above, we reject MEI’s argument that the DOD preempted OSHA’s authority over the cited working conditions. We affirm the following items alleging serious violations in Citation 1 and assess the following penalties totaling \$27,600: Item 1 -- \$5,600; Item 3 -- \$5,600; Item 4 -- \$5,600; Item 5 -- \$4,000; Item 6a and 6b -- \$4,000; and Item 7a -- \$2,800.<sup>8</sup>

/s/ \_\_\_\_\_  
Thomasina V. Rogers  
Chairman

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

/s/ \_\_\_\_\_  
Stuart E. Weisberg  
Commissioner

Date: January 21, 2000

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<sup>8</sup>Because we have been able to resolve the issues in this case based on the record before us, we deny MEI’s motion for oral argument.



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SECRETARY OF LABOR, :  
Complainant, :  
v. :  
MEI HOLDINGS, INC., :  
d/b/a MARTIN ELECTRONICS, :  
Respondent. :

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OSHRC Docket No. 96-740

Appearances:

Channah Broyde, Esquire  
U. S. Department of Labor  
Office of the Solicitor  
Atlanta, Georgia  
For Complainant

Fred M. Johnson, Esquire  
Marjorie M. Cain, Esquire  
Fuller, Johnson & Farrell  
Tallahassee, Florida  
For Respondent

Before: Administrative Law Judge Ken S. Welsch

**DECISION AND ORDER**

MEI Holdings, Inc., d/b/a Martin Electronics, Inc. (MEI), manufactures explosives and pyrotechnic devices at its plant in Perry, Florida (Tr. 5, 17, 152). On November 20, 1995, a fire broke out in Building 105 on MEI's premises. Two employees died as a result of the fire, and a third employee was severely burned. Occupational Safety and Health Administration (OSHA) Compliance Officer Edgar Linden McGowan investigated the fire on November 21, 1995. As a result of McGowan's investigation, the Secretary issued a citation on May 16, 1996, alleging serious violations of the Occupational Safety and Health Act of 1970 (Act).

Item 1 of the citation alleges a serious violation of § 5(a)(1) for failing to ensure that Building 105 was built of noncombustible materials. Item 2a alleges a serious violation of §1910.22(a)(1) for failure to keep Building 105 clean and orderly. Item 2b alleges a serious violation of §1910.176(c) for failure to keep storage areas free from accumulation of materials that constituted hazards from fire or explosion. Item 3 alleges a serious violation of §1910.36(b)(8) for failure to provide two means of egress from Building 105. Item 4 alleges a serious violation of §1910.36(d)(1) for failure to keep the exit from Building 105 free from obstructions. Item 5 alleges a serious violation of §1910.132(a) for failure to provide personal protective equipment to employees. Item 6a alleges a serious violation of §1910.132(f) for failure to provide training to each employee in the use of

personal protective equipment. Item 6b alleges a serious violation of §1910.119(g)(1)(i) for failure to initially train each employee involved in the operating process in an overview of the process and in the operating procedures. Item 7a alleges a serious violation of §1910.119(c)(1) for failure to develop a written plan of action regarding the implementation of the employee participation required by §1910.119. MEI contests each alleged violation and proposed penalty. In addition, MEI contends that, pursuant to §4(b)(1) of the Act, the Review Commission has no jurisdiction over this case.

The § 4(b)(1) defense is rejected, and the citation in part is affirmed.

### **Background**

On November 20, 1995, MEI was under contract with the Department of Defense (DOD) to manufacture “ATWESS” pellets as part of an ATWESS simulator designed to simulate a missile (Tr. 16-20). The flare case, or pellet, of the ATWESS project was manufactured in Building 105 located on MEI’s premises. Building 105 was a 10-foot by 12-foot wooden structure with one exit on the 10-foot wide side facing west (Tr. 16, 42, 59, 196-197, 200-202).

In Building 105, the production process consisted of the mold press and the punch-out press (Tr. 198-205). Three persons worked the production line in Building 105, one operating the push-out and two operating the mold press. Building 105 also housed a quality control area where the column height of the pellets were checked to ensure that they complied with specifications (Exh. R-3; Tr. 215-217, 247, 312).

The operator of the mold press would adjust the mold, insert a flare in the case over the pin, seat it, pick up the funnel, place the funnel in position, and press a foot pedal which would raise the door to a shielded area containing a magnesium composition. The shield would rise, and the operator would scoop out approximately seven grams of composition into the molds. He then would take the mold and insert it into the press. The operator would press two palm buttons; the shield would lower; and the press would compress the composition. After a pressing time of three seconds, the shield would open and the operator would pull the mold out. The operator would then press the foot pedal again and repeat the cycle. He would then remove the pressed mold and give it to the push-out operator (Tr. 206-209).

The next step in production is to push out the pellet from the mold. The shield on the push-out operator’s station would be open. The operator would lay the molded pellet into the press horizontally and then release it. He has two palm buttons which he would press, causing the shield to come down, close, make a switch, and cause the cylinder to come in from the side. The cylinder would go around the core pin, push up the sleeve, and eject the pressed pellet from the mold. The shield would then open, and the operator would reach in and remove the rejected pellet (Tr. 209).

The push-out operator would then place the pellet in a velostat tray made of conductive material. The velostat tray is 9¼ inches long, 7 inches wide, and approximately 2¼ inches deep, and holds 35 pellets in a single layer. Two layers of pellets are placed in a single velostat tray, making the maximum capacity for the velostat tray 70 pellets. Once filled, the velostat tray is covered with a top also made of conductive material, which is specifically designed for MEI's industry (Tr. 211-212). If the pellet did not meet specifications, it was rejected and placed in a velostat container, marked as containing rejected pellets. The quality control person was charged with removing rejected pellets from the building (Tr. 217).

Building 105 has two shielded areas, located at the mold presses, where magnesium composition is stored. Each shielded area contains a maximum of two pounds of composition. Inside the shield the powder is placed in a velostat tray. Once an operator exhausts his supply of powder, he goes to the back of the production area to a box with a lexan door in which a maximum of four pounds of powder is stored (Tr. 212-214).

On November 20, 1995, two of the three employees who regularly worked the evening shift in Building 105 did not show up for work. Barbara Wilkinson, who regularly worked in Building 105, arrived to work the evening shift (Tr. 237-238). Jamie Phillips and Greg Glombowski were assigned to substitute for the workers instead of performing their regular jobs (Tr. 74, 100-101, 238-240, 271-273).

Jamie Phillips and Greg Glombowski had begun working for MEI on November 14, only four working days before the fire (Tr. 73, 240). Jamie Phillips was 18 years old at that time (Tr. 73). Greg Glombowski's age was not given, but references to Glombowski in the record suggest that he was approximately Phillips' age (Tr. 78-79, 240). Neither Phillips nor Glombowski had worked in Building 105 before that night (Tr. 107-108).

At approximately 10:30 p.m. on November 20, a fire erupted in Building 105 (Tr. 101). Phillips, Glombowski, and Barbara Wilkinson were the only employees in Building 105 at the time. Glombowski and Wilkinson died as a result of the injuries they suffered in the fire (Tr. 107). Phillips was severely burned (Tr. 108).

### *Discussion*

### Jurisdiction

MEI admitted in its answer that the Review Commission has jurisdiction over this matter. At the hearing, for the first time MEI raised the argument that the citation should be vacated because OSHA does not have jurisdiction over the cited working conditions. MEI argues that, under §4(b)(1)

of the Act, OSHA's jurisdiction is precluded because MEI was under contract with the Department of Defense and, thus, the Department of Defense's regulations governed the cited working conditions (Exh. C-1).

Section 4(B)(1) provides:

Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

#### (a) Preemption Under §4(b)(1) Is an Affirmative Defense

The Secretary argues that a preemption claim under §4(b)(1) is an affirmative defense. Commission Rule 34(b)(2) requires that all affirmative defenses be pled in the answer. At the hearing, MEI stated that, although the company knew that it would claim OSHA did not have jurisdiction, it did not raise this claim prior to the hearing because "it wasn't required" (Tr. 10). MEI relies on a Fourth Circuit case, *U.S. Air v. OSHRC*, 689 F. 2d 1191, 1195 (4th Cir. 1982), which holds that "[p]reemption as mandated by section 4(b)(1) is not an affirmative defense but is a jurisdictional limitation upon OSHA's authority to issue a citation." The Third Circuit also holds that preemption under §4(b)(1) is not an affirmative defense and can be raised at any time. *Columbia Gas of Pennsylvania, Inc. v. Marshall*, 636 F. 2d 913, 918 (3d Cir. 1980).

The Review Commission, however, has consistently held that preemption under § 4(b)(1) is an affirmative defense that must be raised by the employer before the hearing, or it will be deemed waived. *Pennsuco Cement and Aggregates, Inc.*, 8 BNA OSHC 1378, 1379, n. 2 (No. 15462, 1980); *Lombard Brothers, Inc.*, 5 BNA OSHC 1716, 1717 (No. 13164, 1977) ("It is well-settled that the nature of section 4(b)(1) is not jurisdictional but exemptory and that the affirmative defense permitted by the section cannot be raised beyond the hearing stage of the proceedings."); *Chevron Oil Co.*, 5 BNA OSHC 1118, 1119, n. 3 (Nos. 10799, 10646, 10786, 1977); *Idaho Travertine Corporation*, 3 BNA OSHC 1535, 1536 (No. 1134, 1975) ("It is now well-settled that any lack of OSHA application under section 4(b)(1) of the Occupational Safety and Health Act is an affirmative defense."). The Eleventh Circuit, in which the instant case arises, has not held otherwise. Therefore, Commission precedent requires that preemption under § 4(b)(1) be treated as an affirmative defense.

MEI admitted jurisdiction in its answer and has not subsequently amended it. MEI failed to plead § 4(b)(1) preemption as an affirmative defense in its answer. Accordingly, this defense is deemed waived by MEI.

(b) MEI Failed to Establish Preemption By the Department of Defense

Even if MEI had properly pled preemption under § 4(b)(1) as an affirmative defense, it failed to establish that OSHA's jurisdiction was preempted by the DOD.

To prove the affirmative defense that OSHA's jurisdiction has been preempted under section 4(b)(1), the employer must show that (1) the other federal agency has the statutory authority to regulate the cited working conditions, and (2) that agency has exercised that authority by issuing regulations having the force and effect of law.

*Rockwell International Corp.*, 17 BNA OSHC 1801, 1803 (Nos. 93-45, 93-228, 93-233, 93-234, 1996).

The DOD does not have statutory authority to prescribe or enforce standards regarding occupational safety and health with respect to MEI's employees. MEI had a contractual, rather than a regulatory, relationship to the DOD. MEI relies on safety standards set out in the *DOD Contractors Safety Manual for Ammunition and Explosives* (Exh. C-1).

In a similar case, a company that had contracted with the DOD to manufacture explosives contended that, because its "contract with the Department of Defense requires [the employer] to comply with the manual prescribing standards for [the employer's] manufacturing activities, those activities are beyond the jurisdiction of the Commission." *Ensign-Bickford Co. v. OSHRC*, 717 F. 2d 1419, 1421 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). The D.C. Circuit disagreed, stating:

The fact that [the employer] bound itself in its contract with the Department of Defense to comply with the Department's safety manual on explosives manufacture does not have that effect [of preempting jurisdiction]. Such a contractual obligation does not constitute an "exercise [of] statutory authority to prescribe or enforce standards or regulations" sufficient to justify preemption under 29 U.S.C. section 653(b)(1). To hold otherwise would permit any federal agency to dilute, without congressional approval, the safety standards and remedies contained in the Act. Preemption is appropriate only if a federal agency implements the regulatory apparatus necessary to replace those safeguards required by the Act.

*Id.*

It is significant that at no time has the DOD asserted preemption over OSHA in this case. MEI called no DOD representatives as witnesses. The DOD has no means of enforcing the safety provisions of the DOD manual. The most the DOD could do is terminate the contract with MEI.

MEI has failed to establish that the DOD has the statutory authority to regulate its working conditions. OSHA's jurisdiction was not preempted by the DOD.

## The Citation

### Item 1: Alleged Serious Violation of §5(a)(1)

The Secretary alleges that MEI committed a serious violation of §5(a)(1), the general duty clause. Section 5(a)(1) provides:

Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

The citation states that MEI exposed its employees to the “hazard of death or serious physical harm from exposure to fire in building 105 which was built of wood and where highly flammable materials were stored and packaged during the assembly of pellet tubes which are a part of the ATWESS 22 simulator.” In order to establish a violation of the general duty clause,

the Secretary must show that (1) a workplace condition or activity presented a hazard, (2) the employer or industry recognized it, (3) it was likely to cause serious physical harm, and (4) a feasible and useful means of abatement existed by which to materially reduce or eliminate it.

*Kokosing Construction Co., Inc.*, 17 BNA OSHC 1869, 1872 (No. 92-2596, 1996).

#### (1) A Workplace Condition Presented a Hazard

The condition which the Secretary cites as hazardous is the use of highly flammable materials in a wooden structure. The parties stipulated that Building 105 was constructed of wood (Tr. 6). It is also undisputed that the magnesium composition used in the manufacture of the ATWESS pellets was highly flammable. The material safety data sheet (MSDS) for magnesium powder states, “Magnesium powder is highly flammable, igniting readily. It is difficult to extinguish once ignited” (Exh. C-5). In light of the high flammability of the magnesium powder, its use in a wooden building constitutes an obvious hazard. The photographic exhibits C-8 through C-11 show that the wooden structure was literally burned to the ground. The only part of the building left standing is a metal structure. The Secretary has established that the wooden building presented a hazard.

#### (2) The Employer or the Industry Recognized the Hazard

MEI knew that the use of a wooden building to house the manufacturing process of the ATWESS pellet was hazardous. Jerry Lee Lowe, loss prevention manager for MEI, conceded that a hazard analysis conducted before MEI began work on the ATWESS pellet concluded that the use of the magnesium composition created a fire hazard (Tr. 57-58). The DOD manual, on which MEI relied for its safety specifications, provides:

## C. STANDARDS FOR BUILDINGS

1. Building Exteriors. Exterior wall and roof coverings of operating buildings should be noncombustible . . . .

(Exh. C-1, p. 12-1).

In its brief, MEI argues that because elsewhere in the DOD manual it is stated that the words “should” and “may” are advisory, it was not required to construct Building 105 out of noncombustible materials. This misses the point. Whether or not the DOD mandated the use of noncombustible materials, it put its contractors on notice that buildings constructed of combustible materials presented a fire hazard. The Secretary has established that MEI knew of the hazard.

### (3) The Hazard Was Likely to Cause Serious Physical Harm

The two deaths and the serious injury to Phillips caused by the fire in Building 105 demonstrate the likelihood of serious physical harm that results from the hazard. The Secretary has established this element.

### (4) A Feasible Means of Abatement Existed

The hazard could have been abated by constructing Building 105 out of noncombustible materials. MEI conceded that this could be done (Tr. 24, 224-225).

Accordingly, the Secretary has established that MEI committed a serious violation of §5(a)(1) of the Act.

### Item 2a: Alleged Serious Violation of §1910.22(a)(1)

The Secretary alleges that MEI committed a serious violation of §1910.22(a)(1), which provides: “All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition.”

The Secretary contends that the spills of the magnesium composition around the push-out press were not cleaned up as frequently as necessary so as to prevent a fire. The Secretary has the burden of proving her case by a preponderance of the evidence.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer’s noncompliance with the standard’s terms, (c) employee access to the violative conditions, and (d) the employer’s actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

*Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The Secretary has failed to prove the second element of her case. Barbara Tate, lead person on the first shift, testified that when she was in Building 105 periodically on November 20, the work stations looked clean (Tr. 282). Kathy Mink, the employee in charge of quality control, made the same observation (Tr. 255).

The Secretary relies on the testimony of Jamie Phillips, who stated that he cleaned the punch-out press before every break, which was about once every two hours (Tr. 80). However, Phillips also stated that he did not see any residue of magnesium powder while he was using the press (Tr. 84). Phillips' statement that the powder was cleaned up every two hours is insufficient to support a finding that the press area was not kept clean and sanitary. No evidence was adduced regarding how much powder would accumulate between cleanings. Item 2a is vacated.

Item 2b: Alleged Serious Violation of §1910.176(c)

The Secretary charges MEI with a serious violation of §1910.176(c), which provides:

Storage areas shall be kept free from accumulation of materials that constitute hazards from tripping, fire, explosion, or pest harborage. Vegetation control will be exercised when necessary.

The Secretary alleges that MEI allowed an excessive number of rejected pellets to accumulate in the production area of Building 105 on November 20. These rejected pellets constituted a fire and explosion hazard. MEI argues that §1910.176(c) does not apply to the cited conditions because the production area of Building 105 was not a "storage area." This argument is without merit. The rejected pellets were placed in a black velostat container until the quality control person removed them at the end of her shift (Tr. 217). An area where material is held in one place until such time it is disposed is a storage area. The fact that the duration the material is held is less than one work shift does not alter the fact that it is being stored.

The Secretary contends there were 110 rejected pellets in Building 105 at the time of the fire. The Secretary bases this figure on a memo from John Peterson, MEI's director of administration, sent to Jerry Lowe, MEI's loss prevention manager (Exh. C-14). The memo was in response to a request for information from Compliance Officer McGowan regarding the quantity of magnesium powder in Building 105 at the time of the fire. The memo states in part (Exh. C-14):

The quantities are based on Kathy Mink's interview in which she reported:

1. 20 units were at the work stations
2. 110 scrap units were on the back table
3. 2 velostat containers were half full



Peterson testified that he did not personally interview Kathy Mink regarding the quantity of magnesium in Building 105. He did not know who interviewed Mink (Tr. 345-346). Mink appeared as a witness for MEI at the hearing. When asked how many rejected pellets were in Building 105 at the time of the fire, she responded, "About 15 or 20" (Tr. 251). She was not cross-examined regarding the discrepancy between this estimate and the figure that appears in Exhibit C-14. Instead, on cross-examination she was asked again how many rejected pellets were in the building, and she answered, "There was 15, 20" (Tr. 264). No attempt was made to impeach her with the contradictory statement contained in the memo from Lowe.

Mink's live testimony is credited over her interview statement taken by an unknown person. It is found that the number of rejected pellets in Building 105 at the time of the fire was fifteen to twenty. The Secretary has failed to show that twenty (or even 110) pellets constituted an excessive accumulation of hazardous material. Item 2b is vacated.

### Item 3: Alleged Serious Violation of §1910.36(b)(8)

The Secretary alleges that MEI violated §1910.36(b)(8), which provides:

Every building or structure, section, or area thereof of such size, occupancy, and arrangement that the reasonable safety of numbers of occupants may be endangered by the blocking of any single means of egress due to fire or smoke, shall have at least two means of egress remote from each other, so arranged as to minimize any possibility that both may be blocked by any one fire or other emergency conditions.

Building 105 had only one exit. It was 10 feet by 12 feet, and its door was 6 feet 8 inches high and 48 inches wide (Tr. 14, 42-43). The usual occupancy of the building was four people, three on the production line and one quality control person.

Section 1910.36(b)(8) does not require two exits. It requires two exits when the building in question is "of such size, occupancy, and arrangement" that the occupants could become endangered if one exit was blocked. Building 105 was small and its usual occupancy was low. Generally, such conditions would not require two exits. But the occupants of the building were engaged in hazardous work, handling highly volatile material. The most likely occurrence that would require the occupants to flee the building would be a flash fire. Phillips's description of the fire illustrates the instantaneous nature of such a fire. Phillips was handing a pellet to Glombowski when (Tr. 85-86):

there was like a "pow" and then I seen a little orange ball of fire and it just--within a split second, it was just orange. . . . It looked like it shot out [from behind a press], like the fire shot out in a ball. It shot out and it hit the wall and it turned, and it was just a big ball of fire filled the whole building. . . . It was kind of like a huge flame blower or something . . . . And, the whole side of our room went up. And then whenever I got out--it was all was burning, but whenever I got out of the fire, it went off again because it was like the first side burst, and there was a big fire, and it started

burning the building down, and then it was like all the other stuff on the other side of the room got caught on fire, like the stuff in the safe box and then it was like even a bigger fire.

The magnesium composition that the employees were required to handle caused Building 105 to be consumed in flames in a matter of seconds. The flames obscured the view of the door. Phillips described his run for the exit (Tr. 87):

[T]he orange ball was just coming up in just a split second. And, as I seen it, I was just turning like that (demonstrating), and it just--the fire was everywhere, and I was turning to get up and run towards the door. I didn't see nothing but flames; orange stuff. . . . I just ran towards the door. And, right before I went to stand up and run, I could just barely see the door and I seen like a white coat run out the door and then I really couldn't see the door, but I knew where it was.

Given the volatile nature of the magnesium composition, Building 105 was required to have two exits. The flash fire that would be the most likely emergency would almost immediately obscure the view of the exit. Another exit might reduce the time and distance an employee would have to cover in order to leave the building, and may have better visibility if the employee was closer to it. In a flash fire, seconds could make the difference between life and death, or in degrees of injury. MEI was in serious violation of §1910.36(b)(8).

#### Item 4: Alleged Serious Violation of § 1910.36(d)(1)

The Secretary charges MEI with a serious violation of § 1910.36(d)(1), which provides:

Every required exit, way of approach thereto, and way of travel from the exit into the street or open space, shall be continuously maintained free of all obstructions or impediments to full instant use in the case of fire or other emergency.

The Secretary contends that a golf cart parked by Kathy Mink outside the door of Building 105 obstructed the exit of the building so as to expose the employees to a fire hazard. Jamie Phillips testified (Tr. 87):

I busted out of the door and I fell onto a golf cart that was parked right in front of the door and I fell. It was like parked--like I said, you run out of the door, and it was parked kind of like sideways to where I ran out. I fell onto the seat, the seat of the golf cart.

Kathy Mink testified that she parked the golf cart outside Building 105 more than 4 or 5 feet from the door. She stated that the golf cart did not obstruct anyone from exiting the building (Tr. 256-258).

Roy Settergen, MEI's engineering manager, prepared a scale drawing of Building 105 (Exh. R-3; Tr. 167-168). Using the dimensions of the door and the golf cart, and relying on post-fire

photographs of the scene, Settergen estimated the location of the golf cart in relation to Building 105. Settergen concluded that the golf cart was approximately 94 inches (7 feet 10 inches) away from Building 105's door (Exh. R-5; Tr. 173-187).

Even accepting MEI's estimate of the distance from the door to the golf cart as 7 feet 10 inches, MEI was in violation of §1910.36(d)(1). The standard does not require only the immediate area of the door to be free of obstructions. It requires the "way of travel from the exit into the street or open space" to be clear. When one is rushing from a burning building, 7 feet 10 inches is not far. Having to go around (or, as Phillips did, falling over) an obstruction can cause delays in fleeing from the fire or getting to medical assistance. The Secretary has established a serious violation of §1910.36(d)(1).

#### Item 5: Alleged Serious Violation of §1910.132(a)

The Secretary alleges MEI violated §1910.132(a), which provides:

Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

In the citation, the Secretary asserts that MEI violated the standard by permitting Phillips and Glombowski "to work without fire retardant laboratory coats and coveralls between the hours of 4:00 p.m. and 6:00 p.m. on November 20, 1995, exposing employees to an injury from fire." MEI does not dispute that §1910.132(a) required Phillips and Glombowski to wear some form of fire retardant clothing while working in Building 105. MEI contends they were wearing appropriate protective clothing.

Mink testified that Phillips and Glombowski received protective clothing in MEI's break room prior to going to Building 105 (Tr. 240-241). Barbara Tate also testified that Phillips and Glombowski were wearing protective clothing when they began work in Building 105 (Tr. 278-280). Dave Chasteen, MEI's production supervisor, stated that Phillips and Glombowski were wearing appropriate protective clothing at the beginning of their shift in Building 105 (Tr. 308-309).

Although these three witnesses agreed that the two employees were wearing protective clothing the entire time they were working in Building 105, they disagreed on certain details regarding the clothing. Tate testified the lab coats that were first given to Phillips and Glombowski were too small, and Chasteen later brought both of them coveralls (Tr. 279-280). Chasteen stated

he took Glombowski from Building 105 to another building to fit him with coveralls, and that Glombowski wore coveralls while Phillips wore a lab coat (Tr. 309). Mink did not recall any details about difficulty finding clothes that would fit the employees (Tr. 249).

Phillips' recollection of the events regarding the protective clothing is at odds with those of the other witnesses. He testified that when he arrived at 3:50 p.m. for the evening shift, Tate told him he would be working in Building 105, and that he needed to wear leg stats (Tr. 74-75). When Phillips arrived at Building 105, Tate, Wilkinson, and Mink were there showing Glombowski how to run one of the presses (Tr. 77). At that time Phillips and Glombowski were wearing "school clothes," jeans, and shirts. Neither of them was wearing coveralls or a lab coat (Tr. 78-79). They began running the presses. Phillips testified that "a little before the 6:00 break, Dave and Bill brought coveralls and a lab coat and some shoes" (Tr. 79). The protective clothing was too small (Tr. 79-80):

The first pair of coveralls [Chasteen] brought was too small, and he hadn't found a lab coat yet. And the shoes he brought was too small for Greg. So, he had to go look for bigger ones. And, then, whenever he came back, he had the coveralls fit and the shoes fit Greg, but the lab coat was too small. So, then when he came back at like the 6:00 break, he had a lab coat that fit.

According to Phillips, he was first wearing the coveralls at approximately 5:30 p.m., and Glombowski began wearing the lab coat during the 6:00 p.m. break (Tr. 96).<sup>9</sup>

The testimony of Phillip is more credible than the testimony of Tate, Mink, and Chasteen. Phillips recalls a specific, detailed chronology of events. It is reasonable to assume the details regarding the protective clothing he was given that night would make more of an impression on Phillips than it would on his co-workers. Their work at MEI was routine to them, and they would not be overly concerned with remembering the specifics of when and how two new employees were outfitted with protective clothing. Phillips, however, had been working at MEI for less than a week. All of his experiences there were new to him, and this was the first time he was required to wear protective clothing. The Secretary has established that Phillips and Glombowski were working with

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<sup>9</sup> Phillips's testimony is corroborated in a statement made by former MEI employee Kimberly Grantham to Compliance Officer McGowan (Exh. C-12). Her statement is given no weight, however, because the Secretary failed to establish that it was made while she was employed with MEI, in accordance with Federal Rule of Evidence § 801(d)(2)(D). Grantham's personnel records show her last day of work was November 20, the day of the fire, and that she took personal leave until November 30, when she resigned (Exh. R-19). The typed statement that Grantham gave McGowan states at the top, "10:35 November 30 1995." However, each of the four pages of the statement are signed at the bottom "Kimberly R. Grantham 12-1-95" (Exh. C-12). No reason was given for the discrepancy in the dates, and McGowan was uncertain as to whether he was present when Grantham signed the statement (Tr. 131-132, 135). Grantham was not called as a witness. Because the December 1 date accompanies her signature and is presumably in her handwriting, it is concluded that December 1 is the date of Grantham's statement. As such, the statement was made after her employment with MEI had terminated.

the magnesium composition on the production line for at least ninety minutes on November 20 without protective clothing. Chasteen, the production supervisor, knew of this safety violation because he was the one who brought them the clothing.

The Secretary has established a serious violation of §1910.132(a).

Item 6a: Alleged Serious Violation of §1910.132(f)

The Secretary alleges that MEI violated §1910.132(f), which provides:

The employer shall provide training to each employee who is required by this section to use PPE. Each such employee shall be trained to know at least the following:

- (i) When PPE is necessary;
- (ii) What PPE is necessary;
- (iii) How to properly don, doff, adjust, and wear PPE;
- (iv) The limitations of the PPE; and,
- (v) The proper care, maintenance, useful life and disposal of the PPE.

The Secretary alleges that MEI did not train Phillips in “how to don, doff, adjust, and wear” leg stats. Leg stats conduct electricity out of an employee’s body, reducing the chance of an electrical build-up which could cause a fire (Tr. 110).

When Tate told Phillips to go to Building 105, she told him that he needed to put on leg stats (Tr. 74). Phillips was given no further instructions regarding the leg stats (Tr. 75-76):

Q.: When [Tate] gave you the leg stats, did she show you how to put them on?

Phillips: No.

Q.: Did anybody else show you how to put them on?

Phillips: No.

Q.: Did they explain it to you?

Phillips: No.

...

Q.: At some point, did you get the leg stats on?

Phillips: Yes.

Q.: You just put them on--did you put them on yourself?

Phillips: Yes, I just put one around my foot and one around my ankle because there was another guy, Montez, and he had his on. I looked at how he had his on. I asked Barbara Tate how to put them on, and then she was like in a hurry to get to the building and she was like, “Put them on and meet us down there,” and she took

off. I was looking at his feet and then I just put them on like he had them on.

Q.: After you put them on, did you test them?

Phillips: No.

Q.: Did anybody tell you to test them?

Phillips: No.

Q.: Do you know what a tester is?

Phillips: No.

The testing of leg stats after putting them on is important because, if not adjusted properly, they can fail to conduct electricity out of an employee's body (Tr. 322).

None of the other MEI employees who testified stated that he or she had demonstrated to Phillips how to put on and adjust the leg stats. Tate claimed that Grantham did so, but she testified she did not observe this (Tr. 274, 277-278).

MEI contends that Phillips was trained in the use of leg stats, and adduced a copy of checklist entitled "Employee Orientation Training Supervisor's Checklist" (Exh. R-2). The checklist states, "The following points were included as items of discussion with the above named employee about the safety aspects of his/her job." Item 7 is listed as "Static electricity control: Conductive boots/shoes, leg and wrist straps, and all-cotton clothing" (Exh. R-2). Item 7 is marked as being discussed and is dated November 14, 1995. Phillips signed the checklist.

Phillips testified that he filled out the checklist at the time he was hired, along with other paperwork: "I think we did this at the front with--what is her name--Phyllis . . . . We did a bunch of paperwork with her. We went over all that, and then we drew maps of who we wanted to contact if we got hurt and who to call" (Tr. 97). When asked if he understood all the papers that he signed, Phillips stated, "I think we went over them. We went over a bunch of papers like insurance plans and all that"(Tr. 98).

The Secretary has established that MEI committed a serious violation of §1910.132(f). Phillips was told to put on leg stats and then left to his own devices to figure out how to do it. Even when he asked for help, the supervisor was too busy to assist him. Any minimal instruction contained in the checklist was lost in the shuffle of paperwork that Phillips was given to complete on his first day. Item 6a is affirmed.

## Items 6b, 7a, and 7b: Alleged Serious Violations of the Process Safety Management Standard

The Secretary contends that MEI violated §§1910.119(g)(1)(i), (c)(1), and (e)(1). Section 1910.119 is entitled “Process safety management of highly hazardous chemicals.” As a preliminary matter, MEI contends that §1910.119 does not apply to the cited conditions.

The application section of the standard, §1910.119(a), provides:

This section applies to the following:

- (i) A process which involves a chemical at or above the specified threshold quantities listed in Appendix A to this section;
  
- (ii) A process which involves a flammable liquid or gas (as defined in 1910.1200(c) of this part) on site in one location, in a quantity of 10,000 pounds (4535.9 kg) or more . . . .

It is undisputed that MEI has none of the chemicals specified in Appendix A at its facility, nor does it have a flammable liquid or gas on site in one location, in a quantity of 10,000 pounds or more (Tr. 36-39, 139). Therefore, it would appear that §1910.119 does not apply to MEI in the instant case.

The Secretary counters that §1910.109(k) makes §1910.119 applicable to MEI. Section 1910.109 is entitled “Explosives and blasting agents.” Section 1910.109(k) provides:

*Scope.* (1) This section applies to the manufacture, keeping, having, storage, sale, transportation, and use of explosives, blasting agents, and pyrotechnics . . . .

(2) The manufacture of explosives as defined in paragraph (a)(3) of this section shall also meet the requirements contained in §1910.119.

(3) The manufacture of pyrotechnics as defined in paragraph (a)(10) of this section shall also meet the requirements contained in §1910.119.

MEI qualifies as a manufacturer of explosives under §1910.109(a)(3). The citation cites only §1910.119 in items 6b, 7a, and 7b. Section 1910.109 is not referenced or otherwise mentioned.

MEI argues that §1910.119 is “unconstitutionally vague, ambiguous as applied to Respondent’s business, and fails to provide fair notice to Respondent that it is governed by that regulation” (MEI’s Brief, p. 27). These arguments are rejected. Section 1910.109 is headed “Explosives and blasting agents.” Section 1910.119(a)(3) defines explosives. Section 1910.109(k)(2) provides that manufactures of explosives “shall also meet the requirements contained in §1910.119.” It is the employer’s responsibility to make itself aware of the requirements of the Act. A manufacturer of explosives, such as MEI, is on fair notice that it is required to comply with

§1910.119 if it reads §1910.109. Since §1910.109 addresses explosives, it is reasonable to expect a manufacturer of explosives to acquaint itself with the standard's requirements. It would have been preferable to reference §1910.109(k) in the citation and complaint, but the Secretary's failure to do so does not compromise the fair notice to MEI. Section 1910.119 applies to MEI.

Item 6b: Alleged Serious Violation of §1910.119(g)(1)(i)

The Secretary charges MEI with a serious violation of §1910.119(g)(1)(i), which provides:

Each employee presently involved in operating a newly assigned process, shall be trained in an overview of the process and in the operating procedures as specified in paragraph (f) of this section. The training shall include emphasis on the specific safety and health hazards, emergency operations including shutdown, and safe work practices applicable to the employee's job tasks.

Phillips began working for MEI four working days before the fire. Until the day of the fire, Phillips had not worked with the magnesium composition. Any general safety training that he was given was cursory and administered while he was signing insurance forms and other paperwork.

MEI was required to give Phillips and Glombowski more specialized instruction when it assigned him to Building 105. MEI contends that Phillips and Glombowski were given written work instructions to read and sign before beginning work in Building 105 (Tr. 244-245). Phillips described the extent of his exposure to the work instructions (Tr. 77):

Barbara Tate and Kathy and Barbara Wilkinson and Greg was in there. And, they was showing Greg how to run the machine he was on, and then gave him a paper to look at.

I was sitting on the other side behind him, and they gave him a paper to look at and then they gave him a clipboard to sign. Then, he signed it and then I signed it and put the date on there and that was it.

Phillips also testified that no one trained him in the operating procedures in Building 105. When asked if anyone showed him how to operate the presses, Phillips replied, "I seen Kathy working it. I just watched her over her shoulder because Greg and Barbara were pressing powder in there, and so she was pressing them out. And, I watched her do that and then she got up and left" (Tr. 78). Mink did not explain the operation of the press to Phillips while he was watching her (Tr. 78).

The Secretary has established that MEI committed a serious violation of §1910.119(g)(1)(i). MEI did not train Phillips in an overview of a newly assigned process.



Item 7a: Alleged Serious Violation of §1910.119(c)(1)

Section 1910.119(c)(1) provides:

Employers shall develop a written plan of the action regarding the implementation of the employee participation required by this paragraph.

Lowe, MEI's risk manager, admitted that MEI did not have a written process safety management program (Tr. 24). The Secretary has established a serious violation of this standard.

Item 7b: Alleged Serious Violation of §1910.119(e)(1)

Section 1910.119(e)(1) provides, in pertinent part:

The employer shall perform an initial process hazard analysis (hazard evaluation) on processes covered by this standard. The process hazard analysis shall be appropriate to the complexity of the process and shall identify, evaluate, and control the hazards involved in the process. Employers shall determine and document the priority order for conducting process hazard analyses based on a rationale which includes such considerations as extent of the process hazards, number of potentially affected employees, age of the process, and operating history of the process.

The Secretary failed to establish a violation of this standard. MEI had performed a hazard analysis with respect to the ATWESS project (Exh. R-1; Tr. 57). Sections 1910.119(e)(1)(i)-(v) set out a schedule by which percentages of the analysis are to be completed. Section 1910.119(e)(1)(iv) provides, "All initial process hazards shall be completed by May 26, 1997." The fire occurred on November 20, 1995. The Secretary failed to show the portion of the hazard analysis that MEI performed was not in compliance with the schedule set out in §1910.119(e).

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

MEI employed approximately 250 employees at the time of the fire (Tr. 152). The Secretary had cited MEI previously for violations of the Act (Tr. 68-70). No evidence of bad faith was adduced. The gravity of the violations was extremely high. Employees were working in close quarters in a wooden structure with a highly flammable material. All of the violated safety standards were aimed at preventing a fire hazard. The eruption of a fire under the circumstances in which the

employees in Building 105 were working would likely lead to catastrophic results. In the present case, two employees died and a third was critically burned in the fire.

The penalty for item 1, the violation of §5(a)(1), is \$5,600.00. Constructing Building 105 out of wood, when it housed a process which required the use of magnesium, created a highly hazardous environment for the employees who worked in the building.

The penalty for item 3, the violation of §1910.36(b)(8) is \$5,600.00. Having only one exit from Building 105 increased the chances of injury to the employees. The door was obstructed by flames, and visibility of the door was poor during the fire.

The penalty for item 4, in violation of § 1910.36(d)(1), is \$5,600.00. Parking the golf cart within 8 feet of the only door obstructed the emergency exit made by the employees.

The penalty for item 5, in violation of § 1910.132(a), is \$4,000.00. Phillips and Glombowski were required to work with a highly flammable material for ninety minutes to two hours without protective clothing.

The penalty for items 6a and 6b, the violations of §§ 1910.132(f) and 1910.119(g)(1)(i), is \$4,000.00. MEI failed to show Phillips how to put on a crucial piece of protective equipment, to the point of ignoring him when he directly asked for help. MEI also failed to train Phillips in the safe operation of the process to which he was assigned.

The penalty for item 7a, in violation of § 1910.119(c)(1), is \$2,800.00. MEI's failure to have a written plan of action for employee participation resulted in the haphazard manner in which Phillips was introduced to the work in Building 105.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

### **ORDER**

Based upon the foregoing decision, it is hereby ORDERED that the items cited in the citation be disposed of as follows:

1. Item 1, in violation of § 5(a)(1), is affirmed and a penalty of \$5,600.00 assessed.
2. Item 2a, in violation of § 1910.22(a)(1), is vacated and no penalty assessed.
3. Item 2b, in violation of § 1910.176(c), is vacated and no penalty assessed.
4. Item 3, in violation of § 1910.36(b)(8), is affirmed and a penalty of \$5,600.00 assessed.

5. Item 4, in violation of § 1910.36(d)(1), is affirmed and a penalty of \$5,600.00 assessed.
6. Item 5, in violation of § 1910.132(a), is affirmed and a penalty of \$4,000.00 assessed.
7. Item 6a, in violation of § 1910.132(f), and item 6b, in violation of §1910.119(g)(1)(i), are affirmed and a penalty of \$4,000.00 assessed.
8. Item 7a, in violation of § 1910.119(c)(1), is affirmed and a penalty of \$2,800.00 assessed.
9. Item 7b, in violation of § 1910.119(e)(1), is vacated and no penalty assessed.

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KEN S. WELSCH  
Judge

Date: September 19, 1997