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SECRETARY OF LABOR, Complainant, v. KASPAR ELECTROPLATING CORP., Respondent.	OSHRC DOCKET NO. 90-2866

DECISION

BEFORE: FOULKE, Chairman; and MONTOYA, Commissioner.

BY THE COMMISSION:

At issue in this case is whether a Commission Administrative Law Judge erred in affirming four citation items issued to Kaspar Electroplating Corporation ("Kaspar") for alleged serious violations of machine-guarding standards promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. §§ 651-678. Kaspar petitioned the Review Commission for review of these four alleged violations. It argues that: (1) the citation for those violations is barred by the statute of limitations set forth in section 9(c) of the Act, 29 U.S.C. § 658(c);[1] (2) the judge erred in relying on opinion testimony by the Secretary's compliance officer; and (3) no violations were shown on the merits. For the reasons detailed below, we affirm three serious violations (Item 3, 4, and 5) and the judge's penalty assessments for those items, and vacate the other alleged violation (Item 7).

[1]That section provides that "[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation."

1. Whether the judge erred in ruling that issuance of the citation was not barred by the limitations provision at 29 U.S.C. § 658(c)?

On March 19 or 20, 1990, compliance officer Nicke Antonio of the Secretary's Occupational Safety and Health Administration ("OSHA") arrived at Kaspar's facility in Shiner, Texas, pursuant to a warrant, which Kaspar had demanded. The warrant was based on OSHA's general administrative inspection plan. OSHA's actual workplace inspection, however, took place from March 21-23, 1990, due to time spent on legal questions. The citation was issued on September 20, 1990.

Kaspar argues that the citation is barred because it was issued more than six months after the alleged violations last occurred. It notes that Antonio did not see any of the cited machines in operation on the day of his inspection and cites testimony that several of them had last been used a month or two before the inspection.

The judge held that the limitation period set out at 29 U.S.C. § 658(c) does not begin to run until OSHA discovers, or reasonably should have discovered, a violation. He cited, among other cases, *Kaspar Wire Works, Inc.*, 13 BNA OSHC 1261, 1987 CCH OSHD ¶ 27,882 (No. 85-1060, 1987).

The Commission recently reaffirmed that an uncorrected violation may be cited six months from the time the Secretary discovers, or reasonably should have discovered, the facts necessary to issue a citation. *Johnson Controls, Inc.*, 15 BNA OSHC 2132, 2136, 1993 CCH OSHD ¶ 29,953, p. 40,965 (No. 89-2614, 1993). *See General Dynamics Corp., Electric Boat Div.*, 15 BNA OSHC 2122, 2128, 1993 CCH OSHD ¶ 29,952, pp. 40,956-57 (No. 87-1195, 1993).[2]

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[2]Kaspar cites *Dravo Corp.*, 3 BNA OSHC 1085, 1974-75 CCH OSHD ¶ 19,543 (No. 1487, 1975). There, a citation for failure to comply with spray painting requirements was vacated on the ground that the Secretary failed to prove that the employer was engaged in spraying the specific paint within six months before the citation was issued. To the extent that *Dravo* held that materials not actually used within six months of the citation are not citable, that case is inconsistent with more recent cases such as *Kaspar Wire Works* and *Johnson Controls*. Thus, to that extent it effectively has been overruled. The Secretary need not affirmatively plead or prove compliance with the six-month limitation, although noncompliance with that limitation may be raised as a defense. *See, e.g., General Dynamics*, 15 BNA OSHC at 2127 n.10, 1993 CCH OSHD at p. 40,956 n.10 (29 U.S.C. § 658(c) is not absolute jurisdictional bar to issuance of citation more than six months after occurrence of violation, but rather is statutory limitation provision).

Here, there is no evidence that the Secretary had any prior notice of the existence of the alleged violations. As the judge found, the record indicates that the Secretary's first opportunity to discover them was when the actual workplace inspection began and that he issued the citation within six months of that date. As discussed below, the violations we find in this case (Items 3, 4 and 5) existed at the time of that workplace inspection. Thus, we find the issuance of the citation timely under 29 U.S.C. § 658(c) as to those items. Also as discussed below, we vacate the other item (Item 7) because there is insufficient evidence that employees had the requisite access to the alleged hazards at *any* time.[3]

2. Whether the judge erred in affirming the serious violations on the ground that he erroneously relied on opinion testimony by the Secretary's compliance officer

The judge relied on testimony by Antonio regarding the cited conditions, including certain of Antonio's opinions regarding the hazards presented by those conditions. Kaspar argues that the judge should not have allowed that opinion testimony because the Secretary informed Kaspar, in answer to one of its interrogatories, that he did not intend to call an expert to testify.

Under Commission precedent, opinion testimony by an OSHA compliance officer may be admissible as non-expert testimony if it is "helpful in the resolution of a material issue and is based on his personal knowledge." *Harrington Constr. Corp.*, 4 BNA OSHC 1471, 1472, 1976-77 CCH OSHD ¶ 20,913, p. 25,109 (No. 9809, 1976). In *Harrington*, the Commission ruled admissible an OSHA compliance officer's opinion testimony as to the texture of the soil in a trench, including his inferences as to its stability, because that

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[3]Kaspar suggests that there is no affirmative evidence in the record that the citation was actually served on it within the 6-month citation period. If Kaspar is seeking now to raise that claim as a separate issue, it is untimely. Kaspar has not presented, and we have not found, any indication that the Secretary was aware previously that Kaspar was raising that particular issue. The issue is a factual one and may not be raised for the first time after the hearing. *E.g., Armour Food Co.*, 14 BNA OSHC 1817, 1823-24, 1987-90 CCH OSHD ¶ 29,088, p. 38,885 (No. 86-247, 1990) (amendment of pleadings after hearing is proper only if parties "squarely recognized" that they were trying unpleaded issue).

testimony was based on his observation and handling of the soil. The Commission relied on Rule 701 of the Federal Rules of Evidence.[4]

Based on our analysis of Antonio's opinion testimony, we find that the judge did not err in admitting those opinions into evidence and relying on them regarding Items 3, 4, and 5. Each of those opinions, we find, was rationally based on Antonio's observation of the cited conditions and is of some help in determining a fact in issue.[5]

As to Item 7, certain of the compliance officer's opinions crossed into areas that only experts may testify about (for example, his testimony as to why an employee might contact the nip points, quoted *infra* n.17). A compliance officer does not qualify as an expert witness merely because of the number of previous inspections he or she has done. Commission judges should not admit opinion testimony by a compliance officer on a subject about which only an expert may testify, unless the compliance officer has been shown qualified as an

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[4]That rule states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

See also Ed Jackman Pontiac-Olds, Inc., 8 BNA OSHC 1211, 1215, 1980 CCH OSHD ¶ 24,351, p. 29,681 (No. 76-20, 1980) (OSHA compliance officer's non-expert testimony to effect that there were dangerous quantities of flammable paint vapors and of combustible paint deposits, thus making employer's automobile body shop a "spraying area" subject to cited standard, was admissible because that testimony was probative and based on his observations).

[5]As to item 3, Kaspar complains that the judge relied on Antonio's opinion regarding the alleged hazard created by a bent guard on the bandsaw. As to Items 4 and 5, Kaspar complains that the judge considered Antonio's testimony regarding the hazards of the exposed wheel of a bench-mounted grinding machine. However, all that testimony was rationally based on Antonio's observations of the conditions. The other opinion testimony of which Kaspar complains regarding those items (discussed below) also was based on his observations of Kaspar's machines and of comparable machines, so far as the record shows.

expert in that area.[6] However, Antonio's opinion testimony on which the judge relied in affirming Items 3, 4, and 5 is admissible in this context as non-expert testimony.[7]

Kaspar argues that an OSHA compliance officer's testimony that is based on experience as a compliance officer or on-the-job training prior to becoming a compliance officer necessarily constitutes expert testimony. That is incorrect. Of course, Antonio's experience and training might have qualified him to give expert testimony on certain subjects.[8] However, to say that such a person *may* testify as an expert is not to say that the person *may only* testify as an expert. As discussed above, under Fed. R. Evid. 701, a witness also may give a non-expert opinion in court, where it is rationally based on the witness's perceptions. Kaspar has failed to show that Antonio's opinion testimony on the items we affirm here was expert testimony. Although it claims unfair surprise, it could have anticipated from Commission precedent and the Federal Rules of Evidence that the judge would receive non-expert opinion testimony from Antonio on the nature of the alleged hazards.[9]

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[6]Further, we note that the Secretary could eliminate certain misunderstandings by stating, in response to interrogatories such as Kaspar's, that the OSHA compliance officer is expected to give non-expert opinion testimony regarding the alleged hazards.

[7]Kaspar's reliance on *Northern Heel Corp. v. Compo Indus.*, 851 F.2d 456 (1st Cir. 1988), is misplaced. That decision upheld the trial court's ruling that certain expert testimony would not be admitted because the party offering the expert had not fairly disclosed, during discovery, the substance of what the expert testimony would be. *Id.* at 468 n. 5. Here, Antonio's opinion testimony regarding the items we are affirming was admissible as non-expert testimony.

[8]In *Federal Crop Ins. Corp. v. Hester*, 765 F.2d 723, 728 (8th Cir. 1985), on which Kaspar relies, the court held, "[a] witness may testify as an expert 'if his knowledge of the subject matter qualifies him to offer an opinion that will most likely assist the trier of fact in arriving at the truth.'" *Id.* at 728 (quoting *Sweet v. United States*, 687 F.2d 246, 249 (8th Cir. 1982)). The court in *Hester* held that under Fed. R. Evid. 702, "[a] witness's practical experience can be the basis of qualification as an expert." *Id.*

[9]Kaspar argues that testimony as to probability of an event is, by its very nature, expert testimony. That proposition is unfounded. Kaspar relies on *Berkovich v. Hicks*, 922 F.2d 1018, 1025 (2d Cir. 1991). In *Berkovich*, the plaintiff in a civil rights action against police officers for false arrest and related claims appealed an adverse jury verdict. One of his many assertions was that the judge erred in excluding proffered rebuttal testimony concerning the probability that "no standing" signs were in the area of the arrest, as the officers had testified. The appeals court rejected that argument on the ground that the proffered witness was not an expert in statistics relating to the number of different types of parking signs in the area. However, implicit in its ruling was that the witness' testimony would not be based on relevant personal observations of the area. By contrast, the testimony to which Kaspar objects was based on Antonio's personal observations. We therefore conclude that *Berkovich* does not provide any support for Kaspar's argument.

3. Item 3 -- bent blade guard on bandsaw

The Secretary alleged a violation of the machine-guarding standard at 29 C.F.R. § 1910.212(a)(3)(ii),[10] based on the compliance officer's observation that a blade guard on a bandsaw in the maintenance area had been bent up, exposing about 1½ inches of blade. Because of this, the Secretary contends, if an employee's hand, or the stock, were to slip during operation of the saw, it could contact the blade, resulting in severe lacerations.

In order to prove a violation, the Secretary must show that the standard applied to the cited conditions, that the employer failed to comply with the terms of the standard, that employees had access to the cited conditions and that the employer knew or, with the exercise of reasonable diligence, could have known of those conditions. *E.g., Gary Concrete Prod., Inc.*, 15 BNA OSHC 1051, 1052, 1991 CCH OSHD ¶ 29,344, p. 39,449 (No. 86-1087, 1991).

Kaspar does not take issue with the judge's findings that the standard applied, that there was noncompliance, and that Kaspar knew or reasonably could have known of the violative condition. Kaspar contends, however, that no violation was shown because the Secretary failed to prove that employees had access to the hazard. This is the only issue directed for review.

The Secretary may prove that employees had access to a hazard by showing "that employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger." *Armour Food Co.*, 14 BNA OSHC 1817, 1824, 1987-90 CCH OSHD ¶ 29,088, p. 38,886 (No. 86-247, 1990) (quoting *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, 1975-76 CCH OSHD ¶ 20,448, p. 24,425 (No. 504, 1976). Thus, the question is whether it is reasonably predictable that an employee will be in the zone of danger. *Gilles & Cotting.*

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[10]That standard provides in pertinent part:

> 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.

Kaspar argues that the judge erroneously put the burden of disproving access on it and that the evidence does not show that the saw was accessible. Based on the evidence of record, however, we find that the Secretary presented sufficient affirmative evidence that the bandsaw was accessible. We further find that that evidence was not adequately rebutted.

Antonio testified that he determined that the bandsaw was available for use because it had shavings indicating prior use and it had no tag to indicate it was not in service. Gerard Novosad, a maintenance employee for Kaspar at the time of the inspection, testified that he had used the saw about two weeks before the inspection. His testimony further indicated that other maintenance employees had access to the saw.[11] He recalled that machinery had been tagged before at the plant, although he could not remember a specific instance.

The testimony of Antonio and Novosad mentioned above is barely sufficient to establish, prima facie, that the machine was accessible to employees at the time of the inspection. Kaspar relies on Novosad's testimony that the bandsaw was up on a pallet and unplugged at that time. However, those facts, without amplification, fall short of rebutting the evidence of access. There was no evidence that the employees knew not to plug in such a machine and use it. Since the bandsaw was used only periodically, for specific projects as needed, it was foreseeable that the saw would be accessible to employees even though unplugged.

Kaspar further relies on Novosad's testimony that the bandsaw was not available for use because the guard "was flapped up." That fact alone provides no basis for vacating this item. The evidence did not show that the employees who had access to the machine had

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[11]Novosad testified specifically:

> Q: Besides yourself, who else would have used that particular saw?
> A: Other people in our maintenance crew.
> Q: Okay. So you may not have used it, but other people could have used it?
> A: Yes, sir. On our maintenance crew, yes.
> . . . .
> Q: Okay. Would the maintenance crew have come through there at different times during the day?
> A: Basically, yes. You know, we usually work up and down. And so they probably would, you know, come by there and maybe work, you know, with it or -- you know.

been instructed never to operate it with a guard in that condition.[12] Thus, the testimony on which Kaspar relies does not rebut the evidence that the unguarded saw blade was accessible to employees at the time of the inspection.[13]

Lastly, Kaspar questions the credibility of Antonio's testimony on this item. It notes that Antonio first testified that he did not recollect whether the bandsaw was plugged in, but later testified that "all the equipment I saw was attached, plugged in." Kaspar argues that the change in Antonio's testimony is significant. However, the judge did not rely on Antonio's testimony regarding the plug. Nor do we. Antonio's other factual testimony on this item is not disputed.

We therefore conclude that the Secretary has established by a bare preponderance of the evidence that the bandsaw was accessible to employees at the time of the inspection, regardless whether it was plugged in to an outlet. Thus, the Secretary has established all the elements of a violation. Based on Antonio's unrebutted testimony that severe lacerations would be a likely result if an employee's hand contacted the saw blade while it was in operation, we also conclude that the judge's finding that the violation was serious is correct. "[A] serious violation is established if an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident." *E.g., Consol. Freightways Corp.*, 15 BNA OSHC 1317, 1324, 1991 CCH OSHD ¶ 29,500, p. 39,813 (No. 86-351, 1991). We therefore affirm the judge's finding of a serious violation as to Item 3.

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[12]Kaspar's safety officer, Paul Morkovsky, testified that the fact that the bandsaw was on a pallet and unplugged, with the bent guard, supported Novosad's testimony that it was out of service. However, that testimony merely establishes that there was some indication that the saw was intended to be sent for repairs. Again, there was no testimony that Kaspar employees were told not to use a machine with a bent guard. Morkovsky's testimony that he would have "dead-lined" the saw (taken it out of service) if he had seen it suggests that he would have done more to prevent its use than was done. (Kaspar gave Morkovsky the title "compliance officer," but we will refer to him as "safety officer," to distinguish him from OSHA's compliance officer, Antonio.)

[13]Kaspar relies on the fact that the Secretary did not show that the cord on the saw could reach an available electrical outlet. However, neither did Kaspar offer evidence that the cord could *not* reach such an outlet. It is clear from Antonio's testimony that he did not see that the bandsaw was unplugged. Thus, there is no evidence that he should have looked for an available outlet at that time. By contrast, Kaspar had every opportunity to present rebuttal evidence that the saw was effectively removed from power sources. It presented none. Kaspar notes that it was not cited for a lockout/tagout violation (under section 1910.147), but that fact is irrelevant because the Secretary does not claim that the bandsaw was intended to be out of service.

4. Items 4 and 5 -- grinding machine

The Secretary alleged that the left grinding wheel of a bench-mounted grinding machine located in the maintenance area was hazardous because: (1) the work rest was pulled completely down and away from the wheel and (2) the wheel had no peripheral guard. The judge agreed and found violations of 29 C.F.R. § 1910.215(a)(4) and (b)(9).[14]

Supporting its contention that the judge erred in affirming these violations, Kaspar argues that the Secretary failed to show that the cited standards were applicable to its abrasive wheel machine. Kaspar argues that it was exempt from the standard's coverage, but it presented no evidence in support of that claim.

The Commission recently reaffirmed that the party claiming the benefit of an exception to the requirements of a standard has the burden of proof of its claim. *E.g., Con Agra Flour Milling Co.*, 15 BNA OSHC 1817, 1823, 1992 CCH OSHD ¶ 29,808, p. 40,593 (No. 88-2572, 1992). Further, the Commission has specifically rejected an employer's claim that the Secretary bears the burden of showing that a bench grinder regulated under section

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[14]Those standards provide:

> **Subpart O--Machinery and Machine Guarding**
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> . . . .
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> **§ 1910.215 Abrasive wheel machinery.**
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> (a) *General requirements--*
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> . . . .
>
> (4) *Work rests.* On offhand grinding machines, work rests shall be used to support the work. They shall be of rigid construction and designed to be adjustable to compensate for wheel wear. *Work rests shall be kept adjusted closely to the wheel with a maximum opening of one-eighth inch* to prevent the work from being jammed between the wheel and the rest, which may cause wheel breakage. . . .
>
> . . . .
>
> (b) *Guarding of abrasive wheel machinery* . . . .
>
> (9) *Exposure adjustment.* Safety guards of the types described in subparagraphs (3) and (4) of this paragraph [including safety guards for bench-mounted grinding wheels], where the operator stands in front of the opening, shall be constructed so that the peripheral protecting member can be adjusted to the constantly decreasing diameter of the wheel. The maximum angular exposure above the horizontal plane of the wheel spindle as specified in paragraphs (b)(3) and (4) of this section shall never be exceeded, and the distance between the wheel periphery and the adjustable tongue or the end of the peripheral member at the top shall never exceed one-fourth inch. . . .

(Emphasis added.)

1910.215 is not subject to the exemptions in the standard. *Stephenson Enterp.*, 4 BNA OSHC 1702, 1705, 1976-77 CCH OSHD ¶ 21,120, p. 25,429 (No. 5873, 1976), *aff'd on other grounds*, 578 F.2d 1021 (5th Cir. 1978). Thus, we reject Kaspar's inapplicability argument.

Issues relating solely to Item 4

Antonio testified that the work rest "was pulled completely down and away from the wheel" and was not even close to the wheel. He added that the grinder was plugged in at the time and that the area "was covered with metallic fragments, or dust, from grinding operations." Antonio gave the opinion that without a proper rest, parts could be pulled into the wheel and ejected out at high speed at the employee, or the employee's hand could get caught in the wheel, causing serious lacerations.

Kaspar argues that the Secretary failed to prove that a hazard existed. However, the Secretary points out that the standard presumes a hazard, because it provides that "[w]ork rests shall be kept adjusted closely to the wheel with a maximum opening of one-eighth inch[.]" Under Commission and judicial precedent, including that of the Fifth Circuit where this case arises, the Secretary bears no burden of proving that failure to comply with such a specific standard creates a hazard. *E.g.*, *Bunge Corp. v. Secretary of Labor*, 638 F.2d 831, 834 (5th Cir. 1981) ("[u]nless the general standard incorporates a hazard as a violative element, the proscribed condition or practice is all that the Secretary must show; hazard is presumed and is relevant only to whether the violation constitutes a 'serious' one"); *Pyramid Masonry Constr.*, 16 BNA OSHC 1461, 1464, 1993 CCH OSHD ¶ 30,255, p. 41,674 (No. 91-600, 1993) (if standard presumes that hazard exists when its terms are not met, Secretary need not prove existence of hazard).[15]

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[15]Kaspar relies on a Commission case on this issue, *Weatherhead Co.*, 4 BNA OSHC 1296, 1976-77 CCH OSHD ¶ 20,784 (No. 8862, 1976). However, the portion on which it relies is an unreviewed judge's decision. 76 OSAHRC 61/F4. Such a decision lacks precedential value. *Leone Constr. Co.*, 3 BNA OSHC 1979, 1981, 1975-76 CCH OSHD ¶ 20,387, p. 24,322 (No. 4090, 1976). Furthermore, Kaspar relies on the summary of *Weatherhead* in the BNA volume, which differs from the judge's actual decision on the issue. The actual decision does not help Kaspar here. To the extent that the judge in *Weatherhead* placed a burden of proof on the Secretary to prove the existence of a hazard under section 1910.215(a)(4), that ruling is inconsistent with the consistent Commission precedent cited above, and is erroneous.

(continued...)

Kaspar did not show that the wheel was free from hazard with the work rest away from the wheel. It notes that Antonio testified that if the piece being ground is large enough, "this machine could be used in a safe manner[.]" However, there is no evidence that Kaspar prohibited grinding of smaller parts, for which the work rest could be adjusted to within one-eighth inch of the wheel. In fact, Kaspar assumes on brief that such an object would be the next item ground on the wheel. (Novosad testified that the machine was used basically to sharpen punches.) Thus, Antonio's testimony does not support Kaspar's contention. To the contrary, as noted above, Antonio testified that the failure to adjust the work rest exposed the employees to injury.

Kaspar argues that the Secretary did not show that the work rest was not adjusted to within one-eighth inch before small items were ground. However, the Secretary need not prove that fact. The Secretary showed noncompliance with the literal terms of the standard because the standard specifically requires that work rests be "kept adjusted" within one-eighth inch of the wheel. The wheel was not so adjusted at the time of the inspection. To rebut that prima facie evidence, Kaspar had the responsibility to present evidence that the machine *was* adjusted properly for small pieces. It presented no such evidence. We therefore conclude that Kaspar failed to rebut the evidence of noncompliance.

In any event, the Secretary established by a bare preponderance of the evidence that the work rest was *not* properly adjusted before small pieces were ground. Antonio concluded that the work rest was not properly adjusted when small pieces were ground, because he did not see marks on the side of the wheel or guard indicating such adjustments. Kaspar argues that Antonio's observations do not show noncompliance because he only testified that such marks would appear "normally." Thus, it argues, their absence proves nothing.

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[15](...continued)
In *Weatherhead*, the judge vacated the alleged violation because "by a preponderance of the evidence, respondent proved that due to the nature of the work being performed on the grinder in question there was no foreseeable danger of it becoming jammed." 76 OSAHRC 61/F13. Here, Kaspar failed to prove that there was no foreseeable danger of the wheel becoming jammed. Kaspar also argues that the judge held in *Weatherhead* that where the compliance officer does not observe the grinder in use, and where the probability of injury is "slight," the citation should be dismissed. Again, that proposition is not supported by the actual judge's decision, and, in any event, it would be contrary to the Commission precedent we have applied above.

Although Antonio's conclusion is based on circumstantial evidence, he was in a position to draw that conclusion because of his experience with grinding machines. Kaspar elicited testimony that Antonio had been an aircraft mechanic for 12 years, had used grinding wheels in that job, had seen injuries on such machines, and had seen parts go into and back out of such machines. Antonio also had 2½ years of experience as a safety specialist for the Department of the Air Force, and another 2½ years experience as an OSHA compliance officer. Based on his experience with grinding machines, Antonio's testimony is minimally sufficient to establish that the machine was not adjusted properly when small pieces were ground. Kaspar presented no contrary evidence.

Kaspar also suggests that the judge should not have relied on Antonio's testimony regarding marks normally left when a work rest is adjusted, because it was expert testimony. However, Kaspar's counsel himself elicited that testimony and Kaspar did not establish that Antonio's opinion was based on anything other than his personal observations of comparable machines.

We affirm the judge's finding of a serious violation as to Item 4. The Secretary's evidence of noncompliance was sufficient, although minimally so, and was not rebutted. There is no question that employees had access to the conditions and that they were in plain sight. The judge properly found the violation serious, because Antonio's testimony that serious lacerations could result from employee contact with the wheel was unrebutted.

Issues relating solely to Item 5

Antonio testified that because the grinder lacked the required peripheral guard, the wheel might throw out small metal parts that get into it or even broken pieces of the wheel itself. Antonio further testified that such objects might strike the operator and cause puncture wounds, lacerations, or other injuries. He testified that the hazards could be abated by installing the kind of peripheral guard depicted in the standard.

Kaspar argues that the metal shell around the wheel, along with the bolt and the housing below the work rest, provided peripheral protection. The evidence it cites is Antonio's testimony that "the shell of metal around the wheel provides peripheral protection *for the portion that it covers*[.]" (Emphasis added). However, Antonio testified that

employees were exposed to injury due to lack of guarding around the rest of the periphery. His testimony does not provide support for Kaspar's argument.

The standard cited here presumes the existence of a hazard, just like the standard cited in Item 4. Thus, Kaspar bore the burden of proof on its claim that no hazards resulted from noncompliance. We conclude that it failed to meet that burden. Although there was testimony that no injuries had occurred involving the grinder in its 32-year history, that in itself does not disprove the existence of a hazard. *E.g.*, *Rockwell Intl. Corp.*, 9 BNA OSHC 1092, 1098, 1980 CCH OSHD ¶ 24,979, p. 30,846 (No. 12470, 1980) ("the occurrence of an injury is not a necessary predicate for establishing a violation").[16]

We therefore affirm the judge's finding of a serious violation as to Item 5. The testimony established that: (1) the wheel lacked the required peripheral guard; (2) the wheel was available for employee use and was used from time to time; and (3) the violative conditions were in plain sight. Further, based on Antonio's unrebutted testimony that a part thrown out by the wheel could cause lacerations requiring sutures, we find a substantially probability that serious injury could result in the event of an accident.

5. Item 7(a) and (b) -- belts and pulleys of drill presses

The Secretary alleged that two drill presses had inadequate guards for belts and pulleys, in violation of 29 C.F.R. § 1910.219(d)(1) and (e)(1)(i).[17] Antonio testified that

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[16]Kaspar relies on *Rockwell* in arguing that the Secretary was required to prove a hazard. However, the standard in *Rockwell*, unlike the standard involved in Items 4 and 5, requires proof of a hazard. In *Rockwell*, although the Commission found the lack of injuries relevant to whether the machine presented a hazard, it based its finding of lack of proof of a hazard on other factors as well. (Those factors were the slow operation of the unguarded machine part and the fact that no employee would have any reason to be near enough to be injured during operation.)

[17]The cited standards provide:

> **§ 1910.219 Mechanical power-transmission apparatus**
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> . . . .
>
> (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. . . .
>
> . . . .
>
> (e) *Belt, rope, and chain drives*--(1) *Horizontal belts and ropes.* (i) Where both runs of horizontal belts are seven (7) feet or less from the floor level, the guard shall extend to at

(continued...)

as a result, both presses had in-running nip points near the top that an employee could contact by reaching up and over the metal front. He also testified that the older machine had similar nip points about 4 inches in from its side, due to the lack of guarding. Antonio testified that an employee's hand could be injured if it contacted the nip points.

We find, however, that the Secretary failed to prove the necessary employee access to the hazards. Antonio testified to ways in which he believed an employee might contact the nip points. For example, he testified on cross-examination that before the employee "turned the machine on, he may have set something on top of the machine . . . a tool, or something -- a rag up on top. If it fell in there when he turned the machine on, he could reach up there, and try to grab it, before he turned it off." However, Antonio did not indicate any basis in his personal experience for making those conclusions.[18] Furthermore, he agreed that in order to contact a nip point, the employee would have to reach over the top of the machine, then move his or her hand several inches laterally and several inches down into the inner workings of the machine.

We find that Antonio's non-expert testimony on employee access to the nip points was unduly speculative. The nip points were removed from where the employee worked. Antonio's testimony apparently was not based on his personal knowledge and, under his theory, any contact with the nip points would require a series of very unusual movements by the employee. Thus, we find Antonio's testimony on this issue unconvincing and insufficient.

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[17](...continued)

least fifteen (15) inches above the belt or to a standard height (see Table O-12), except that where both runs of a horizontal belt are 42 inches or less from the floor, the belt shall be fully enclosed in accordance with paragraphs (m) and (o) of this section.

[18]The judge stated that Antonio testified that he had known employees to place tools and rags on top of presses. However, the judge did not cite, and we have not found, actual support for that statement. The only relevant testimony that the judge cited is Antonio's statement that "*we* find this happens occasionally [an employee reaching inside a press] where they have put a rag, or something, on top of the machine, or something of that nature." (Emphasis added) That testimony, however, does not indicate personal knowledge of such a practice by Antonio -- it apparently reflects OSHA's opinion of the hazards of the machine. As a non-expert witness, Antonio was permitted to testify only to matters that were rationally based on his own observations (see *supra* pp. 3-5). Thus, it would be inappropriate to consider the testimony by Antonio just quoted.

We also note that Kaspar's experienced safety officer, Paul Morkovsky, testified that he could not conceive of a way of operating the machine that would suggest to an employee to stick his hand in the top.[19] We therefore find that the Secretary failed to establish that it was reasonably predictable that an employee would contact the nip points inside either of the power presses. *See, e.g., Armour* (citation under specific standard requiring enclosure of sprocket wheels and chains was vacated where evidence did not show that access was more than theoretically possible -- hazards were quite attenuated and were not where employees worked).[20]

6. Penalties

The Secretary proposed penalties of $240 each for Items 3, 4 and 5, and a combined penalty of $160 for Items 7(a) and (b). The judge reduced each penalty by 50 percent, assessing $120 each for Items 3, 4, and 5, and a combined $80 for Items 7(a) and (b). He noted Antonio's testimony regarding the four penalty factors set forth in 29 U.S.C. § 666(j) -- the gravity of the violation, the employer's size, good faith and history of violations.

The chief factor in penalty assessment generally is gravity. *E.g., Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972). As to the bench-mounted grinding machine involved in Items 4 and 5, the judge found that "the cited wheel was used about once a month and had apparently caused no injuries." Thus, he found that the gravity of both those violations was low, and that finding is not disputed. We find the gravity of Item 3 to be low as well. The testimony indicated that although the bandsaw was accessible to employees, it was unplugged and on a pallet, which showed Kaspar's intention to have it removed for repairs. The Secretary does not argue that any of the penalties that

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[19]Antonio testified that both presses could be operated with one hand if the work was clamped down. He noted that there was a clamping device on the Clausing press. Morkovsky acknowledged that once the black button on the Clausing press was pushed to start it operating, it would run without the employee's hand on it. However, he testified that to his knowledge operators had to hold the part being worked on. He added that the vise on that press was used to cradle parts being worked on, and was not bolted to the press.

[20]Kaspar makes other arguments, including the claim that the older press was not cited with "reasonable promptness," as required under section 9(a) of the Act. In view of our disposition of this item, we need not and do not address Kaspar's other arguments.

the judge assessed should be raised. We therefore affirm the judge's penalty assessments for Items 3, 4, and 5.

7. Conclusion

Accordingly, we affirm the judge's findings of serious violations as to Items 3, 4, and 5, and we also affirm his penalty assessments of $120 for each of those items. We vacate Item 7(a) and (b).

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: December 16, 1993

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. KASPAR ELECTROPLATING CORP., Respondent.	Docket No. 90-2866

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on December 16, 1993. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

December 16, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 90-2866

NOTICE IS GIVEN TO THE FOLLOWING:

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Secretary of Labor,
Complainant,

v.

Kaspar Electroplating Corporation,
Respondent.

Docket No. 90-2866

NOTICE OF DOCKETING

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on December 5, 1991. The decision of the Judge will become a final order of the Commission on January 6, 1992 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary **on or before December 26, 1991** in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. § 2200.91.

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

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St., N.W., Room 401
Washington, D. C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

December 5, 1991
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 90-2866

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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. KASPAR ELECTROPLATING CORPORATION, Respondent.	:	OSHRC DOCKET NO. 90-2866

APPEARANCES: E. Jeffery Story, Esquire
Dallas, Texas
For the Complainant.

Vic Houston Henry, Esquire
Dallas, Texas
For the Respondent.

DECISION AND ORDER

SCHWARTZ, Judge:

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

On March 21, 1990, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's plant located north of Shiner, Texas; as a result, one citation alleging nine serious violations was issued. Respondent contested all nine items of the citation, and a hearing was held on April 23, 1991. Respondent's preliminary challenges to the issuance of the citation are discussed infra, as are the nine citation items.

Timeliness of Citation

Respondent contends that the issuance of the citation was in contravention of § 9(a) of the Act, which provides as follows:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a ... standard, ... he shall with reasonable promptness issue a citation to the employer.

Respondent notes that the inspection was completed on March 21, 1990, and that within two weeks of that date OSHA had the necessary information in regard to all nine of the citation items. (Tr. 12-15; 81-84). Respondent maintains that because the citation was not issued until September 20, 1990, it did not meet the reasonable promptness requirement of § 9(a).

The Commission recently addressed this issue in Bland Constr. Co., 15 BNA OSHC 1031, 1991 CCH OSHD ¶ 29,325 (No. 87-992, 1991), and held that a citation issued within the six month limitation period of § 9(c) meets the reasonable promptness requirement of § 9(a) unless the employer is able to demonstrate prejudice to the defense of its case. Id. at 1040-41. The citation in this case was issued within six months of the inspection date, and Respondent does not claim prejudice to the defense of its case. Accordingly, the citation was not issued in contravention of § 9(a) of the Act.

Respondent further contends that the citation contravenes § 9(c) of the Act, which provides as follows:

> No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

Respondent asserts that because some of the alleged violations occurred before the date of the inspection, the citation is barred

by § 9(c). However, Commission precedent is well settled that the limitation period set out at § 9(c) does not begin to run until OSHA discovers, or reasonably should have discovered, a violation. Kaspar Wire Works, Inc., 13 BNA OSHC 1261, 1987 CCH OSHD ¶ 27,882 (No. 85-1060, 1987); Sun Ship, Inc., 12 BNA OSHC 1185, 1985 CCH OSHD ¶ 27,175 (No. 80-3192, 1985); Yelvington Welding Serv., 6 BNA OSHC 2013, 1978 CCH OSHD ¶ 23,092 (No. 15958, 1978). The inspection in this case was a planned inspection conducted pursuant to a warrant. (Tr. 10-13). It is concluded that OSHA could not reasonably have discovered the cited conditions before the inspection, and that the citation is not barred by § 9(c).

Item 1 - 29 C.F.R. § 1910.151(c)

Nicke Antonio is the compliance officer ("CO") who conducted the subject inspection; he was accompanied by Douglas Kaspar, the company vice-president, and Paul Morkovsky. Antonio testified that there were 58 employees and five electroplating lines at the plant. One of the lines was a manual hoist line, where a power chain hoist was used to lower parts into tanks containing chemicals; employees worked on the floor at the end of the line most of the time. Tank U-12 had a label showing it contained nickel acid with a pH factor of 4.0; other tanks contained acids such as sulfuric acid and sodium hydroxide. There was an eyewash station on either side of the line of tanks, and Antonio tested both of them. The eyewash near tank U-12 had only about a half-inch flow of water from the left sprayhead and none at all from the right, and the eyewash near tank H-18 did not operate at all when he turned its flag valve.

Kaspar indicated the valve was defective, and showed him an in-line valve, similar to a spigot a hose would be attached to, underneath the flag valve. The station operated after the in-line valve was turned on. Antonio determined the in-line valve was used to operate the station, and that it had been shut off to keep water from flowing continuously. (Tr. 6-16; 26-29; 87-88; 117-18).

Antonio concluded the condition was hazardous because of the chemicals in the tanks and the employee he saw working in the area, who wore no goggles or other eye protection; a part dropping from the hoist could have caused chemicals to splash into the employee's eyes and resulted in chemical burns if the employee was unable to flush his eyes with water.[1] He noted that while the H-18 station could be operated by turning on the in-line valve, that valve was 14 to 16 inches away from the flag valve and could only be turned on by getting down on one's knees. He said an employee familiar with the station could find the valve, but that this would cause a delay. His opinion was that an eyewash should be available within a few seconds of contact with corrosive materials. He recalled several garden-type hoses in the facility, but was not sure how far they were from the tanks. (Tr. 31-33; 90-91; 103-16).

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[1]Respondent objected to the CO testifying about the hazards of any of the alleged violations based on the Secretary's response to its third interrogatory that she planned to call no experts. The objection was sustained in regard to the CO testifying about the significance of a pH factor of 4.0, but was overruled in regard to the CO testifying about why he considered the cited conditions hazardous. (Tr. 15-33; 37-38; R-1). Commission precedent is well settled that opinions may be given by lay persons to assist the trier of fact. See Connecticut Natural Gas Corp., 6 BNA OSHC 1796, 1800, 1978 CCH OSHD ¶ 22,874 (No. 13964, 1978).

Antonio identified the green hose in R-5 as a five or six-foot drench hose or safety shower, used to drench the body in case of a chemical splash. He was not sure if R-5 depicted the U-12 eyewash, but said that R-6-7 appeared to show it and a shower operating in compliance with the standard. He also said that R-8-10 appeared to show the H-18 eyewash with an operating shower attached to it; he noted an employee would have to reach way down to turn on the valve in R-8. Antonio did not remember a shower attached to either eyewash. His opinion was that it is harder to drench the eyes with a shower, but that a shower might suffice with another person assisting. Antonio said R-11 appeared to be a plating tank holding approximately 800 gallons. He indicated that if the tank was filled with clean, cold water it would assist an employee exposed to corrosive materials. He did not recall how many of the tanks on the line contained water, and did not determine if any injuries had occurred on the line. (Tr. 87-89; 103-05; 112; 116-17; 125-32).

Clarence Berger has worked for Kaspar Electroplating for seven years. He testified that he works on the hoist line, and that he remembered the CO's inspection of the eyewash stations. He said that R-5-7 showed the U-12 eyewash and safety shower; both were working on the day of the inspection, but the eyewash had very little flow because it had gravel in it and the head on the shower, which was at least two or three inches, was lower than it should have been. Berger noted that the bottom of R-5 depicted a water faucet protruding from under a catwalk; he said the faucet was operational and about three feet off the ground. (Tr. 238-44).

Berger further testified that R-8-10 depicted the H-18 eyewash and shower as they looked at the time of the inspection, and that both were working that day. He recalled the CO turning the valve below so the water flow would increase, and that the flow from the eyewash spigots was 2.5 to three inches high. Berger did not know why the CO said the eyewash was not working. He noted he turned the water on earlier that day, that it was working, and that it stayed on as far as he knew. He also noted that the valve stays on, and that it can be operated by bending over a little. (Tr. 239-42; 262).

Berger stated he was familiar with how to operate both of the eyewashes, and that he tested them every morning when making his rounds. He also stated that if he put the shower spray in his face, it would cover his whole face. Berger noted that if a splash occurred and the eyewashes and showers were not working he would yell for help, use the water hose located at the end of the line or dunk his head in the nearest rinse tank. He said some of the rinse tanks, like the one in R-11, contain clean water and that he knows which ones do; they are six to eight feet long, six to seven feet deep and hold 1200 gallons or more. (Tr. 244-48).

Berger related that Ervin Flowers, his immediate supervisor, and other supervisors, including Oscar Weber, had told him that if he got anything on him, no matter what it was, to wash it off immediately with water or to yell for help if he could not do it himself. (Tr. 251-52).

Oscar Weber is the assistant plant manager of Kaspar Electroplating; he has worked for the company for 35 years. He testified that the hoist line has existed since 1959, and that no injuries have occurred from splashes from the tanks. Weber said the only injury was in the mid-70's to 80's when Ervin Flowers, presently a shift supervisor, got caustic soda on his face and eyes when a tank pipe he was working on broke; Flowers immediately went to a rinse tank to rinse his head and face, and then rinsed his face with a water hose. Weber noted the incident had caused only irritation and had had no permanent effect. He also noted the stations were put in because of the incident, on Paul Morkovsky's recommendation, and because the company knew the chemicals could be hazardous. Weber did not know the concentrations of the chemicals, or whether they could be corrosive to eyes or skin. (Tr. 263-72).

Paul Morkovsky has been the company's compliance officer for over six years. He testified he was present during the inspection, that both eyewash shower attachments were working, and that R-7 and R-10, respectively, accurately depicted the operation of the shower attachments to the U-12 and H-18 eyewashes that day. Morkovsky said R-6 showed the U-12 eyewash, and that it was not working when the CO was there because gravel or rock from minerals in the water had gotten into its flow restrictor; the eyewash was disassembled, the rock was removed and filters were installed below both eyewashes to ensure the condition would not recur. (Tr. 273-76).

Morkovsky further testified he had operated the quarter-turn valve on the H-18 eyewash, and that he did not have to get down on

his knees to do so. He said the eyewash worked when the valve was open, and that to his knowledge it was working on the day of the inspection. He also said the valve was supposed to stay open, and that he did not recall it ever being closed when he made his weekly walk-throughs of the plant. Morkovsky noted there were 18 tanks on the hoist line, and that about 13 of them were rinse tanks holding over 800 gallons each. He also noted the safety shower hoses were around five feet long and about an inch thick, and that the flow from the hoses was gentle. (Tr. 276-79).

The subject standard provides as follows:

> Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

Respondent contends the Secretary failed to establish that the substances in the tanks were injurious corrosive materials.[2] For purposes of this decision, it is assumed arguendo that the substances were corrosive. Regardless, the Secretary has failed to establish a second crucial element of the charge. The evidence of record demonstrates there were suitable eye-flushing facilities in the hoist line area within the meaning of the standard.

The evidence is somewhat conflicting with respect to the question of suitable eye-flushing facilities. There is no question that the CO recommended this citation item because he believed the

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[2]The CO testified that a substance's corrosiveness depends on its concentration, and that he did not test the strengths of any of the chemicals in the tanks. He also testified he was not an expert in the corrosiveness of chemicals. (Tr. 86-87; 90).

eyewash stations were not operating properly. However, his recall of the facts supporting this particular recommendation is somewhat flawed. He could not remember how many of the hoist line tanks contained only water, was not sure how far the water hoses he observed were from the tanks, and did not recall the shower attachments described by Berger and Morkovsky and shown in R-5-7 and R-8-10. Moreover, his testimony that an employee would have to get down on his knees to operate the in-valve is not supported by R-8, which shows the in-valve to be directly below the flag valve and apparently easily accessible.

The testimony of Berger and Morkovsky was that both of the shower attachments and the H-18 eyewash were working on the day of the inspection. Although Berger said the U-12 shower was lower than it should have been, he noted it had at least a two to three-inch head on it that day. I observed the demeanor of Berger and Morkovsky and found their testimony believable in regard to this citation item. Their testimony is therefore credited over that of the CO, and it is found that both stations met the requirements of the standard. Although the CO's opinion was that a shower was not as suitable as an eyewash, the Commission has held that a standard shower may be a suitable eyewash facility. E.I. du Pont de Nemours & Co., Inc., 10 BNA OSHC 1320, 1324-26, 1982 CCH OSHD ¶ 25,883 (No. 76-2400, 1982). The Commission has also held that water facilities within a reasonable distance of the work area comply with the standard. Gibson Discount Center, 6 BNA OSHC 1526, 1978 CCH OSHD ¶ 22,669 (No. 14657, 1978). In this case, the hoist line had two

eyewash stations, a water hose at the end of the line, a water faucet near tank U-12 and rinse tanks containing clean water. This citation item is accordingly vacated.

Items 2 and 6 - 29 C.F.R. §§ 1910.212(a)(1) and 219(c)(2)(i)

Nicke Antonio testified that an automated electroplating line called the M-T line had a linkage, or arms, that raised racks of parts into tanks and created a nip point when the arms lowered into the mounting bracing where the gear box was located. He said the two employees he saw working in the area were exposed to the hazard of being caught in the linkage, which could cause broken bones or crushing injuries. Antonio further testified the horizontal drive shaft which drove the gear box was also hazardous; loose clothing could have become entangled in the shaft and pulled an employee into it, resulting in broken bones. Antonio noted there had been barrier guards in front of the line that had corroded away, and that Kaspar indicated the line was to be taken out of service in the next few weeks and overhauled, at which time the guards would be replaced. He identified C-1-2 as photos of the line. He said the shaft could have been guarded separately, but that the area would have been protected against both hazards if guarded as in R-12. (Tr. 33-39; 53-56; 140-41).

Antonio said the employee in C-1 was six feet or more from the hazard. His concern was when employees picked up the baskets in C-1-2, which he estimated to be two to three feet from the hazard, or if they picked up parts falling to the floor past the pieces of wood in C-1-2. Antonio noted employees could trip on the wood,

which added to the hazard, and that while the two employees working in the area were not wearing loose clothing he saw others wearing aprons. He saw no fallen parts in the area when he was there, and had no personal knowledge this occurred. He also had no knowledge of any accidents involving the shaft or the arms. He said there would be no hazard if employees never went into the area or got close enough to trip over the boards. (Tr. 54-55; 132-41).

Gerard Novosad testified he worked for Kaspar Electroplating from September, 1987, until April, 1990. His said his duties were in maintenance, and that he had performed maintenance on the M-T line. He noted he had replaced the guard in front of the machinery in C-1 because the old one had rusted out. (Tr. 223-27).

Chris Berger testified he worked for Kaspar Electroplating for three years, and that he had left the plant in December, 1990. He identified the employee in C-1 as Jesse Arriaga and noted he had had the same job, which involved hanging parts on racks and taking them off after they were plated. Berger said the guard in R-12 was in place when he worked there, and that the period the area was not guarded, which was about a week, coincided with OSHA's inspection. He estimated the shaft and arms were about two feet from the guard in R-12, and that when he worked around the M-T line when it was unguarded he was four to five feet from the shaft and arms. Berger said the employee's location in R-12 was the typical place he stood and racked parts; he did not work around the arms or recall ever sticking his hands or arms into that area. He also said he never had any reason to be around the shaft, and that he never wore

clothing that could have gotten tangled in it due to the company rule prohibiting the wearing of loose clothes. Berger observed neither he nor Arriaga had ever fallen or tripped in the area. He could not conceive of any way of falling such that the arms could have hit him unless he was reaching for a part, and noted that he could not recall a part ever falling into that area. (Tr. 253-60).

Oscar Weber testified he was aware of no injuries caused by the unguarded arms or shaft on the M-T line. Paul Morkovsky testified that Berger's recollection about the length of time the M-T line was unguarded was correct. He noted the guard was removed shortly before the inspection for repairs, after which it was put back on. He had observed employees performing maintenance in the area of the arms and shaft when the line was shut down, but had never seen Berger or Arriaga in that area. (Tr. 266; 280-82).

1910.212(a)(1) and 1910.219(c)(2)(i) provide, respectively, as follows:

> One of 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.
>
> All exposed parts of horizontal shafting seven (7) feet or less from floor or working platform, ... shall be protected by a stationary casing enclosing shafting completely or by a trough enclosing sides and top or sides and bottom of shafting as location requires.

The record shows the M-T line was unguarded for at least a week, and that it was inadequately guarded prior to that time due to the corroded condition of the old guard. (Tr. 137-38; C-1-2). However, to establish a violation the Secretary must demonstrate

employee access to the condition. See, e.g., Walker Towing Corp., 14 BNA OSHC 2072, 2074, 1991 CCH OSHD ¶ 29,223 (No. 87-1359, 1991). This requires the Secretary to "show that employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingess-egress to their assigned workplaces, will be, are, or have been in a zone of danger." Gilles & Cotting, Inc., 3 BNA OSHC 2002, 2003, 1976 CCH OSHD ¶ 20,448 (No. 504, 1976). Although the CO believed the employees' duties exposed them to contact with the arms and shaft, the testimony of Berger, which the Secretary did not rebut, shows that employees worked four to five feet from the arms and shaft and that their job duties at no time caused them to be any closer. His testimony also shows that a company rule prohibited the wearing of loose clothing. It is found that the Secretary has failed to demonstrate employee access to the cited conditions; therefore, both of these citation items are vacated.

Item 3 - 29 C.F.R. § 1910.212(a)(3)(ii)

Nicke Antonio testified that the blade guard on a bandsaw in the maintenance area had been bent up, exposing employees to the hazard of contacting the blade if their hands or stock were to slip during operation of the saw. He said C-3 depicted the condition, which exposed about 1.5 inches of blade and could have resulted in severe lacerations. He did not know when the condition occurred, but observed it could have been abated in minutes by bending the guard back into place. (Tr. 40-45; 149-50).

Antonio said there were two employees in the maintenance area when he was there, one of whom was Gerard Novosad. He did not see the saw used or know when it was last used, but noted C-3 showed metal shavings from previous use. He thought it was plugged in, and determined it was available for use since it was not tagged to indicate it was not. He also thought it was affixed to the floor, but said it could have been on a shipping pallet. Antonio noted the guard was adjustable, but that it was not made to be bent out of the way; if the saw had been guarded as it was in R-13, he would have considered the condition abated. (Tr. 42; 146-54; 218-20).

Gerard Novosad testified he had used the saw in C-3 about two weeks before the inspection. He said it was not available for use on the day of the inspection because the guard was bent up; he also said it was up on a pallet and unplugged at that time. He did not recall if the saw was tagged to indicate it was not to be used. He recalled machinery being tagged before, but then said he could not specifically remember any such instances. Novosad indicated he did not use the saw when the guard was bent, but that other employees in the maintenance crew could have. (Tr. 227-30; 233-34).

Paul Morkovsky testified that the bandsaw was on a pallet the day of the inspection, that he did not see it operated and that to his knowledge it was not plugged in. He said the company policy is to not violate guards, and that if he had seen the saw in C-3 he would have dead-lined it until it was repaired; he noted the new guard shown in R-13 completely enclosed the blade. Morkovsky had never seen the saw operated with the guard bent up. He had no

knowledge to dispute Novosad's testimony that the saw was out of service, and said his testimony was supported by the fact the saw was unplugged and on a pallet. (Tr. 282-83).

The subject standard provides as follows:

> The point of operation of machines whose operation exposes an employee to injury, shall be guarded....[and] 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.

Respondent contends there was no violation of the standard because the bandsaw was not available for use. Commission precedent is well settled that an employer is not liable under the Act if defective equipment is effectively removed from employee access. See Gilles & Cotting, Inc., supra, at 2003-04. See also Pennsylvania Steel Foundry & Machine Co., 12 BNA OSHC 2017, 2030-31, 1986 CCH OSHD ¶ 27,671 (No. 78-638, 1986). The issue in this case, therefore, is whether the bandsaw was effectively removed from employee access.

Respondent asserts that defective equipment was removed from service until repaired, and that Novosad specifically recalled his supervisor advising him the bandsaw was not available for use. The record reveals that Novosad's actual testimony was that he recalled machinery being tagged to indicate it should not be used, but that he could not specifically remember any such instances. (Tr. 230). Moreover, there is no persuasive evidence the saw was effectively removed from employee access. That it was unplugged and on a pallet does not demonstrate such was the case, particularly since Novosad indicated other employees in the maintenance crew could

have used it, and it was not tagged to advise employees it was not to be used. This citation item is affirmed as a serious violation.

A penalty of $240.00 was proposed for this item. The CO testified that in proposing the penalties in this case, no credit was given for good faith or history due to the resistance to the inspection, the number of accidents and injuries, and history of prior inspections. He acknowledged, however, that the plant was making an effort to protect against hazards, that the overall plant was clean and organized and that it had no history of prior violations. (Tr. 119-25). The record also shows all but one of the cited conditions were abated.[3] The Commission is the final arbiter of penalties in contested cases. Brennan v. OSAHRC and Interstate Glass Co., 487 F.2d 438, 442 (8th Cir. 1973). Pursuant to the Act, the Commission is required to give due consideration to the employer's size, good faith, history of previous violations and gravity of the violation. Upon consideration of these factors, I conclude that a penalty of $120.00 is appropriate for this item.

Items 4 and 5 - 29 C.F.R. §§ 1910.215(a)(4) and (b)(9)

Nicke Antonio testified the tool rest on the left wheel of a bench-mounted grinding machine located in the maintenance area was pulled completely down and away from the wheel; the condition was hazardous because an operator's hand could slip and contact or get caught in the wheel, which could result in serious lacerations. It

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[3]Although there is nothing to show the condition cited in it 8 was abated, that item was not found to be a violation. Moreov while there is no evidence the ground prong condition cited in 9(a) was abated, that item was presumably corrected along wit other electrical repairs made to the plant. (Tr. 267).

was also hazardous because parts could be pulled into the wheel, which did not have a peripheral guard. Antonio explained that the purpose of a peripheral guard, which is adjusted as the wheel's diameter decreases, is to prevent parts that may get into the wheel or broken fragments of the wheel from being ejected towards the operator at high speed, which can cause eye injuries, lacerations or puncture wounds. (Tr. 45-51; 160-62; 166; 172-73; 217).

Antonio did not see employees use the wheel, but noted it was plugged in and operated when he turned it on, and that the area was covered with metallic fragments or dust from grinding operations. His opinion was that the wheel had been used for a long time with the rest moved away because he saw no marks on the side of the unit to indicate it had been positioned and tightened. He did not measure the distance between the wheel and the rest, but said there was no need to do so since the rest was in a fold-down position and not even close to the wheel. Antonio noted the condition could be abated by keeping the rest properly adjusted as the wheel wore away. He also noted that the machine had a mounting pole available to install a peripheral guard on top of it, and that the standard itself, at figures 0-18 and 19, depicted the type of device required. (Tr. 47-48; 51-53; 158-60; 164; 169; 216-17).

Antonio said C-4 showed the grinding wheel. He did not know what type or size of parts were ground on it, and indicated the wheel could have been operated safely if a part was large enough that it would not have gone into the area between the wheel and rest. He also indicated that wheels can be defective or damaged

during shipment or grinding, which can cause them to break when used. He noted that defective wheels usually break soon after installation, and that since the wheel in C-4 looked like it had been there some time it was not likely to break for that reason. He also noted the wheel appeared evenly worn. Antonio stated there was a pair of dirty safety glasses near the machine, shown in C-4, and that there were other glasses in a locker in the area. He did not know if employees wore the glasses when operating the wheel. He said wearing them would protect the eyes, but not the rest of the face. (Tr. 46; 49; 160-67; 217; 221).

Antonio was aware of no injuries caused by the grinding wheel. He noted his machine guarding background was based on training and on-the-job experience with both OSHA and the Department of the Air Force, where he had been a safety specialist and a mechanic and had operated much of the same equipment cited in this case, including grinding wheels. Antonio said he had seen injuries as a mechanic caused by hands getting into grinding wheels; he also recalled an instance of a part entering and exiting a grinding wheel, which did not result in an injury. He observed that R-14 appeared to show the cited wheel with a properly-adjusted peripheral guard and the tool rest closely adjusted to the wheel. (Tr. 71-72; 168-72).

Gerard Novosad testified he had used the grinder about a month before the inspection. He said it was used about once a month, mostly to sharpen punches. (Tr. 228-29).

Oscar Weber and Paul Morkovsky testified they were unaware of any injuries caused by grinders at the plant. Morkovsky further

testified he had never known of a grinding wheel breaking at the plant or a part getting into a grinder and coming back out. He said the company policy was for employees to wear safety glasses when using the grinder. He noted the policy was communicated to employees by their supervisors, and indicated there was a sign in this regard near the cited grinder. Morkovsky observed that he had seen pipes too large to get into the wheel being ground on the grinder, and that the work rest and guard were adjusted within a day or two of the inspection. (Tr. 266; 283-85).

1910.215(a)(4) and 1910.215(b)(9) provide, respectively, as follows:

> On offhand grinding machines, work rests shall be used to support the work. They shall be of rigid construction and designed to be adjustable to compensate for wheel wear. Work rests shall be kept adjusted closely to the wheel with a maximum opening of one-eighth inch to prevent the work from being jammed between the wheel and the rest, which may cause wheel breakage. The work rest shall be securely clamped after each adjustment. The adjustment shall not be made with the wheel in motion.
>
> Safety guards of the types described in subparagraphs (3) and (4) of this paragraph, where the operator stands in front of the opening, shall be constructed so that the peripheral protecting member can be adjusted to the constantly decreasing diameter of the wheel. The maximum angular exposure above the horizontal plane of the wheel spindle as specified in paragraphs (b)(3) and (4) of this section shall never be exceeded, and the distance between the wheel periphery and the adjustable tongue or the end of the peripheral member at the top shall never exceed one-fourth inch.

Respondent contends the Secretary has not demonstrated the applicability of 1910.215(a)(4), based on 1910.215(a)(5), which excludes certain types of wheels from coverage. According to established Commission precedent, it is the employer's burden to

show an exception applies. Since Respondent presented no evidence in this regard, the cited wheel is not excluded from coverage.

Respondent asserts there is no proof of a violation of 1910.215(a)(4) because the CO did not measure the distance between the work rest and the wheel. However, it is obvious from C-4 and the CO's testimony that the work rest was not adjusted to the wheel with a maximum opening of one-eighth inch as required. Respondent also asserts there was no hazard because there was no evidence that anything other than parts too large to get into the opening were ground on the wheel. The record does not support this assertion. Although Morkovsky testified he had seen pipes too large to get into the opening ground on the wheel, he did not discuss the punches, which, according to Novosad, were the parts generally ground on the wheel. Since it is clear the work rest was not adjusted as required by the standard, a serious violation has been established. While safety glasses, if used, could have prevented eye injuries, they could not have prevented the other injuries described by the CO.

In regard to 1910.215(b)(9), Respondent admits the condition but asserts there was no hazard because of the CO's testimony that the metal shell around the wheel, and the bolt and housing below the work rest, provided some peripheral protection. (Tr. 170-71). However, the fact that some protection was provided does not excuse noncompliance with the specific language of the standard, which mandates the finding of a violation when its requirements are not met. A serious violation of 1910.215(b)(9) has been shown.

Turning to the assessment of an appropriate penalty, the record shows that the cited wheel was used about once a month and had apparently caused no injuries. The Secretary proposed a penalty of $240.00 for each of these citation items. Although the violations are properly classified as serious, the gravity of both conditions was low due to the infrequent use of the wheel. Upon consideration of this factor and the other factors noted supra, a penalty of $120.00 is assessed for each of these items.

Items 7(a) and (b) - 29 C.F.R. §§ 1910.219(d)(1) and (e)(1)(i)

Nicke Antonio testified there were two inadequately guarded drill presses at the plant. One was an older press of undetermined manufacture, as shown in the foreground of C-5, and the other was a Clausing press, as shown in the background of C-5. The tops of both presses, where there were nip points created by belts and pulleys coming together, were unguarded.[4] Antonio's opinion was that employees could get caught in the nip points and sustain broken bones, lacerations or amputations. He said the sides of the Clausing were adequately guarded, but that the sides of the older press were not, exposing employees to the same hazard. Antonio did not see the presses operate, but determined they were available for use because they were plugged in and not tagged to indicate they were out of service. He noted that both conditions could have been abated by completely enclosing the belts and pulleys. He also noted that because it is the belt and pulley combination which

[4]Antonio testified that the unguarded belts on the older press were easily visible, and that he reached up and felt those on the top of the Clausing. (Tr. 175).

creates the hazard, OSHA's policy is to cite both 1910.219(d)(1) and (e)(1)(i). (Tr. 57-60; 176-77; 218-19).

Antonio explained that an employee could have been exposed to the nip point of the older press by sticking his hand about four inches into its side or by reaching a hand over its top and down an inch or so, where the belt and pulley were located. He said that exposure to the nip point of the Clausing could have resulted in the same way; he could not recall how far down the belt and pulley were on the Clausing, but said it could have been several inches. Antonio noted that the operation of the presses would not require employees to put their hands on top, but that he had known workers to place tools and rags on top of presses; if an object were to fall into a press during operation an employee could instinctively grab for it and get caught in the machinery. He also noted that although the Clausing could be operated as shown in R-16, both presses could be operated with one hand if the work was clamped down. Antonio observed that the Clausing's clamping device was shown in C-5. He also observed that R-15 appeared to show the Clausing press properly guarded. (Tr. 58-59; 174-88).

Gerard Novosad testified that the presses in C-5 were used only by maintenance workers. He said he had used the Clausing, and indicated he had used the older press at an earlier time when it was in better condition. Novosad could not recall if other workers used the older press, but noted that they probably had before. (Tr. 230-31).

Oscar Weber and Paul Morkovsky testified they were unaware of any injuries relating to the pulleys or belts on top of the drill presses. Morkovsky indicated the older press was not used after the Clausing was installed because it was worn out. He said it was essentially out of service at the time of the inspection, although it was not tagged, and that it was removed from the plant shortly thereafter. (Tr. 267; 285-86; 296-98).

Morkovsky further testified that R-16 showed Jimmy Hymen, the maintenance supervisor, correctly operating the Clausing except for the fact he was not wearing safety glasses. Morkovsky noted the black button on the press was the on button, and that after pushing it the press would run without the operator's hand remaining on the button. He also noted that although there was a vise on the press it was used to cradle parts and was never bolted to the table. He did not recall if the vise could be bolted down, and said that to his knowledge operators had to hold the part being worked on. Morkovsky said there was no operation which would require an employee to stick his hands into the top of the press, and that he could conceive of no way of operating the press that would suggest such an action to an employee. (Tr. 287-88; 297-99).

1910.219(d)(1) and 1910.219(e)(1)(i) provide, respectively, as follows:

> 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.
>
> Where both runs of horizontal belts are seven (7) feet or less from the floor level, the guard shall extend to at least fifteen (15) inches above the belt or to a standard

> height (see Table O-12), except that where both runs of a horizontal belt are 42 inches or less from the floor, the belt shall be fully enclosed in accordance with paragraphs (m) and (o) of this section.

Respondent contends the Secretary has not shown that the standards apply, based on 1910.219(a)(1), which excepts certain types of belts operating at 250 feet per minute or less. As noted supra, the employer bears the burden of proving the applicability of an exception. Since Respondent presented no such proof, the cited presses are not excepted from coverage.

It is clear from the record that the standards apply and that the belts and pulleys on the presses were inadequately guarded. Respondent contends, however, that the Secretary has failed to demonstrate employee exposure to the cited hazards, and that only an intentional act on the part of an employee could have caused an injury. I disagree. The CO, whose machine guarding background is noted supra, testified convincingly about how employees could have inadvertently been caught in the machinery of the presses. The CO's testimony is supported by R-16, which shows the top of the Clausing to be well within the operator's reach, and by C-5, which shows the presses to be about the same height. Although Respondent presented the testimony of Morkovsky in an attempt to rebut that of the CO, his testimony was not persuasive because of his lack of knowledge in regard to the vise on the Clausing. These citation items are affirmed as serious violations.[5]

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[5]In affirming the violations, Respondent's assertion that the older press was out of service is rejected. The older press was plugged in, not tagged and not removed until after the inspection; therefore, it was not effectively removed from employee access.

In regard to the penalty assessment, items 7(a) and (b) were grouped and a penalty of $160.00 was proposed for both items. Upon consideration of the factors noted supra, I conclude that a penalty of $80.00 for these two items is appropriate.

Item 8 - 29 C.F.R. § 1910.242(b)

Nicke Antonio testified he saw a nozzle in the maintenance area of the type used to blow compressed air to clean dust or metal fragments from drilled or ground parts. He used a standard air pressure gauge to test the nozzle, and found it produced 70 p.s.i. rather than under 30 p.s.i. as required. Antonio said the nozzle was hazardous; it could cause metal fragments to be blown into eyes if protective equipment was not used, or it could inject air into skin and cause an embolism if used to blow dust from clothing, particularly if there were cuts on skin. Antonio had no personal knowledge of how the nozzle was used, and did not know if employees used compressed air to clean themselves. (Tr. 61-64; 188-93; 218).

Paul Morkovsky testified that the cited hose was used in the maintenance area to blow air into steam coils to check for leaks and to blow out the radiator core; it was also used to blow out tank lines on the production line. He said the hose was not used for cleaning up, and that he had never seen anyone injured from air blowing through skin. (Tr. 288-90).

Respondent's assertion that the violations were not shown to be serious because the CO did not know the belts' speed or tightness is likewise rejected. (Tr. 184-88). The CO's opinion in regard to the serious nature of the hazard was persuasive, in light of his background, and the violations are properly classified as serious.

The subject standard 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.

As Respondent points out, the Commission has held that 1910.242(b) applies only to compressed air used for cleaning purposes. Anoplate Corp., 12 BNA OSHC 1678, 1691, 1986 CCH OSHD ¶ 27,519 (No. 80-4109, 1986). The CO recommended this item because he believed the nozzle was used for cleaning purposes; however, he had no personal knowledge such was the case. Morkovsky, on the other hand, testified the hose was used to check for leaks and to blow out the radiator core and tank lines, and that it was not used for cleaning. Since the Secretary presented no evidence to rebut Morkovsky's testimony, she has failed to demonstrate a violation of the standard. This citation item is vacated.

Items 9(a) and (b) - 29 C.F.R. § 1910.304(f)(4)

Nicke Antonio testified that a portable pipe-threading machine in the maintenance area, as shown in C-6, did not have a ground prong on its attachment cord. He said the machine was hazardous because if a fault occurred the employee using it could suffer an electrical shock. The machine was not plugged in or used when he was there, but Antonio determined it was available for use because it was not tagged to indicate it was out of service; he also determined it was recently used because of the metal chips and cutting oils on it. (Tr. 64-65; 193-95; 218-20).

Antonio further testified that he used an Ecos tester on a number of receptacles in the plant. Six of them measured between

four and six ohms, and two had machines plugged into them; one was a buffing machine, and the other was the grinder in C-4. Antonio determined the impedance of the receptacles was high based on a chart on the tester stating that a 120-volt, 30-amp circuit should not test higher than 1.3 ohms. He indicated his determination was also based on his electrical training with OSHA and the Department of the Air Force, the language of the standard and the National Electric Code ("NEC"), but noted that none of these specifically provided that four to six ohms was a high impedance. He also noted that the chart was not part of the regulations or his training. Antonio said the company would not have known that four to six ohms was high without the Ecos or a similar tester unless a qualified electrician had so advised it. He did not recall the cost of the tester. (Tr. 65-69; 195-97; 200-07).

Antonio stated that if machinery was plugged into one of the receptacles and a ground fault occurred the high impedance could prevent a sufficient amount of current from flowing back to the circuit breaker and keep it from tripping, which could cause an electrical shock.[6] He explained that when a fault occurs current flows through the path of least resistance, which in this case could be an employee contacting a machine. Antonio said that human skin has at least 1,000 ohms of resistance. Although his opinion was that a receptacle with an impedance of four to six ohms was high enough to cause electricity to flow through and injure an

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[6]Antonio noted the receptacles could also cause equipment to overheat, which could result in a fire.

employee, he was unable to conceive of a scenario in which this would be likely to occur. (Tr. 66-69; 197-201; 206-08).

Gerard Novosad testified he had used the pipe threader a month or two before the inspection, and that not much threading was done at the plant. He said it was not available for use at the time of the inspection because the ground plug was off, and that Jimmy Hymen, his supervisor, told him not to use it. Novosad did not know whether Hymen told the other two maintenance workers who had access to the machine to not use it, and did not believe it was tagged. (Tr. 232-33).

Oscar Weber testified that after the inspection, the plant spent between $9,000 and $10,000 to install safety switches and outlets and to replace all the wiring needing repair. (Tr. 267).

Paul Morkovsky testified he had no personal knowledge of whether the threader was out of service; as it was near a plug, he assumed it would have been plugged in if it was in service. He said company policy prohibited the use of defective equipment, and that all of the plant's outlets had three prongs. (Tr. 291-92).

Morkovsky further testified he had some undergraduate training in physics, and avocational and on-the-job experience in electronic equipment assembly and automotive and machinery electricity. He was unaware of any recognized authority stating that a ground plug with six ohms of resistance did not meet OSHA or NEC requirements, and his opinion was that resistance that low provided continuity. He also opined that dry skin has a resistance of 50,000 ohms, and that if an employee was operating a machine plugged into an outlet

with five ohms of resistance the electricity would be 10,000 times more likely to go into the outlet than the employee. Morkovsky said no one at the plant knew the plugs measured six ohms, or that that measurement did not satisfy the standard. He also said the plant electricians were familiar with the NEC and instructed to comply with it, and that he had no reason to believe the plant was not in compliance at the time of the inspection. He recalled that the CO told him the Ecos meter cost about $5,000. (Tr. 290-96).

The subject standard provides as follows:

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

In regard to the pipe-threading machine, Respondent asserts it was not available for use. However, the machine was not tagged, and while Novosad was told to not use it there was no evidence the other two maintenance employees were so instructed. Respondent also asserts the company policy prohibited the use of defective equipment. This assertion is unpersuasive, particularly in light of the fact that other defective equipment was in use at the plant. Based on the record, the machine was in violation of the standard.

Although this item was cited as a serious violation, it is concluded the violation is more properly classified as nonserious. The record shows the machine was infrequently used, and that it was apparently not used for at least a month prior to the inspection. Moreover, while the CO testified that the machine could cause an electrical shock, he did not testify about the likelihood of such an occurrence. This citation item is accordingly affirmed as a nonserious violation, and no penalty is assessed.

In regard to the receptacles, it is found that the Secretary has not met her burden of showing a violation. Although the CO's opinion was that the receptacles had a high impedance, he is not an electrician and was unable to identify any source in support of his opinion other than the chart on the Ecos tester. Moreover, the Ecos is an apparently expensive device which Respondent did not possess, and the CO himself acknowledged the company would not have known that four to six ohms was a high impedance without it or a similar tester, or the determination of a qualified electrician. Finally, while the CO believed the receptacles could cause injuries, he admitted he was unable to envision a scenario in which this would be likely to occur. This citation item is vacated.

Conclusions of Law

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

2. On March 21, 1990, Respondent was not in violation of 29 C.F.R. §§ 1910.151(c), 1910.212(a)(1), 1910.219(c)(2)(i), and 1910.242(b).

3. On March 21, 1990, Respondent was in serious violation of 29 C.F.R. §§ 1910.212(a)(3)(ii), 1910.215(a)(4), 1910.215(b)(9), 1910.219(d)(1) and 1910.219(e)(1)(i).

4. On March 21, 1990, Respondent was in nonserious violation of 29 C.F.R. § 1910.304(f)(4).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Items 1, 2, 6, 8 and 9(b) are VACATED.

2. Items 3, 4 and 5 are AFFIRMED, and a penalty of $120.00 is assessed for each item.

3. Item 7 is AFFIRMED, and a penalty of $80.00 is assessed.

4. Item 9(a) is AFFIRMED as a nonserious violation, and no penalty is assessed.

Stanley M. Schwartz
Administrative Law Judge

DATE: November 21, 1991