Department of Licensing and Regulatory Affairs

Michigan Administrative Hearing System

Chris Seppanen, Executive Director

~~~~~~

MIOSHA DIGEST

~~~~~~

August 2015

M I O S H A

Michigan Occupational Safety and Health Act

DIGEST

By: J. Andre Friedlis
Administrative Law Judge Manager

Department of Licensing and Regulatory Affairs

Michigan Administrative Hearing System

611 West Ottawa Street

Lansing, MI 48913

(517) 335-2484

ISSUANCE PAGE

First Issuance ..... **March 1984**
Update ..... **August 1984**
Update ..... **January 1985**
Update ..... **September 1986**
Update ..... **September 1987**
Update ..... **September 1988**
Update ..... **September 1989**
Update ..... **September 1990**
Update ..... **September 1991**
Reissued ..... **December 1993**
Update ..... **February 1994**
Update ..... **January 1995**
Update ..... **April 1996**
Update ..... **March 1997**
Update ..... **January 1998**
Update ..... **February 1999**
Update ..... **March 2000**
Update ..... **August 2008**
Update ..... **July 2009**
Update ..... **August 2014**
Update ..... **August 2015**

PREFACE

The Michigan Occupational Safety and Health Act (MIOSHA), 1974 PA 154, as amended; MCL 408.1001 *et seq*, took effect on January 1, 1975. This act created a Board of Health and Safety Compliance and Appeals (Section 46) to review proposed decisions regarding citation appeals (Sections 41 and 42) and petitions to modify abatement periods (PMA's) [Section 44(2)]. Until the first issuance of the *Digest* in March 1984, there was no index available to assist litigants. The absence of such a research tool made it necessary for parties, Administrative Law Judges (ALJs), and Board members to re-examine issues previously thought decided.

The *MIOSHA Digest* contains a subject index, table of cases, and digest entries for substantive decisions issued by the ALJs and the Board for MIOSHA citation appeal and PMA cases. In addition, effective March 1997, this *Digest* covers variances (Section 27) and discrimination decisions (Section 65). Supplements are prepared periodically for additional cases. Digest entries are also amended as needed to include decisions by reviewing authorities.

The full text of any referenced decision may be obtained at Freedom of Information rates by contacting the Michigan Administrative Hearing System, 611 West Ottawa Street, 2nd Floor, P.O. Box 30695, Lansing, Michigan 48909-8195, (517) 335-2484; Fax (517) 335-6696.

ACKNOWLEDGMENTS

The *Digest* update in March 2000 included all cases from each of the MIOSHA contested case areas - citation appeals, PMAs, variance, and discrimination.

Thanks to the efforts of Christopher L. Taylor and Rachel Szela, law students at Michigan State University College of Law, citation appeal decisions from 2000 through June 2007 and discrimination decisions from 2005 through 2009 have now been digested. I thank them for their efforts.

During the summer of 2008 Matthew Dubowski, a law student at Cooley Law School updated our citation appeal decisions to 2008 as well as the MIOSHA Discrimination decisions from 2000 through 2005. I thank him for his effort.

During the summer of 2014, Ryan Jones, a law student at Michigan State College of Law, updated the citation appeal decisions up to 2014.

During the summer of 2015, Samantha Reasner, a law student at Michigan State University College of Law, updated the discrimination decisions from 2010 through 2012.

This valued work from our law clerks has resulted in a volume that is easy to use and more up-to-date. I am sure all of those who use the *Digest* will benefit from their work.

J. Andre Friedlis,
Administrative Law Judge Manager
Michigan Administrative Hearing System

TABLE OF CASES – DISCRIMINATION

Case Name & Docket Number **Paragraph #**

TABLE OF CASES – DISCRIMINATION

Case Name & Docket Number **Paragraph #**

TABLE OF CASES – DISCRIMINATION

Case Name & Docket Number **Paragraph #**

TABLE OF CASES – DISCRIMINATION

Case Name & Docket Number **Paragraph #**

TABLE OF CASES – DISCRIMINATION

Case Name & Docket Number **Paragraph #**

TABLE OF CASES – DISCRIMINATION

Case Name & Docket Number **Paragraph #**

TABLE OF CASES – DISCRIMINATION

Case Name & Docket Number **Paragraph #**

TABLE OF CASES – DISCRIMINATION

Case Name & Docket Number **Paragraph #**

TABLE OF CASES – DISCRIMINATION

Case Name & Docket Number **Paragraph #**

TABLE OF CASES – DISCRIMINATION

Case Name & Docket Number **Paragraph #**

TABLE OF CASES – DISCRIMINATION

Case Name & Docket Number **Paragraph #**

TABLE OF CASES – DISCRIMINATION

Case Name & Docket Number **Paragraph #**

TABLE OF CASES – DISCRIMINATION

Case Name & Docket Number **Paragraph #**

TABLE OF CASES – DISCRIMINATION

Case Name & Docket Number **Paragraph #**

TABLE OF CASES – DISCRIMINATION

Case Name & Docket Number **Paragraph #**

TABLE OF CASES – DISCRIMINATION

Case Name & Docket Number **Paragraph #**

TABLE OF CASES – DISCRIMINATION

Case Name & Docket Number **Paragraph #**

TABLE OF CASES – DISCRIMINATION

Case Name & Docket Number **Paragraph #**

TABLE OF CASES – VARIANCE

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

TABLE OF CASES - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Case Name & Docket Number **Paragraph #**

SUBJECT INDEX - DISCRIMINATION

Subject **Paragraph #**

SUBJECT INDEX - DISCRIMINATION

Subject **Paragraph #**

SUBJECT INDEX - DISCRIMINATION

Subject **Paragraph #**

SUBJECT INDEX - DISCRIMINATION

Subject **Paragraph #**

SUBJECT INDEX - DISCRIMINATION

Subject **Paragraph #**

SUBJECT INDEX - DISCRIMINATION

Subject **Paragraph #**

SUBJECT INDEX - DISCRIMINATION

Subject **Paragraph #**

SUBJECT INDEX - DISCRIMINATION

Subject **Paragraph #**

SUBJECT INDEX - DISCRIMINATION

Subject **Paragraph #**

SUBJECT INDEX - DISCRIMINATION

Subject **Paragraph #**

SUBJECT INDEX - DISCRIMINATION

Subject **Paragraph #**

SUBJECT INDEX - DISCRIMINATION

Subject **Paragraph #**

SUBJECT INDEX - DISCRIMINATION

Subject **Paragraph #**

SUBJECT INDEX - DISCRIMINATION

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

SUBJECT INDEX - NOTICE OF APPEAL (NOA) AND PETITION TO MODIFY ABATEMENT (PMA)

Subject **Paragraph #**

1 GUARDING

Open-Sided Floor or Platform

75-10 Kelsey-Haves Company (1975)

This case concerned the problem of whether Respondent was required to erect guardrails on a washer being cut apart. An employee was working with a cutting torch on top of the washer eight feet off the ground.

It was held that Respondent was required under Part 2, Rule 408.10213(2), to guard the perimeter of the washer in spite of the fact that it was being dismantled.

2 TRUCK RIDING

75-4 Barton Malow (1975)

Respondent was cited for allowing an employee to ride on a pile of lumber in the rear of a pickup truck. The standard applied was Part 13, Rule 408.41336(2).

The ALJ concluded that the standard required all riding in the rear of a pickup truck to be on a seat and that the employee be maintained within the lines of the truck bed by gates, barriers, or seat arrangements.

3 GUARDING

Point-of-Operation Guard or Device
Operator Exposure

75-8 Thorrez Industries (1975)

Respondent was cited for a violation of punch press standard Part 23, Rule 408.12321. No violation was found because Respondent did have a front guard in place to protect the operator of the press. The facts indicated that the operator was not in danger from the space at the side and the rear of the press since he could not operate the press and still enter the point of operation at these openings. The standard was held to refer to the operator of a press only and not to other employees.

4 INTENT OF PROMULGATING AUTHORITY

POWER TOOLS

Safety Device to Reduce Pressure in Line

WELDING & CUTTING Safety
Check Valves

75-11 Detroit Edison Company (1976)

Safety check valves are required in portable welding units, as well as manifold systems, GISS Rule 1252 and CSS Rule 702.

It was improper to consider the testimony of one member of promulgating commission as to intent of full commission. See National School of Aeronautics, Inc v US, 142 F Supp 933, 938 (1956).

Affirmed by Board 10/25/76.

5 BURDEN OF PROOF

Department Required To Prove Violation

DUE PROCESS

Employer Must Know What Is Prohibited Rule
Vague

HAZARD ACCESS **TEST**

75-12 Bartos Construction Company (1976)

The rule cited by the Department must clearly tell Respondent what is prohibited. The rule cited in this case was vague because it referred to other standards. These did not, however, prohibit Respondent's activities.

The Department had the burden of showing that Respondent's actions were unlawful, not the job of Respondent to show his work to be proper.

Access to hazard test adopted. Gilles & Cotting, Inc, 504 F2d 1255 (4th CA, 1974).

6 COMPRESSED AIR

75-31 Huron Cement (1976)
75-47

The ALJ held that Respondent violated Rule 408.13832 which prohibits use of an air-blow gun to blow off clothes.

The Board reversed (8/3/76) finding that only a hose was used for this purpose. The hose did not have a "gun" at the end. The air was measured at 60 psi.

7 ACCESS TO VIOLATIVE CONDITION

EMPLOYEE

Vice President of Corporation

EMPLOYER DEFENSES

Lack of Injury

EYE PROTECTION

GUARDING

Point-of-Operation Guard or Device
Not Guarded as Required

HAZARD ACCESS TEST

INJURY

Violation Dismissed When No Proof of Injury Presented

PENALTIES

Use of Department Penalty Schedule

VARIANCE

75-162 Latchaw Enterprises, Inc. (1976)

Respondent was cited for violation of numerous GISS. The issues remaining in dispute at the time of hearing concerned an alleged violation of: Part 7, Rule 408.10727(1), relating to guards for belts and pulleys; Part 11, Rule 408.11115(1), relating to wheel guards; Part 26, Rule 408.12635(1)(b)(3), relating to a band saw guard; Part 27, Rule 408.12721, 22, and 37, relating to guards for a table saw and a jointer; Part 23, Rule

408.12321, relating to point-of-operation guards; and Part 35, Rule 408.13511, 12, and 51, relating to certified eye protection for employees. In addition, Respondent contested all penalties issued for these violations.

It was held that Respondent was not in violation of the belt pulley requirement. There was no exposure to injury because the belt around either wheel was too loose.

A jointer was held to be in violation of this standard even though Respondent argued that the machine belonged to the president of the corporation personally and did not belong to the corporation.

Although the machine was in part of the building not leased to Respondent, it was readily accessible to employees.

Violations were found concerning Part 11 even though Respondent contended that it would not be possible to perform custom work on lighting fixtures with the required guard in place. Respondent was referred to the variance procedure contained in Section 27 of the Act.

A violation was found of Part 26 even though Respondent contended that the guarding met Federal 051-IA requirements at the time of purchase. This contention was not supported by the employer. Further, there was no evidence that federal compliance continued until the date of inspection. The evidence produced by the Department that the machine violated the state standard was not rebutted by Respondent.

Respondent contended that since only the vice president of the corporation used three machines found in violation of Part 27, that no citation should be issued. In addition, it was contended that the machines belong to the president of the corporation personally.

It was held that a vice president of a corporation is an employee under Section 5(1) of the Act. In addition, the machines were accessible to employees of the corporation.

A violation was held for Part 23 since the evidence presented established that the points of operation on the machines were not guarded as required.

A violation of the eye protection requirements was found since Respondent did not require employees exposed to possible hazards to wear the eye protection devices. It was also held that the penalties proposed by the department were properly computed in accordance with Section 35(3) of the Act.

8 EMPLOYER DEFENSES

Lack of Knowledge

GUARDING

Saws

LOCKOUT PROCEDURE

SAWS

WARNINGS

By Safety Officers Instead of Citations

75-25 Rapid Pattern & Plastics, Inc (1976)

Respondent contested alleged violations of Part 1, Rule 408.10011(c) and Rule 408.10032(1)(2), relating to the use of a power lockout procedure, and alleged violations of Part 27, Rule 408.12722 and Rule 408.12730(1), relating to the guarding of a circular saw and a radial arm saw.

It was held that Respondent was in violation of the power lockout procedure. The lack of knowledge of Respondent concerning this requirement of the standard did not establish a defense against a citation for violation.

It was held that no exposure was presented by a 5/16 inch space between the table top and the bottom of a guard placed over a circular saw.

A violation was found for failure to properly guard a radial arm saw. The saw did have the proper guards but lacked a spring which fully extended one arm of a scissor-type guard to cover a saw blade. It was held that the Department was required to issue a citation for this item under Section 33 of the Act, even though the lack of a spring was a simple matter easily corrected.

It was also held that the Act does not permit safety officers to give warnings to an employer concerning violations found at a place of employment under Section 33 of the Act.

9 ACCESS TO VIOLATIVE CONDITION

GUARDING

Grinder

HAZARD ACCESS TEST

75-16 GMC, Saginaw Steering Gear #4 (1976)

It was held that Respondent was in violation of the standard because the facts established that the grinder had been used in the past without the required peripheral guard. In addition, although Respondent contended that the machine was being rebuilt, there were no signs on the machine to indicate to exposed employees that the machine was not to be used during the rebuilding procedure.

(Part 1A, Rule 408.10125).

10 CHEMICALS

Transportation

GENERAL DUTY CLAUSE

Transportation of Chemicals

75-36 Michigan State University (1976)

Respondent was cited for an alleged violation of the GDC contained in Section II(a) of the MIOSHA Act.

It was held that the record did not establish it to be a recognized hazard for three employees to transfer uncushioned and unrestrained containers of used chemicals in the body of an enclosed van.

11 CRANES

Brakes
Positive Stop Device

75-18 Whitehead and Kales Company (1976)

Respondent was cited for failure to install a positive stop mechanism on hoisting devices. Respondent argued that the hoisting devices were not cranes so as to come within the requirement of the cited rule, Part 18, Rule 408.11843(3).

It was held that the hoisting devices were cranes within the purview of Part 18. Each hoisting device is underslung on the lower flange of an I beam, The I beam, however, travels on rails located on top of horizontal perpendicular beams at each end of the I beam, permitting the I beam to move forward and backward at right angles to the direction of travel of the hoisting mechanism.

This decision was reversed by the Board (2/7/77) with reliance on a post-hearing amendment to Part 18 that excluded the hoisting devices in use by Respondent. The Board's decision was affirmed by the Ingham County Circuit Court 6/30/81.

12 EYE PROTECTION

Probability vs Possibility
Probability Not Established

75-49 Evart Products Company, Inc (1976)

Respondent was cited for failure to require the use of certified eye protection for all employees at its plant.

It was held that the facts presented in the record did not support the Department's position that there was a "probability" of injury to all employees in every department of the plant.

13 APPEAL

Cannot be Converted from Penalties to Citation

DUE PROCESS

Department Failure to Consider Employer Petition

EMPLOYER DEFENSES

Impossibility of Performance

STANDARD

Effect of Law

75-62 Four Star Corporation (1976)

Respondent was cited for violation of numerous GISS. The issue remaining in dispute at the time of the hearing concerned an alleged violation of Part 23, Rule 408.12321, relating to the safeguarding of the point of operation on power press machines.

It was held that the record established a violation of the standard, Respondent argued that it would be impossible to perform the job in question with the required guarding in place. It was held that "impossibility of compliance" was an affirmative defense not established in the record by Respondent. No proofs were presented by Respondent of actual attempts to change the current mode of operation to accommodate the required guarding. Once promulgated, a standard has the effect of law and must be applied uniformly to all employers in the State of Michigan.

Also dealt with in the case was the question of whether an employer was required to state with particularity the reasons for its disagreement with a citation issued by the Department. The ALJ held that this was not required by an employer and that a simple statement of disagreement with the citation was all that was necessary under Section 41 of the Act. In addition, it was held that the Department's failure to initially treat Respondent's petition as a bona fide petition under Section 41 of the Act did not constitute a denial of due process of law to Respondent requiring a dismissal of the citations on appeal.

14 JURISDICTION

Personnel Hoists

PERSONNEL HOISTS

75-9 Tishman Construction Company (1976)

Respondent was cited for an alleged violation of CSS Part 10, Rule 408.41004(2), relating to the requirements for personnel hoist locking devices. Respondent argued that the mechanical locks currently in place on the hoist-way doors in use at the Renaissance Center project in Detroit, Michigan, met the requirements of the law.

The ALJ affirmed the Department's prior decision and citation requiring interlocking devices on all hoist-way doors which would serve two functions: 1) To prevent operation of the hoist until the landing door is locked in a closed position; and, 2) To prevent the opening of the landing door unless the hoist is stopped at the floor in question.

Also at issue was whether the CSS Division of the BSR of the Department has jurisdiction to inspect and require compliance with safety standards concerning requirements for personnel hoists used at Respondent's work site in the city of Detroit under the authority of MIOSHA. The ALJ held that the named division did have such jurisdiction under the law.

Affirmed by Board on 10/26/76, Wayne County Circuit Court 1/23/79.

15 FLOOR MAINTENANCE

75-111 Browne Morse (1976)

Respondent was cited for violation of Part 2 of the Occupational Standards, Rule 408.10241, dealing with the maintenance of floors. It was established that Respondent failed to maintain the second floor of the plant facility free of broken and worn areas. The facts were clear that Respondent was in violation of the cited standard. Numerous areas of the second floor had become splintered and damaged causing extreme differences in height which could easily present tripping hazards to employees. Moreover, pieces of wood from the decaying floor had been left lying about.

16 EMPLOYER DEFENSES

No Guard Produced by Industry

GARBAGE DISPOSAL MACHINE, GUARDING OF

GUARDING

Garbage Disposal

75-103 Michigan State University (1976)

Respondent was cited for violation of Part 1, Rule 408.10034(3), relating to a point-of-operation guard on a garbage disposal machine. A guard was prepared by Respondent and placed on the garbage disposal device after the inspection. It was held that the facts presented established a violation with respect to operation of the garbage disposal device. It was not a defense for Respondent to allege that the particular industry did not produce a guard for the particular device in question. If such an argument were followed, enforcement of the occupational safety standards would be limited by the recognition and manufacture by the industry being regulated. This would place the industry and not the Department in a position to control enforcement of occupational safety standards.

17 JURISDICTION

Late Department Decision
Mandatory Requirement

75-178 Nelson Mill Company (1976)

The issue concerned the question of whether the Board lacked jurisdiction concerning an item on appeal due to the fact that the Department did not issue its decision on this item within 15 working days after receipt of Respondent's petition for review. It was held that the language of Section 41 of the Act places a mandatory requirement on the Department to issue its decision in response to an employer's petition for review within 15 working days after the Department's receipt of said petition. Failure of the Department to issue its substantive decision concerning the item protested by the employer must result in a dismissal of the item under contest.

18 EMPLOYER DEFENSES

Impossibility of Performance

REPEAT VIOLATION

75-35 S & S Products, Inc. (1976)

Respondent was cited for a repeat violation of Part 23, Rule 408.12321, relating to the safeguarding of a point-of-operation power press machine.

It was held that the record established a repeat violation by Respondent of the standard. Respondent raised two arguments in defense of the citation: 1) The job could not be performed with the required guard in place, and; 2) Employees could only "with extra effort" reach the point of operation. These arguments were held insufficient to require dismissal of the citation.

19 AUTOMOTIVE SERVICE OPERATIONS

DUE PROCESS

Particularity of Citation

FLOOR MAINTENANCE

JURISDICTION

Late Department Decision Mandatory Requirement

MANUFACTURING FACILITIES, EXEMPTION FOR

75-30 Chrysler Corporation, Huber Foundry (1976)

Three issues were presented in this appeal. The first concerned whether the Complainant stated with sufficient particularity the violations alleged concerning Rule 408.10015(2) relating to housekeeping requirements. It was held that Section 33 of the Act does not require specificity of the location of an alleged violation. The citation must describe with "particularity" the "nature" of the violation. It was not necessary in the case for the Department to specify each pile of sand alleged to be a tripping hazard throughout Respondent's plant. A general statement that Respondent failed to maintain floor and work areas free of slip and trip hazards was sufficient.

The second issue concerned the question of whether Part 72 entitled "Automotive Service Operations" of the Occupational Safety Standards has application to violations alleged in the truck repair department of the Huber Foundry, a manufacturing facility. It was held that "manufacturing" was not being carried on in the truck repair department of the Huber Foundry. In this department where hi-lo trucks were being repaired, Part 72 of the Occupational Safety Standards could be applied.

19 (Continued)

The third issue concerned the question of whether the Board lacked jurisdiction concerning an item on appeal due to the fact that the Department did not issue its decision on this item within 15 working days after receipt of Respondent's petition for review. It was held that the language of Section 41 of the Act places a mandatory requirement on the Department to issue its decision in response to an employer's petition for review within 15 working days after the Department's receipt of said petition. Failure of the Department to issue its substantive decision concerning the item protested by the employer must result in a dismissal of the item under contest.

20 CITATION

Basis for Issuance

DUE PROCESS

Particularity of Citation

EMPLOYER DEFENSES

Greater Hazard

SAFETY NETS

75-1 US Steel Corporation, American Bridge Division (1976)
75-160
75-161

The issue presented in this case concerned the question of whether Respondent violated CSS Part 6, Rule 408.40603(1), concerning the use of safety nets for "connectors." It was held that safety nets were required to be used by Respondent. Related issues were presented concerning whether the citation adequately informed Respondent of the nature of the violations alleged, whether the Department abused its discretion in issuing the citations, and whether installation of the nets would have been more hazardous than not using nets.

Ingham County Circuit Court decision 11/8/79, affirming. Also affirmed by the Court of Appeals 12/8/80.

21 WHEEL BLOCKING

76-233 Gateway Transportation Corporation (1976)

The issue presented in this case was whether Occupational Safety Standards, Part 21, Rule 2176(1), required Respondent to use two blocks for the wheels of a trailer or whether a single block was sufficient. It was held by the ALJ that two blocks were required.

22 BURDEN OF PROOF

Department Required to Prove Violation

EMPLOYER DEFENSES

Intentional Acts of Employee

GUARDING

General Rule 34(3) Slow
Speed of Ram

75-159 Mold-Ex Rubber Corporation, Inc (1976)

The issue presented in this case was whether 13 press machines in use by Respondent were required to be guarded by GISS Part 1, Rule 34(3). The ALJ held that such guarding was required even though the upward traveling ram moved at speeds of 5 to 30 seconds to cover 14 1/2 inch to the closed position. Reversed by Board on 2/7/77

A decision was issued by the Ingham County Circuit Court on 4/22/83, affirming a Board decision which reversed the proposed decision of the ALJ issued 9/24/76. The Board's ruling concluded that the Department had not presented a prima facia case of violation by Respondent of Rule 34(3) regarding the requirement of a point-of-operation guard or device. Accordingly, Respondent had no obligation to rebut the need for a guard. Since need for the guard had not been established, the Board did not determine whether a slowly moving platen requires a guard. Moreover, there was ample space around the sides of the platen for an employee to put his hands while the platen is closed and still avoid the pinch points and potential injury.

The All concluded that, since a single employee may operate several of the 13 machines at issue at one time, this job assignment could contribute to employee injury because an employee could become confused by the differences in closing times of the machines being worked.

A miscalculation and an attempt by an inexperienced employee to adjust a mold could cause an injury. Guarding was also considered required because an employee might place his or her hands into the point of operation in order to do a "better" job for the employer.

23 NATIONAL ELECTRICAL CODE

Applicability of Exemptions for Rule 1910.309(b)

75-140 Detroit Mobile Home, Division of National Gypsum (1976)

Respondent was cited for an OTS violation of GISS, Rule 1910,309, dealing with the National Electrical Code, Article 250-5(b)(1)-(4).

The first issue concerned whether Rule 1910.309(b) provided an exemption for Respondent from grounding of electrical circuits in an old office building area. This office building had been built during the early 1950s.

With respect to this issue, it was held that all of the provisions listed in Subsection (1) of 1910.309 were intended to be put into immediate effect in all places of employment. Provisions of the Code not listed in Subsection (1) would fall within the exemption set forth in Subsection (b). The Article under concern in this case was listed in Subsection (1).

The second issue concerned whether an "interpretation" of the Secretary of Labor concerning 29 CFR 1910.309(a) has applicability to the case at issue. It was held that the "interpretation" had applicability only to the Article discussed therein, Article 250-45 of the Code. Since a different Article of the Code was cited in the instant case, the "interpretation" was not held applicable.

The third issue concerned whether or not Respondent was required to comply with the grounding requirements set forth in Article 250-5(b) of the Code. With respect to this issue, it was not held necessary for Respondent to comply with the Article cited. While the "interpretation" of the Secretary of Labor concerned a different Article of the Code, the rationale expressed therein was held applicable to the issue presented concerning Article 250-5(b). The rationale for excluding office-type equipment from enforcement of Article 250-45 was held applicable to the wiring of a building used only for office purposes [Article 250-5(b)].

24 GRANDFATHER CLAUSE

Powered Industrial Trucks

POWERED INDUSTRIAL TRUCKS

Grandfather Clause

Testing of Employees

75-136 Knape & Vogt Manufacturing Company (1976)

The issue presented in this case was whether GISS Part 21, Rule 2154, required Respondent to test all employees assigned the task of driving powered industrial trucks. It was held that although Rules 2154(5) and 2151(6) provided a “grandfather clause" provision, Respondent must still test all employees assigned to drive powered industrial trucks. If an employee thus tested was found deficient in some respect, he/she could still be continued as an operator of a powered industrial truck "if his handicap or inability does not prove detrimental to his task." Respondent may not use this "grandfather clause" provision as a defense for not testing all employees on the job when the standard took effect. Respondent may exercise his option to continue employees on the job only if after testing it is determined that the handicap of the employee is not detrimental to the employee's task.

25 REPEAT VIOLATION

75-128 Fredrick Company (1976)

It was held in this case that although the record presented a violation by Respondent of GISS Part 23, Rule 2321, the record did not present a "repeat" violation by Respondent of this standard. The AU adopted the reasoning of the 3rd Circuit Court of Appeals concerning the "repeat" concept in Bethlehem Steel Corp v OSAHRC and Brennan, No. 75-2301, 540 F2d 157 (1976) . This finding was reversed in the case of D D Barker, NOA 78-789 (1979), par. 124.

76-255 Bechtel Power Corporation (1976)

In this matter, the ALJ had found Respondent in violation of CSS Rule 408.2108(5) regarding the failure of an employee to attach his safety belt and lanyard to a safety line while working on a swing stage scaffold.

Exceptions were filed on 1/3/77, however, the Board failed to direct review. Therefore, the ALJ's report became a final order of the Board on 1/12/77.

Bechtel sought judicial review of the order and on 12/6/77, Judge Kallman, Ingham County Circuit Court, issued Opinion No. 77-19954-AA in which he held, among other things, that employer knowledge is a necessary component in OTS violations and that MIOSHA does not establish strict liability for unpredictable isolated employee acts which result in violations. The Court concurred in the finding of the ALJ that employers must do more than provide safety equipment; they must enforce its use. However, the requirement to enforce was held not to result in strict liability for every violation. As a defense the employer can show that ". . . he established safety rules, educated his employees on safety rules and procedures, and actively required employee compliance with the rules . . ." The Court remanded the case to the Board for a determination of fact as to whether these elements were present.

The Board, on remand, reviewed the record and reversed and vacated the citation, concluding that ". . . Plaintiff/Appellant had (1) provided safety equipment and instructions on its use, (2) established and communicated a safety training program to its employees, and (3) enforced the program. Further, the Board concurs with the Circuit Court's opinion that an employer is not strictly liable for the actions of its employees where such actions are unpredictable and isolated and without employer knowledge." (Decision dated 5/19/78.)

27 STANDARD

Lack of Guidelines

STOCK - STACKING

75-182 Chrysler Corporation, Mack Avenue Stamping Plant (1977)

Respondent was cited for an alleged OTS violation of Part 1 of the Occupational Safety Standards, Rule 15(1), relating to the stacking of materials. It was held that Respondent had not violated the standard cited in the placement of stock on a stand adjacent to a power press. Faced with a standard without guidelines, one must decide whether the accident was reasonably foreseeable. The standard simply directed Respondent to stack stock in a manner that does not create a hazard.

28 CRANES

Guarding of Sheaves

EMPLOYER DEFENSES

Greater Hazard

JURISDICTION

Late Department Decision
Mandatory Requirement

75-68 GMC, Fisher Body Division, Stamping Plant #37 (1977)

Two items of a citation on appeal were dismissed by the ALJ for lack of jurisdiction because the Board case file showed that the Department issued an untimely decision in response to Respondent's PMA (Section 41 of MIOSHA). See Director of Labor v Chrysler Corp, Huber Foundry, Appeal Docket NOA 75-30, par. 19.

Respondent was also held not to be in violation of Rule 716 of Part 7 of the Occupational Safety Standards relating to the providing of guards for specified cranes. The Department had cited Respondent for violation of this standard in that Respondent did not have guards surrounding the crane sheaves. Greater hazard defense adopted.

29 FOOT PROTECTION

JURISDICTION

Late Department Decision Mandatory
Requirement

75-78 GMC Chevrolet Motor Division, Detroit Assembly Plant (1977)

An item of a citation on appeal was dismissed for lack of jurisdiction because the Board case file showed that the Department had issued an untimely decision in response to Respondent's PMA. See Director of Labor v Chrysler Corp - Huber Foundry, Appeal Docket NOA 75-30, par. 19.

A second item of a citation on appeal relating to the wearing of foot protection for employees on regularly assigned jobs, Part 31 of the Occupational Safety Standards, Rule 3113(1), was vacated. The ALJ held that the facts produced at the hearing showed that an employee need only carry a completed part a distance of three feet and that a portion of this distance was over a workbench at which the employee had assembled the part. In addition, no other employees worked in the immediate area of the employee. Further, no foot injuries had occurred in the area of concern since the job was begun in 2/75.

Based on the above reasons, Respondent was not held in violation of the cited standard.

30 COMITY

Department Not Required to Follow Federal Law

JURISDICTION

Highway Trucks, Loading or Unloading

POWERED INDUSTRIAL TRUCKS
Preemption

PREEMPTION - SECTION 4(b) (1) OF OSHA,

Powered Industrial Trucks

75-85 GMC Parts Division, Detroit Assembly Plant (1977)

The issue presented in this case is the legal question of whether the Department has jurisdiction to inspect and require compliance with Part 21 of the Occupational Safety

Standards, Rule 2176(1), relating to powered industrial trucks loading or unloading highway trucks,

The ALJ held that Section 4(b)(1) of the federal OSHA law and interpretations thereof, limiting federal OSHA authority, do not limit the jurisdiction of the Department to inspect, that other federal laws involved do not preempt the state from inspecting, and that comity should not be regarded as applicable in the case.

30 (Continued)

Also, see paragraph 862 where the Ingham County Circuit Court reached the opposite conclusion.

31 TRENCH

Gas Main
Sloping

76-292 Kamminga & Roodvoets (1977)

Respondent was cited for an alleged OTS violation of the CSS Rule 921(1) relating to the shoring or sloping of a trench more than five feet in depth.

It was held that the facts established that the soil through which Respondent was cutting was largely sand; and, according to the table described in Part 9, angles of 26 degrees to 33 degrees are recommended for sand conditions. Since it was admitted by Respondent that the slopes of the sides of the trench at issue in this case were greater than 45 degrees, the ALJ held Respondent in violation of the cited standard.

Respondent argued that due to the presence of a gas main across the direction of the trench, it was necessary for the sides of the trench to be sloped to a steeper degree than called for in the table. The ALJ did not find this to be an adequate defense concerning the alleged violation of Rule 921(1) because Rule 905(1) requires that utilities left in place during trenching operations be protected against damage by supporting or covering.

32 EMPLOYER EFENSES

Employer Good Faith

INSPECTION

During S.E.T. Program

PENALTIES

Dismissed

S.E.T. PROGRAM, INSPECTION DURING

76-245 Anderson "Safeway" Guardrail Corporation (1977)

Respondent was cited for alleged violations of various provisions of the Occupational Safety Standards. Respondent filed an appeal concerning the proposed penalties assessed by the Department.

Respondent contended that penalties should be dismissed because Respondent was in the midst of a safety and education training seminar being conducted by an official of the Department's SET program. The training program began in 1/76 and was to terminate on or about 3/19/76. An inspection was conducted by the Department on 2/26/76. The representative from the SET Division advised Respondent that no inspections would be conducted by the enforcement division of the Department until after 3/19/76. The statement by the SET consultant was acknowledged to be contrary to departmental policy.

Based on the believable and uncontradicted testimony of Respondent's representative, the ALJ dismissed those penalties associated with violations which Respondent was actively working on in good faith with the SET consultant. This decision was specifically limited to the unique facts presented in the case and does not affect the overall departmental policy concerning inspection activity during SET consultations.

33 GUARDING

Saws

PENALTIES

Use of Department Penalty Schedule

REPEAT VIOLATION

Rule Violation Not Same Piece of Equipment, Section 35(4)

SAWS

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

78-804 Swartz Creek Elevator and Lumber (1981)

Use of Department penalty schedule accepted. The Department's schedule follows Section 36(1) which requires an examination of seriousness of violation, size of employer, and history of previous citations. Also see Barry Steel, NOA 79-1469 (1981), par. 34 and Kelsey-Hayes Co, NOA 75-10 (1975), par. 1.

Serious violations upheld--Section 6(4) radial arm saw--no guard on lower blade. Substantial probability existed that serious physical harm could result. Also, Respondent should have known of presence of violation. Also see Barry Steel, NOA 79-1469 (1981), par. 34.

A repeat violation of Rule 727(1) was upheld. Section 35(4) requires a repeated violation of a rule, not a citation for same piece of equipment.

34 CRANES

Brakes

EMPLOYER DEFENSES

Remoteness

EYE PROTECTION

Probability vs Possibility
Probability Not Established
Probability Required

EXPOSED TO CONTACT

Projections

GUARDING

Slitter

HEAD PROTECTION

79-1469 Barry Steel Corporation (1981)

Rule 3211(1) refers to Rule 3201 for a determination of when head protection is required. The record did not show any risk of falling or flying objects, harmful contacts or explosives, risk of injury from electrical shock, hair entanglement, chemicals or temperature extremes as set forth in Rule 3201.

Also see Lear Siegler, Inc. NOA 78-846 (1979), par. 113, and GMC, Fisher Body, NOA 78-726 (1980), par. 183.

Rule 3512 requires probability, not possibility, of eye injury. No slivers or particles of steel were generated by Respondent's operation and no probability of injury found.

Also see Evart Products Co, Inc. NOA 80-1742 (1981), par, 209.

No exposure was found to drive shaft projections. Rule 736 requires exposure to contact. The record did not establish this condition.

Rule 1841(1) concerning crane brakes requires a brake or other braking means. Respondent utilized a counter torque method of compliance, The Department did not show that this method of braking would not stop the crane as required by the rule. Also the breaking standard does permit "other braking methods."

Rule 2647(a) concerning slitters requires guarding for the in-running side. Respondent's arguments that guarding is not required because: 1) feed rails were not powered; 2) points of operation were remote; and, 3) guarding is provided by feed rolls, were rejected.

35 ELECTRICAL

Guard Live Parts 50 Volts or More From Accidental Contact

POWER TOOLS

Safety Device to Reduce Pressure in Line

79-1447 Gerace Construction Company (1981)

Respondent had moved a compressed air safety device from a compressor and a 3/4 inch hose while in operation - affirmed.

Employees were exposed to accidental contact plugging in extension cords to the panel. The panel was 30 inches off the ground attached to a pipe. Lugs and buzzbars were exposed and energized.

Respondent argued that the electrical subcontractor left the box open, and energized was not held to be a defense. Regardless of responsibility for the presence of a hazard, Respondent is responsible for protecting its employees on the site.

36 EMPLOYER DEFENSES

Isolated Incident

STAIRWAY vs FIXED LADDER

79-1387 Gerace Construction Company (1981)

An employee failure to use goggles while operating a masonry saw held to be an isolated incident.

Bechtel Power Corp, Ingham County Circuit Court No. 77-19954-AA, was applied, par. 26.

Respondent had an established safety rule on the wearing of goggles. Employees were educated in use of the goggles, and Respondent required employee compliance.

Respondent argued that a structure was not a staircase and, therefore, not in violation of Rule 408.42101, Ref. OSHA 1926.501(j). It was argued to be a fixed ladder and, therefore, subject to Part 3 of the GISS. It was found to be a staircase. The pitch (60 degrees) made it more akin to a staircase. If it were a ladder, it would be at the bottom of the critical range permitted for ladders. Also, Respondent presented no reasons to show that a 60 degree slope was required to meet conditions of installation as required by Rule 365(1) and (2).

37 DISCONNECT

Electrical
By Entering Disconnect Box By
Supervisor or Electrician

ELECTRICAL
Disconnects

LOCKOUT PROCEDURE

79-1268 GMC, Saginaw Steering Gear #1 (1982)

Rule 763(1) requires a machine to be equipped with a means of disconnecting from source of power during maintenance, repair, and adjustment operations.

Respondent argued that the machine could be disconnected by an electrician or qualified supervisor by entering the disconnect box.

It was held that requiring one to be an electrician in order to disconnect is not compliance. Ordinarily, an employee is left with no ability to stop power from machine. The section requires a means of easily disconnecting power. A padlock meets this test.

Also see Fisher Body Plant #1, NOA 76-242 (1979), par. 145.

The finding of the ALJ and Board was reversed by the Wayne County Circuit Court on 3/25/83, No. 82-216312. It was held that requiring that the disconnect be performed "easily" added a requirement to the standard not included by the drafters.

38 GENERAL vs SPECIFIC

LOCKOUT PROCEDURE

78-1013 GMC, Saginaw Steering Gear #6 (1982)

The Department cited Part 1, Rule 11(a) and 32(1)(2), for a Greenlee transfer machine. The Department relied on GMC, NOA 77-668 (1980), par. 182.

Respondent argued this is a piece of metalworking machinery and is covered by Part 26, Rule 2618(1). Respondent cited Chrysler, NOA 77-711 (1980), par. 187. It was concluded that since there is no provision in Rule 2618(1) for locking out a metalworking machine during set-up operations, the general rule which has such a requirement applies.

The Board reviewed and reversed. The Board found it an error to apply General Rule 11(c) and 32(1)(2) where there are specific rules addressing metal working machinery. Part 26 is applicable to the stipulated facts. Rule 2618(1) contained in Part 26 applies to both servicing situations and set up.

39 JURISDICTION

Late Employer Petition/Appeal
Unintentional

82-2961 Vulcan Iron Works, Inc (1983)

Respondent argued that failure to file a timely appeal was unintentional and caused by Respondent's attempt to request a variance and trying to find out why citation was issued.

Good Cause Test: The kind of cause that would prevent a reasonably prudent person from the performance of an important obligation. It does not include conduct that shows carelessness, negligence, or a lack of reasonable diligence.

Also see Tezak Co, NOA 80-2161 (1981), par. 244 and par. 301.

40 JURISDICTION

Late Employer Petition/Appeal
Contacting a Third Party Good Cause Test

82-2921 Meijer, Inc. (1983)

Respondent contacted an independent third party licensee for an explanation of citation. The reply from the licensee did not come in until after the 15 working day period had expired,

See Good Cause Test - par. 39.

Also see B.O.W., Inc. NOA 79-1696 (1979).

41 JURISDICTION

Late Department Decision
Attempted Meeting With Employer

80-2167 Wearless Products, Inc. (1981)

The Department argued a decision was not issued within 15 working days after receipt of the petition for dismissal because the Department attempted to meet with Respondent prior to issuance of the decision. This was not found to be a "good cause" explanation for the late decision. The Act does not permit a meeting to delay the Department's issuance deadline.

42 PENALTIES

Dismissed

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

Reduced to Other Than Serious

TESTING

Water Storage Tank

75-156 Neuman Company Contractors (1977)

Respondent was cited for an alleged serious violation of Part 1 of the CSS, Rule 408.40112(1), relating to the alleged failure of Respondent to test the atmosphere of a water storage tank prior to the entry of employees. An immediate abatement date was established and a penalty amount of $400 proposed.

It was held that the facts established that Respondent had violated the standard cited but that the violation was not serious in nature. Based on the personal protective equipment being worn by the employees performing work in the water tower, it was held that the record failed to establish a substantial probability that death or serious physical harm could occur to employees from Respondent's violation of the cited standard. Accordingly, the alleged violation was reduced from a "serious violation" to an “OTS.”

The proposed penalty was reduced to $50. This case was directed for review by the Board (Decision 5/13/77 - agreed violation should be OTS). The penalty was dismissed entirely.

43 AMENDMENT

By Administrative Law Judge

STANDARD

Interpretation

76-253, 76-298, 76-304, 76-375 Wickes Agriculture (1977)

Each of these cases dealt with a different grain elevator facility. The question presented in each case was whether Respondent was in violation of Occupational Safety Standard, Part 6, Rule 408.10695(3), relating to the providing of an exterior stair or basket ladder to all floors.

43 (Continued)

In each case, it was held that Respondent was in violation of the standard specified. It was held that grain dust is combustible. Interpretation of standard involved. On appeal to Circuit Court, the decision was reversed. The ALJ created language in the rule that the commission did not include. Saginaw County 10/26/79, No. 77-02616, 17, 18

44 EMPLOYER DEFENSES

Employer Good Faith

PENALTIES

Need to Promulgate

TRENCH

Storage of Spoil
Trench Shield

WILLFUL VIOLATION

Actions of Foreman Imputed to Employer

75-113 Barry Excavating (1977)

Respondent was cited for willful violations of Part 9 of CSS, Rule 408.40922 and Rule 408.40905, relating to the sloping of the sides of a trench when an open-type shield is used and the storage of excavated material respectively. A $1,600 penalty was proposed for each violation.

It was held, based on the facts presented, that Respondent did willfully violate the standards specified due to the actions of Respondent's foreman which were imputed to that of Respondent. However, based on the good-faith efforts of Respondent himself concerning safety on the job site, the proposed penalties were reduced to $400 each for the violations indicated above.

The penalty schedule of the Department can be applied even if not promulgated.

45 FOOT PROTECTION

76-329 R J Fox Construction Corporation (1977)

Respondent was found in violation of CSS, Part 6, Rule 608, relating to foot protection. Respondent did not require safety shoes or arch caps for employees using 37 pound chipping hammers in bridge resurfacing work.

46 EMPLOYER DEFENSES

Employer Good Faith

GUARDING

Accepted by Department at One Location

76-437 Keeler Brass Company (1977)

A citation issued by the Department was vacated based on reasonable reliance by Respondent. Respondent's Lake Odessa Plant was inspected by a safety officer and machine guarding installed as a result of the prior citation was accepted. Respondent then installed the same guards on the same kind of machines at a second plant. This second plant was inspected by the same safety officer who had approved the Lake Odessa machine guards. However, the machines viewed at the second plant were considered in violation of Rule 2411(1) of Part 24 of the Occupational Safety Standards. The citation was vacated based on the particular facts of the case. The decision specifically stated that it did have general applicability to other cases or even to the same employer should a further inspection find Respondent in violation of Rule 2411(1).

47 EMPLOYER DEFENSES

Greater Hazard

GUARDING

Treadle

STANDARD

Performance

76-439 Manistee Drop Forge (1977)

A citation for failure to guard a treadle on a forging hammer was upheld. Greater hazard defense rejected. Performance standard requires an employer to devise methods to comply with the standard.

48 EMPLOYER

Control of Business

EMPLOYER DEFENSES

Greater Hazard

FIRE HAZARD

Sprinkler System

NATIONAL ELECTRICAL CODE

Class I, Division I, Location

PAINT SPRAY BOOTH

Lighting Fixture Placement

SPRINKLER SYSTEM

STANDARD

Effect of Law

76-384 Du-Laur Products Company (1977)

Respondent was held in violation of Rule 1910.107(c)(7) relating to placement of lighting fixture within 20 feet of spraying area. Flammable gases found to exist in the paint booths so as to satisfy test of "continuously, intermittently, or periodically" contained in Article 500-4 of Code. No sprinkler installed; a violation was found of Rule 1910.1907(b)(5)(iv). Greater hazard defense not established. Comparison of OSHA and MIOSHA discussed with regard to intent of Acts and Respondent's argument of need to control his business.

49 HEAD PROTECTION

76-442 Hamady Brothers Food Market, Inc. (1977)

Failure to wear hard hat in meat cooler upheld. Danger to employees from falling overhead meat trolleys found. Rule 408.13211(1) and Rule 408.13221.

50 COMPLAINT

By Former Employee

INSPECTION

Complaint From Former Employee

PRECEDENT

Federal Cases

76-454 Horst Manufacturing Company (1977)

Citations were upheld despite the fact that the complaint which gave rise to inspection came from one who was no longer an employee of Respondent at the time the complaint was filed. Section 28(l)--discussion of similar federal case. Section 46(6) discussed.

51 EMPLOYER DEFENSES

Impossibility of Performance

GUARDING

General Rule 34(3)

PRECEDENT

Federal Cases

76-417 Gibson Sheet Metal Company (1977)

Rule 34(3) at issue. Cagle's decision. CCH 21.052 used to shift burden to Department to show compliance is possible. Respondent testified that he knew of no way to prepare a holding mechanism for parts. Section 46(6) discussed. Tests for Rule 34(3) to apply also covered.

52 EGRESS, MEANS OF

FLOOR OPENING

HOUSEKEEPING

LADDER

Construction Site

MEASURING DEVICES

Used By Safety Officer

PERIMETER CABLE/GUARDRAIL

SAFETY NETS

76-254 W & K Erectors, Inc. (1977)

Several issues involved in construction project presented--obstructions in means of egress, safety nets, ladder not extending 36 inches above landing, floor opening, guarding perimeter cable. All citations affirmed by ALJ. The Board reversed two items. Ingham County Circuit Court issued a decision 4/27/82, No. 78-21185. In this decision, the Court covered concept of stating findings of fact and conclusions of law to support the Board decision, deference to ALJ observations, use measuring devices by safety officers and identification of employee of employer on worksite.

53 EMPLOYER DEFENSES

Intentional Acts of Employee

GUARDING

Point-of-Operation Guard or Device
Automatic Feed and Operation

75-75 GMC, Diesel Equipment Division (1977)
75-76 GMC, Cadillac Motor Division

Violation of Rule 408.12321 (Rule 2321) found operator exposure to point-of-operation hazard. Operator was responsible for several machines set up in automatic feed and operation. There were openings around sides of guards at rear of machine for access to point of operation. Violation held even though the injury could only occur if the employee "intentionally" entered point of operation.

54 EMPLOYER DEFENSES

Impossibility of Performance

EXPOSED TO CONTACT

Operator Exposure

GUARDING

General Rule 34(3)

PRECEDENT

Federal Cases

75-183 Clark Equipment Company (1977)
76-227

Violations of Rule 2321 (Part 23) and Rule 34 (Part 1) vacated. Record did not establish operator exposure.

55 EMPLOYER

On Walkaround

EVIDENCE

Quashing

INSPECTION

Accompaniment By Employer Representative

76-401 Don Cartage Corporation (1977)

Safety officer conducted inspection without contacting Respondent. During inspection, he took measurements and photographs. The law on subject was reviewed, including Hartwell Excavating 37 F2d 1071, AccuNammics, 515 F2d 828, Western Waterproofing, CCH 20,805, Chicago Bridge & Iron, CCH 15,416. The evidence obtained was quashed.

56 **DISCOVERY**

Interrogatories

EMPLOYER

On Walkaround

EVIDENCE

Quashing

INSPECTION

Accompaniment by Employer Representative
Opening and Closing Conference

JURY TRIAL

PENALTIES

Need to Promulgate

WILLFUL VIOLATION

Definition

76-246 Farm Bureau Services, Inc, (1977)
Michigan Elevator Exchange

Explosion of grain elevator. During confusion of rescue and clean up, Department safety officers inspected site, took samples, pictures, picked up debris, and talked to witnesses. All this was done in violation of Section 29(4) which requires opening conference, walk around inspection, and closing conference with employer representative in attendance. The evidence obtained in this manner was quashed.

Federal Court and Commission decisions examined. Orders also issued denying jury trial, compelling discovery, including interrogatories, and denying motion for declaratory judgment covering definition of willful and promulgation of penalty schedule.

57 **PRESSES**

Brakes

76-336 Chrysler Corporation (1977)

Violations of Rules 2422(1) and 2425(3)(b), relating to brakes and slide counterbalance systems on mechanical power presses, were upheld. The press did not have the capability to perform the functions required by the rules.

58 GUARDING

Scrap Cutter

WITNESSES

Credibility

77-501 Hastings Manufacturing Company (1977)

Violation for failure to guard scrap cutter upheld, Rule 2472. Credibility of witnesses discussed.

59 LANYARD

WITNESSES

Credibility

76-340 Combustion Engineering (1977)

Violation of Rule 1108(5), relating to use of lanyard attached to safety line, was vacated. Credibility of witnesses also discussed.

60 EMPLOYER

Competition with Others

EMPLOYER DEFENSES

Excessive Costs
Impossibility of Performance

GUARDING

Saws

PRECEDENT

Federal Cases

SAWS

STANDARD

Performance

77-544 Plywood Sales Corporation (1977)

Violation of Rule 2722(1)-(5), relating to hood-type guard for circular saw, was upheld. Department showed a way to guard saw. Therefore, it was not impossible, only inconvenient.

60 (Continued)

The rule cited is a performance standard requiring Respondent to devise a method of compliance. The fact that an employer has competitors that have not been cited is not a defense to the violation. Excessive costs for compliance also rejected as a defense.

61 ATTORNEY

Employer Provided New Hearing With Attorney

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

TRENCH

Ladder in Trench
Sloping
Storage of Spoil

WILLFUL VIOLATION

Actions of Foreman Imputed to Employer

WITNESSES

Credibility

76-188 Subsurface Construction Corporation (1977)

Willful violations and $10,000 penalties affirmed for Rule 905(4) relating to storage of excavated material and Rule 921(1) relating to sloping or shoring of a trench more than five feet in depth. Also a serious violation of Rule 905(6) relating to ladder in an excavation. Respondent did not have an attorney at the hearing. Reliance placed on testimony of foreman who stated he received no training.

Case appealed to Kent County Circuit Court. Remanded to permit more employer evidence. After hearing evidence of employer training for foreman, willful violations were reduced to serious.

62 DUE PROCESS

Particularity of Citation

EMPLOYER DEFENSES

Greater Hazard
Impossibility of Performance
Intentional Acts of Employee
Isolated Incident

GENERAL vs SPECIFIC

GUARDING

Saws
Band Saw Grinder

HAZARD - ASSUMED IF RULE IS PROMULGATED

LOCKOUT PROCEDURE

SAWS

Band Saw

76-198 Chrysler Corporation, Sterling Stamping Plant (1977)
76-280

Serious violation of Rule 11(c) and 32(1)(2) General Rules -- lockout vacated. Particularity of citations discussed. Rule 2477(4) is a more specific lockout procedure for die setters than the general rules on lockout. Employee conduct was unforeseeable. OTS violations for failure to guard grinding and horizontal band saw upheld. Isolated incident argument discussed regarding grinding wheel. Impossibility and greater hazard defenses covered with band saw. Also, held that Department does not have to establish the existence of a hazard. The standard assumes existence of a hazard. The Board affirmed except for band saw violation. This was later reversed by Circuit Court.

63 EYE PROTECTION

HOUSEKEEPING

LADDER

Portable

PRESSES

Distinguished From Press Brakes

RECORDKEEPING

76-460 Whitehead and Kales Company (1977)

Citations were issued alleging violations of the Occupational Safety Standards, Rule 3512 relating to face and eye protection, Rule 15(2) relating to housekeeping, Rule 33(2) relating to identifying control device functions, Rule 426(2) relating to portable ladders, and Rules 2411(1) and 2463(7)(c) relating to measuring the formula specified in the rule for hand-in-die loading and maintenance of records for inspection of power press machines, were affirmed by ALJ. The testimony of the safety officer alleging violation was unrebutted by Respondent at the hearing. The presses at issue, with respect to Rules 2463(7)(c) and 2412 were held to be power presses and not press brakes excluded from coverage of Part 24 by Rule 2401.

An alleged violation of Rule 34(3), relating to point-of-operation guards, was vacated because the safety officer was not able to testify as to whether the machine was operated with a two hand control device which would have obviated the need for a guard.

64 CITATION

Posting

EMPLOYEE

Participation
Receipt of Employer Petition

POSTING

75-67 GMC, Saginaw Steering Gear Plant #7 (1977)
77-570 GMC, Chevrolet Saginaw Parts

Citations were issued alleging a violation of Section 41 of MIOSHA for failure of Respondent to transmit a copy of a PMA to affected employees or employee representative and for failure to post a copy of the Department's decision issued in response to Respondent's PMA were affirmed.

65 GUARDING

Roll Over

ROLL-OVER GUARDS

SITE CLEARING OPERATIONS

77-507 Triangle Excavating Company (1977)

A citation was issued alleging a violation of Part 13 of the CSS, Rule 1929.604(a)(2), relating to the use of roll-over guards and overhead and rear canopy guards on equipment used in site clearing operations, was affirmed.

66 TRAINING

Rescue Crew

STIPULATION OF FACTS

76-435 Charles J Rogers, Inc (1977)

A citation issued alleging a violation of Rule 6401(2)(f)(ii) of the Occupational Health Standards relating to provisions for a trained rescue crew was reversed because the record did not establish that Respondent lacked a rescue crew.

67 EMPLOYER DEFENSES

Anning-Johnson

EXPOSED TO CONTACT LP
Gas Container

HOUSEKEEPING

WILFULL VIOLATION

Actions of Foreman Imputed to Employer

77-512 Honeywell, Inc. (1977)

Citations issued to Respondent alleging violations of Part 1 of the CSS, Rule 408.40111, relating to the keeping of passageways free from debris, and Part 18 of the CSS, Rule 1926.153(j), relating to storage of LP gas containers within a building, were reversed and vacated. It was held by the ALJ with respect to Rule 408.40111 that the cited rules did not apply to the fact situation presented and with respect to Rule 1926.153(j) that the employees were not exposed to the hazards.

68 DE MINIMIS VIOLATION

PRESSES

Brake Monitors

76-279 General Electric, Carboloy Systems Department (1978)

A citation issued alleging violation of the Occupational Safety Standards Emergency Rules, Rule 2372(10), relating to brake monitoring on mechanical power presses was affirmed. This case was appealed to Circuit Court and remanded for consideration of de minimis defense. Upon rehearing, the violation was found to be de minimis.

69 BURDEN OF PROOF

NATIONAL ELECTRICAL CODE

Connections

PENALTIES

Dismissed

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

Reduced to Other Than Serious

76-226 Farmington Public Schools (1978)

A citation issued alleging a serious violation of Section 400-10 of the National Electrical Code, 1971 Edition, was reduced to an OTS violation by the ALJ. This case was directed for review. The Board reversed the ALJ's finding of a violation of Section 400-10 of the National Electrical Code as adopted by MIOSHA. The Board held that the director had failed to sustain the burden of proof sufficiently. The appeal related to a citation that had been issued, following a fatality, for failing to provide ". . , connections to devices and fitting on a flexible cord which will prevent the transmission of tension to the joints or terminal screws." A proposed penalty of $500 was also vacated by the Board.

70 CRANES

Brakes

EMPLOYER DEFENSES

Greater Hazard

77-584 Kelsey-Hayes Company (1978)

A citation issued alleging a violation of Rule 1841(1), relating to providing a brake or noncoasting device on cranes, was affirmed. Respondent filed exceptions to the report of the ALJ with the Board. After directing review, the Board upheld the decision of the ALJ.

71 EMPLOYER DEFENSES

Exposure

EYE PROTECTION

Point of Operation

GUARDING

General Rule 34(3)

77-564 Brunswick Corporation (1978)

A citation alleged a violation of Rule 34(3), covering point-of-operation guard for a press, was reversed because the record did not prove exposure to a point-of-operation hazard.

72 CRANES

Guarding Radius of Superstructure

GUARDING

Radius of Crane Superstructure

HAZARD ACCESS TEST

HAZARD - ASSUMED IF RULE IS PROMULGATED

77-648 Gerace Construction Company, Inc. (1978)

A citation issued alleging a violation of Part 10 of the CSS, Rule 1926.550(a)(9), relating to barricading accessible areas within the swing radius of the superstructure of a crane, was affirmed.

73 EMPLOYER DEFENSES

Isolated Incident

GUARDING

Point-of-Operation Guard or Device
Use of Dummy Plug

76-311 Chrysler Corporation, Mack Avenue Stamping Plant (1978)

The ALJ affirmed a citation concerning the use of a dummy plug by two employees. The citation was issued following amputation of an employee's finger in the press on grounds that Respondent allowed workers to use dummy plugs to increase production and attain required output sooner so as to have more time for breaks at the end of the shift, The Board found that dummy plugs were used to test machines and that workers, including the one who lost her finger, had been disciplined for use of dummy plugs. The Board vacated the ALJ decision.

74 ABATEMENT

Right of Employee to Object to Method

EMPLOYEE

Right To Object To Method of Abatement

77-505 Ford Motor Company, Michigan Truck Plant (1978)

The issue in this case was whether an employee group had the right to object to the method of abatement used by Respondent after the PHC in which the Department and Respondent agreed on resolution of all issues on appeal. It was ruled that it did not, and the settlement agreement drawn up by the Department and Respondent was approved.

75 DUE PROCESS

Rule Vague

GUARDING

Abrasive Wheel
Belt and Pulley
Grinder
Open-Sided Floor or Platform Saws
Band Saw

OPEN-SIDED FLOORS vs ROOFS

PENALTIES

Against Public Employer
SAWS
Band Saw

STANDARD

Amendment

77-599 Michigan State University, Power Plant (1978)

In this case, the ALJ issued a report upholding citations for OTS violations including citations for failure to (1) adjust a peripheral member of bench grinder, (2) guard the abrasive wheel, (3) ground powered-metalworking machines, (4) provide safety feet on ladder, (5) provide guard for belt and pulley, and (6) provide a guard for a horizontal band saw.

However, a citation for failure to guard an open-sided floor was vacated on the basis that work was being performed on a roof area, not a floor as prescribed by the standard. Proposed penalties also were sustained on grounds that Section 35(10) of MIOSHA provides for the assessment of civil fines or for mandamus action as sanctions that may be utilized by the Director in seeking compliance under the Act by public employees. Respondent argued that the Director lacked the authority to issue fines against another state entity.

76 TRENCH

Unstable or Soft Material
Road as Tie Back

77-495 Charles J Rogers, Inc. (1978)

A citation was issued alleging a violation of Part 9 of the CSS, Rule 1926.652(b), relating to the consistency of the soil of the sides of trenches in which work was being performed. The citation was vacated because the record did not establish that the trench was being cut through unstable or soft material. It was held that frozen earth on top of a trench and under an asphalt road acted as a tie back to stabilize the rest of the trench. Expert witnesses (soil engineers) were presented by Respondent and Department.

77 EMPLOYER DEFENSES

Intentional Acts of Employee
Isolated Incident

OTHER THAN SERIOUS VIOLATIONS

Employer Knowledge

PERSONAL PROTECTIVE EQUIPMENT

PROCESS SPACE

Testing

RECORDKEEPING

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

Reduced to Other Than Serious

TESTING

Process Space

76-432 Detroit Water and Sewage Department (1978)

A citation was issued for a serious violation and later amended to an OTS for the alleged violation of Rule 325.2430(1) and (2) which requires that a "process space" be ventilated and tested; and, if found to be nonrespirable, only a trained person with necessary protective equipment may enter. In this case, two employees were asphyxiated while in a utility hole attempting to take meter readings. The ALJ upheld the citation and penalty of $225 holding that Respondent failed to enforce the requirement to test and/or ventilate and provide a trained person, but modified the citation by vacating references in the citation to Respondent's failure to provide testing equipment, maintain records, and provide air-moving devices.

78 **PENALTIES**

Use of Department Penalty Schedule

POWER TOOLS

Safety Device to Reduce Pressure in Line

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

TRENCH

Unstable or Soft Material

77-611 A & P Construction Company (1978)

A serious violation of Part 9, Rule 1926.652(b) of the CSS, relating to trench operations, was affirmed. Also affirmed was an OTS violation of Rule 1926.302(b)(7) relating to safety device for compressed air source of supply.

79 FOOT PROTECTION

77-589 Bormans, Inc, Farmer Jack (1978)

A citation for toe protection, Rule 3113(1), was vacated. "Likely" defined as probable. Reference to GMC. Chevrolet Motor Division Detroit Assembly Plant, NOA 75-78, par. 29.

80 BURDEN OF PROOF

EMPLOYER DEFENSES
Greater Hazard

EXPOSED TO CONTACT
Overhead Falling Debris

OVERHEAD PROTECTION

WARNINGS

By Safety Officers Instead of Citations

77-709 McCarthy Brothers Corporation (1978)

A citation alleging a violation of Part 10, Rule 1926.522(b)(4) of the CSS, relating to the providing of overhead protection for the operator's station of a hoisting machine, was vacated. Citations alleging a violation of Part 18, Rule 1926.152(c)(4)(i), relating to the placement of a portable tank containing flammable liquid; Part 18, Rule 1926.152(d)(2), relating to the providing of a fire extinguisher; and Part 18, Rule 1926.152(g)(9), relating to the placement of a sign prohibiting smoking in a refueling area, were affirmed. Exceptions were filed by the Department. No Board member directed review, and the matter became a final order of the Board.

81 BURDEN OF PROOF

EMPLOYER DEFENSES
Impossibility of Performance

PRECEDENT

Federal Cases

77-699 Acorn Tool & Die, Inc. (1978)

A citation for use of an air-blow gun with excessive pressure was vacated - Rule 3832(1). Respondent prevailed on impossibility defense -- unable to clean drill holes with less than 80 p.s.i. Respondent makes hydraulic pumps that must be cleaned of all residue in drilled holes or the pumps will not function.

82 EMPLOYER DEFENSES

Isolated Incident

GUARDING

Grinder
Grinder Workrest
Saws

SAWS

STIPULATION OF FACTS

76-215 Chrysler Corporation, Eight Mile Stamping Plant (1978)

Citations for Part IA, Rule 114(2), GISS, relating to work rest adjustment on a pedestal grinder, were vacated. Also vacated was a citation to Rule 2730(1), radial arm saw.

83 DE MINIMIS VIOLATION

76-196 Chrysler Corporation, Marysville Parts Department (1978)

A violation of Part 72, Rule 7231(2), GISS, relating to providing a tag for automotive lift, was modified and held de minimis.

84 FOOT PROTECTION

STANDARD

Interpretation

77-486 Besser Company (1978)
77-630 National Standard Company

A citation to Rule 3113(1) of the GISS, relating to foot or toe protection, was vacated. "Likely" considered to be probably.

(Paragraph number 85 was not assigned.)

86 PRESSES

Single Stroke Mechanism

78-731 Midway Die & Engineering, Inc (1978)

A violation of Rule 2432(1) of the GISS, relating to providing single stroke mechanism on full revolution clutch presses, was affirmed.

87 EMPLOYER DEFENSES

Impossibility of Performance

PRECEDENT

Federal Cases

STANDARD

Interpretation

77-661 Ferguson Steel, Inc (1978)

A citation to Rule 914(1)(a)(b)(2) of the GISS, relating to installation of a fixed fire equipment system, was vacated. Interpretation of the word "dispensed" was discussed. It was found impossible for Respondent to use a fixed fire equipment system in its building.

88 GUARDING

Point-of-Operation Guard or Device
Pullbacks

SUPERVISION

77-714 McInerney Spring and Wire Company (1978)

A violation of Rule 2411(1) of GISS, relating to supervision of required safeguards, was affirmed. Respondent chose pullbacks as its method of protecting employees exposed to points of operation. Respondent failed to supervise new employee.

89 ELECTRICAL

Energized Lines

GENERAL DUTY CLAUSE

Operating Oil Rig Near Power Lines

77-578 McConnell and Skully, Inc (1978)

An oil well company cited for violating Michigan GDC involving an employee electrocuted while handling a line from an oil well casing being replaced when the "pulling rig" contacted a 4,800 volt power line overhead. The Board and Department affirmed the GDC violation. Respondent contended that operations near electric lines were not a recognized hazard. This argument was rejected because Michigan has several standards covering work near power lines. Because none directly mention the oil industry, the GDC was appropriate. No evidence was presented to show that the deceased employee disobeyed training and warnings or that the equipment operator had received safety training.

90 GUARDING

General Rule 34(3)

PENALTIES

Reduced

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

78-789 Equipment Fabricators (1978)

A serious violation was found of a guarding requirement for radial arm saw. Respondent conceded the violation but objected to the serious category and penalty. The penalty was reduced based on limited use of saw, abated at time of hearing, and use of saw was not a direct need of his business. For this reason, he was not familiar with Part 27 of the GISS.

91 GUARDING

Point-of-Operation Guard or Device Operator Exposure
Press Brake

78-790 Iroquois Industries, Inc (1978)

A violation of Rule 34(2), relating to point-of-operation guard or device, was vacated. The standards set forth in the rule were discussed--slow closing die. See Mold-Ex Rubber, NOA 76-169, par. 22.

92 BURDEN OF PROOF

EVIDENCE

Hearsay
Within the Control of a Party

77-633 City of Roseville (1978)

A violation of Part 11, Rule 1117, relating to reporting of injury, was vacated, The Department's case was rejected because it was based solely on hearsay evidence. It was concluded that since Court review of administrative decisions must be based on "competent" evidence and since hearsay evidence alone is not "competent evidence," the Department did not carry its burden.

93 EMPLOYER DEFENSES

Employer Good Faith

PENALTIES

Dismissed

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

78-770 Standard Die & Fabricating, Inc. (1978)

The proposed penalty was vacated. The violation was for an unguarded radial arm saw. The saw was purchased from Sears and assembled exactly as it came from the store. Respondent spent $1,500 to guard the saw after being told of guarding violation. The saw is used on a limited basis. Respondent argued good faith and lack of familiarity with woodworking standard. Although violation was held to be serious, penalty was vacated. It should be noted that this penalty elimination is in violation of the Act, Section 34(1) which requires a penalty for a serious violation,

94 EMPLOYER DEFENSES

Employer Good Faith

INSPECTION

Prior Inspections Produced No Citation

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

Lack of Knowledge
Reduced to Other Than Serious

78-766 Michigan Woodworking Specialties Company (1978)

A serious violation was reduced to an OTS. Radial arm saw guarding and sliding cut off saw, Rule 2730(1) and Rule 2728(1). The subject saws had been seen and not cited by two prior inspectors. Penalty reduced to OTS because employer knowledge not present.

95 PENALTIES

Reduced

TRENCH

Road as Tie Back
Sloping
Trench Shield
Unstable or Soft Material

WILFUL VIOLATION

Definition

77-687 Charles J Rogers, Inc (1978)

A willful violation to 1926.652(b) was upheld but reduced in degree. This case contrasted with Rogers, NOA 77-495, par. 76. This case, NOA 77-687, had a very unstable trench with sand, at bottom being washed out by water. Expert witnesses (soil engineers) were presented by Respondent and Department. The superintendent knew he was to use a shield but gave orders for work to start without shield in place. He also did not order sloping. Respondent knew of requirements of standard. Penalty reduced taking into account short period of exposure and tie back feature of asphalt road.

96 AMENDMENT

By Motion

EMPLOYER

Delegation to Employees of Safety Requirements

INSPECTION

Accompaniment By Employer Representative Opening and Closing Conference

PENALTIES

Reduced

PRECEDENT

Federal Cases

SAFETY NETS

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

78-738 Ingalls Iron Works Company (1978)

Part 26, Rule 1926.105(a) of the CSS, Safety nets. The Department's amendment was approved and the violation affirmed, but the penalty was reduced. No violation of 29(4) was found by the Department. Federal cases interpreting Rule 1926.105(a) followed based on 46(6).

97 DE MINIMIS 'VIOLATION

EMPLOYER

Competition With Others

GUARDING

Pressure Sensing Device

PRESSES

Pressure Sensing

77-677 Star Watch Case Company (1978)

Rule 1115(1), relating to polishing and buffing, reduced to de minimis. Rule 2341(5), relating to pressure sensing device, sustained. Respondent would not be uncompetitive with others if guards were used on presses.

98 BURDEN OF PROOF

TRENCH

Unstable or Soft Material

77-583 Lee Wood Contracting Company (1978)

No testimony presented as to stability of the soil. Therefore could not conclude soil was unstable as argued by the Department.

99 DE MINIMIS VIOLATION

SCAFFOLDS

78-748 Gerace Construction Company, Inc (1978)

Violation of Rule 1926.451(e)(10) and Rule 1926.45.1(e)(10), relating to guardrail for rolling scaffold and bracing for scaffold, reduced to de minimis.

100 DUE PROCESS

Internal Department Memo
Interpretation of Enforcing Agency

HEAD PROTECTION

PRECEDENT

Federal Cases

STANDARD

Interpretation of Enforcing Agency

TRENCH

Shoring Sloping

78-741 Gordon Sel-Way, Inc. (1978)

Citation for Rule 1926.652(c), relating to trench in hard or compact soil, dismissed, Safety officer recommended violation based on internal memo of Department not seen by Respondent. This memo required average soil to be sloped to 45 degrees or shored. All clay soil was to be treated as average soil. Department policy, requiring shoring for first five feet of trench, rejected.

101 EMPLOYER DEFENSES

Isolated Incident

GUARDING

Saws
Bolt Saw
Swing Saw

HEAD PROTECTION

PENALTIES
Reduced

SAWS

Bolt Saw
Swing Saw

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

STANDARD

Effect of Law

78-772 O J Briggs Lumber Company (1978)

Swing saw had been used with guard, but it had broken off and was used without guard. Serious violation discussed and upheld. Respondent encouraged to participate in rule promulgation process, but rules as promulgated have effect of law. Enforcement of hardhat requirements discussed. Isolated incident not found due to no enforcement of standards. Penalties proposed for saw violations were reduced based on Respondent's good faith.

102 EMPLOYER DEFENSES

Employer Good Faith

GUARDING Saws

PENALTIES

Against Public Employer
Reduced

SAWS

78-761 Waterviliet Public Schools (1978)

Michigan political subdivision required to pay monetary penalties. Although the Department may seek a writ of mandamus instead of civil penalties when violations are discovered at public employer work sites, an ALJ ruled this does not mean that it must do so. A $75 penalty against Respondent was affirmed. It was found that the instructor of a high school industrial arts class had thwarted the administrator's good faith efforts to comply with MIOSHA guarding requirements for a radial arm saw. The penalty on a citation for a serious violation was reduced from $160 to $75. An argument that student education would suffer because of the penalty was rejected. The ALJ pointed out that the school could use the citation and penalty to teach safety education to students and employees.

103 GENERAL vs SPECIFIC

GUARDING

Saws
Band Saw

PRECEDENT

Board Decision

SAWS

Band Saw

78-904 Chrysler Corporation (1978)

Although an ALJ did not agree with the Board's decision that horizontal band saws did not require guarding, the ALJ followed the precedent and vacated citations issued to Respondent for failure to guard its horizontal band saws. The ALJ noted that Rule 2635(1)(a)(2)(3) requires horizontal saw guarding, but the Board applied Rules 2602(1) and 2607(1) which exempt guarding of metalworking machinery where the point of operation is remote. The ALJ noted in following the Board's precedent that where the metalworking provision was general, the more specific Rule 2635 should prevail.

104 POWERED INDUSTRIAL TRUCKS

Blocking Wheels of Railroad Cars

WITNESSES

Credibility

76-323 GMC, Chevrolet Grey Iron Casting (1978)

Citations were issued alleging OTS violations of Rule 2176(2), Part 21 of the Occupational Safety Standards relating to powered industrial trucks. The ALJ found that Item 34, concerning protection from movement when loading or unloading railroad cars, should be affirmed and the rule reference amendment approved. The credibility of the Department's witness versus that of Respondent was examined.

105 CITATION

Inspection Dates Limited To Cited Employer

FALL PROTECTION

PENALTIES

Reduced

PERSONAL PROTECTIVE EQUIPMENT

SAFETY NETS

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

Lack of Knowledge

78-827 W & K Erectors, Inc. (1978)

A citation was issued alleging a serious violation of CSS Part 6, Rule 1926.105(a) and Rule 1926.28(a), relating to safeguarding of an employee working more than 25 feet above the ground or other surface. The ALJ approved Respondent's withdrawal of its appeal. Respondent was confused by the list of dates for inspection put in the citation. These dates included all dates the safety officer was on the job site inspecting all subcontractors. Respondent was prepared to defend, with reliance on facts, for one of these days but not the date the safety officer observed a violation. Once Respondent understood the correct date, a withdrawal was filed. The penalty was reduced due to this confusion and good faith of Respondent.

106 BURDEN OF PROOF

EVIDENCE

Hearsay

FLOOR OPENING

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

Lack of Knowledge

78-850 J & J Mason Contractors, Inc. (1978)

This is a proceeding to review the report of the ALJ dated 11/17/78. On 11/18/78, review was directed by a member of the Board; and, at its 2/23/79 meeting, the Board conducted a review of the report.

The decision of the Board became final on 8/7/79. The issue concerned whether there was sufficient evidence from the record to sustain the burden of proof required of the Director of Labor to justify the ALJ's holding that Respondent committed a serious violation of CSS Part 21, Rule 1926.500(b)(1), relating to the guarding of floor openings.

The Board determined that from the record, the Director of Labor did not sustain the burden of proof to show the knowledge plus the likelihood of substantial probability that serious physical harm or death could result from the violation of the standard. The Board reemphasized its concern about the burden of proof required from the Director of Labor under the Act and the necessity for direct evidence as distinguished from hearsay evidence.

107 EYE PROTECTION

Probability vs Possibility
Probability Not Established
Lack of Injury
Painting

78-791 T D Shea Manufacturing Company (1978)

A charge of failure to provide safety goggles for employees performing spray painting and silk screening operations was vacated by an ALJ because eye injuries were not probable. Respondent used a very small amount of paint in fabricating and decorating plastic parts for automobiles and strong spray booth ventilation resulted in a clean atmosphere. Paint used in the silk screening operation was very thick and machine-forced through the screen by a stiff rubber device. No injuries had occurred from those operations. Respondent stipulated that goggles would be provided for all persons assigned to mixing operations in the decorating department, except for employees adding solvent in the silk screening operation.

108 EVIDENCE

Hearsay

GENERAL DUTY CLAUSE

Water In Holding Furnace

75-167 GMC, Chevrolet Grey Iron Foundry Division (1978)

A worker at a large foundry was killed in an explosion when water flowed during quenching operations from a cupola into an adjacent holding furnace, but an ALJ vacated a general duty charge because MIOSHA did not show Respondent knew an employee was violating its written procedures on quenching. Respondent knew that allowing water to enter a holding furnace of hot slag was a recognized hazard and had issued specific instructions to prevent this occurrence, as well as emergency procedures for shutdowns. Testimony by the division that the cupola tenders did not know what emergency procedures to follow, based on interviews with three employees, was considered hearsay since MIOSHA failed to take notes at the interviews and did not submit written statements from the employees. The three were not produced as witnesses, nor were Respondent's written rules provided for the record.

109 HOUSEKEEPING

JURISDICTION

Management Service Contractor

77-710 Bechtel Power Corporation (1978)

Management service contractor subject to Michigan construction standards. Respondent hired to provide management services at a coal-fired power plant project was subject to Michigan's construction standards because the management contract negotiations and safety hazard correction functions formed an integral part of the project, ruled an ALJ. However, a citation for a housekeeping violation was vacated because it lacked particularity and did not specify locations of alleged debris.

110 TRENCH

Soil Borings
Unstable or Soft Material

78-952 Pi-Con, Inc. (1978)

A citation alleging a serious violation of the CSS, Part 9, Rule 1926.625(b), relating to safety requirements in trenching operations, was dismissed on the grounds that the CSS Division had not established that the trench in question was being constructed in "unstable and soft material."

111 AMENDMENT

By Administrative Law Judge

GUARDING

General Rule 34(3)

76-443 Chrysler Corporation, Hamtramck Assembly (1978)

The Board reversed a decision by the ALJ which had granted the Department's motion to amend the citation, and remanded the case for a hearing based upon the original citation issued by the Department. The ALJ had approved amendment to Rule 34(3) and found a violation of that rule.

112 EMPLOYER

Delegation to Employees of Safety Requirements

FOOT PROTECTION

78-863 Metal Cabinet Company (1978)

The ALJ ruled that Respondent should have required its employees to wear safety-toed shoes while moving metal electrical enclosure parts weighing from 5 to 250 pounds. The standard requires protection when conditions of regularly assigned jobs would be likely to cause foot injury. The ALJ noted there had been three foot injuries since 1975 that could have been prevented by foot protection, and there was no indication that common industry practice dispensed with foot protection in such situations. A review of prior foot protection cases is also addressed in the decision.

113 HEAD PROTECTION

78-846 Lear Siegler, Inc. (1979)

The ALJ ruled hard hats were not needed in forge areas. Respondent did not violate Rule 4232(2) requirements for head protection in forge areas because Rule 3201 requires protection only when specific hazards are found, The ALJ stated that workers in the forge area were not exposed to falling or flying objects, electric shock, hair entanglement hazards, chemical or temperature extremes that would make head protection necessary. The citation was issued alleging an OTS violation of Rule 4232(2) relating to the use of head protection in forging operations. The ALJ vacated the citation on the grounds that the interpretation of the BSR was unreasonable in that Part 42 refers to the general requirements for personnel protective equipment in Part 32 and cannot, therefore, be read in isolation. Thus, the criteria requiring a showing of a hazard contained in Part 32 must be present before employees are required to wear head protection pursuant to the requirements in Part 42. Exceptions were filed, however, no member of the Board directed review.

114 BURDEN OF PROOF

GUARDING

General Rule 34(3)

76-250 GMC, Chevrolet Grey Iron Foundry Division (1979)

Respondent should have provided point-of-operation guarding on its hot box core machines, an ALJ ruled in affirming a charge of a serious violation of guarding requirement Rule 343(3) along with a $750 penalty. An employee attempting to unplug a clogged sand blow tube, crawled on forks used to extract cores from the hot box, caught his glove on a fork moving on automatic cycle, and was dragged to his death against the machine.

Even though a company work rule called for single-cycle operation during the cleaning process, the rule was not regularly followed, and fingers had been pinched at the point of operation. It was found that employees could produce more cores, and keep their positions as hot box core operators, by leaving the machines on automatic while performing routine unplugging tasks which took them into the danger zone of the operating cycle. The Board affirmed the ALJ’s dismissal of Item I concluding that the Department had not proven a violation of Rule 408.1011 [Rule 11(c)] and Rule 408.10032 [Rule 32(1) and (2)] contained in Part 1 of the GISS, regarding lockout procedures. With respect to Item 2, the Board reversed the ALJ's decision holding that the Department had not met the burden of proof sufficiently to establish a "serious violation" of Part 10, Rule 408.10034 [Rule 34(3)] of the GISS, regarding guarding of machinery.

115 REPORTING OF FATALITY

STANDARD

Effect of Law

78-1128 Wayne County Intermediate School District (1979)

Telephoning the Bureau of Worker's Disability Compensation to report a worker fatality did not satisfy the requirement that such notice be given within 48 hours to the BSR ruled an ALJ. Respondent argued that the MIOSHA poster provided that notification may be accomplished by calling the "Michigan Department of Labor" at a Lansing number and that it satisfied the requirement by calling the Bureau of Worker's Disability Compensation, However, the ALJ ruled that regulations require employers to notify BSR, and the regulations take precedence over the poster.

116 PENALTIES

Dismissed

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

Lack of Knowledge
Reduced to Other Than Serious

78-862 Sucher Tool & Manufacturing, Inc (1979)

A citation was issued alleging a serious violation of Part 24 of the GISS, Rule 2462(8)(c). "Mechanical Power Presses," relating to the safety distance between two hand trips and the point of operation. Based upon the results of the hearing, the AU found Respondent could not reasonably be expected to have the knowledge of the violation and accordingly, reduced the item to an OTS violation and the penalty to zero. Respondent had undergone a SET consultation. The SET representative did not see this violation. Respondent thought all safety problems had been taken care of.

117 FALL PROTECTION

PERSONAL PROTECTIVE EQUIPMENT

PRECEDENT

Federal Cases

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

78-816 Midwest Steel Erectors, Inc. (1979)
78-946

Citations alleging a violation of Part 6 of the CSS, Rules 1926.28(a) and 1926.105(a), relating to the use of fall protection equipment, were affirmed by the ALJ. The items were abated at the time of the inspection.

118 AMENDMENT

At Hearing

DUE PROCESS

Particularity of Citation

77-529 GMC, Chevrolet Spring & Bumper (1979)

A conveyor guarding charge issued to Respondent was dismissed for lack of particularity because the allegedly violative department was not properly identified. MIOSHA's motion to amend the citation referenced from "south end of department #11" to "south end of #11 house" was denied because it would prejudice Respondent who did not learn the location of the alleged guarding violation until the hearing and had prepared a defense for department #41. The company representatives, during the five day walkaround, did not remember discussing the violation with the inspector. At the prehearing conference, Respondent pointed out it had no department #11 at the plant and was promised a clarification, which was never provided.

119 EMPLOYER

Discipline of Employees

EMPLOYER DEFENSES

Isolated Incident

TRAINING

Operator

77-464 Chrysler Corporation, Warren Stamping (1979)

A citation was issued alleging a serious violation of Part 24, Rule 2411(1), relating to the installation of required safeguards. The ALJ dismissed Item 1 stating that more safeguards were not required to protect the off and removal operation. The ALJ also granted Complainant's Motion To Dismiss Item 2 dealing with the required manual operation of both two-hand controls on partial revolution clutch press.

120 GUARDING

Point of Operation

Two-Hand Controls

PRESSES

Two-Hand Control Device

77-518 Chrysler Corporation, Warren Stamping (1979)

A citation alleging an OTS violation of Part 24, Rule 2463(7)(a), relating to separate two-hand controls in press operations requiring more than one operator, was dismissed. The ALJ found that only one operator need operate the press in question.

121 BURDEN OF PROOF

FLOOR MAINTENANCE

GUARDING

Grinder

Paint Agitators

Point-of-Operation Guard or Device
Operator Exposure

NATIONAL ELECTRICAL CODE
Enclosures

76-217 GMC, Truck & Coach Division (1979)

Citations were issued alleging a serious violation of Section 110-17 of the National Electric Code, 1970-71 edition, relating to providing enclosures or guards for electrical equipment [Item 3(b)]; a serious violation of Part 7, Rule 716, relating to providing a guard on paint agitator, were exposed to contact [Item 8(c)]; an OTS violation of Part 1A, Rule 123, relating to guarding a portable grinder [Item 33(b)]; an OTS violation of Part 2, Rule 241, relating to maintaining floors, platforms, treads, and landings so as to prevent a tripping or falling hazard (Item 41); and OTS violation of Part 23, Rule 2321, relating to providing a point-of-operation guard [Item 54(a) and (b)]. The ALJ found that the electrical boxes had necessary enclosures or guards and dismissed Item 3(b). According to the testimony, the ALJ decided there is no risk to an employee concerning Item 8(c) and dismissed the item. The ALJ dismissed Item 54(a) and (b), concluding that Complainant has not met its burden of establishing by a preponderance of the evidence, that the presses in question were in violation. The ALJ affirmed Items 33(b), portable grinder, and Item 41, prevention of trip and fall.

122 CITATION

Basis For Issuance

77-634 McLouth Steel Corporation (1979)

A citation issued for returning mobile cranes and trucks to service before repairs were completed was dismissed because the inspector had heard only general allegations by employees and had no specific instances on which to base a citation at the time it was issued. The defect could not be remedied by an investigation eight months later, even though it disclosed specific instances of violation. It was held that fundamental fairness requires that the Department have sufficient facts to support a citation prior to issuance. Moreover, the Department violated its own procedures in failing to gather specific facts at the time of inspection.

123 EMPLOYER DEFENSES

Isolated Incident

PRESSES

Side Guards

SUPERVISION

78-856 Kelsey-Hayes Company (1979)

Respondent failed to ensure its employees were following correct operating procedures and that guards were in place on a clutch press. An employee lost a portion of his thumb when the ram on the press descended. Contrary to safety procedures, the side guards had been removed while two employees fed parts into the machine. The employees in the plant were given free time if they filled their quota before the end of the shift. It was held that the supervisor should have been aware of safety violations by the injured employee and four other employees who worked on his crew. This case was appealed to Circuit Court and remanded. A further decision by the ALJ was issued and the case then went back to Ingham County Circuit Court where the decision of the Board was affirmed on 8/5/83.

124 EMPLOYEE

Not On Payroll

EMPLOYER

Payment To Employees Other Than Cash

REPEAT VIOLATION

TRENCH

Road as Tic Back Sloping

78-779 D D Barker Construction (1979)

Failure to slope the sides of a trench to the angle of repose was a repeated violation by Respondent based on a prior uncontested citation issued two months earlier for the same infraction. Reliance was placed on the definition of "repeated" decided by Fourth and Ninth Circuit Appeals Court rulings that a prior citation for the same rule violation justified a finding of repeat.

The owner's son and a friend who were "helping Respondent to repay debts" were found to be employees based on the general definition of employee in Section 5(1) of MIOSHA.

The ALJ held that concrete or asphalt did not abut the north and south sides of the trench. The 9 foot deep trench extended 5 1/2 feet west of a driveway. Therefore, there was no tieback protection for the trench's north and south sides.

125 FIXED FIRE EQUIPMENT SYSTEM

78-805 Dearborn Tool and Machine Corporation (1979)

A Michigan boring and milling machine assembler, who used only 15 to 20 gallons to spray paint two or three machines a year, was required to install a fixed fire equipment system. Respondent argued that the quantity of paint and frequency of painting should be considered, but it was held that the cited standard, Rule 914, does not contain an exception for infrequent usage.

126 FIRE-FIGHTING REGULATIONS

GENERAL DUTY CLAUSE

Low Ceiling In Fire Station

STANDARD

Raising Promulgation Defects

78-733 Detroit Fire Department (1979)
78-751
78-781
78-799
78-800

A general duty citation issued to Respondent after a fire truck tillerman was killed when he struck a low ceiling as the truck left the station was vacated for lack of evidence that the fire-fighting industry recognized a hazard in low ceilings and high equipment. The tillerman's cab cleared the ceiling by four inches, and departmental rules required that he be seated with a safety belt fastened before signaling the driver to pull out, but evidence indicated he inexplicably stood up. The Department inspected five of Detroit's 54 stations and found three had low ceilings.

The fire department was found in non-serious violation of requirements for emergency lighting systems that automatically activate in case of power failure. Arguments that city-owned facilities, Detroit Edison, or the regional grid system, provided redundant emergency power were rejected, since the standard requires a station system exclusive of these systems. Non-serious charges were affirmed for failure to provide backup alarms on four trucks and backup lights and alarms on three. A departmental rule requiring a lookout man when backing apparatus was insufficient.

Before deciding on the merits of the case, the ALJ ruled on a threshold question, holding that adoption defects in a standard may not be raised in an action to enforce the standard. Thus, allegations that the standard is inadequate, unclear or excessive, and Respondent's failure to participate in the standard promulgation process are not defenses to an alleged failure to comply with a standard.

127 DUE PROCESS

Internal Department Memo

GUARDING

General Rule 34(3)

78-1057 Addison Products Company (1979)

Respondent was cited with a serious violation of Rule 34(3) contained in Part 1 of the GISS in that there was a failure to provide a point-of-operation guard or device. Respondent had been operating the equipment in question under an abatement alternative issued by the Department as a result of an earlier inspection in 12/76. Unknown to Respondent, the abatement alternative had been revoked on a memorandum dated 1/13//78, sent by the chief of the GISS Division to all assistant chiefs, supervisors, review and appeal officers, and safety officers. This memo provided that the Department would no longer accept abatement alternatives in lieu of compliance with standards. This action was taken based on the advice of the Attorney General (AG) that the Department does not have the authority to issue such directives. The ALJ found that Respondent was not provided a reasonable opportunity to know what was prohibited by Rule 34(3) in view of the fact that it had been operating pursuant to the earlier abatement order and that no notice was given to Respondent as to the change in circumstances. It was also found that Respondent was actively requiring employees to follow the requirements of this abatement alternative. Accordingly, the citation was ordered reversed and the proposed penalty amount vacated.

128 EVIDENCE

Hearsay

GENERAL DUTY CLAUSE

Defective Automatic Transmission on Lift Truck
Operation of Lift Truck on Slippery Floors
Specific Standard

78-1219 Chef Pierre, Inc. (1979)

In this case, the ALJ affirmed two citations for serious violations of the GDC, Section 11(a) of MIOSHA. It was held that the operation of powered industrial trucks in areas where the floor is extremely slippery, and the operation of the lift truck with a defective transmission foot-control device, constitutes a "recognized hazard" under the Act. Sufficient facts were presented to establish that Respondent had actual knowledge of the conditions cited and that it was substantially probable that the consequences of an accident resulting from the violation presented would most likely result in death or serious injury to an employee. A third citation against Respondent, alleging violation of Rule 682 of Part 6 of the GISS, providing for emergency lighting facilities, was dismissed by the ALJ. The Department's citation was supported by uncorroborated hearsay statements. Respondent presented competent testimony contradicting the Department's required quantum of proof had not been met.

128 (Continued)

On 6/4/81, the Grand Traverse County Circuit Court issued a decision reversing Item I regarding slippery floors and affirming Item 2 regarding the defective brakes, The Court found that the GDC could not be used where a specific standard covered the facts. Rule 2190 of the GISS permits operation of a lift truck on a slippery floor. Since the rule does not include degrees of slipperiness, even a very slippery floor may be driven over. Use of the GDC in this situation was wrong because it did not give the employer fair notice of what conduct was prohibited.

129 DUE PROCESS

Internal Department Memo

Interpretation of Enforcing Agency

POWERED INDUSTRIAL TRUCKS

General Industry Rules Applied To Construction Equipment

STANDARD

Interpretation of Enforcing Agency

78-1049 Laman Asphalt & Paving Company (1979)

General industry requirements for powered industrial truck operators' permits are not applicable to operators of front-end loaders which are used in construction, and the ALJ ruled in vacating a citation issued to Respondent. Respondent's citation for, not having a permit was vacated. The general industry requirement covers forklift trucks. Equipment operation permits under construction standards are not required because there is usually more room to operate and better visibility at outdoor construction sites. An internal department memo requiring permits was neither promulgated nor distributed to employers.

130 EMPLOYER DEFENSES

Isolated Incident

GUARDING

Saws

SAWS

TRENCH

Sloping

78-861 Amway Corporation (1979)

An employee using a circular saw with a raised hood guard was an isolated incident and contrary to a company prohibition. An employee was cut seriously using a circular saw with the fence and hood guard moved away from the blade. The employee received a written warning and a six month pay freeze for the safety violation. Before the accident, a supervisor warned him not to use the saw with hood guard raised. Respondent had a good safety program, including lectures, written materials, and disciplinary action for safety violations.

131 FALL PROTECTION

Floor Openings

INSPECTION

Accompaniment by Employer Representative Opening and Closing Conference

78-1098 Helger Construction Company (1979)

This case involves a citation alleging a serious violation by ER of Rule 1926.500(b)(1) contained in Part 21 of the CSS which requires that floor openings shall be guarded by a standard railing and tow boards or covers. Based on the evidence presented, the ALJ affirmed the citation. ER had argued that the evidence obtained by the SO should be suppressed since the SO did not identify himself as such, did not hold an opening conference, and continued to conduct the walkaround inspection after ER's representative had voluntarily absented himself. The ALJ concluded, however, that the evidence obtained by the SO should be admitted since ER did not show any prejudice by the alleged irregular activities of the SO.

132 GUARDING

Saws

PENALTIES

Reduced

SAWS

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

78-1062 Pleasure Industries, Inc, (1979)

This case results from a Respondent's appeal of a citation alleging a serious violation of Part 27 of the GISS, entitled "Woodworking Machinery," Rule 2722(6). The ALJ found that a violation had occurred since neither a hood-type guard or the jig or fixture permitted pursuant to Rule 2722(6) were in use at the time the accident in question occurred. It was held this constituted a serious violation since with reasonable diligence Respondent could have been expected to know of the presence of this violation; and, further, it is substantially probable the consequences of an accident resulting from the violation would most likely result in death or serious injury to an employee. However, based on the evidence presented at the hearing, the ALJ recomputed the penalty and reduced the penalty from the initially proposed $180 to $75.

133 GUARDING

Saws

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

SAWS

WITNESSES

Credibility

78-1039 Special Machine & Engineering, Inc (1979)

The ALJ affirmed a citation alleging a serious violation of Rule 2722(1)(2) contained in Part 27 of the GISS entitled "Woodworking Machinery" in that Respondent failed to provide a guard for a circular saw. The violation was found to be serious in that sufficient facts were presented to establish Respondent had actual knowledge of the conditions cited and it was substantially probable the consequences of an accident resulting from the violation presented would most likely result in death or serious injury to an employee. Another issue presented was whether the saw guard was used during operation of the saw. The safety officer conducted the inspection with a plant superintendent, who informed him the saw operator does not use the guard for the blade when it is in operation, but only when the saw is not in use. Respondent alleged the safety inspector had the duty to go beyond questioning the superintendent and should have examined the operator himself as to whether the saw was used without the guard in place over the blade. The ALJ disagreed with this assertion stating the safety officer should have been able to rely on the statements made by the plant superintendent as to the activities performed at the place of employment being inspected. Additionally, Respondent was afforded the opportunity to present the operator for testimony at the hearing but did not avail himself of that opportunity.

134 EMPLOYER DEFENSES

Excessive Costs
Lack of Injury

EXPOSED TO CONTACT
Revolving Parts

HAZARD - ASSUMED IF RULE IS PROMULGATED

STANDARD
Interpretation

78-1158 Rockwell International (1979)

The facts presented at the hearing establish an OTS violation by Respondent of Part 7, Rule 716. Respondent contended that workers operating the balance testers involved in this case were not exposed to contact as defined in Rule 703(4). Further, it was alleged no accidents were caused by such a machine in Respondent's plant since 1966. Additionally, Respondent argued that other employers utilizing the same kind of machinery have not been cited; and, further, the cost of guarding the machines would be unreasonable.

The ALJ found that workers were "exposed to contact" with the machines. All the Department has to provide is the possibility of contact and injury, not necessarily the actual occurrence for accident.

With respect to Respondent's argument that no injuries had occurred as a result of the unguarded balance testing machine, it was held that the Department need not present factual proof of an actual hazard to show noncompliance by an employer of a cited standard.

The Act is directed at prevention, and the standard itself assumes the existence of a hazard. The ALJ found no merit in Respondent's defense that other companies in the state utilize similar machines and have not been required to provide guards.

The determination of whether or not a violation has occurred must be based only on the conditions existing at the work place inspected and not at other work places. Regardless of how extensive noncompliance may be throughout an industry, individual employers are not excused from their duty under the mandatory requirements.

Finally, the ALJ was not persuaded by Respondent's cost argument since the allegations were not based on objective and tested data; they amounted to little more than speculation.

135 STANDARD

Effect of Law

78-995 Grand Rapids Forging & Steel Company (1979)

This case involved an alleged violation by Respondent of Part 42, Rule 4241(3), in that Respondent failed to provide a scale guard for the back of a steam hammer.

Respondent alleged that no hazard was presented by the lack of a guard at the rear of the hammer. The ALJ affirmed the citation pointing out the standard was promulgated by the GISS Commission as an administrative rule. As such, it has the force and effect of a statute and is binding on all employers in the state. Therefore, an ALJ has no authority to excuse compliance with a promulgated rule unless it is found that Respondent has preponderated on a recognized offense. In the instant case, no affirmative defense was raised.

136 EMPLOYER DEFENSES

Intentional Acts of Employee Isolated Incident.

GENERAL DUTY CLAUSE

Employee in Lead of Train to Warn Other Employees

78-740 Ford Motor Company, Rouge Plant (1979)

A GDC violation was affirmed. The failure of Respondent to have an employee in the lead car of a train of mold ingot buggies or walking in advance of the lead car was a recognized hazard. This requirement was in Respondent's own rules. Thus, actual knowledge of the conditions was present. An isolated incident defense was not established because Respondent did not enforce the rule. This decision was reversed by the Board.

The Circuit Court affirmed the Board's decision finding that the decision was supported by competent, material, and substantial evidence on the whole record. The Board's decision was not arbitrary, capricious, or constituted an abuse or an unwarranted exercise of discretion. Although the opinion of the Board may have left something to be desired, it was sufficient and its conclusions were supported by a reasoned decision as required by Section 85 of the APA.

137 DE MINIMIS VIOLATION

FLOOR MAINTENANCE

GUARDING

Saws

HOUSEKEEPING

PENALTIES

Reduced

POWERED INDUSTRIAL TRUCKS

Overhead Guards

SAWS

78-857 Drake Industries, Inc (1979)

This case involves Respondent's appeal to multiple citations by the GISS Division. The ALJ dismissed a citation for an OTS violation of Rule 2712(2). Complainant alleged that Respondent failed to maintain the floor free of hazards, in this case, a hardwood floor with sawdust.

The ALJ dismissed the citation in that only a small amount of sawdust was found on the floor. Additionally, Complainant did not establish the floor in question was Respondent's station for a machine. More important, the safety officer's conclusion that a given floor is slippery is purely a subjective decision of a condition which is transitory in nature.

As such, Complainant must present documentation or corroborating evidence to demonstrate the existence of the slippery condition. In the instant case, Complainant failed to do so.

The ALJ affirmed a citation finding a serious violation by Respondent of Rule 2730(1) in that Respondent failed to provide a guard for a radial arm saw. The saw had a guard when used for straight cuts, but said guard had to be removed when used to perform miter cuts. Based on the limited number of employees exposed to the hazard and it being found the saw was used very rarely in a miter configuration, the ALJ found the likelihood of injury to an employee would be remote. The penalty amount was accordingly reduced from a proposed figure of $200 to a revised assessed figure of $75.

137 (Continued)

In a separate matter, Respondent was cited for an OTS violation of Rule 2143(1), in that an overhead guard was not provided for a high-lift truck. The ALJ noted, subsequent to the inspection, the GISS Commission promulgated an "emergency rule" with respect to Part 21. Rule 2143 was amended to exempt the requirement of overhead guards for high-lift trucks when the truck is never used to lift or raise material more than 72 inches measured from the floor to the forks and if the following requirements are met: (1) The load is limited to a single rack or pallet; (2) The truck is not operated in an area where materials or objects are stacked above the operator's head; and, (3) A sign is provided in the area stating the truck may not be used to lift materials above the operator's head. In the present case, the ceiling height of the building in which the high-lift truck was used by Respondent is less than 72 inches from the floor. Additionally, loads carried by the truck have always been limited to a single rack or pallet. Because of the ceiling height, it is physically impossible to stack objects above the operator's head. At the time of the inspection, however, Respondent did not have in place the sign required in the "emergency rule."

The ALJ concluded that placement of this sign in the manner prescribed would not increase the safety of the operators due to the low ceiling. Therefore, the sign did not have a direct bearing on safety and health. Accordingly, the violation was considered de minimis.

Finally, the ALJ affirmed as an OTS violation a citation against Respondent for failure to provide a separate construction building storage facility for bulk storage of portable containers for lacquer and topcoat Class I materials. The standard involved was Rule 1910.107(e)(2). This is a federal standard incorporated by reference by the Department pursuant to Section 14(1) of MIOSHA.

138 BURDEN OF PROOF

EMPLOYER DEFENSES

Isolated Incident

EVIDENCE

Hearsay

TRAINING

TRENCH

Unstable or Soft Material

79-1385 DeWitt Excavating, Inc. (1979)

The CSS Division cited Respondent with an OTS violation of Part 1, Rule 1926.21(b)(2), and with a serious violation of Part 9, Rule 1926.652(b), entitled "Excavating, Trenching, and Shoring."

These citations resulted from an inspection following a cave-in at a construction site, resulting in the injury of one worker. The ALJ reversed both citations, finding Complainant's case was based solely on uncorroborated hearsay evidence. Thus, Complainant failed to meet the burden of proof. Further, competent evidence produced by Respondent showed Respondent's on-the-job training on safety guidelines were adequate and the employee's conduct in the instant case was isolated, unexpected, and contrary to the normal job procedures.

139 BURDEN OF PROOF

Department Required To Prove Violation

DUE PROCESS

Employer Must Know What Is Prohibited

INTERLOCKS

STANDARD

Interpretation

78-729 Budd Company (1979)

The issue is whether Respondent was in violation of Rule 2477(4). It was the Department's position the standard required the use of an interlocked safety block while Respondent argued an employer is in compliance with the cited standard simply by providing safety blocks that are not electronically interlocked with the mechanism of the press.

It was concluded the standard does not require the use of interlocked safety blocks; and, accordingly, Complainant may not insist upon this interpretation of the standard. In addition, an employer cannot be held subject to the requirement of a standard unless provided a reasonable opportunity to know what is prohibited. In this case, Respondent was not placed on reasonable notice that Rule 2477(4) would be interpreted by the Department to require an interlocked safety block mechanism.

140 **EMPLOYER**

Control Over Work Area

GARBAGE DISPOSAL MACHINE, GUARDING OF

GUARDING

General Rule 34(3)
Garbage Disposal

76-320 GMC, Fisher Body Division, Livonia (1979)

A violation for Rule 34(3), guarding of garbage disposal units, was affirmed. The units are used by a company who prepares food for GMC employees. GMC employees, however, repair the units as needed. Federal cases regarding exposure of employees were reviewed. In this case, it was found that GMC had control over the units and the cafeteria facility and, therefore, had a duty to guard this equipment even though its own employees did not use the devices. The case was ultimately affirmed by the Board on 6/19/81, after the MSU appeal to Circuit Court in a garbage disposal case was dismissed.

141 BURDEN OF PROOF

Department Required to Prove Violation

EXPOSED TO CONTACT

GUARDING

Paint Agitators

SUPERVISION

TRAINING

77-476 GMC, Fisher Body Division, Grand Blanc (1979)

The first issue concerned whether Respondent had violated Rule 2411(1) regarding training, instruction, and supervision by Respondent of employees before starting work. Although an injury had occurred to an employee as a result of an accident regarding the point of operation of a designated press, it was concluded the evidence did not establish the failure to have the correct guarding in place was as a result of inadequate supervision by Respondent.

The alleged violation was accordingly dismissed.

The second issue concerned Respondent's alleged failure to guard revolving paint barrel containers. Rule 34(5) was cited for this alleged violation.

It was concluded the facts did not establish that the location of the rotating barrels was such that a person might come into contact with the barrels and be injured pursuant to the definition of the phrase "exposed to contact" contained in Rule 703(4). It was observed that no injuries had been incurred by employees with regard to operation of these devices, and there was no presentation on the record concerning the activity of employees with respect to the issue so as to establish the likelihood of injury. It was concluded further that the interlocking chain device place around the rotating containers in question adequately protected employees in the area.

The third issue concerned the alleged violation of Rule 716 regarding Respondent's alleged failure to guard a Red Devil Paint Shaker device.

It was concluded Part 7 did apply to the actual situation since Rule 701 specified the part applied to all equipment used in the transmission of power. It was concluded the shaker equipment is the end product of the transmission of power and, therefore, properly cited under Part 7. However, the phrase "exposed to contact" is used in Rule 716.

Since there was no presentation on the record to establish the activity of employees in the area and their likelihood of coming into contact with an agitating paint shaker device, it was considered the Department had not met its burden of proof.

142 ACCESS TO VIOLATIVE CONDITION

EXPOSED TO CONTACT

Hoists

HAZARD ACCESS TEST

77-556 GMC, Fisher Body Division, Livonia (1979)

Respondent was cited for an OTS violation of Rule 716. The citation alleged Respondent failed to install a chain-collecting basket on hoists and failed to guard connecting guard rods and cams on an identified press.

It was held employees in the area of the hoists and unguarded portions of the press were exposed to the hazards identified therein. It was considered to be sufficient that employees had general access to the zones of danger created by the alleged hazards during the course of their activities for Respondent. It also was held employees were "exposed to contact" to the identified hazards as that phrase is used in Rule 703(4) of Part 7.

143 AMENDMENT

At Hearing

CRANES

Warning Signal

EMPLOYER DEFENSES

Anning-Johnson

78-848 Utley-James, Inc (1979)

On the date of the hearing, Complainant filed a motion to amend Rule 1926.550(d)(3) contained in Part 10 of the CSS. The motion was granted noting that in an administrative setting, amendment of citations should be freely granted unless prejudice can be shown by Respondent. It was not considered that Respondent's objection established prejudice so as to deny the motion.

The second issue concerned the Department's contention Respondent violated, in a serious fashion, the above-referenced rule. This rule and the ANSI reference requires overhead and gantry cranes to sound a warning signal during travel, particularly when approaching workers. Respondent was engaged in constructing 18 inch concrete columns in the turbine house at the Fermi Plant, Frenchtown Township. At the time of inspection, the safety officer observed the cab of an overhead crane pass above an employee of Respondent while on a 28 foot high scaffold without sounding a warning signal.

The operator of the crane was not an employee of Respondent. The crane itself was owned by the Detroit Edison Company. Respondent had furnished walkie-talkies to the employees on the scaffold, the crane operator, and employees at the cement loading station.

Since Respondent had no control over the operation of the crane and no authority to direct or discipline the activities of the crane operator, the case of Anning-Johnson (Commission Decision), CCH Vol. 1975-1976, par. 20, 690 (1976), applied to the factual situation presented. The Commission concluded a subcontractor is required to provide reasonable safeguards for employees even though (1) the subcontractor did not create the hazard of concern, (2) the subcontractor may not ultimately be responsible for correction of the hazard; and, (3) the subcontractor may not have the skills necessary or the authority to correct the hazard. Under the Anning-Johnson case, the facts of each situation must be examined to ascertain whether the subcontractor involved attempted to safeguard its employees through means other than the correction of the hazard concern.

143 (Continued)

The citation was dismissed in that Respondent did exercise reasonable precautions to safeguard its employees from being struck by the undercarriage of the crane by providing walkie-talkies to the employees involved.

144 HAZARD - ASSUMED IF RULE IS PROMULGATED

INSPECTION

Prior Inspections Produced No Citation

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

Reduced to Other Than Serious

78-859 Vinylast, Inc (1979)

The citation alleged a serious violation of Rules 2461(1), 2462, and 2463. The decision reduced the type of violation to an OTS in nature, based on a finding that Respondent did not have knowledge of the presence of the violation pursuant to Section 6(4) of MIOSHA. A prior inspection by Complainant failed to cite the guards of the presses in question. The proposed penalty associated with the item was reduced to zero.

It was also concluded, contrary to the assertions of Respondent, that no injuries need be shown in order for the Department to allege a violation of a promulgated standard. In addition, Complainant need not establish the violation in question constitutes a hazard. Since the rule in question was a properly-promulgated standard, it was concluded the standard itself assumes the existence of a hazard.

145 DISCONNECT

Electrical

Power Disconnect Switches

EXPOSED TO CONTACT

GUARDING

Point-of-Operation Guard or Device

Inadvertently Entering Point of Operation

PRESSES

Powered Disconnect Switches

76-242 GMC, Fisher Body Division, Plant #1 (1979)

The first item on appeal concerned an alleged OTS violation of Rule 763(1). The five presses cited did not have power disconnect switches which could be locked out. In addition, several of the switches would not deactivate the press even when placed in the off position.

It was concluded that Part 7 applied to the presses at issue, since power is transmitted to and through the presses to perform a press function (Rule 701). Although Respondent argued employees could open the door to the electrical cabinet and deactivate the internal switch, the evidence was clear that only electricians could enter the electrical boxes due to the presence of hot wires contained within. Rule 763(2) requires Respondent to provide procedures to ensure that a power disconnect is in an off position. No procedures were presented by Respondent requiring employees to deactivate the presses in question by opening the cabinets and throwing the switch inside.

The second issue concerned an alleged OTS violation of Rule 716. No violation was found by the ALJ of this rule, since Complainant failed to establish employees are "exposed to contact" with the moving parts involved.

The third issue concerned an alleged OTS violation of Rule 2321. Although the facts indicated employees on occasion, dislodge pieces of metal from the presses by inserting portions of their body into the hinged portion of the barrier device in place at the rear of the press, it was clear from the record the barrier in place at the rear of the press performed the function of a "point-of-operation device" as defined in Rule 2310(4) in that it prevented normal press operation if the operator's hands are inadvertently within the point of operation. It was concluded an employee would not inadvertently place his hands within the point of operation of the press in question due to the fact an employee would have to move or climb over a 42 inch high stock tub, prop open a hinge gate on the barrier guard, and stretch an arm up and into the point of operation, a distance of 18 to 24 inches from the barrier. These activities of an employee could not be performed inadvertently. Complainant was directed to investigate this issue if desired, and issue new citations specifically addressed to the problem of Respondent failing to enforce safeguarding procedures.

146 AMENDMENT

At Hearing

DUE PROCESS

Particularity of Citation

EMPLOYER DEFENSES

Anning-Johnson

FLOOR OPENING

HAZARD ACCESS TEST

JURISDICTION

Telephone Company - Construction Activities

78-864 General Telephone Company (1979)

Complainant's motion to amend the citation at the time of hearing from Rule 1926.500(b)(1) to Rule 1926.500(b)(5) contained in Part 21 of the CSS was approved. It was held that the record did not establish employer prejudice as a result of the amendment.

It was also found Respondent was subject to citation for violation of the CSS in that the coverage provision of Section 2(1) of MIOSHA is all encompassing in nature. The work being performed by Respondent fell within the definition of "construction operations" as defined in Section 4(4) of MIOSHA.

It was also concluded the citation issued by Complainant satisfied the particularity requirements of Section 33 of MIOSHA.

Finally, it was concluded the floor hole present in a room where Respondent's employees were installing a telephone terminal and equipment panel on one wall was not within the zone of danger created by the floor hole. The employees of Respondent during the ordinary course of their duties had no reason to be near the floor hole. The hole was not adjacent to or in the path of exit from the room. In order to perform their job, the employees would have to remain within arm's length from the wall upon which the equipment was placed. This wall was 6 feet 1 inch from the closest portion of the floor hole. The decision pointed out the fact that if employees had been working 10 stories in the air and 6 feet 1 inch from the edge of a roof without a guardrail along the roof perimeter or other safety equipment being used by the employees that, in such a case, the employees would be considered to be within the zone of danger, due to the fact that employees falling over the edge would almost certainly be killed or suffer serious physical injury. By contrast, due to the greatly reduced risk of injury involved with the floor hole in question, it was concluded the distance involved placed the hole outside the zone of hazard.

147 GUARDING

Gondola

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

76-394 GMC, Saginaw Steering Gear Plant #3 (1979)

Rule 34(2) contained in Part 1 was at issue, and it was concluded a guard put in place on a gondola tipper created a hazard in and of itself based upon the fact a two inch pipe came immediately next to the rising gondola, thereby creating a pinch point between the gondola and the pipe.

It was concluded the violation was serious in nature because the facts establish it to be substantially probable that the consequences of an accident caused by the above-described guard would most likely result in death or serious physical injury.

It was also concluded Respondent knew or should have known that a pinch point was created by simply watching the functioning of the guard in conjunction with the action of the rising gondola. An employee witness testified similar devices were put in place in a nearby plant, but these guards did not create a pinch point. The arms of the descending guard at the nearby plants extended a minimum of 15 and maximum of 24 inches from the descending gondola unlike the situation prompting the citation.

148 EMPLOYER

Discipline of Employees

EMPLOYER DEFENSES

Isolated Incident

76-421 GMC, Fisher Body Division, Plant #37 (1979)

Respondent argued the violation of Rule 2187 contained in Part 21 observed by the safety officer was isolated in nature. It was not held that this defense was established by Respondent since no safety rules were presented as evidence at the hearing. It also was concluded Respondent did not educate its employees concerning compliance with the rules regarding operation of power industrial trucks. Although the employee observed violating the cited rule was disciplined by Respondent, it was not concluded discipline alone established the isolated incident defense. As noted in the case of Bechtel Power Corp v Director of Labor, Opinion #77-19954-AA (1977), as issued by the Ingham County Circuit Court, in order for an employer to prevail on the isolated incident defense, "an employer must show that he established safety rules and procedures, and actively required employee compliance with the rules."

149 FLOOR OPENING

HAZARD - ASSUMED IF RULE IS PROMULGATED

PAINT SPRAY BOOTH

Lighting Fixture Placement

POWERED INDUSTRIAL TRUCKS

Hole In Driveway

76-425 GMC, Fisher Body Plant #21 (1979)

The first item concerned Rule 215(2) contained in Part 2. The violation was upheld. A hole was observed by the safety officer in a driveway of Respondent over which power industrial trucks traveled. The hole measured approximately 12 inches long by 4 inches wide and 4 inches deep.

It was concluded that, although no trucks or employees were observed on the driveway at the time of the inspection, this was entirely fortuitous. It is unnecessary for the Department to present factual proof of an actual hazard to show noncompliance by an employer. The other appealed item concerned Section 1910.107(b)(5)(iv). It was concluded Respondent was in violation of the cited standard.

Complainant need not establish that only paint was used in the spray booth. The definition of spray booth refers to "spray, vapor, and residue." Accordingly, the spraying of epoxy as opposed to paint would satisfy the requirement of the definition.

150 EMPLOYER DEFENSES

Impossibility of Performance

FALL PROTECTION

Perimeter Protection

LANYARD

SAFETY NETS

78-836 Selmar Company (1979)

The testimony of the SO established a violation by ER of Rule 1926.28(a) and Rule 1926.105(c) contained in Part 6. EEs of ER were exposed to a fall from the edge of a fifth floor building. The EEs were not using any fall protection, either in the form of safety nets or safety belts around the perimeter of the building.

It was held, however, based on the testimony of the safety officer and ER's witness, that there was no way for safety nets to be erected or for belts and lanyards to be used by these EEs. It was held that ER had prevailed on an impossibility defense with respect to the alleged violation of the safety standards.

The Board directed review of this case on 11/29/79 and affirmed the report of the ALJ in an order dated 1/9/80.

151 EMPLOYER DEFENSES

Impossibility of Performance

78-903 Massey Ferguson, Inc (1979)

Respondent agreed its mode of operation did violate Rule 215(2) contained within Part 2. It was held Respondent had prevailed in an impossibility defense. Respondent demonstrated no means of compliance known to it. In such a case, the burden of going forward with the evidence shifts to the Department to demonstrate a method of compliance. It was concluded it was impossible for Respondent to comply with the cited rule and still produce its product.

152 TRAINING

77-622 Detroit Edison, Del-Ray Plant (1979)

No violation was held by Respondent of Rule 11(a) contained in Part 1 with respect to an accident which occurred on 7/8/77, at the Del-Ray Plant. The accident resulted in the death of two employees who were engaged in a phasing operation. It was concluded it was not reasonable for the employer to believe, based on prior knowledge and experience of the employees involved, that more training should have been provided by Respondent prior to the phasing assignment.

153 FALL PROTECTION

Floor Edge

GUARDING

General Rule 34(3)

78-1223 Keeler Brass Company (1979)

The first item appealed concerned Rule 34(3). It was concluded EEs of ER were not exposed to a hazard of having a portion of their body in the hazardous area during the operating cycle of an embossing machine.

The second item concerned Rule 213(2)(5). During the inspection, a box of light bulbs was observed above the ceiling over the plant offices. The box measured approximately 2 feet by 2 feet and was placed 10 to 15 feet from the edge of the floor or ceiling. The only access to the area for placement and removal of light bulbs contained in the box was through the use of a portable ladder since no stairway or fixed ladder was present. In order to reach the box or place the box in position initially, an employee would have to leave the portable ladder and stand on the ceiling or floor and walk in proximity to the edge of the floor. A violation of the cited rule was found.

154 FLOOR MAINTENANCE

78-718 GMC, Fisher Body Division (1979)

The issue concerned Rule 15(2) of Part 1 of the standards. The citation was dismissed because the oil on the floor observed by the safety officer was not established to be in a "work area or aisle" as required by the standard. The Board affirmed the ALJ 's decision on 1/9/80.

155 CRANES

Protection From Elements

EYE PROTECTION

Probability vs Possibility

Probability Required

Banding Operations

GENERAL DUTY CLAUSE

Crane - Protection From Elements

78-938 Lee Steel Corporation (1980)

Issue 1 alleged a GDC violation concerning use of a crane inside a building while leaks from the roof allowed water to fall on the crane rails. It was concluded that since the crane at issue was constructed to perform outside and inside the building and had special insulating features built into its construction for outside use, the fact that leaks from the roof were falling on the rails should present a situation no different than that encountered when the same crane was run out-of-doors during or just after a rain or snowstorm. The facts indicated that for the first 20 years of its use, the crane was used inside and outside of the building. After this period of time, the building expanded to cover the entire crane operation.

The second issue concerned an allegation that Respondent did not provide eye protection as required in Part 35 for employees operating a slitter machine and performing banding operations. It was concluded that Rule 3512 requires eye protection "where there is a probability of injury that can be prevented or reduced by such protection." The facts did not establish that employees were subjected to a probability of injury during either operation. Accordingly, the item was dismissed.

156 FLOOR OPENING

77-679 GMC, Chevrolet Truck Assembly (1980)

Rule 241 contained in Part 2 of the standards was at issue in this case. It was concluded that a floor hole approximately 5 inches wide by 13 inches long and 2 1/2 inches deep was present adjacent to an assembly area. Employees were required to walk into the area to obtain parts for use on the assembly line. Reference was made to prior decisions of the Board involving the same employer and same rule: NOA 76-217 and NOA 76-425.

157 CIRCUIT COURT REVIEW

ER Failure to Satisfy Board Rule R 408.21428(2)

EMPLOYER

Nonappearance at Scheduled Hearing
Good Cause
No Compliance with Board Rule R 408.21428(2)

GOOD CAUSE - NONAPPEARANCE AT HEARING

HEARING

Failure to Appear
No Compliance with Board Rule R 408.21428(2)

78-947 Duane Smelser Roofing Company (1980)

This case involved a situation where ER did not appear at a schedule prehearing and hearing. Testimony was taken from MIOSHA and the citations at issue were affirmed.

ER filed exceptions, and the Board directed review remanding the matter to determine whether ER could establish good cause for failure to appear at the scheduled hearing and also whether good cause could be established for failure to notify the ALJ within ten days of the scheduled hearing as to the reason for ER's nonappearance [Board Rule 428(2)1].

The facts presented at the rescheduled hearing established that ER's representative did not appear at the prior hearing because of illness of a child. This was determined to constitute good cause for the nonappearance. However, it was held that ER did not present a good cause explanation for failure to notify the ALJ within ten days of the scheduled hearing to present an explanation for the nonappearance.

The record established that ER simply ignored the matter and made no attempt to contact the ALJ during the ten day period. This decision was affirmed by the Macomb County Circuit Court on 1/5/83.

158 GENERAL DUTY CLAUSE

Glass Cart, Overloading

GUARDING

Saws

SAWS

WILFUL VIOLATION

79-1256 Double Seal Glass Company, Plant #1 (1980)

The chief issue presented in this case concerned an alleged willful violation of the GDC concerning an accident involving an overloaded A-frame glass cart. Based on the fact that three supervisory employees, in addition to six other employees, were attempting to push the cart upon instructions of the shop superintendent and that these efforts resulted in the collapse of one of the cart wheels and a discharge of glass from the cart. It was concluded that a willful violation of the GDC was established. A penalty amount of $1,260 was affirmed.

It additionally was held that the facts supported a serious violation of Part 27 of Rule 2730(1)(2) concerning radial arm saws. An OTS violation was upheld concerning Rule 2632(1)(a) contained in Part 26 regarding a circular metal saw.

159 CONSTRUCTION - POWER LINES DEFINITION

ELECTRICAL

Energized Lines

WITNESSES

Credibility

78-778 City of Detroit, Public Lighting Department (1980)

Respondent was held in violation of Rule 1926.21(b)(2) of Part 1 in that employees were not advised concerning the fact that an electric line they were working on had been energized. Although Respondent contended through its witnesses that the employees would be advised concerning the energized nature of the line, testimony from the deceased employee's supervisor indicated the supervisor would not have necessarily advised the employee of the energized nature of the line. A citation for violation of Rule 1926.950(c)(1)(i)(ii)(iii) was upheld by the Board, reversing the proposed decision of the ALJ who had concluded the allegation should be vacated since the scope provisions of Rule 192.6.950 apply only to the alteration, conversion, and improvement of existing electrical equipment. Respondent was engaged in repair of damaged equipment.

160 HAZARD - ASSUMED IF RULE IS PROMULGATED

LOCKOUT PROCEDURE

PRECEDENT

Federal Cases

77-681 Detroit Free Press (1980)

The issue presented in this case concerned the lockout procedure rules set forth in Part 1, Rules 11(c) and 32(1)(2). It was concluded by the ALJ that these rules applied to the plating-up procedure followed by pressman in the performance of their duties. Three near accidents were related by pressmen during the hearing so as to establish the type and seriousness of possible injury.

It was held that Complainant need not present a history of prior injuries to establish the applicability of the above rules. It was also concluded that the Federal Review commission had not issued any decisions with respect to this issue so as to provide guidance for the Board. It was also concluded that the current use of a safe button on a control box did not comply with the requirement of the cited rules. It was suggested that Respondent apply for a variance from the cited rules with respect to the control box, but that a variance could not be considered in an appeal pursuant to Sections 42, 43, and 46 of MIOSHA.

It was concluded that the experiment conducted by Respondent with regard to use of locks on a press should not result in a conclusion that locks are not required during the plating-up procedure. It was clear that the employees using the locks had no previous experience or training in the application of locks to the press unit. It was suggested that further experimentation and training by Respondent could greatly shorten the length of time needed to apply the locks and to publish Respondent's paper.

The Board directed review of this case on 2/28/80 and reversed the report of the ALJ in an Opinion dated 8/6/80. In this Opinion, the Board held that the record did not establish an employer violation of the cited rules.

A request for rehearing was filed by Complainant on 10/3/80. A further hearing was held by the Board on 1/23/81, and a decision reaffirming the earlier Board ruling was issued on 7/9/82.

A decision was issued by the Wayne County Circuit Court on 1/11/88, reversing the Board's decisions of 816/80 and 7/9/82, and adopting the ALJ's decision as the final ruling of the Board.

On 5/31/89, the Court of Appeals affirmed the Circuit Court.

161 AISLES

FLOOR MAINTENANCE

78-1059 Chrysler Corporation, Mack Avenue Stamping (1980)

This case involved an alleged violation of Rule 15(2). It was concluded that even though an exit is used infrequently, the floor area leading to the exit must be termed an aisle for purposes of Rule 15(2), relating to oil on floor, slip-and-trip hazard at issue.

162 EMPLOYER DEFENSES

Compliance During Preliminary Evaluation of Work

FALL PROTECTION

Perimeter Protection

78-1089 C & H Piping, Inc. (1980)

A serious violation of Rule 1926.5000(d)(2) contained within Part 21 was affirmed against ER. It was concluded that the requirements of the safety standards must be complied with by ER during preliminary evaluation, as well as during actual work performance. While it is true that an ER cannot know all of the hazards of the job until the job is examined, ER should have realized that the guardrail system on the west and north sides of the platform in question was missing at the time of evaluation. The evaluation work should not have commenced until the required perimeter protection was provided. The Board directed review of this case on 2/29/80 and affirmed the report of the ALJ in an order dated 3/18/80.

163 GUARDING

Belt and Pulley

77-698 GMC, Fisher Body Division (1980)

A violation was found by Respondent of Rule 727(1) with respect to an exposed belt and pulley. Employee representatives testified that the belt and pulley were exposed for a substantial period of time despite requests to reinstall the guard. Although Respondent contended that removal of the guard was necessary for proper adjustment of the belt and pulley, the record did not establish how often employees were required to make adjustments while the guard was removed. It was also unclear as to specifically what adjustments had to be made. Faced with this lack of presentation, it was concluded that Complainant had met its burden of proof in establishing the existence of a violation.

164 EXPOSED TO CONTACT

Belt and Pulley

GENERAL vs SPECIFIC

GUARDING

Belt and Pulley

76-438 GMC, Fisher Body Division (1980)

The issue on appeal concerned an alleged violation with respect to Rule 727(1). The machine in question was a vertical milling machine. It was concluded that the machine in question was properly cited under Part 7, even though Part 26 covered metalworking machinery, because Part 26 did not contain a specific rule which required the guarding of belts and pulleys on milling machines. Part 7 pertains to the guarding of belts and pulleys on all equipment used to transmit power. The situation was not, as argued by Respondent, a choice between a specific rule covering the matter at issue and a general rule. No specific rule covered the guarding of a belt and pulley on a milling machine. It was accordingly permissible for Complainant- to utilize a more general standard which specifically applies to the guarding of belts and pulleys on all machines.

It was concluded, however, that Complainant did not establish that employees were exposed to the hazard created by the exposed belt and pulley. The phrase "exposed to contact" is used in Rule 703(4).

165 APPEAL

Cannot be Converted from Penalties to Citation

PENALTIES

Appeal on Penalties Cannot be Changed to Appeal of Citation

79-1344 Baywood Industries (1980)

The chief issue presented in this case concerned Respondent's attempts to expand the nature of the PMA. The petition filed by Respondent appealed only the proposed penalties for the items at issue. After receipt of the Department's decision, Respondent, through its attorney, attempted to file an appeal with respect to the alleged violations, as well as the penalties associated with the items at issue.

It was concluded that Respondent did have knowledge concerning the separate nature of the concepts of violation, abatement period, and proposed penalty. Respondent did not intend, in its initial petition, to appeal more than the proposed penalties. Accordingly, Respondent's appeal with respect to the alleged violations was dismissed.

165 (Continued)

In the event that a reviewing authority considered this decision to be erroneous, conclusions were also made with respect to the items at issue. It was concluded that Respondent was in violation of Rule 2722(l)-(5) and Rule 2730(1), both contained within Part 27.

A motion to dismiss Rule 2730(l) for reasons of vagueness was also dismissed. The proposed penalty amounts associated with the items at issue were affirmed. The Board directed review of this case on 2/29/80 and affirmed the report of the ALJ in an order dated 3/18/80.

166 DE MINIMIS VIOLATION

DUE PROCESS

Employer Must Know What Is Prohibited
Internal Department Memo
Interpretation of Enforcing Agency

EMPLOYER DEFENSES

Impossibility of Performance

FIRE HAZARD

Smoking

Use of Methanol

GUARDING

Grinder

METHANOL - STORAGE, USE

POWERED INDUSTRIAL TRUCKS
Agricultural Tractor

PRESSES

Inspection Program
Production Operation Definition
Single Stroke Mechanism

PUNCHES

STANDARD

Interpretation of Enforcing Agency

78-833 Millford Fabricating Company (Budd Company) (1980)

Issue 1 alleged a violation of Rule 114(2) contained in Part 1A. It was concluded that the record did not establish that the grinder in question was in use at the time of inspection. Respondent did have a work rule requiring proper adjustment prior to a grinding operation. Accordingly, the item was dismissed.

Issue 2 is a question of violation of Rule 2131(1). It was concluded that Respondent had not been placed on reasonable notice, that Part 21 applied to an agricultural-type tractor being used for snow removal. Part 21 does not specifically apply to this type of tractor. Part 54 does apply to snow removal equipment. The item was dismissed.

166 (Continued)

Issue 3 alleged a violation of Rule 2373. This item was dismissed based on a showing of compliance by Respondent. Regular and periodic inspection programs for presses required by rule.

Issue 4 alleged a violation of Rule 2412. It was concluded that Respondent had complied with the requirement of periodically and regularly inspecting the presses in question. It was held, however, that Respondent was in technical or "de minimis" violation of the rules since no records were maintained of the inspections performed.

Issue 5 concerned a violation of Rule 3835(1). The punch observed was found to have been in violation of the standard.

Issue 6 concerned an alleged violation of Rule 1611 and 1612. It was concluded that it was not impossible for Respondent to find labeling materials which would withstand erasure from the contents of the cans (mineral spirits). After inspection, but prior to the hearing, Respondent did succeed in finding a producer of a label which could withstand the types of liquids used in Respondent's facility. The item was affirmed.

Issue 7 alleged a violation of Rule 1910.106(d)(7)(iii). The safety officer's testimony established the existence of 10 to 12 gallons of methanol in an area outside of an approved room or cabinet. It was not concluded that the table under which the cans were observed was a storage area. The cited section, accordingly, did not apply and the item was dismissed.

Issue 8 alleged a violation of Rule 1910.106(e)(2)(iv)(c) and (e)(6)(i). During inspection, employees were observed using methanol on rags to remove blue ink from parts. Ashtrays were observed on the tables where this work was performed. In addition, a welding booth was approximately ten feet away from the nearest table where methanol was being used. A violation was found on the cited standards.

Issue 9 alleged a violation of Rule 1910.106(e)(6)(i). This item was affirmed. The facts established that employees were observed brushing lacquer on molds while other employees in the immediate area were smoking.

Issue 10 alleged a violation of Rule 2431(1). This violation was affirmed. It was concluded that the rule required the inclusion of a single stroke mechanism in the construction of the press. The rule may not be bypassed for "nonproduction" operations.

Issue 11 alleged a violation of Rules 2461(1), 2462, and 2463 contained within Part 24. With respect to this violation, the Department interpreted the phrase "production operation" contained within Rule 2461(1) to refer to an operation where 25 or more parts are produced.

166 (Continued)

It was concluded that this interpretation has not been promulgated as a rule by the Department. Moreover, Respondent was not placed on notice that this standard (25 parts) would be utilized by safety officers. Respondent accordingly could not be held in violation of the Department's interpretation of the rule. Moreover, it was concluded that Respondent's use of the press did not constitute a production operation. The press in question was used on an irregular basis. When actually in use, parts are fed into the point of operation by hand with tongs. Together with a similar press, both presses are used a total of up to 30 or 40 hours per year. The other press was used more frequently than the cited press. Four employees have been designated to operate the press in question. All had worked for the company in excess of seven years and had been thoroughly instructed in proper operations. When actually in operation, the press is operated by the same person who installed the die and who would be required to make adjustments on the die and remove it after the operation.

Issue 12 alleged a violation of Rule 2461(2)(a). The record did not establish that the operator place one or both of his hands in the point of operation during operation as testified to by the safety officer. It was, therefore, held that the cited rule did not apply.

167 ELECTRICAL

Energized Lines

GENERAL DUTY CLAUSE

Roofing Work

Near Power Lines

ROOFING WORK

Power Lines

WILFUL VIOLATION

Actions of Foreman Imputed to Employer

78-1050 Carpentry By Woodcraft (1980)

A willful violation was held against Respondent of the GDC of MIOSHA, Section II(a). A proposed penalty of $5,000 was affirmed. In this case, a work crew of Respondent was permitted to continue installing roofing despite the fact that a primary overhead line was observed within two feet of the gable of the home under construction. Respondent claimed to have presented this fact to the general contractor on several occasions prior to the roofing work. However, the power lines had not been moved.

167 (Continued)

It was concluded that Respondent, through the inaction of its foreman, allowed its employees to continue working in close proximity to the overhead power lines despite the unresponsiveness of the general contractor or the Detroit Edison Company. This inaction was willful in nature.

168 DE MINIMIS VIOLATION

EXPOSED TO CONTACT

Belts and Pulleys

GUARDING

Belt and Pulley Saws

PENALTIES

Reduced

SAWS

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

Reduced to Other Than Serious

78-1102 Ottawa Truss Company (1980)

Violations were alleged of Rules 2730(1) and 727(1). It was concluded the Plexiglass ® guard on a radial arm saw only partially covered the saw blade and did not guard the lower portion of the blade as required. The violation was reduced from a serious to an OTS violation because Respondent relied upon the representation made to it from the manufacturer of the Plexiglass ® guard. A serious violation was affirmed for failure to guard the lower portion of the blade with respect to another cited radial arm saw. A proposed penalty for this issue was reduced from $150 to $75 because one of the sub-items was reduced to an OTS violation.

With respect to the alleged violation of Rule 727(1), it was concluded that the violations presented should be considered to be de minimis because the facts indicated only technical violations by Respondent. These violations were held to have only a negligible relationship on the safety and health of workers. Although a technical violation was presented since Respondent did have belts and pulleys less than seven feet from the floor in an unguarded condition, it was concluded that these violations presented no hazard to employees because the devices did not contain enough pressure or tension to result in employee injury.

169 CITATION

Inspection Dates Limited to Cited Employer

EMPLOYER DEFENSES

Isolated Incident

FALL PROTECTION

Personal Protective Equipment

FREEDOM OF INFORMATION ACT

PERSONAL PROTECTIVE EQUIPMENT

79-1293 Mundet Insulation Company (1980)

ER was alleged to have violated Rule 1926.28(a) contained within Part 6. It was concluded that although ER's supervisor was observed on a two foot pick installing insulation without the required personal protective equipment, that violation was isolated in nature because ER had provided a scissor-jack for installation materials. No picks had been provided by ER. The pick upon which the supervisor was observed standing had been left by a prior subcontractor. The supervisor climbed on the pick to apply insulation to that area of the duct work.

The ALJ concluded that the citation must list only the inspection/investigation dates pertaining to the ER involved in the citation being issued. MIOSHA was also directed to comply with requests from parties at prehearing conferences for information under the Freedom of Information Act. The Board directed review of this case on 4/7/80 and affirmed the report of the ALJ in an order dated 5/5/80.

170 COMPRESSED AIR

EMPLOYER DEFENSES

Impossibility of Performance

FIRE EXTINGUISHERS

LADDER

Portable
Special Purpose

77-597 GMC, Chevrolet Saginaw Manufacturing Plant (1980)

Issue 1 alleged a violation of Rule 452(1). This matter concerns use of a portable ladder without safety feet in a pit containing weirs. Use of a ladder in the pit with safety feet create an unsafe condition in that the ladder slipped on the oily compound at the bottom of the weirs. Removal of the safety feet allowed the ladder to remain safely in position during cleaning operations. It was concluded that this alteration of the ladder created a "special purpose ladder" as set forth within Rule 407(4). Item dismissed.

Issue 2 alleged a violation of Rule 835(2). The fire extinguisher in question was held to be an "extra" fire extinguisher provided for employees as a tool to cool down metal. Respondent did provide fire extinguishing cylinders approximately four feet from the cited extinguisher. The item was accordingly dismissed.

Issue 3 alleged a violation of Rule 3832(1). It was concluded that Respondent required use of in excess of 30 pounds per square inch of air in order to remove blockages under machinery. It was concluded that it was impossible for Respondent to break up blockages unless the cited devices were used. It was concluded that Respondent had established an impossibility defense, and the item was dismissed.

171 FLOOR MAINTENANCE

GUARDING

Point-of-Operation Guard or Device
Inadvertently Entering Point of Operation

LADDER

Safety Feet

76-216 GMC, Fisher Body Division, Plant #1 (1980)

Issue 1 concerns an alleged violation of Rule 426(2). During the inspection, the safety officer observed the top section of a two-section extension ladder propped against a building column. This section did not have safety feet. No employees were observed using this portion of the extension ladder.

Respondent requires all employees to use ladders equipped with safety feet. Employees are required to check out an entire ladder, including a top and bottom portion. However, because both sections may not be needed, an employee is permitted to place the top portion of the ladder in a position where it can be retrieved in order to later return both sections to the storage crib. The evidence presented by the Department did not establish that these employer requirements were not being met by employees. Item was dismissed.

Issue 2 concerns an alleged violation of Rule 2321.

All presses cited are automatically-fed presses. The record indicated that only with an intentional effort could an employee reach the point of operation. It was not found that an inadvertent action on the part of an employee could result in injury at the point of operation. [See Rule 2310(4)]. Item was dismissed.

Issue 3 alleged a violation of Rule 15(3) contained within Part 1. It was concluded that Respondent did provide a nonslip floor surface for the passage in question, but that oil had accumulated on the surface which did cause a slip hazard. Accordingly, the item was affirmed.

172 CRANES

Brakes

GENERAL DUTY CLAUSE

Pouring of Molten Metal with Employees on Floor

78-1182 White Pine Copper Division (1980)

Two issues were presented in this case. The first was an allegation of a GDC violation in that Respondent did not require any employee to assist the crane operator during moves of the crane within the smelter building converter aisle. Respondent relied on the testimony of an expert witness who pointed out most copper smelters use a system where the crane operator is able to hook molten metal loads to the crane without the assistance of anyone on the converter aisle floor. The process was designed to remove employees from the floor making it less likely for injuries to occur.

In this case, Respondent removed the position of the crane chaser, permitting anyone on the converter aisle floor to attach the tail chain to the molten metal load to be carried by the crane operator. However, the persons performing this operation often gave incomplete, unintelligible, erroneous instructions to the crane operator. Some attempted to give hand signals to the operator and some used radios.

In this case, Respondent has not established a self-hooking procedure for the crane operator. Hookers are still present on the converter aisle floor during hot metal moves. For the hooker's protection, as well as the protection for the other employees in the area, signals must be provided to the crane operator. It was concluded that Respondent cannot eliminate the crane chaser position and still have employees exposed to the possible mistakes of the crane operator.

The second alleged violation concerned Rule 1875(1). It was concluded that Respondent did attempt to maintain the brakes of the crane at issue. The maintenance reports established that Respondent recognized the problem connected with the brakes and secured the advice of the brake manufacturer. This representative provided new brake adjustment techniques which corrected the problem. It was concluded that Respondent recognized its responsibilities and acted reasonably in attempting to correct the problem.

173 GUARDING

Point-of-Operation Guard or Device
Remote

PRESSES
Remote

78-974 GMC, Oldsmobile Division, Plant #3 (1980)

An alleged violation of Rule 2472 was dismissed. It was concluded that the rule requires that the scrap handling envisioned by the drafters take place within the confines of a mechanical power press. It makes little sense for a rule placed within Part 24 to be applied to scrap-handling operations performed on a completely separate machine that is not a powered press.

The facts indicated that the scrap sheer machine at issue had been placed adjacent to a mechanical powered press, and with the aid of a conveyor system, scrap from the power press was fed into the scrap-cutting device.

During normal operations of the sheering device, the operator would be "remote" from the point of operation within the meaning of Rule 2607(1) contained within Part 26 of the standards regarding metalworking machinery.

174 EMPLOYEE
New

EMPLOYER DEFENSES
Isolated Incident

INSPECTION

Accompaniment By Employer Representative
Opening and Closing Conference

TRAINING

78-1190 Duane Smelser Roofing Company (1980)

It was concluded that the safety officer properly followed the requirements set forth in Section 29 of MIOSHA with regards to the opening and closing conference and walkaround inspection. In addition, neither Respondent nor the Ford Motor Company denied the safety officer permission to conduct an inspection. Accordingly, it was necessary for the safety officer to obtain a warrant pursuant to Section 29(2) of MIOSHA.

174 (Continued)

It was also concluded that Respondent was in serious violation of Rule 1926.152(g)(8) contained within Part 18 of the CSS.

A new employee was instructed to obtain gasoline from a nearby truck but was not advised as to what to do with the gasoline. The employee, after obtaining the gasoline, attempted to pour it into a pumper tank during operations. The tank, however, had already been filled with gasoline; and, therefore, the gasoline, being poured, overflowed the tank and fell on open flames being used to heat the tar utilized by Respondent. The employee was badly burned.

It was concluded that more specific instructions should have been given to the new employee. To such an employee, the instructions to obtain gasoline from a specific source could also reasonably imply an instruction to put the gasoline in the tank. A new employee attempting to do a good job for an employer could reasonably be expected to anticipate instructions from a supervisor so as to cause the supervisor to be pleased with his performance.

This was not an isolated incident, since Respondent could not present evidence that it had instructed the new employee concerning hazards on the job. The Board directed review of this case on 6/18/80 and affirmed the report of the ALJ in an order dated 6/30/80.

175 PENALTIES

Use of Department Penalty Schedule

STANDARD

No Need to Give Rules to Employer Before Inspection

79-1660 Elsey Metal Products, Inc (1980)

A stipulation of facts was presented by the parties together with written argument. The sole issue presented was whether penalties can be issued to an employer when the Department did not give the employer copies of the rules before the inspection. It was concluded that all the rules cited by Complainant had been in effect for several years prior to the inspection and that Respondent had an obligation to apprise itself of the promulgated safety standards applicable to its business. There is no requirement for the standards promulgating commission to send without request, copies of rules being promulgated to employers in the state. Nor does the APA of 1969, as amended, require copies of rules being promulgated to be sent to affected employers before the rules can become effective. Since Complainant considered the seriousness of the offense, the prior history of Respondent, and the size of Respondent in assessing the proposed penalties involved, it was proper for these proposed penalties to be affirmed since the elements listed in Section 36 of MIOSHA had been met.

176 GENERAL DUTY CLAUSE

School With Broken Chimney Door

RECOGNIZED HAZARD

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

Lack of Knowledge

78-1221 Ann Arbor Public Schools (1980)

An allegation of a violation of the GDC was dismissed. Although it was held that it is a recognized hazard for a school to operate with a broken chimney clean-out door, thereby permitting exhaust fumes to circulate throughout the school via the heating system, it was concluded that Respondent did not have the required knowledge of the broken chimney clean-out door so as to justify finding a serious violation.

177 DE MINIMIS VIOLATION

GUARDING

Squaring Shears

77-364 Chrysler Corporation, Central Operations (1980)
76-712

The alleged violations in these cases concerned Rule 2617(4) contained within Part 26 concerning the guarding of squaring shears. It was concluded that although a technical violation was presented by the unguarded treadle device, that the violation was only technical in nature and was concluded to be de minimis, since the facts established the violation had only a negligible relationship to the safety and health of the workers.

178 GUARDING

Saws
Band Saw

PRECEDENT

Board Decision

SAWS

Band Saw

79-1398 Genesee County Road Commission (1980)

The Department's citation was dismissed based on the prior Board precedent in the case of Chrysler Corp, Sterling Stamping, NOA 76-280, 5/24/78, and Chrysler Corporation, NOA 78-904, 12/4/78. This precedent established that an employer is not required to guard a horizontal band saw pursuant to Rule 2635(1)(a)(3) contained within Part 26. The citation issued to Respondent alleged that Respondent had a damaged guard in place.

179 FALL PROTECTION

Roof

FLOOR OPENING

Roof

HEAD PROTECTION

INSPECTION

Accompaniment By Employer Representative
Opening and Closing Conference
Warrants

78-1146 Duane Smelser Roofing Company (1980)

It was concluded that MIOSHA had complied with the requirements of Section 29 regarding the conduct of the inspection, the necessity of obtaining a warrant, the providing of opening and closing conferences, and the conducting of a walkaround inspection.

It was concluded that ER was in violation of Rule 1926.100(a) contained within Part 6. The facts indicated that EEs of ER were observed hoisting bundles of insulation with the use of a well wheel while not wearing protective helmets.

An alleged violation of Rule 1926.500(b) of Part 21 was affirmed. Review was directed on this issue, and the report of the ALJ on this issue was reversed. The Board concluded that the "hole" in the roof was not part of the roof perimeter as concluded by the ALJ and, therefore, the opening needed guarding.

180 AISLES

FLOOR MAINTENANCE

79-1411 Chrysler Mack Avenue Stamping Plant (1980)

Respondent was held in violation of Rule 15(1) contained within Part 1. Facts indicated that an employee slipped on pieces of scrap lying on an access route from the parking lot to the building entrance. This scrap had been lying on the driveway for three or four days prior to the accident.

181 AMENDMENT

By Motion

EMPLOYER DEFENSES

Isolated Incident

LOCKOUT PROCEDURE

78-760 GMC, Chevrolet Grey Iron Foundry Division (1980)

Complainant's motion to amend the alleged rule violation from Rules 11(c) and 32(1)(2) contained within Part 1 to Rule 4485(1) contained within Part 44 was approved, there having been found no prejudice to Respondent as a result of the amendment.

It was found, however, that the alleged violation was isolated in nature. The employee involved in the violation was a maintenance supervisor. The facts presented at the hearing indicated that the supervisor had received complete knowledge of the lockout procedure of Respondent and had participated in several training sessions at which the lockout procedure was discussed. Moreover, the record supports the conclusion that Respondent disciplines employees for violations of the lockout procedure. The item, as amended, was accordingly dismissed.

182 GENERAL vs SPECIFIC

LOCKOUT PROCEDURE

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

77-668 GMC, Saginaw Steering Gear, Plant #6 (1980)

An alleged violation by Respondent of Rules 11(c) and 32(1)(2) contained within Part 1 was affirmed. It was concluded that although the swager machine at issue was a metalworking machine within the purview of Part 26, Part 26 does not contain any specific rule regarding a lockout procedure to be followed by employees with regard to swager or accurate transfer machines. Accordingly, based on the scope provision of Part 1, it was proper to utilize the rules contained in Part 1, since no specific rule is set forth in another standard that contains a lockout procedure for the equipment at issue.

The facts indicated that employees did not have a general understanding of the requirement of Respondent's lockout procedure when applied to the swager machine at issue.

The violation was considered to be serious based on the fact that Respondent knew or should have known that machinery that is not properly locked out during repair, service, or setup, can cause and has been known to cause, serious injury and death.

183 ELECTRICAL

Emergency Stop Device

EMERGENCY STOP DEVICE

EXPOSED TO CONTACT

Belt and Pulley
Gears, Sprockets, Chain drivers

GENERAL vs SPECIFIC

GUARDING

Belt and Pulley

HEAD PROTECTION

78-726 GMC, Fisher Body Division (1980)

An alleged violation of Rule 1859(2) was dismissed. It was concluded that the use of head protection is controlled by the presentation of facts and that the elements contained within Rule 3201 are present in the work place. The facts did not establish the presence of these elements. See the case of Lear Sigler, Inc, NOA 78-846, Final Order of the Board, 2/12/79, in which a similar conclusion was made.

Also alleged was a violation of Rule 727(1). Although it was concluded that the machinery in question consisted of metalworking machinery within the purview of Part 26, since no rule is contained within Part 26 that specifically refers to the guarding of a belt and pulley, it was proper for Complainant to utilize the general rule contained within Part 7. Other alleged violations of the same rule were dismissed since the facts did not establish that employees were "exposed to contact" to the belts and pulleys as required by Rule 727(1).

An alleged violation of Rule 731(1) was dismissed since the facts did not establish that employees were exposed to contact to gears, sprockets, and chain drives at issue.

An alleged violation of Rule 1282(5) was dismissed. It was concluded that the "emergency stop device" required by the rule did not necessarily mean an emergency stop button. Respondent had an engine stop device built into its electrical circuitry which satisfied the requirement of the rule.

184 DE MINIMIS VIOLATION

78-724 GMC, Fisher Body Division (1980)

An alleged violation by Respondent of Rule 1442(2) contained within Part 26 was held to be de minimis. It was concluded that a technical violation was present since the conveyor in question did create a pinch or shearing action against a large roller drum. However, the facts indicated that this pinch or shearing action was so slight as to be negligible.

185 GUARDING

Point-of-Operation Guard or Device
Operator Exposure

PRESSES

Point of Operation

WILFUL VIOLATION

79-1287 Plastic Diversified (1980)

It was alleged in this case that Respondent seriously and willfully violated Rules 2461(1), 2462, and 2463. The facts indicate that an employee was injured in the point of operation of a Rozelle press on 9/9/78. A prior employee had been injured in the same mariner on 5/12/78. Approximately one month after the second injury, Respondent still permitted operation of the press in the manner which led to the prior two injuries. Restraints were put in place for employees near the end of 9/78.

It was concluded, based on these facts, that Respondent did willfully violate the cited rules and that this violation was serious in nature. A proposed penalty of $1,800 was affirmed.

186 EXPOSED TO CONTACT

GENERAL vs SPECIFIC

78-765 GMC, Chevrolet Flint Engine (1980)

Part 1 of Rule 34(3) was at issue. Cited operations all performed identification stamp function on engine blocks being transported down specific assembly lines. Respondent argued that Part 26 covering metalworking machinery governed the machines at issue since they performed cutting, shaping, working, assembly, or forming operation (Rule 2606), It was concluded that the facts did not indicate that the stamp received by the engine block amounted to a function within the purview of Rule 2606(4). Moreover, there is no specific rule contained within Part 26 that pertains to the stamp identification function being performed by the equipment at issue. Complainant is not prevented from use of the General Rules when a specific standard does not exist covering the kind of equipment and function at issue. See GMC, Fisher Body Division, NOA 76-438, Final Order dated 3/3/80.

It was concluded that employees were not exposed to a hazard since the record did not contain any facts to support a conclusion that employees are required at any time during their job functions to have a part of their body within the hazardous areas during the operating cycle. Accordingly, the item at issue was dismissed.

187 EYE PROTECTION

FOOT PROTECTION

GENERAL vs SPECIFIC

VARIANCE

WELDING & CUTTING

Restraining of Cylinders
Cutting Activities
Distribution and Supply Companies

77-711 Chrysler Corporation, Eldon Axle Plant (1980)

Issue I alleged a violation of Rule 3113(1). It was concluded that the conditions of the job at issue were not such as to conclude that it would be likely for a foot injury to occur. The operation involved the activ*ity* of the employee who received a part weighing 27 to 29 pounds after it slid down a gravity rack. The employee was required to place two adjuster nuts inside holes in the side of the part. The part then had to be lifted by the employee and placed in a container approximately three feet behind the operator. Although the part was covered with a coolant, employees were required to wear gloves for the safe handling of the part. In addition, the part had several holes in its sides so that the employees could easily grasp and hold the part during the lifting and transfer to the container.

Issue 2 alleged a violation of Rule 1211(1)(d) regarding welding protection. It was concluded that the rule does not require curtains, safety glasses, and face shields, all to be utilized by an employer to reduce the risk of flash burns, sparks, and foreign bodies to the eyes of employees. The rule simply required employers to provide protective devices.

The type used is up to the employer. While it was concluded that risk to employees could have been further reduced if Respondent had utilized curtains around welding areas in addition to use of safety glasses, the standard did not require this combination of devices. In the instant case, Respondent required all employees in the area to wear safety glasses and supplied protective curtains around the welding areas. During the inspection, openings were observed around two welding operations. Since the facts clearly indicated that wearing of safety glasses does reduce the risk of flash burns, sparks, and foreign bodies to the eyes of employees in the area, it was concluded that Respondent had complied with the cited standard.

187 (Continued)

Issue 3 alleged a violation of Rules 11(c) and 32(1)(2) contained within Part 1. It was concluded that Complainant had cited an incorrect standard with respect to the item at issue since a more specific standard did exist for citation by Complainant. Rule 2618 was held to be a more specific rule designed to cover the specific equipment cited in the standard. The item was accordingly dismissed.

It was concluded, however, that if the Department had cited Respondent for violation of Rule 2618, the manner of compliance advanced by Respondent would not have been adequate to comply with the provisions of Rule 2618. The method of compliance advanced by Respondent was in the nature of a variance request. It was concluded that Rule 2618 does not allow any other method of locking out the particular machine at issue other than a padlock. Respondent's argument that it had a method of protecting employees with a five-step plan was held to be in the nature of a variance request and could not be considered as a defense to an alleged violation of Rule 2618.

188 TRAINING

Run Button Placement

WITNESSES

Credibility

77-596 Chrysler Corporation (1980)

It was concluded that the record supports the conclusion that employees are trained as to the proper placement of run buttons and that employees are subject to discipline when supervisors observe run buttons improperly placed. An alleged violation of Rule 2411 was dismissed. This dismissal was based upon the conclusion that the testimony provided by Respondent's witnesses was more believable than that presented by Complainant's witnesses. This finding was reach in part based on the close familiarity with the subject matter expressed by Respondent's witnesses, the examples of discipline provided, and the close observation of the employees by Respondent's representatives.

189 ELECTRICAL

Energized Lines

GENERAL DUTY CLAUSE

Dump Truck Around Power Lines

78-1252 Farmers Grain (1980)

Respondent was held in serious violation of the GDC and assessed a penalty amount of $240 for a violation which involved failing to prohibit employees from raising dump truck boxes in close proximity to overhead power lines. The Board affirmed the ALJ's decision at their 1/23/81 meeting.

190 BRIEFS

HEARING

Orders of ALJ

Failure to Follow

79-1653 Keeler Brass Company (1981)

The citation of the Department was dismissed based on the failure of the Department to comply with a direction for the presentation of briefs on matters raised by Respondent in a Motion to Dismiss. Board Rule 431(d) and Section 80(d) of the APA gives the ALJ or the Board the authority to fix the time for the filing of briefs and other documents. It was concluded that the Department has an obligation to respond to the requests and directions of the ALJ assigned to a MIOSHA case.

191 PENALTIES

Reduced

PROCESS SPACE

Testing

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

TESTING

Process Space

WILFUL VIOLATION

Definition

78-764 Consumers Power Company (1981)

The Department alleged a willful violation of Rule 3301(2)(a)(b). It was concluded that Respondent did permit an employee to enter steam extraction lines in its generating facilities without following the requirements of the rule. It was concluded, however, that this was a serious violation and not a willful violation. The penalty was reduced from $10,000 to $500.

192 EVIDENCE

Hearsay

Quashing

GENERAL vs SPECIFIC

HEARING

Reopening Case at Reconvened Hearing

LOCKOUT PROCEDURE

78-758 GMC Oldsmobile Division (1981)

One item was dismissed because the Department failed to present other than hearsay evidence to support the citation. It was concluded that the Department has to present more than simple hearsay testimony or documents to support the issuance to a citation. At a reconvened hearing for other items at issue in the case, the Department attempted to present an eye witness on the item which had previously been dismissed. The Department's motion to reopen the matter was denied based on the fact that Respondent was not prepared to proceed.

192 (Continued)

The second item was dismissed because the Department cited a general rule when a more specific rule was in existence. The Department cited Respondent for a violation of Rules 11(c) and 32(1)(2) contained within Part 1, However, the machine at issue was a metalworking machine and the proper rule should have been Rule 2618(1). It was specifically held that the changing of tools within a machine when a bit wears out would be "servicing" as contained within Rule 2618.

193 AISLES

CONVEYOR

EMPLOYER DEFENSES

Lack of Injury

GUARDING

Coolant Splash
Conveyor

INJURY

Possibility

VARIANCE

77-545 GMC, Pontiac Motor Division (1981)

The first issue concerned Rule 632. It was concluded that an aisleway overall width was reduced to 57 inches, and this was not in violation of the cited rule. The second issue concerned Rule 1421(7). The first cited conveyor did not pass over a walkway, passageway, or working area. The conveyor declined into a floor hole. The fact that employees chose to walk between the bumpers does not make this a walkway, passageway, or work area. There was, in fact, no work performed beneath the conveyor. Another area where the screen guard was provided only over half the width of an aisle was affirmed. The guarding ended when the conveyor started to decline at approximately the center of the aisle. It was found that the conveyor did pass over a walkway or work area and was, therefore, required to be guarded.

A third location was dismissed. It was not found that guarding was needed beneath baskets into which employees place parts. Another issue concerned Rule 1421(5). One sub-item was reversed and another sub-item was affirmed. It was concluded that the requirements of the rule must be complied with by Respondent despite his argument that the possibility of injury was low.

193 (Continued)

Moreover, Respondent's assertion that the actual configuration and speed of the conveyor, as well as the height of the parts, provide a condition "as effective as" anything else required by the standard was in the nature of an argument for a variance that could not be considered by the Board. Section 27 of MIOSHA provides a mechanism for Respondent to request a variance from Complainant. However, this question may not be dealt with by the ALJ in a proceeding under Sections 42, 43, and 46 of MIOSHA, since the Board has no authority to grant a variance.

A third issue involved Rule 2620(2). It was found that since witnesses observed coolant splash coming over the top of the guard, it was likely that some of the splash would strike the operator in the ordinary course of operation. The item was affirmed.

194 RECORDKEEPING

79-1664 Mid-West Timer Services, Inc (1981)

Respondent was cited for violation of Rule 1111(1) through (4)(a) contained within Part 11 of the rules entitled, "Recording and Reporting of Occupational Injuries and Illnesses." It was concluded that as long as Respondent had only one injury to record on the MIOSHA Form 200, that the workers' disability Form 100 is a substitute and can be used as an equivalent for MIOSHA Form 200 pursuant to Rule 111(3). The citation and proposed penalty were accordingly dismissed.

195 SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

Lack of Knowledge

79-1409 Odl, Inc. (1981)

Respondent was alleged to have violated Rule 2722(6). The alleged serious violation was reduced to an OTS and the proposed penalty dismissed. It was concluded that Respondent reasonably relied upon the fact that the Department's safety officer did not cite Respondent's failure to have a cover over the exposed blade during a recent inspection. Since employer knowledge is one of the requirements needed to establish a serious violation [Section 6(4) of the Act], a serious violation could not be sustained.

196 CRANES

Over Employee

79-1569 Harnischfeger Corporation (1981)

The Department's citation alleging a violation of Part 18 was dismissed and proposed penalty vacated. It was concluded that the facts presented at the hearing did not establish, with any certainty, that a crane operator had directed a crane over an employee office with the crane bay.

197 NOISE

Feasible Engineering Controls

77-562 Bell Fibre Corporation (1981)

The Department's citation alleging that Respondent failed to provide feasible engineering and administrative controls to protect employees from noise exceeding the permissible daily noise dose at Respondent's double-backer operation and starch-baler room operation were dismissed. The record presented at the hearing did not establish that feasible engineering or administrative controls were available to reduce the noise levels for employees in these areas.

198 FIRE-FIGHTING REGULATIONS

GENERAL DUTY CLAUSE

Automatic Timer to Close Door

78-1094 Detroit Fire Department (1981)
78-1156

Citations alleging violations of Rule 7421(2)(b) pertaining to the equipping of fire apparatus with back-up lights and back-up alarms and Rule 7415(3) pertaining to the providing of an emergency lighting system were affirmed. An alleged GDC violation alleging that Respondent violated Section 11(a) by use of an automatic timer to close an overhead door on an apparatus bay was dismissed.

199 BURDEN OF PROOF

EVIDENCE

Hearsay
Quashing

79-1657 Coppens Roofing Company (1981)

Respondent was alleged to have violated Rule 408.41723(3) contained within Part 17. It was concluded that the evidence presented by Complainant was insufficient to establish the violation by Respondent by a preponderance of the evidence. The record contained only hearsay evidence to support Complainant's position.

200 EMPLOYER DEFENSES

Exposure

FIRE HAZARD

Storage of Flammable Liquids

PAINT SPRAY BOOTH

Storage of Liquids

PRESSES

Single Stroke Mechanism

78-911 Chrysler Corporation, Introl Division, SCIO Plant (1980)

Respondent was cited for violation of Rule 2431(1). The cited press was used to make pointers for speedometer gauges. A guard on the feed side was damaged and viewed in this condition during inspection. Even with this damage, the opening was at most 1/2" by 2" versus the permissible opening dimension of 1/4" by 2." No exposure found. Item dismissed.

Respondent was also cited for Rule 1910.107(e)(2) regarding storage of flammable liquids. It was found that Respondent had paint out of a storage room in excess of that needed for one day or one shift.

201 HEARING

Orders of ALJ

Failure to Follow

WITNESSES

List to be Exchanged

78-1047 Motor Wheel Corporation (1980)

It was concluded that Respondent was prejudiced by not having a witness list from the Department as ordered by the ALJ. Respondent had complied with the order. The Department's citation was dismissed. Two federal cases were cited in support. Also reference was made to Westmac, Inc., NOA 78-956 (1979).

202 BURDEN OF PROOF

DUE PROCESS

Employer Must Know What Is Prohibited

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

Lack of Knowledge

TRAINING

Hazards of Safeguards

WILFUL VIOLATION

76-347 William Ferrel, Inc. (1977)

A serious violation was dismissed based on a lack of showing that training was not given as required by Rule 103 in Part 1 of the CSS. Also employer knowledge was not established as required by Section 6(4) of the Act.

Willful violation of Rule 1004(2) also was dismissed. It was concluded that Respondent was not provided a notice as to what standards of conduct were expected when using a cage to raise and lower employees. The Department required the cage to "be approved," but the proofs did not establish this to be set forth in the rules.

203 EMPLOYER DEFENSES

Equipment Sold as "OSHA Approved"
No Objection to Equipment by Insurance Company or Union Group

GUARDING Saws

PENALTIES

Use of Department Penalty Schedule

SAWS

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

80-1834 United Materials Company (1980)

Respondent had a saw which did not have a hard type guard to cover lower half of guard as required by Rule 2728(1)(2). Respondent argued the seller advertised the saw as "OSHA approved" when he bought it. Also the insurance company and union had no objection to the saw. It was held that Respondent had an obligation to know what is required by the safety standards. Also MIOSHA gives no authority to unions or insurance companies to approve equipment in violation of safety standards.

204 PENALTIES

Dismissed

POSTING

RECORDKEEPING

79-1419 Glabman-Paramount Furniture Manufacturing Corp (1980)

Respondent was found in violation of Rule 1114(2) which requires posting of annual summary of injuries and illnesses. However, the penalty was dismissed because Section 35 of the Act does not provide authority for such a penalty.

205 ATTORNEY FEES AND COSTS

DISCOVERY

Interrogatories

HEARING

Assessing Costs

Orders of ALJ

Failure to Follow

79-1392 Chrysler Corporation, Warren Stamping (1981)

The Department's citations were dismissed because the Department failed to comply with the order of the ALJ regarding interrogatories and documents.

Attorney fees and Respondent's petition for attorney fees and costs were denied. The Act and Rules do not give the ALJ or Board that authority.

Complainant appealed to the Ingham County Circuit Court. On April 27, 1983, the Court issued an opinion finding that although the Board's rules do not specifically allow the ALJ to order discovery through interrogatories, Board Rules R 408.21426 and R 408.21431 permit the ALJ to direct the parties to exchange information and require the production of books, papers, and other documentary evidence. These rules are broad enough to permit the ordering of interrogatories. The Court also found that "once it is determined that a hearing officer has the authority to order a party to follow a certain procedure, it is necessarily implied that the hearing officer has the power to enforce that order." The authority of the ALJ to dismiss Complainant's citations for failure to provide interrogatories and other documents was found to be "necessarily implied from the authority the Board possesses to order discovery."

206 GENERAL DUTY CLAUSE

Multistage Scaffold Held by Crane

PENALTIES

Use of Department Penalty Schedule

RECOGNIZED HAZARD

SCAFFOLDS

WILFUL VIOLATION

80-1756 Gizzi Metal Erectors Corporation (1981)

The parties submitted a stipulation of facts upon which it was concluded that Respondent knew the use of a multistage scaffold, hung from a crane, was a recognized hazard. The chief of the division had a discussion with Respondent prior to the inspection so as to put Respondent on notice.

207 AMENDMENT

Denied

FLOOR MAINTENANCE

GENERAL vs SPECIFIC

STANDARD

Amendment
Interpretation

78-1144 GMC, Hydramatic Division (1981)

An area where oil was on the floor was found to be a work area, and the violation was affirmed. Two other areas, found to be adjacent to metalworking machinery, should have been cited under the Metalworking Machinery Standard. Since they were not, these items were dismissed.

A motion to amend filed by the Department in its post-hearing brief was denied. Granting this motion would require reconvening the hearing to hear Respondent's defense. Simply amending and finding a violation would deny due process to Respondent.

208 EYE PROTECTION

Probability vs Possibility

Probability Not Established

Foam Line Operations

Painting

80-1742 Evart Products Company (1981)

Rule 3512(1) requires eye protection where there is a probability of eye injury. It was found that it is not probable for injury to occur to employees at any of the cited locations. Rivet tools, foam line operations, staplers, and painting were involved.

209 EMPLOYER DEFENSES

Greater Hazard

Impossibility of Performance

EYE PROTECTION

Probability vs Possibility

Protection Provided

GUARDING

Saws

SAWS

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

80-1957 Manistique Dimension & Dry Kiln (1981)

Respondent was held in serious violation of Rule 2728(1)(2). Defenses of greater hazard and impossibility were not established by Respondent. The knowledge requirement of Section 6(4) of MIOSHA was met because Respondent was cited on prior occasion for violation of Rule 2728(1). In addition, on a previous inspection, several violations of Part 27 were found. Also, Respondent's business is concerned with woodworking. It would, therefore, be reasonable that Respondent be required to be familiar with all requirements of the Woodworking Machinery Standard, Part 27.

A citation for violation of Rule 3511 concerning "Eye Protection" was dismissed, since it was concluded that Respondent did provide eye protection where there is a probability of eye injury to employees.

210 GUARDING
Saws

SAWS

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)
Lack of Knowledge
Reduced to Other Than Serious

80-1997 Manistique Tool & Manufacturing Company (1981)

Respondent was held to have violated Rule 2730(1)(2) in an OTS fashion. The alleged serious violation was reduced because it was concluded that Respondent did not have knowledge of the existence of the standard in question. Respondent is not generally involved in the manufacturing of tools and, for this purpose, many pieces of metalworking machinery. The cited saw is used on an infrequent basis for the cutting of lumber in order to make shipping boxes. Secondly, Respondent was previously inspected by the Department on two prior occasions. On neither occasion was the saw in question cited, although Respondent presented testimony that the saw had been purchased prior to the first inspection.

211 EMPLOYER
Control of Business

EMPLOYER DEFENSES
Greater Hazard

GUARDING
Saws

HAZARD - ASSUMED IF RULE IS PROMULGATED

SAWS

STANDARD
Effect of Law

80-1951 Peterson Brothers Manufacturing Company (1981)

Respondent was held in violation of Rules 36(1), 2730(1)(2), 2728(1)(2), 5273(12), 2143(1), 2716(2), 5242(5), 5242(6), 5232(2), and 5237(17). Respondent's appeal was based on intense opposition to the MIOSHA program.

212 POSTING

80-2093 Ironman Construction, Inc. (1981)

Respondent's appeal was dismissed based on the finding that affected employees had not received the required notice of Respondent's petition for dismissal, the appeal to the Board, or the Notice of Prehearing Conference and Hearing sent by the ALJ. It was concluded that Respondent violated Rule 1351(2)(3) contained in Part 13 of the rules promulgated by the Departments of Labor and Public Health. In addition, Board Rules 415(1) and 422(1) were violated because the appeal to the Board and the Notice of Prehearing Conference and Hearing were not posted or sent to employees as required by these rules.

It was held that an employer's appeal to the Board need not be automatically dismissed when an employer fails to post a petition for dismissal. The purpose of this rule is to give notice to employees of the employer's disagreement with a citation. If an employer can demonstrate that the employees had been given notice of the petition (even if the notice is given after the required date), the earlier failure to post would be corrected and the appeal would go forward. The rule, at most, sets up a rebuttal presumption which can be met if an employer shows that the employees were notified of the petition even after the fact.

The facts of this case, however, establish that Respondent did not at any time notify his employees of the filing of the petition and also did not post or send to the employees a copy of the appeal to the Board or the Notice of Prehearing Conference and Hearing issued by the ALJ

213 EMPLOYER

Competition with Others

EXPOSED TO CONTACT

Revolving Parts

GUARDING

Envelope Machine

STANDARD

Interpretation

80-1815 Tullar Envelope Company (1981)

Respondent should have guarded the revolving discs on an envelope machine. These discs were within easy reach of adjacent aisle ways. Respondent argued it had been singled out and placed at unfair competitive advantage with other envelope companies. Individual employers are not excused from requirements regardless of how extensive noncompliance may be in the industry Rule 716 was cited.

214 DISCOVERY

Interrogatories

HEARING

Orders of ALJ

Failure to Follow

81-2425 Lindell Drop Forge (1981)

The Department is required by MIOSHA and by the APA to respond to interrogatories by an employer. The citation was dismissed on Respondent's motion, based on the Department's failure to respond to the request for interrogatories and to the ALJ's provision of time to object. The Department's argument that Respondent had no right under the Act or its rules to request interrogatories was rejected; the request was an attempt to find out the basis for the citation before the hearing, a perfectly acceptable endeavor which should be encouraged, the ALJ noted, The Department had voluntarily replied to interrogatories in previous cases. The Board reviewed this case and affirmed the ALJ's decision in an order dated 7/19/82.

215 SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

Reduced to Other Than Serious

TRENCH

Trench Shield

80-1890 Blakema, Inc (1982)

It was concluded that Respondent was in serious violation of Rule 408.40945 contained in Part 9 because employees were not protected for the bottom five feet of a trench. Although a trench box was being used by Respondent, the box was placed five feet above the bottom of the trench, unprotected from the possibility of a cave-in. The cited rule requires trench boxes to provide protection equal to or greater than sheeting or shoring. It was concluded that this requirement means dial employers must provide trench box protection at (he bottom of the trench as well.

A citation of Rule 408.41962 was reduced to an OTS violation. It was concluded that Respondent was using a grinding disk attached to a cut-off wheel for the purpose of side grinding. Rule 186 contained in Part 1-A of the GISS, incorporated by reference in the CSS, prohibits side grinding of any abrasive wheel unless the wheel is specifically designed for that purpose. The record presented at the hearing did not establish that the Homelite cut-off saw being used was specifically designed for the purpose of side grinding.

The violation was reduced to an OTS because it was not found that Respondent had the necessary knowledge set forth in Section 6(4) of the Act to justify a serious violation.

216 AMENDMENT

Denied

80-1865 Litemetal Diecast, Division of Hayes Albion (1982)

The Department filed a motion to dismiss the item on appeal. This motion was approved. In conjunction with the order approving the motion to dismiss, a previously issued Order Denying Motion to Amend, issued 11/6/81, was reissued to permit Board review. The motion to amend the item was denied because it was concluded that the Department was attempting to reinstate an item on the citation which was previously dismissed by the Department. In addition, there was a serious question presented as to why the Department should be permitted to use a general rule on training (the GDC) when a specific rule, Rule 4507(1), existed covering the subject of die-casting.

217 SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

WILFUL VIOLATION

76-348 Detroit Edison Company Monroe Power Plant (1982)

A cited willful violation to Rule 408.41004(2) regarding a personnel hoist was found to be a serious violation of the cited rule. A proposed penalty of $10,000 was reduced to $600. It was concluded that the facts did not establish that Respondent deliberately or intentionally chose to violate the cited rule by putting in place and operating the hoisting device in question. The record was insufficient to establish that Respondent knew the hoisting mechanism basket and rigging had to be tested by Complainant and the Elevator Safety Division prior to being used. A serious violation was upheld because it was concluded that the tests set forth in Section 6(4) of the Act had been met. This case was appealed to Circuit Court.

A decision was issued by Ingham County Circuit Court on October 6, 1993, affirming the conclusions of the ALJ.

(Paragraph numbers 218 and 219 were not assigned.)

220 HEARING

Orders of ALJ

Failure to Follow

80-1816 Consumers Power Company (1981)

Two separate motions to strike two different items were approved in two orders. On each occasion, the Department failed to respond to the motion and to the ALJ's orders to answer. Respondent requested answers to questions designed to give Respondent information concerning the Department's position.

221 EMPLOYER DEFENSES

Greater Hazard
Impossibility of Performance

FALL PROTECTION

Aerial Work Platforms
Personal Protective Equipment

79-1700 Great Lakes Steel (1982)

ER should have provided guarding or safety harnesses for EEs cleaning and inspecting molds from an 11 1/2 foot high platform. ER argued that the frequent movement of molds across the platform surface made construction of a standard guardrail impossible and that, since the platform was constantly being hit by molds and by the magnet and slag puller device used to clean the molds, a guardrail would be exposed to constant battering. There was nothing to tie a lanyard to in order to prevent a fall, and the tracks on which the molds were carried made a movable scaffold impossible. However, there was no evidence that ER could not alter its work process to comply with the standards. Its arguments that EEs could be injured while wearing safety belts by hitting the platform supports or a mold, or that EEs using ladders to reach the molds might contact live parts of the tracks were rejected because there was no showing that these hazards were greater than the existing fall hazard. Rules 213(2)(5) and 511(1) were cited.

A decision was issued by the Circuit Court on 2/7/84 remanding for the purpose of determining whether the exception provided in Rule 213(4) applied to ER's platform. This rule permits an exception when the platform is used primarily for loading or unloading railroad cars and trucks. The allegation of violation of Rule 511(1) was affirmed. ER's arguments of impossibility- of performance and greater hazard were rejected. The Commission's decision in F H Lawson, Inc, CCH par. 24,227 (1980) was cited with approval.

Upon remand, ER withdrew its appeal for both issues, and the abatement date was extended.

222 GUARDING

Point-of-Operation Guard or Device
Inadvertently Entering Point of Operation

PRESSES

Imprinting Number
Production Operation Definition

STANDARD

Interpretation

79-1681 Budd Company (1982)

Rule 2461(1) did not apply to a press that simply imprinted a number on a part. The scope provision in Part 24 limits applicability of the part to machinery that shears, punches, forms, or assembles metal. Also a "production operation" was not taking place when a rim is not in place at the point of operation.

223 DISCOVERY

Interrogatories

HEARING

Orders of ALJ
Failure to Follow

80-1911 Slagboozn Die & Stamping (1982)
80-2088 Regal Stamping Company

Orders dismissing citations were issued based on the Department's failure to provide interrogatories to Respondent upon request after ordered by ALJ.

224 FIRE-FIGHTING REGULATIONS

80-1853 Capitol Regional Airport Authority (1982)

Part 74 of the GISS cannot be applied to Respondent since the airport authority is not a "municipal fire service." The scope provision of Part 74 limits applicability to municipal fire service organizations.

225 GUARDING

Point-of-Operation Guard or Device
Operator Exposure
Two-Hand Controls

PRESSES

Two-Hand Control Device
Required Functions

78-910 GMC, Chevrolet Flint Metal Fabricating Plant (1982)

Respondent failed to provide a separate set of two-hand controls for multiple operators of a mechanical power press. The press' automatic ejection system malfunctioned, and the operator of the next machine in line manually removed parts from the rear of the press. Respondent argued that only one worker was needed to operate the machine. However, the operator of the next machine at the rear of the press was equipped with tongs to remove parts from the press and a hinged metal screen protected against point-of-operation contact. It was concluded that the removal of parts from malfunctioning press became a required function for continued operation, and Respondent chose to use a second operator for the task. The hand tool and screen could not serve as point-of-operation guards for an operator at the rear of the press who was not in control of activating the press.

226 ELECTRICAL

Energized Lines
Grounding

79-1374 Consumers Power Company (1982)

The Department's contention that Section 1926.954(f) required Respondent to ground each of six power lines on both sides of a pole being replaced was unsuccessful. The ALJ held that the language of the standard gives the option of placing grounds between the work location and all sources of energy and as close as practicable to the work location or simply at the work location. Respondent's method of tying three lines together on either side of the pole, connecting the grounding lines from each set and grounding the resultant cable adjacent to the pole, was within the language of the standard that permitted grounding at the work location.

227 GUARDING

Furnace Tender Splash Guard
Point of Operation Guard or Device Two-Hand Control Device

HOUSEKEEPING

LOCKOUT PROCEDURES

PRESSES

Two-Hand Control Device

80-1882 Pemco Die Casting Corporation (1982)

Respondent was cited for violation of Rule 2331(1) regarding use of two-hand controls on a hydraulic press. The slide on the press did not stop or return to its starting point when the operator removed one or both hands from the two-hand controls. The item was affirmed. Respondent argued that its machines are shut down when they malfunction and are repaired promptly. The machine did not stop as required at the time of the inspection, and the employee had no protection from a serious point-of-operation injury. A penalty of $350 was affirmed. A $175 penalty was also assessed for failure to provide a lockout procedure for machinery being serviced, Rules 11(c) and 32(1)(2). Respondent was also held in violation of Rule 2615(2) relating to maintaining a four foot wide aisle from work station to aisle and Rule 4553(3) relating to furnace tender splash guard.

228 INSPECTION

Creation of Violation by Safety Officer

WITNESSES
Credibility

79-739 GMC, Fisher Body Division, Coldwater Plant (1982)

It was held that the safety officer did not create a violation of a raised blade on a circular saw and then cite Respondent for a violation.

229 HEARING

Orders of ALJ

Failure to Follow

WITNESSES

List to be Exchanged

78-956 Westmac, Inc (1979)

The Department failed to follow an order directing an exchange of witness lists. It was held that Board Rule 431(2)(d)(e) provide this authority.

230 BURDEN OF PROOF

FLOOR MAINTENANCE

OTHER-THAN-SERIOUS VIOLATIONS

Employer Knowledge

79-1464 GMC, Hydramatic Division (1982)

Respondent was cited for an OTS violation of Rule 2615(3) regarding a slipping hazard caused by oil and water on floors. The item was dismissed due to lack of proof of employer knowledge of the conditions. The Department argued that knowledge is not an element of a nonserious violation, but it was concluded that employer knowledge is an essential element necessary to establish both a serious and a nonserious violation.

231 EMPLOYER

Nonappearance at Scheduled Hearing

General Entry for Nonappearance Cases

HEARING

Failure to Appear

No Compliance with Board Rule R 408.21428(2)

General Entry for Nonappearance Cases

ER failed to appear at a scheduled hearing. The hearing proceeded pursuant to Section 72(1) of the Michigan Administrative Procedures Act (APA). Testimony was taken from witnesses presented by MIOSHA and the evidence considered concerning the items appealed.

ER did not file a request for rehearing within ten days as permitted by Board Rule 428(2).

232 DUE PROCESS

Particularity of Citation

GENERAL DUTY CLAUSE

Steering Mechanism oil Bus

JURY TRIAL

PLACE OF EMPLOYMENT

79-1546 Capitol Area Transportation Authority (CATA) (1982)

Respondent was cited for a GDC violation [Section 11(a) of MIOSHA] regarding a loose steering mechanism on a bus. The bus was returned to operation after an inspector discovered the steering mechanism was loose. This exposed the driver to a potential steering failure. Respondent's argument that a bus is not a place of employment was rejected, based on the broad definition of Section 6(1) of the Act. It was held that Respondent's mechanic had actual knowledge of the defect and that the foreman who decided to put the bus back into service should have recognized the hazard. Respondent's request for jury trial was rejected relying on Atlas Roofing, 430 US 452 (1977). Respondent was provided fair notice of the matters to be litigated.

Respondent filed exceptions with the Board, but review was not directed. The decision was appealed to Ingham County Circuit Court, and a decision was issued on 9/27/83 by Judge Jack Warren.

The Court held:

1. A bus is a "place of employment" as defined in Section 6 of MIOSHA.
2. The employer was subject to the Act even though also subject to the Motor Vehicle Code.
3. The employer was not entitled to a jury trial because the penalty was remedial and not purely punitive. The legislature chose to use the term civil penalty and not fine.
4. Operation of a bus with loose steering linkage was a hazard recognized by the employer since the foreman knew of the defect.

233 EMPLOYER DEFENSES

Intentional Acts of Employee

EXPOSED TO CONTACT

Garbage Disposal

GUARDING

Garbage Disposal
General Rule 34(3)

PRECEDENT

Federal Cases

79-1533 Kroger Stores #317 & #318 (1982)
79-1601

Respondent was cited for a violation of Rule 34(3). It was held that there was a lack of evidence that workers were exposed to the hazards of finger or hand injuries. As a worker pushed produce into a 15 1/2 inch by 16 1/2 opening, gravity and water directed the garbage onto a turntable 23 3/4 inches below. A worker who slipped would have to bend his/her arm to reach the point of operation. There was no hazard because, during the normal operating cycle, a worker would have no reason to reach into the disposal opening and could reach the point of operation only by making a deliberate effort to do so. Since the standard does not presume that every unguarded machine exposes employees to injury, proof of a hazard was necessary.

234 EMPLOYER DEFENSES

Intentional Acts of Employee
Favorable Prior Record

EXPOSED TO CONTACT

GUARDING

Slow Speed of Ram

HAZARD - ASSUMED IF RULE IS PROMULGATED

PRECEDENT

Federal Cases

80-1785 Morenci Rubber Products, Inc (1982)

Respondent was cited for Rule 34(3) regarding a rubber molding press. Although the employee's duties did not require him/her to place a hand near the point of operation on the press, it could be reached by leaning over a 26 inch table. The employee leaned over the table to remove excess rubber from the mold. Warnings to keep hands from the point of operation showed recognition of exposure. Respondent was held in violation for failure to provide guards. Although no prior injuries had occurred to employees while operating molding machines in Respondent's 40 year history, neither the Act nor the cited guarding standard excuse employers with favorable records from compliance. Review was directed by the Board.

On 3/21/85, the Board reversed the ALJ's decision.

235 BURDEN OF PROOF

Department Required to Prove Violation

DUE PROCESS

Particularity of Citation

80-1904 Nationwide Demolition & Wrecking (1982)

A citation was issued because the upper 4 x 5 foot section of a wall appeared to be freestanding and unsupported after the lower section had been removed. The ALJ held that the Department failed to establish a hazard. The safety officer only assumed that the wall was weakened because he could not visually observe any support.

236 BURDEN OF PROOF

Department Required to Prove Violation

PRESSES

Point of Operation

STIPULATION OF FACTS

79-1642 GMC, Chevrolet Motor Division (1982)

Respondent agreed in a written stipulation of facts that a guard on a mechanical power press could be raised to the "up" position while the press continued to run, but no other evidence was presented to establish a point-of-operation guarding violation. The item was, therefore, dismissed. It was not shown whether it would be possible for an employee to reach through, over, or under the guard to reach the point of operation, or whether the guard conformed to the maximum permissible openings. Evidence was also lacking on whether the guards contained fasteners to minimize the possibility of misuse or removal or that the guard did not offer maximum visibility of the point of operation. Rule 2462(1)(a)-(f) was cited. No evidence other than the stipulation of facts was submitted.

237 BURDEN OF PROOF

Department Required to Prove Violation

EVIDENCE

Hearsay
Quashing

80-1850 Iron Siding & Sash, Inc. (1982)

The uncorroborated testimony of safety officers, based on information provided by an injured employee, constituted hearsay evidence and, as such, was not sufficient to establish that Respondent failed to support a scaffold and secure lifelines. One worker was killed and another injured when a swing scaffold on which they were working fell 39 feet. Based on statements made by the injured employee to one safety officer that two of the six counterweights were on the outside of the scaffold frame on which the outrigger rested and four were on the inside of the scaffold, which had a rated capacity of 500 pounds, the Department's witness estimated that the scaffold was overloaded since the workers, tools, and louvers which they were installing weighed over 500 pounds. There was no evidence presented by someone on the scene prior to the accident.

238 EMPLOYER DEFENSES

Isolated Incident

LOCKOUT PROCEDURE

79-1584 St Clair Rubber Company (1981)

An employee who broke a finger when his hand was trapped between the damper plate and stock of a blender mill consisting of two large rolling pins was aware of a company rule requiring that the mill be locked out before workers attempted to remove stock from the mill. The employee was experienced and had used the lockout procedure several times on the day of the accident. A lockout charge with a proposed penalty of $320 was vacated on grounds the incident was unforeseeable and isolated.

239 BURDEN OF PROOF

Department Required to Prove Violation

EVIDENCE

Hearsay
Quashing

GENERAL DUTY CLAUSE

Overloading Stackers

STOCK STACKING

79-1503 Clark Equipment Company (1981)

Respondent was cited for a GDC violation [Section 11(a) of Act] relating to the overloading of stackers. It was concluded that the Department failed to establish that Respondent had no procedure to prevent overloading of stackers used in stacking component parts for lift trucks because it relied on hearsay evidence and failed to produce any individual with direct knowledge of the alleged violation of other "hard" evidence. The safety officer had interviewed only one stacker operator (who did not testify at the hearing) and relied on hearsay from an employee representative for his conclusion that the operators were concerned about overloading. Although Respondent was cited for not having a procedure to prevent overloading, the inspector failed to determine during his inspection whether such a procedure existed. The decision contrasted the American Bridge decision NOA 75-1, 160, 161 (1976) and McLouth Steel, NOA 77-634 (1979).

240 EMPLOYER DEFENSES

Greater Hazard

FALL PROTECTION

Excavations
Personal Protective Equipment

LANYARD

VARIANCE

80-1740 Soils & Materials Engineers (1981)

ER was cited for violation of Rule 946(4) relating to excavating activities. It was concluded that ER failed to ensure that its EEs attached lifelines to their shoulder harnesses when entering pier excavations. ER argued that use of the lifelines would result in a greater hazard -- either the line could become snagged while EEs were ascending, pulling them off the crane bucket in which they rode, or the surface attendant could fail to lower the line quickly enough while they were descending, leaving them dangling. However, ER did not apply for a variance from the standard, nor did it show that such an application would be inappropriate. The tests for greater hazard defense are discussed with reference to federal cases.

241 ELECTRICAL

Energized Lines

EMPLOYER DEFENSES

Power Company Refused to Shut Down Lines

79-1590 Eisenhour & Forsberg Construction Corporation (1981)

Respondent was cited for violation of Rule 1301 relating to operation of a backhoe within ten feet of energized power lines. Respondent's defense that the engineering firm coordinating work for the project refused to shut off the lines was rejected. Respondent knew that the backhoe was very close to the power line pole and serious injury or death could have resulted from contact. The engineering firm refused the request to move the sewer line because access to the subdivision would have been blocked, and the power company refused to cut off power to residents in the area. The rule does not allow excusing compliance for the reasons advanced by Respondent.

(Paragraph number 242 was not assigned.)

243 EXPOSED TO CONTACT

Sagging Roof

GENERAL DUTY CLAUSE

Sagging Roof

RECOGNIZED HAZARD

79-1524 Rockwell International (1981)

The ALJ dismissed an alleged violation of the GDC because the Department failed to show that any employees were exposed to a recognized hazard, Respondent was charged with allowing employees to work in a building after the roof had sagged because of accumulation of snow. However, the Department's own witnesses testified that they were not aware of any employee who worked under the roof after it had sagged.

244 JURISDICTION

Late Employer Petition/Appeal
Good Cause Test
More Strict Good Cause Test Needed

77-468 Lanzo Construction Company (1981)

Respondent filed a late petition because its attorney placed the citation in the wrong file. The attorney had never handled a MIOSHA case. The case discusses Court of Appeals' decision in Lanzo, 86 Mich App 408; 272 NW2d 662 (1978), and concludes that a more strict standard for "good cause" must be applied in MIOSHA cases than in general civil cases. The case remanded by Macomb County Circuit Court for findings as directed by the Lanzo Court of Appeals' decision. Also see Tezak Company, NOA 80-2161 (1981).

245 EMPLOYER DEFENSES

Anning-Johnson

Intentional Acts of Employee

79-1283 Bechtel Power Corporation (1981)

Respondent was cited for a ladder violation, Rule 1124(4), and a scaffold violation, Rule 1926.451(m)(6). It was concluded that Respondent did not take reasonable steps to ensure the safety of its employee using another contractor's violative ladder and scaffold at a shared construction site. The side rails of the 34 foot ladder leading to the scaffold extended only ten inches above the landing instead of the required 36 inches, and the scaffold was guarded with manila rope which did not meet guarding requirements. The foreman did not inspect the area to see if it was safe before assigning the employee to work. The company's safety program did not show evidence of training employees in the safe use of scaffolds and ladders. Employees were merely instructed to use safety belts while using scaffolds owned by another contractor or which did not comply with safety standards. A work rule requiring employees to sign a statement that they had received a copy of safety regulations and would read them was no assurance that they would read the rules.

246 GENERAL DUTY CLAUSE

Drifting of Press

GUARDING

Point-of-Operation Guard or Device

Die Tryouts

Slow Speed of Ram

LOCKOUT PROCEDURE

79-1555 Autodie Corporation (1981)

The ALJ concluded that Respondent was not in violation of five cited standards.

In Item 1 of the Citation, Respondent was alleged to have allowed employees to use a Verson hydraulic press which drifted down while employees were in the press die area, in violation of the GDC, The ALJ concluded that no hazard was presented because of the slow drift of the press and since stop or safety blocks were used whenever employees worked in the die area.

Item 2 alleged violations of point-of-operation guarding requirements for hydraulic presses. This item was dismissed because the Verson press was used mainly for die tryouts.

246 (Continued)

Item 3 alleged violations of Rule 408.12370(2) which requires the use of safety blocks during die repair in a press, and Rule 408.12370(3) which requires that means be provided to prevent the cycling of a press with safety blocks in place. The citation was vacated because no evidence was presented to indicate the die repair was performed in the press. Further, when an employee does work in the press, power is shut down to prevent recycling and a complex and time-consuming method prevents recycling of the press when safety blocks are in place.

In Items 4 and 6, the Department charged that Respondent failed to establish and utilize a die-setting procedure for hydraulic and mechanical power presses, respectively. Since no evidence was offered to establish that Respondent was engaged in "production," Rule 408.12369(1)(a)(b) was not applicable. Item 6 was vacated because no evidence on the record related to mechanical power presses.

247 AISLES

FLOOR MAINTENANCE

78-1038 GMC, Fisher Body Division, Fleetwood Plant (1981)

The ALJ ruled that 7 x 15 foot dead-end area used by industrial trucks and employees for delivering stock was an "aisle" rather than a "passageway." A charge by the Department that a cable attached to an oxygen acetylene cart was not kept clear of the "passageway" was vacated. General Rule 4(1) and Rule 1406(1) of the GISS define a passageway as a path of travel for employees on foot, while Rules 3(1) and 1403(1) state that an aisle is a pathway for both mobile equipment and employees.

248 LOCKOUT PROCEDURE

79-1525 H B Sherman Manufacturing Company (1981)

The ALJ ruled that an employee who opened an interlocked gate which shuts off power to a mechanical power press while changing a die cup, and then reactivates the press by closing the gate to move another cup into position to be changed, did not need to follow lockout procedures.

Lockout procedures are required when unexpected motion could cause injury during servicing, repair, or set up of a machine. There were no other persons in the area who might have unexpectedly bumped the gate closed and activated the press, and the die-setter was not in an unbalanced position so that he would inadvertently bump the gate. A similar charge of failure to lockout a Bliss power press was vacated because there was no evidence that an employee checking alignment in the die area of the press could activate the power source located on the opposite side of the machine.

249 DUE PROCESS

Interpretation of Enforcing Agency

EMPLOYER DEFENSES

Press Not a Powered Machine

GUARDING

General Rule 34(3)

PRESSES

Powered By Operator's Foot

STANDARD

Effect of Law
Interpretation
Interpretation of Enforcing Agency

74-1005 McCord Gasket Division (1980)

Respondent defended against a guarding violation of Rule 34(3) by arguing that the press is powered only by pressure supplied by an operator's foot. General Rule 4(5), however, defines "power source" as "hydraulic, pneumatic, electrical, or other source." The violation was affirmed. The Department's interpretation was held to be reasonable. A promulgated standard has effect of law.

250 EMPLOYEE

Son of Owner

GUARDING

Saws

PENALTIES

Use of Department Penalty Schedule

SAWS

STANDARD

Effect of Law

79-1614 Woodcrafters (1981)

The ALJ found that Respondent failed to guard the point of operation of a radial arm saw. Arguing that the injuries could not occur if the operator followed instructions for using the saw was no defense against a charge of failing to provide guarding. Respondent admitted the lack of a guard and employee exposure and did not contend that the standard had been improperly promulgated. A proposed penalty of $60 was affirmed. The ALJ also rejected an argument that the machine had only been used by Respondent's son; an employee is any person who is permitted to work.

251 JURISDICTION

Late Employer Petition/Appeal
Mail Handling

86-4013 James River, KVP Division, Plants 1,2, 3 and 12 (1986)

Good cause was not found when Respondent believed the citation was received later than the actual receipt date. It was concluded that poor mail-handling procedures did not constitute good cause, Respondent is responsible for training employees as to correct mail-handling procedures.

252 GUARDING

Point-of-Operation Guard or Device
Inadvertently Entering Point of Operation

PRESSES

Inadvertently
Point-of-Operation Guard

78-719 GMC, Fisher Body Division (1981)

Respondent was cited for a serious violation of Rules 2161(1), 2462, and 2463. It was concluded that an automatically-fed mechanical power press lacked a point-of-operation guard or device to prevent operator contact. Respondent argued that the design of the machine made the point of operation too high and too far away for the operator's hand to inadvertently enter, but the ALJ ruled that the machine guarding standard mandated that a guard or device be provided. Design factors in a power press are not sufficient protection. This decision was reversed by the Wayne County Circuit Court (Kaufman) on 4/7/82. The Court held the press was equipped with a point-of-operation device. The Court considered the height of the point of operation to satisfy the "inadvertence" test of Rule 2463(1). On 2/10/84, the Court of Appeals reversed the Circuit Court decision and remanded for a decision on other issues raised by Respondent but not addressed by the Circuit Court. The Court of Appeals agreed that Respondent had not provided a guard or device to safeguard the point of operation. The press design feature relied on by the Circuit Court, and Respondent did not satisfy the requirement for placement of a guard or device.

253 TESTING

Device - Calibration

78-1034 GMC, Fisher Body Division (1982)

An ALJ ruled that the results from an untested gauge used to measure the pressure of air nozzle in the paint gun repair area were not sufficient to establish a violation of Rule 3832(1), The citation was issued after the inspector determined that the nozzle had a discharged pressure of more than 30 p.s.i.; however, the measuring device had not been checked for accuracy before the inspection. A certificate of accuracy obtained 2 1/2 years later was not sufficient to establish the gauge's condition at the time of inspection.

254 ELECTRICAL
Grain Dust

GUIDELINE
Distinguished From Standard

NATIONAL ELECTRICAL CODE
Grain Dust

STANDARD
Distinguished From Guideline

79-1317 Minor Walton Bean (1981)

In an attempt to reduce the risk of grain dust explosions and fire hazards, Respondent's grain elevators were cited by BSR in 11/78 for violation of Section 500-5(1) of the 1971 National Electrical Code. The bureau charged that the switches, switch boxes, naked bulbs, motors, receptacles, fixtures, junction boxes, reset boxes, and other similar equipment within the cited elevators did not meet the requirements of the code and had to be replaced.

Respondent contended that it and the bean and grain industry had incurred excessive costs litigating inappropriately issued citations. It argued the Department had misinterpreted and misapplied the National Electrical Code because it could not establish that dust was in the cited locations in quantities sufficient to cause an explosion or start a fire. Respondent also asserted the Department improperly relied upon "guidelines" rather than upon the language of the National Electrical Code.

The ALJ vacated all of the citations because the Department failed to establish that combustible dust was present in any of the cited locations in a quantity sufficient to support a fire or cause an explosion and had, therefore, failed to sustain its burden of proof. No dust samples were taken by the safety officer during the inspection, and the Department's expert witness testified he could not determine from examining photographs whether the dust pictured would explode. The ALJ also found the safety officer had improperly relied upon Department "guidelines" in recommending the citations be issued. A "guideline" is defined in the APA to mean an agency statement or a declaration of policy which the agency intends to follow. It does not have the force and effect of law and does not bind any person outside the agency.

255 MOLTEN METAL

Personal Protective Equipment

PERSONAL PROTECTIVE EQUIPMENT

Molten Metal

STANDARD

Interpretation

82-2682 Independent Steel Castings (1983)

Respondent was cited for a serious violation of Rule 4421(2) relating to wearing of personal protective equipment in a foundry. Respondent argued the rule was vague because it does not state that protective clothing must be heat resistant and fire retardant. It was held that since the standard calls for the equipment to protect an employee from burns it, therefore, must perform this function. A standard is not vague because it requires the exercise of judgment.

256 PRECEDENT

Res Judicata

RES JUDICATA

81-2330 Oakland County, Wailed Lake Sewage Plant (1983)

The citation was dismissed based on res judicata. The Department issued a citation to Respondent which was later withdrawn in a settlement agreement. The Department reinspected and cited Respondent for the same violations. It was held that the second citation was barred since the settlement agreement contained language that execution of the agreement was with prejudice.

257 TRENCH

Soil Borings Solid
Rock

81-2514 Board of Water and Light (1983)

Respondent was held in violation of Rule 941(1) relating to excavations. The angle of repose was stipulated to be 90°. The material being excavated was not solid rock even based on Respondent's presentation. Therefore, Respondent was in violation of the rule, since the standard permits a 90° angle only for excavations in solid rock.

258 NATIONAL ELECTRICAL CODE

Applicability of Exemption for Rule 1910.309(b)

78-1120 Cutler Dickerson Company (1982)

This case was closed based on the Department's motion to dismiss the items at issue. However, a preliminary order was issued denying Respondent's motion to dismiss for lack of jurisdiction. Respondent argued that Rule 1910.309(a) did not apply based on grandfather clause language contained in Rule 1910.309(b).

259 ECONOMIC FEASIBILITY

Expenditures Do Not Eliminate Need For Personal Protective Equipment

FAILURE TO ABATE

NOISE

Feasible Engineering Controls

STIPULATION OF FACTS

79-1539 Danbar Corporation (1982)

The stipulation of facts submitted by the parties established that Respondent failed to abate a violation as cited by the Department. The violation and penalty were affirmed. This case was appealed to Macomb County Circuit Court who ruled (9/24/84) to affirm the administrative decision finding Respondent in violation. The required expenditure of $5,000 initially, plus a Teflon application to reduce noise levels, was not found to be unreasonable. The fact that personal protective equipment would still be required after the expenditure was not enough to demonstrate economic nonfeasibility. Respondent did not offer evidence to show the reduction to be so minimal as to be economically unfeasible.

259 (Continued)

The case was appealed to the Court of Appeals, and a decision was issued on 9/11/85 (No. 82214).

The matter was remanded to Circuit Court for further remand to the Board to determine whether engineering controls are economically feasible. Cost benefit evidence should be produced by the Department at a future hearing. The ALJ should have considered the economic feasibility of proposed engineering controls before finding noncompliance with the cited standard.

260 EMPLOYER DEFENSES

Intentional Acts of Employee

EXPOSED TO CONTACT

GUARDING

Point-of-Operation Guard or Device Operator Exposure

PRESSES

Point of Operation

79-1587 Walker Manufacturing Company (1981)

The ALJ concluded that the barrier guards used by Respondent on mechanical power presses complied with the requirements of Rule 2462. Round openings which measured more than 1/4 inch and permitted insertion of parts measuring from 3 1/2 to 7 inches long by 2 1/2 inches in diameter were on the front of each mechanical power press cited by the Department. While a part is inserted through the round openings during a production operation, an operator's hands or fingers cannot enter the points of operation when there is no part in the die area. The ALJ vacated citations of the mechanical power press rule even though the openings were greater than the 1/4 inch specified in the standard because the barrier guards used by Respondent made it impossible for an operator's hands or fingers to reach the points of operation during production.

261 FLOOR MAINTENANCE
INJURY
Not Needed to Establish Violation

80-1921 Dow Chemical Company (1982)

A violation of Rule 15(3) dealing with slippery floors was affirmed. A worker was injured in a fall while walking on a cement ramp after he put a drying compound on the wet areas as instructed. Respondent argued unsuccessfully that there was insufficient evidence that the accident was caused by the slippery condition. It was held that it is not necessary to show that a violation caused an accident. Respondent's argument that the standard prohibited only accumulations of materials and not other slip-and-trip hazards was also rejected.

262 EYE PROTECTION
Probability vs Possibility
Not Required For All Employees

81-2169 Eaton Stamping Company (1983)

Respondent was cited for a violation of Rule 3512(1) relating to eye protection. It was held that eye protection was not needed for all workers throughout the manufacturing areas of its three plants. Respondent claimed that less than 4,000 square feet of its approximately 50,000 square feet of manufacturing space was used for operations which posed eye hazards and that it required eye protection for workers in those areas. During the five years prior to the citation, 1,888,079 hours were worked in the plants and only 37 eye injuries, just one of which resulted in lost time. It was held that there was no evidence to show that eye protection was needed throughout the entire manufacturing area.

263 INSPECTION
Accompaniment By Employer Representative

81-2221 Duane Smelser Roofing Company (1983)

Respondent objected to citations because a foreman was not offered walk-around rights. It was held that the foreman was aware of his walk-around right and did not assert it. The foreman was advised that an inspection was taking place and the inspector had made efforts to have the general contractor assemble a proper group of representatives.

264 EMPLOYER DEFENSES

Isolated Incident

LOCKOUT PROCEDURE

PENALTIES

Need to Promulgate

80-1945 Dow Chemical Company (1983)

The lockout provisions of Rules 11(c) and 32(1)(2) were cited. It was held that Respondent failed to enforce work rules on lockout. Respondent argued unsuccessfully that an employee's failure to lock out the power while unclogging the discharge cylinder on a dryer was an isolated incident of misconduct. A worker's two fingers were partially amputated when his hand was struck by moving paddles. It was also held that the Department's penalty schedule did not need to be promulgated.

265 JURISDICTION

Late Employer Petition/Appeal

Good Cause Test

Human Error

81-2247 Wayne County Road Commission (1981)

Respondent's argument that human error caused a delay in forwarding a citation was not held to be good cause, Also see Shear Tool Co, NOA 81-2639 (1982).

266 JURISDICTION

Late Employer Petition/Appeal

Fifteen Working Days

Good Cause Test

81-2258 Grow Group, Inc. (1982)

Respondent argued it was closed during most of December, and those dates should not be counted as part of the 15 working days to file a petition for dismissal. Good cause was not found, but the Board reversed and remanded the case. The case ultimately settled. Also see Genesee Electric Co, NOA 81-2234 (1981). Also see par. 318 for "state legal holiday." Also see Champion Spark Plug Co, NOA 83-3260 (1983) par. 329.

267 JURISDICTION

Late Employer Petition/Appeal
Citation Should Not Have Been Issued
Good Cause Test

81-2475 John Groya Plumbing & Heating (1981)

Good cause was not found. Respondent argued that since it was a sole proprietorship the citation should not have been issued. It was held that if Respondent disagreed with the citation a petition should have been filed.

268 EMPLOYER DEFENSES

Intentional Acts of Employee
Drug Use
Isolated Incident

GUARDING

Nip Points

TRAINING

80-1923 GMC, Buick Motor Division (1983)

A press operator had parts of two fingers amputated when he reached into a cam press to remove a part. A citation was issued for failure to guard a pinch point. Respondent argued that its employees were "otherwise protected" and that the accident was an isolated incident of employee misconduct. The ALJ concluded that the citation should be affirmed since the operator had not been adequately trained and was not even aware of the pinch point's existence. Further, the evidence did not support Respondent's contention that this was an isolated incident.

The Board reviewed this decision and issued an opinion signed by six members that reversed the ALJ 's decision and dismissed the citation. Rule 34(9), Part 1 of the GISS, requires a pinch-point hazard to be guarded if not otherwise protected. It was held that the area where the accident occurred was not readily accessible and required an overt intentional and unsafe act by the employee. Also the employee was on drugs. The removal of blocks from the line was not the injured employee's job, Therefore, Respondent was not required to train him on this task. There were other methods provided to protect employees from the cam probe so that a guard was not required.

269 EMPLOYER DEFENSES

Intentional Act of Employee

GUARDING

Nip Points

78-1108 GMC, Nodular Iron Metal Casting Plant (1983)

Respondent was cited for failing to guard a nip point of a conveyor belt roller. A maintenance worker's arm was caught in the nip point as he was reaching into the machinery to spray adhesive on the roller. The ALJ rejected Respondent's contention that maintenance workers were not covered by the guarding rule because it was possible to spray the roller effectively from behind the guard. It was held that the conveyor's framework and the nip point's remote location did not protect maintenance workers.

The Board reviewed this decision and issued an opinion on a vote of 4 to 2 to dismiss the citation because the nip point was safeguarded within the provisions of Rule 1442(2). It was held that the rule does not require safeguarding skilled trades maintenance employees from nip-point hazards. It was concluded that it would not be possible to spray the roller through a screen guard. Employees could perform spraying operations from outside the machinery. In order to bypass the machine barriers, an employee would have to perform an unsafe act, i.e., reach into the pinch-point area.

270 BURDEN OF PROOF

EMPLOYER DEFENSES

Exposure

EXPOSED TO CONTACT

Point of Operation

EYE PROTECTION

Point of Operation

79-1579 Michigan Sintered Metals, Inc (1981)

The Department alleged a violation of Rules 2461(1), 2462, and 2463 regarding guard opening in press, exposed point of operation. Respondent argued that there was no employee hazard. It was held that an operator could put his hand through the guard opening and reach the point of operation. The affirmative defense was rejected.

271 TRAINING

79-1272 Detroit Edison Company, Monroe Power Plant (1981)

The ALJ affirmed a citation by the GISS Division alleging a violation of Rule 11(a) of the General Rules under the GISS Commission. The evidence of the record was conclusive that Respondent failed to provide adequate training and supervision for the performance of an assigned task. The activity to be performed by the employees was so inherently dangerous and in contravention of Respondent's own safety rules that it came dangerously close to constituting reckless disregard of employee safety by Respondent. The ALJ further stated that the citation could be upheld even on the basis of Respondent's evidence alone.

The Board directed review of this case on 6/8/81 and affirmed the report of the ALJ in a letter dated 6/12/81. Respondent filed a petition for rehearing dated 6/30/81, and the Board denied the request at its 11/6/81 meeting.

272 DUE PROCESS

Interpretation of Enforcing Agency
Rule Vague

GUARDING

General Rule 34(3)

PRESSES

Powered By Operator's Foot

STANDARD

Interpretation
Interpretation of Enforcing Agency

79-1497 Keyes-Davis Company (1981)

The ALJ affirmed a citation issued by the GISS Division alleging an OTS violation of General Rule 34(3), in that provider did not "provide a point-of-operation guard or device for six mechanical kick presses." It was determined that foot operated mechanical kick presses fall under the requirements of pinch-point guarding under the rule. Further, the ALJ determined that the standard cited was not unenforceably vague.

273 BURDEN OF PROOF

Department Required to Prove Violation

EXPOSED TO CONTACT

79-1702 Ben T Young, Inc (1981)

The ALJ reversed a citation issued by the CSS Division finding Respondent in violation of Rule 408.421021 of Part 21 of the CSS. The citation alleged a serious violation of the standard and assessed a penalty of $90. The ALJ found that the testimony of the safety inspector was inconclusive and lacking in the required quantum of proof to meet the burden required by the Department. Further, the ALJ determined that even if a portion of the railing was missing as alleged, there was insufficient evidence on the record to indicate that any employees were exposed to a potential hazard. Accordingly, the citation was reversed and the order for payment vacated.

274 BURDEN OF PROOF

HEARING

Directed Verdict

NOISE

Feasible Engineering Controls

PRECEDENT

Federal Cases

77-682 GMC, AC Spark Plug Division (1981)

A health citation for a violation of Rule 2401(3)(a) of the health standards for GI was vacated. Complainant did not establish the availability of specific feasible engineering controls for, noise reduction. It was the Department's burden to show specific technologically feasible engineering noise controls.

275 GENERAL DUTY CLAUSE

Sagging Roof

TRAINING

Operator

79-1540 Allied Paper Company (1981)

Employees were not prevented from gaining access to the area beneath an area of a roof weighted down by snow. Respondent had knowledge of this violation. Also a lack of training was found pursuant to Rule 6311(a). The employee had received four days of on-the-job training. This wasn't considered adequate to learn how to thread paper in a roll.

(Paragraph number 276 was not assigned.)

277 JURISDICTION

Late Employer Petition/Appeal

Communication

82-3002 Superior Products, Wire Division (1983)

Respondent argued that a late petition was filed because the manager neglected to note the penalty associated with the citation. It was found that Respondent did not establish good cause for the late filing. A breakdown in communication between the plant manager and his supervisors shows a lack of reasonable diligence. Also see Wayne County Road Commission, NOA 81-2247 (1981).

278 FIRE HAZARD

Sprinkler System

PETITION TO MODIFY ABATEMENT DATE PMA

75-96 Scientific Brake & Equipment Company (1976)

Respondent wanted a three year extension to the abatement date [Section 44(2)] in order to use city water for its sprinkler system. Respondent would have had to spend $7,000 to $10,000 for a channel system. Based on the costs involved and the fact that only one employee was exposed, the request was approved. Respondent agreed to take interim steps such as providing fire protective clothing for the employee. Respondent also placed all painting in one room and provided two portable extinguishers close at hand. The tests set forth in Section 44(2), relating to "good faith" and "circumstances beyond the reasonable control of the employer" were established.

279 GENERAL DUTY CLAUSE

Railroad Car

81-2326 Blount Agriculture (1983)

Respondent was cited for GDC violation for permitting an employee to be exposed to hazard of being run over by moving railroad car. The tests for this violation are:

1. The employer failed to render work place free of hazard.
2. The hazard is recognized either by employer or industry.
3. Death or serious physical harm could result from violation.
4. Employer could by feasible means eliminate hazard.

These elements were found to exist, and the violation and penalty were affirmed.

280 INSPECTION

Accompaniment By Employer Representative

81-2433 Michigan Roofing & Sheet Metal (1983)

The safety officer conducted an inspection with a senior employee who was not a management representative. The safety officer did not know that the employee was not authorized to act for Respondent. It was held that Section 29(4) of the Act was not violated since Respondent did not establish prejudice. The federal cases cited as authority for this finding were: Chicago Bridge & Iron, 535 F2d 37 (CA 7, 1976); Landmark Grain Elevator, CCH par. 23749; and Moore Paint & Body Shop, Inc, CCH par. 19,450.

281 COUNTERWEIGHT

EMPLOYER DEFENSES

Anning-Johnson

OPEN-SIDED FLOORS VS ROOFS

OVERHEAD PROTECTION

STANDARD

Interpretation

80-1873 Duane Smelser Roofing Company (1983)

Respondent was cited for violation of Rule 2101, 1926.500(b)(2) relating to guarding an exposed side of a floor opening and Rule 2407(8) relating to use of a counterweight on a manually-powered hoist. Respondent filed a motion to dismiss the floor opening violation based on Langer Roofing, 524 F2d 1337 (CA 7, 1975). Respondent also argued that it did not create the hazard and could not have corrected it.

It was concluded that unlike the Langar case, supra, the cited rule does apply to roofs, and Respondent was in violation. Respondent also did not satisfy the Annine-Johnson test (see CCH par. 20690) adopted in Honeywell, Inc., NOA 77-512 (1977), and Utly James, NOA 78-848 (1979).

The counterweight item was dismissed because the rule refers to use of a counterweight in the handling of tar or kettles. The facts presented did not establish the lifting of these covered materials.

282 BURDEN OF PROOF

Department Required to Prove Violation

COMPRESSED AIR

PERSONAL PROTECTIVE EQUIPMENT

Tank Entry

PROCESS SPACE

Emergency Conditions

79-1650 Betchel Power Corporation (1983)

A health citation regarding entry into a nonrespirable space was dismissed. It was held the tank did not have insufficient oxygen when Respondent's employees entered. Respondent had used compressed air lines to create a respirable atmosphere prior to entry of employees to rescue employees of another employer who had become overcome. An item alleging violation for failure to have written procedures covering its safe use of respirators was dismissed because the Department did not present any proofs on this issue.

The Board directed review and, in a decision issued 1/27/84, reversed the ALJ's decision with a vote of four members in favor, one against, and one abstention. Rules 3301(2)(b) and 3302(1) and (2) were violated by Respondent. Correct procedures for tank entry were not followed. Respondent's safety representative was at the tank entry point and in charge during the rescue effort. This finding does not hinge on the Department showing that a nonrespirable atmosphere exists. Respondent must follow the requirements of the standard for testing or providing personal protective equipment prior to any entry. The airlines were inserted after several rescuers had entered the tank. This after-the-fact action does no excuse failure to comply. The Board specifically found that these rules apply during emergency situations as well as normal operating conditions.

283 EMPLOYER DEFENSES

Not Practical to Measure Angle of Repose
Stair Stepping

STANDARD

Effect of Law

TRENCH

Sloping

82-2819 City of Roseville, Water Department (1983)

Respondent dug a trench 6 feet deep, 10 feet long, and 5 feet wide. Respondent argued that it is not practical for operators to measure angle; stair stepping the side of trench is acceptable. It was held that Respondent did not follow Table 1 in Rule 941 of the standards. These rules have the effect of law once promulgated. Respondent's arguments do not excuse compliance with the rules. The item was affirmed.

284 WITHDRAWAL OF APPEAL

79-1276 Fisher Abrasive Products Corporation (1979)

Respondent sent a letter requesting cancellation of a PHC and stating that it had received information on how to abate. A letter was sent to Respondent asking if the request to cancel the PHC was a withdrawal of the appeal. If not, failure to respond would be treated as a withdrawal of the appeal. No response was filed and the case was dismissed.

285 ATTORNEY FEES AND COSTS

HEARING

Assessing Costs

76-445 Chrysler Corporation, Eight Mile Stamping Plant (1979)

Respondent's request for costs was rejected. Neither the Board nor ALJs have authority to assess costs.

286 PETITION TO MODIFY ABATEMENT DATE

Union Objection

PMA 78-1225 Chrysler Corporation, Control Division (1979)
PMA 78-1226

Respondent made good faith efforts to correct a constricted passageway between buildings used by machines moving diesel engine parts and workers going to the cafeteria. A PMA was granted extending the abatement date eight months beyond the six month period originally set. The UAW contended Respondent could have changed storage areas to remove most machine traffic from the 6 foot wide aisle way. It was held that Respondent's analysis of several methods of abatement, its plan to construct a second passageway at a cost of $10,000, and hiring an architect constituted good faith.

287 HEARING

Failure to Appear

PETITION TO MODIFY ABATEMENT DATE

Did Not Appear

General Entry For Nonappearance of PMA Cases

Failure to appear at a scheduled hearing resulted in dismissal of petition for modification of abatement.

288 PETITION TO MODIFY ABATEMENT DATE

PMA 78-1176 Active Industries, Inc. (1978)

Respondent was originally given 30 days to abate a violation of Rule 2463(7)(c) relating to safety distance between two-hand controls and point of operation. Five extensions were each approved based on no opposition being filed by either the Department or affected employees. The sixth and seventh requests for extensions were opposed by the Department.

Respondent argued that 26 of the originally cited 30 presses had been abated at a cost of $300,000 and 29,686 hours of work. The remaining four presses required additional hours of work and expense at a time when it had lost skilled workers to better paying jobs. An extension was approved until 12/31/78, instead of the 4/17/79 requested for two presses. A period of 30 days was approved for the remaining two presses based on a lack of showing of good faith effort to comply.

289 JURISDICTION

Late Department Decision
Mandatory Requirement

76-201	**City of Kalamazoo, Water Department**	**(1977)**
76-403	**Subsurface Construction Company**	
77-530	**Tishman Construction Company**	
78-746	**GMC, Buick Motor Division**	**(1978)**
78-794	**Sackner Products, Inc**	

The Department's decision was dismissed based on its issuance more than 15 working days after the Department received Respondent's petition for modification or dismissal-Section 41 of MIOSHA. Decision issued prior to Lanzo decision [86 Mich App 408; 272 NW2d 662 (1978), app lv den, 1/11/80] setting forth good cause test. It was concluded that the Department's 15 working day response period is jurisdictional in nature. If a late decision is issued and appealed to the Board, the items appealed must be dismissed for lack of jurisdiction.

290 JURISDICTION

Settlement Agreement

SETTLEMENT

Neither Approved Nor Disapproved

77-639	**Lanzo Construction Company**	**(1978)**
77-644		
77-669		
77-690		
77-735		

Parties agreed in a settlement agreement to resolve several files. Some of the files involved situations where Respondent did not file a timely petition or appeal, or the Department did not issue a timely decision pursuant to Section 41 of MIOSHA. The settlements by the parties on these files were neither approved nor disapproved, but the parties were left to their mutual agreements and the files were closed.

291 CRANES

Rated Capacity

GUARDING

Slitter

PETITION TO MODIFY ABATEMENT DATE

PMA 77-1156 Hancock Steel Company (1978)

The Department provided 60 days for Respondent to abate a violation of Rule 1855(1)(b) relating to the use of a crane beyond maximum rated lifting capacity. An extension was granted. Good faith efforts to comply were presented as well as facts which showed failure to abate based on circumstances beyond the reasonable control of Respondent. An extension requested for Rule 716, relating to a guard for a revolving part (slitter machine), was denied.

292 ELECTRICAL

Grain Dust

NATIONAL ELECTRICAL CODE

Enclosures

PETITION TO MODIFY ABATEMENT DATE

PMA 77-1121 Root's Feed Mill (1977)

Respondent requested additional time to abate three violations of the National Electrical Code relating to enclosures for fuses and lamps and rigid metal conduit. An extension of five years was requested and opposed by the Department. A two year extension was approved. The estimate of $6,000 for correction of the violations when spread over two years was considered reasonable.

293 SETTLEMENT

Change of Mind

75-127 F H Martin Construction Company (1977)

Respondent signed a settlement agreement and then retained counsel and attempted to halt approval of settlement agreement. It was concluded that the agreement was binding on Respondent since it was not the result of fraud, mistake, or improper means.

294 BOARD REVIEW

Time Periods

JURISDICTION

Late Employer Petition/Appeal

Prior to Lanzo

77-468 Lanzo Construction Company (1977)
77-470 Mayfair Construction Company

These cases involved untimely petitions filed by employers. Appeals were dismissed for lack of jurisdiction. This occurred prior to good cause test of Lanzo case. The exceptions to the Board were not immediately transferred to the Board. The executive secretary, on his own, extended the review period for the Board by 30 days to correct this error.

295 HEARING

Orders of ALJ

Failure to Follow

WITHDRAWAL OF APPEAL

76-257 Norco Oil Company (1977)

Respondent's attorney stated that he would withdraw appeal. A letter was sent requesting the withdrawal. Based on Section 80(d) of Act 306 and Board Rule 431(2)(d), the appeal was dismissed for lack of prosecution.

296 JURISDICTION

Late Employer Petition/Appeal

Prior to Lanzo

76-284 Root's Feed Mill (1977)
76-403 Subsurface Construction Company

Respondent's appeal to the Board was dismissed because an untimely petition was filed pursuant to Section 41 of MIOSHA.

297 JURISDICTION

Late Employer Petition/Appeal
Prior to Lanzo

76-397 GMC. Assembly Division (1977)

Respondent filed an untimely petition. The appeal to the Board was dismissed based on Section 41 of the Act. Respondent argued that the petition was placed in U.S. mail on the 15th working day based on Blum Construction, CCH par. 20, 735. It was held that the petition was placed in Respondent's mail on the 15th day, not the U.S. mail.

298 JURISDICTION

Late Employer Petition/Appeal
Mail Handling

82-2985 Thompson McCully Asphalt Paving Company (1983)

Respondent's petition was delayed because the citation was sent to several people before reaching the desk of the person responsible for filing a response. It was held that Respondent is responsible for training its staff in the correct mail-handling procedures. Respondent had received prior citations from the Department, and they had been sent to different addresses for response. Good cause is not found for the late petition. Also see Superior Products, NOA 82-3002 (1983), 1277; Power Seal Corp, NOA 81-2612 (1982), 1955; Wayne County Road Commission, NOA 81-2247 (1981), ¶265; and Tezak Co, NOA 80-2161 (1981), ¶922.

299 JURISDICTION

Late Employer Petition/Appeal
Appeal Cannot Be Filed By Posting

82-2762 Smith & Andrews Construction Company (1983)

Respondent filed a late appeal because he believed posting the petition satisfied the rules. Respondent's misunderstanding does not establish good cause.

300 JURISDICTION

Late Employer Petition/Appeal
Out of Town

82-2754 DeMaat Brothers Painting Contractors (1982)

Respondent filed a late petition because he was out of town when the citation was received. By the time he returned and investigated, the time for appeal had expired. Good cause was not found. A reasonable employer going out of town must either check with the office periodically or assign the task of reviewing mail to a responsible employee. Also see Power Seal Corp, NOA 81-2612 (1982).

301 JURISDICTION

Late Employer Petition/Appeal
Attorney Failure to File

81-2636 Jemco, Inc (1982)

Respondent delivered citation to its attorney, but - the attorney did not file a timely petition. It was not clear from Respondent's presentation whether the attorney failed to file timely because of illness. Such an explanation would satisfy the good cause test. Since Respondent's presentation does not make this clear, good cause was not found. Respondent's attorney had not exercised reasonable care in the processing of Respondent's petition. Also see Stroh Brewery, NOA 79-1588, 1589 (1981), 1920; Duane Smelser Roofing Co, .NOA 80-1876 (1981), ¶321; and Tezak Co, NOA 80-2161 (1981), ¶922.

302 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Service on Attorney or Representative
Service on Attorney or Representative

81-2309 Ski Brule, Inc (1982)

Good cause found for late appeal to the Board. The Department had not sent Respondent's attorney of record a copy of the Department's decision so the attorney could file an appeal.

303 JURISDICTION

Late Employer Petition/Appeal
Confusion
Good Cause Found
Confusion

77-467 Vitos Trucking & Excavating Company (1981)

Good cause was found based on Respondent's confusion in the face of 23 citations received from 3/76 to 1/77. In total, over 100 pieces of correspondence were exchanged during this period of time. Respondent was not found to be careless or negligent in processing the paperwork received. Also see Lanzo Construction Corp, NOA 80-2056 (1981), ¶921; and Bechtel Power Corp, NOA 78-774 (1980), ¶919.

304 JURISDICTION

Late Employer Petition/Appeal
Marriage

81-2617 Triple Tool & Manufacturing Company (1982)

Respondent argued that a late petition was filed because the office manager got married during the 15 working day period. It was held that the marriage was two days after receipt of the citation, and the return to work which was one week later, still permitted a timely filing to be made. Getting married does not permit one to neglect his/her business affairs.

305 JURISDICTION

Late Employer Petition/Appeal
Death
Good Cause Found
Death

80-1884 City of Kalamazoo (1981)

Death in the family of one of Respondent's officials, with whom Respondent's attorney had to confer, constituted good cause for the late filing.

306 EVIDENCE

Failure to Produce

JURISDICTION

Late Department Decision

76-201 City of Kalamazoo, Water Department (1977)

The unexplained failure of a party to produce evidence under its control creates a presumption against that party. Also see par. 289 in Digest regarding late Department decisions.

307 JURISDICTION

Late Employer Petition/Appeal

Citation Amendment

Good Cause Found

Citation Amendment

78-896 Michael Murphy Construction Company (1980)

Respondent filed a late appeal after the Department's decision amended the citation. The amendment did not mention affirmance of proposed penalty. It was held that good cause was present for untimely appeal. A reasonable person could have concluded that the Department was deleting the penalty when it did not refer to it in the amendment.

308 JURISDICTION

Late Department Decision

No Explanation For Late Filing

General Entry For Late Department Decision

The Department's decision in response to Respondent's petition for dismissal was issued more than 15 working days after the Department received Respondent's petition for dismissal. It was concluded that Section 41 of MIOSHA makes it a jurisdictional requirement that the Department issue its decision within 15 working days after receipt of Respondent's petition. Based on the finding of the Court of Appeals in Lanzo Construction Co v Department of Labor, 86 Mich App 408; 272 NW2d 662 (1978); app lv den, 1/11/80, the Department was provided an opportunity to establish good cause for the untimely issuance of its decision. No response was filed by the Department. It was accordingly found that good cause had not been established by the Department for the late filing. The citation was, therefore, dismissed.

309 JURISDICTION

Late Employer Petition/Appeal
Good Cause Test
Mail Handling

82-3039 Elwin G Smith Division (1983)

Respondent filed a petition for dismissal more than 15 working days from receipt of the Department's citation, Pursuant to a request, a hearing was held in order to provide Respondent an opportunity to present good cause for the late filing and a meritorious defense to the citation. These tests 'are set forth in the case of Lanzo Construction Co v Department of Labor, 86 Mich App 408; 272 NW2d 662 (1978); app lv den, 1/11/80.

Since (lie decision in Lanzo, the Board has considered the term "good cause" to be the kind of cause that would prevent a reasonably prudent person from the performance of an important obligation, It does not include conduct that shows carelessness, negligence, or a lack of reasonable diligence.

Respondent argued the citation had been sent to an incorrect address. It was argued that his office has jurisdiction over the construction site in question and that all employer responses to citations on that site have come from his office. The Department mailed the citation to the address supplied by the foreman on the job site which listed a different district office as Respondent's address. The citation was sent to that address and forwarded to the district office covering the construction site in question. This caused the delay in responding to the Department's citation in a timely fashion.

It was concluded that Respondent was responsible for training its staff in correct mail-handling procedures. Respondent has the responsibility of giving the safety officer the address to which the citation will be sent. Failure to advise field staff as to the proper address shows a lack of reasonable diligence in exercising Respondent's appellate rights. It was also observed that even if the 15 working day time period was computed from the time that the citation was actually received in the correct district office, the petition would still be late due to a delay by the "proper" official at the correct district office.

Good cause was not established for the untimely filing. Respondent's appeal to the Board was dismissed.

310 PETITION TO MODIFY ABATEMENT DATE

Exceptional Circumstances for Late Petition

PMA 83-1459 Harding Tube Corporation (1983)

An order dismissing a PMA date was issued 7/15/83. Respondent had filed a PMA beyond the date by which abatement was required in violation of Board Rule 441(3). This rule requires that a PMA must be filed with the Board no later than the close of the next working day following the date on which abatement was originally required. The rule goes on to provide that a late petition must be accompanied by an employer statement stating that "exceptional circumstances" caused the delay.

An inquiry to Respondent for a statement as to the exceptional circumstances in this case went unanswered. The petition was accordingly dismissed.

311 JURISDICTION

Late Employer Petition/Appeal

Meritorious Defense

No Explanation For Late Filing

General Entry for Untimely Cases

Respondent filed a late petition for dismissal or appeal. No response was filed to the Order to Show Cause inquiring as to the cause for the late filing. It was concluded that "good cause," as required by the Lanzo Construction Co v Department of Labor, 86 Mich App 408; 272 NW2d 662 (1978); app lv den, 1/11/80, Court, was not established. Respondent's appeal to the Board was dismissed.

312 ABATEMENT

Notification of

REPEAT VIOLATION

83-3021 Austin Excavating Company (1983)

The Department issued a repeat violation citation for Part 13, Rule 1349(1), and assessed a proposed penalty of $50. This rule requires Respondent, to whom a citation is issued, to notify the Department in writing immediately upon compliance with each item of the citation.

312 (Continued)

The Department issued the citation approximately one year prior for violation of the trenching requirements of Rule 941(1). This citation was not appealed by Respondent. Respondent did not send a certification of abatement for this item. The Department then sent a letter to Respondent requesting certification of abatement and payment of the proposed penalty. Respondent filed no response. The Department then issued a second citation alleging a violation of Section 33(3) of MIOSHA, since Respondent had not certified or paid the penalty. When still nothing was heard from Respondent, the Department issued the citation which was the subject of the instant case.

Respondent's representative testified that the initial citation was, in fact, abated ten days after the inspection. It was concluded that this constitutes certification of abatement. In view of the certification of abatement, the citation being reviewed was dismissed and the proposed penalty vacated. It was concluded that what is important in the case is abatement hazards, not punishment. Respondent did abate the violation. Nothing would be served in assessing another $50 fine against Respondent.

313 JURISDICTION

Late Employer Petition/Appeal Confusion
Good Cause Found
Confusion

82-2925 Shaw Electric Company (1983)

An order approving Respondent's withdrawal of appeal was issued 6/10/83. However, prior to this order, a previous order was issued 2/25/83, directing that Respondent's appeal be considered despite a late appeal having been filed. It was concluded that the paperwork in the file created a confusing situation which justified a finding of good cause for Respondent's untimely filing. It was also concluded that a meritorious defense was presented by Respondent. Both of these tests were required by Respondent in the case of Lanzo Construction Co v Department of Labor, 86 Mich App 408; 272 NW2d 662 (1978); app lv den, 1/11/80.

314 EMPLOYER

Delegation to Employees of Safety Requirements

EMPLOYER DEFENSES

Isolated Incident

EYE PROTECTION

INSPECTION

Contacting City Hall Prior to Inspection

PENALTIES

Affirmed

PERSONAL PROTECTIVE EQUIPMENT

STANDARD

Effect of Law

TRENCH

Sloping

82-2869 City of Troy (1983)

This case involved the review of citations issued to Respondent as the result of an inspection of a construction site concerned with a trench operation. A violation of Rules 624(1) and 625(3) were established. These rules relate to face and eye protection and the wearing of foot protection. Employees on the job site were breaking concrete with a sledge hammer and an air hammer.

Respondent asserted an isolated incident defense based upon the contents of its employee safety book which requires goggles, gloves, and toe protection when an air hammer is being used. It was concluded that the isolated incident defense had not been established because the record did not satisfy the requirement that employees be educated on the safety rules and procedure as required in the case of Bechtel Power Corp, No. 77-19954-AA (1977), Ingham County Circuit Court.

It was also concluded that these violations were serious in nature. The management of Respondent should have known of the presence of the violation if adequate supervision of the employees on the job site was provided. An employer cannot turn over responsibility for enforcing safety provisions to employees and then defend against a serious violation by asserting a lack of knowledge. The employer is the entity who hires and assigns employees to their work assignments. It is the employer that is responsible for the enforcement of the safety standards, including the wearing of personal protective equipment. If Respondent wishes to make use of a lead worker method of supervision, it

is still necessary for Respondent to supervise the work site to make certain that all employees are properly following the safety requirements. See Section 6(4) of MIOSHA.

Respondent was also cited for violation of Rule 941(1) relating to the sloping and shoring requirement. Respondent argued that its employees on the job site had numerous years of experience in digging excavations. It was their opinion that the trench in question was safe.

It was concluded that once a standard has been properly promulgated it has the effect of law and must be complied with by all employers in the state. An employer may not deviate from the requirements of the standard even if the years of experience of the employer tells him/her the excavation in question need not have the support or sloping required by the standard. These are areas which the CSS Commission has removed from consideration by an employer.

It was concluded that employees in the trench were exposed to death or serious physical injury and Respondent knew or should have known of the presence of this violation. It was accordingly concluded that this violation was serious in nature.

The proposed penalties assessed for the items at issue were affirmed by the ALJ since the Department followed the criteria set forth in Section 36(l) of MIOSHA in considering the size of the business, the seriousness of the violation, and the history of previous citations.

Finally, it was concluded that the Department's representative acted in accordance with the provisions of the Act when he entered the job site and waited for a representative of Respondent as opposed to going to city hall in order to contact Respondent. Respondent argued that the safety officer should have presented his credentials to city hall instead of the job site. Respondent desired to have a superintendent take part in the inspection. However, because the safety officer did not go to city hall, a foreman took part in the inspection. It was concluded that the fact that Respondent chose to send a foreman instead of a superintendent was not a basis for finding that the inspection was improperly conducted. In this case, the heavy equipment operator on the job site contacted the foreman, and the foreman appeared on the job site to represent Respondent. If Respondent finds it necessary to have a different person in attendance during the inspection, then it is up to Respondent to see to it that that person is provided so the inspection can take place without delay.

315 FIRE HAZARD

Storage of Flammable Liquids

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

Lack of Knowledge

81-2467 Hueblein, Inc (1983)

Respondent was cited for a serious violation of a rule that prohibits welding within 35 feet of flammable materials without proper precautions. The citation was issued following an accident which occurred when a flammable liquid suddenly came out of a pipe which a plumber had mistakenly left uncapped. The citation was dismissed as to this serious violation because Respondent did not and could not, with exercise of reasonable diligence, know of the presence of the violation. The citation was affirmed as to the violation of a requirement that an observer be assigned whenever welding is done in an area where a fire could start. It was concluded that Respondent's rectifying department, which contained large volumes of flammable liquids in tanks and overhead pipes, was an "area where a fire could start" as contemplated in the rule.

(Paragraph number 316 was not assigned.)

317 WILFUL VIOLATION

Prank

80-1967 Saginaw Civic Center (1983)

On 6/10/83, an ALJ affirmed a willful serious charge of failure to prevent a means of egress to be locked ma manner that would prevent or hinder free escape from the inside of a building as required by Rule 632(2). A foreman willfully locked an employee in a locker room over night as a prank. The foreman knew the inside thumb release latch on the door was broken, and the employee had no means to leave the room or the building. The employee could have suffered serious burns or death had a fire occurred. An appeal to Circuit Court was filed by Respondent and then dismissed based on Respondent's withdrawal. The Court's order is dated 3/6/84.

318 JURISDICTION

Late Employer Petition/Appeal

Good Friday

76-284 Root's Feed Mill (1977)
87-4318 Visioneering, Inc (1988)

Respondent argued that Good Friday should not be considered as a working day for purposes of counting the 15 working day appeal period (Section 41 of MIOSHA). MCL 435.101 lists the legal holidays recognized in the State of Michigan. Good Friday is not included as a "state legal holiday." Section 6(8) of MIOSHA defines "working day" to be any day other than Saturday, Sunday, or state legal holiday.

319 JURISDICTION

Late Employer Petition/Appeal

No Explanation For Late Filing

82-2955 Lanzo Construction (1983)

Respondent filed a response to the Notice of Docketing and Order but did not explain why the petition was filed late. The submission only asserted that Respondent had a meritorious defense to the citation. It was held that good cause was not presented, and Respondent's appeal was dismissed. Also see Rashid Insulation, NOA 82-2873 (1983).

320 GENERAL vs SPECIFIC

82-2906 Great Lakes Steel (1983)

A citation alleged that Respondent violated a rule of general applicability (Rule 3501) by failing to provide personal protective clothing to employees assigned to coal tar by-products plants. The citation was issued because of the alleged presence of phenanthrene and chrysene in Respondent's coke oven by-products plant. The citation was dismissed because specific rules (Rules 2101 & 2102), which do not require protective clothing, regulate employee exposure to phenanthrene and chrysene.

321 JURISDICTION

Late Employer Petition/Appeal
Attorney Failure to File
Vacations

80-1876 Duane Smelser Roofing Company (1981)

Counsel for Respondent was on a trip to New Orleans, Brazil, and then to court for a week. These activities resulted in a late filing. It was held that a vacation would not prevent a reasonably prudent person from the filing of a timely appeal. Failing to either have a reliable person in charge during the attorney's absence or to check with the office on a regular basis discloses a lack of reasonable diligence. Reference was also made to the decision in Stroh Brewery, NOA 79-1588 and 1589 (1980), where the employer's attorney entrusted the filing of the employer's appeal to a temporary secretary while the attorney was on vacation. The secretary failed to file the appeal within the 15 working day period.

The Legislature imposed a 15 working day petition/appeal period to require prompt action by employers in order to keep worker exposure to a minimum. Permitting vacations to constitute good cause would defeat this goal. Respondent herein did file a timely petition for dismissal and should have known that the Department would be issuing a decision in response while counsel was out of town. Good cause was not found. Also see par. 244 and 301 in Digest.

322 EMPLOYER DEFENSES

Impossibility of Performance

GUARDING

Buffing Wheel

82-2899 Kelsey-Hayes Company (1983)

An ALJ affirmed an OTS charge of failure to provide 180° wheel guards on both sides and periphery of several buffing wheels, Rule 1115(1)(2) of Part 11. Rejected was Respondent's contention that it was impossible to provide guards since the machines had been modified to contain two wheels instead of one. If the extra wheel was removed, the machine could be guarded in accordance with the standard. Also rejected was Respondent's argument that it had been unable to guard similar wheels in plants in other states and that compliance with the standard would preclude performance of its buffing operation to the extent that several thousand wheels would have to be scrapped each day. This decision was directed for Board review and remanded to permit further presentations by Respondent.

After remand, Respondent withdrew the appeal and the case was closed.

323 BURDEN OF PROOF

CRANES

Riding the Load

82-2901 Babcock & Wilcox (1983)

Respondent was cited for a serious violation of ANSI Crane Standard B30.5-1967, par. 5.3.2.3(3), incorporated by reference in Rule 408.41001 of Part 10 of the CSS. The allegation was vacated. The proofs presented by the safety officer failed to show that employees were riding the crane load as it was being lifted. He testified that he only saw two employees on the filter after the lift was completed. The foreman in charge of the filter installation explained that two employees who attached the filter to the crane line remained on the ground while the filter was lifted. After the load was adjacent to the building where it was to be installed, two other employees climbed onto the filter from a safety scaffold to disconnect the crane line and to attach the chain fall to allow the filter to be transferred into the structure.

324 GUARDING

Point-of-Operation Guard or Device
More Time to Automate

PETITION TO MODIFY ABATEMENT DATE
Interim Employee Protection

PMA 80-1310 United Steel & Wire Company (1982)

The ALJ granted an extension for one year to abate a violation of Rule 2461 of Part 24 of the GISS. The violation concerned operator exposure to the point of operation of oven rack clippers. Respondent needed more time because it sought to automate the clippers to avoid operator exposure. During the abatement extension, Respondent was directed to instruct employees in the safe operation of the presses and to discipline employee violations of these instructions.

325 JURISDICTION
Railroads

PREEMPTION - SECTION 4(b)1 OF OSHA
Railroads

75-7 Chesapeake and Ohio Railway Company (1980)

Respondent argued that the Department's citations should be dismissed because jurisdiction over railroad safety rested exclusively with the Department of Transportation, Federal Railroad Administration (FRA). Section 4(b)(1) of federal OSHA exempts an industry where a different federal agency is given authority to regulate the working conditions of employees. It was argued that OSHA jurisdiction and that of the Department of Labor ended when FRA published a Notice of Proposed Rulemaking on 3/7/85.

It was concluded that OSHA jurisdiction was not preempted. The Court in Southern Railway Co v OSHRC, 539 F2d 335 (CA 4, 1975), cert den, 429 US 995 (1976), held that Section 4(b)(1) requires an actual exercise of FRA's statutory authority before OSHA jurisdiction is lost.

326 EMPLOYER DEFENSES

Greater Hazard

Leggings

MOLTEN METAL

Personal Protective Equipment

PERSONAL PROTECTIVE EQUIPMENT

Molten Metal

81-2613 Standard Automotive Parts Division (1983)

Respondent was cited for failure to require workers handling molten metal to wear leggings, spats, an apron, or other equivalent personal protective equipment pursuant to Rule 4421(2) of Part 44, GISS. It was held that the safety standard required such personal protective equipment to be made of heat and flame resistant material. Therefore, denim jeans were not equivalent personal protective equipment. Moreover, the ALJ rejected Respondent's affirmative defense that, since molten metal sticks in the wrinkles of the leggings, compliance with the standard would result in a greater hazard than noncompliance.

327 AMENDMENT

At Hearing

CITATION

Technical Violation Only
Violation Not Alleged on Citation

HAZARD - ASSUMED IF RULE IS PROMULGATED

PENALTIES

Reduced
Low Probability

SCAFFOLDS

Separate Fall Protection Device

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

STANDARD

Effect of Law

VARIANCE

82-3019 Elwin G Smith Division (1983)

Respondent was cited for serious violations of Rules 1233, 1234(1), and (4) of Part 12 of the CSS. Respondent's scaffold was suspended from two outriggers. However, these outriggers were not tied back as required by Rule 1233(9)(c). Respondent argued that there was no place to tie the outriggers. The Department asserted that a hole should have been cut in the deck and a lower floor structural steel member used for tying off.

Also the two employees observed on the scaffold 20 feet from the ground did not have safety belts in violation of Rule 1234(3). Since this rule was not cited by the Department, the allegation was dismissed.

The serious violation was upheld. Although the bottom of the scaffold was mere inches from the ground, without fall protective devices, the scaffold could have moved from the wall throwing employees from the scaffold. It is not necessary for the Department to establish a hazard based on the violation. The promulgation of the standard assumes the existence of hazard. Also, a promulgated standard has the force and effect of a statute.

327 (Continued)

It was concluded that death or serious physical injury could have resulted from the injury and that Respondent knew or should have known of the requirements of the standard. Respondent's argument that weights chained to the outrigger created a 5 to 1 safety factor was held to be in the nature of a variance request. Variance requests cannot be reviewed by the Board but must be made to the enforcement division (See Section 27 of MIOSHA).

The proposed penalty was reduced from $180 to $90 based on a finding of low probability for an accident taking place.

328 JURISDICTION

Late Employer Petition/Appeal
Communication

83-3109 Plastics Research Corporation (1983)

Good cause was not found where a new president did not know of prior receipt of citation, and the plant manager who did know believed that Respondent did not want to appeal but only abate the violation.

329 JURISDICTION

Late Employer Petition/Appeal
Collective Bargaining Agreement Days Off

83-3260 Champion Spark Plug Company (1983)

Respondent argued that July 1 should not be counted in the 15 working day period because it was a day off pursuant to the collective bargaining agreement and not a working day. The term "working day" is defined in Section 6(9) to be days other than Saturday, Sunday, or state legal holidays. These holidays are set forth in MCL 435.101, and July 1 is not included as a holiday. Good cause was not found.

330 JURISDICTION

Late Employer Petition/Appeal
Citation Should Not Have Been Issued

83-3191 Jim Christopher, Inc (1983)

Good cause was not found where Respondent argued he did not file a timely petition because he did not employ any workers at the time of inspection.

331 JURISDICTION

Late Employer Petition/Appeal
Employer Too Busy

83-3274 James River Corporation, KVP Division (1983)

Good cause was not found where Respondent argued that business duties prevented a timely filing.

332 EMPLOYER DEFENSES
Isolated Incident

GUARDING

Failure to Provide

INJURY

Not Needed to Establish Violation

81-2458 Johnson Stamping & **Fine Blanking, Inc (1983)**

Respondent was cited for failure to provide a point-of-operation guard or device on a mechanical power press, Rules 2461(1), 2462, and 2463 of Part 24 of the GISS. The ALJ rejected the defense that the violation was the result of an isolated incident of employee misconduct in that the employee should have refused to operate the press without a guard. Regardless of whether the employee violated a work rule, Respondent failed to provide a guard. Moreover, it was no defense that the accident did not occur at the point of operation.

333 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Saturday Citation Receipt
Saturday Citation Receipt

83-3281 City Construction Company (1984)

The Department's citation was received by Respondent on a Saturday. Since Section 41 of MIOSHA permits a 15 working day period in which to file a petition or appeal and "working day" is defined in Section 6(9) as a day other than Saturday, Sunday, or state legal holiday, it was concluded that the receipt date should be considered as the following Monday. It was concluded that the petition was filed in a timely fashion.

334 GUARDING

Saws
Miter Box

EXPOSED TO CONTACT

Saw Disassembled

SAWS

Miter Box

82-2808 B C Schueman Company (1984)

There was no employee exposure to the hazard of an unguarded miter box saw which had not been used in its unguarded condition. The saw had been disassembled for repairs and would not have worked if it had been plugged in and turned on. Therefore, a citation for violation of Rule 408.41934, Part 19 of the CSS, requiring a guard on the saw was dismissed.

335 TRAINING

Aerial Device

82-3035 Oakland County Facilities (1984)

As a result of an accident which caused serious injuries, Respondent was cited for failure to provide training before authorizing the employee to operate an aerial device. Rule 5811(a) of Part 58, GISS, was cited. The evidence established that the injured employee and other employees were instructed by supervision to operate an articulating lift platform vehicle. The citation was affirmed because the employees did not receive training regarding the hazards or safeguards of the machine.

336 JURISDICTION

Railroads

PREEMPTION - SECTION 4(b)1 OF OSHA

Railroads

POSTING

81-2173 Soo Line Railroad Company (1984)

The ALJ affirmed a citation for failure to post a MIOSHA notice [Rule 1311(1)(2)]. Respondent argued that a notice was not required because MIOSHA had been preempted by a policy statement issued by the Federal Railroad Administration on 3/14/78. It was held that MIOSHA was preempted with regard to employees engaged in railroad operations and the movement of equipment over rails. However, the notice was required for other employees at the facility, such as stenographers, cashiers, and certain maintenance workers who were not engaged in railroad operations.

337 ELECTRICAL

Exits From Transformer Bays

EVIDENCE

Offered After Hearing

FIRE HAZARD

Exits From Transformer Bays

TRANSFORMER OIL

Flammability

82-2914 Detroit Edison, McGraw Substation (1984)

Respondent was cited for an OTS violation of Rule 634(2) contained in Part 6 of the GISS. The Department argued that two exits were required from each of five transformer bays. It was held that these areas were not high hazard locations within the definition of Rule 604(3). The transformer oil in the transformers and regulators located in each bay will not burn with extreme rapidity or lead to explosions or poisonous fumes in case of fire.

The employee group attempted to introduce evidence in its post-hearing brief. This offer was rejected because post-hearing submissions are limited to a review of evidence offered at hearing. This case was reviewed by the Board, and the ALJ decision was affirmed.

338 JURISDICTION

Late Employer Petition/Appeal
Out of Town
Small Employer

84-3479 Design It (1984)

Good cause for a late petition was not found where Respondent was out of town when the citation was received. Respondent argued that he could not afford a full-time secretary since his was a small business.

It was concluded that Respondent should have known that a citation would be issued within 90 days of the inspection date and should have taken steps to respond to it during his absence, Filing a timely petition does not require a full-time secretary. Small employers are not permitted more time to file petitions than other employers; all have 15 working days. When an employer is out of town during a time that a citation could be expected (as in this case), the employer must take steps to have someone review the mail and file timely responses or to check back periodically to direct the proper handling of important matters.

339 CONSTITUTION

Separation of Powers

INSPECTION

Accompaniment by Employer Representative
Warrants

WARRANTS

Probable Cause

80-2002 Hehr International (1984)

Respondent was cited for 15 MIOSHA violations following an inspection which was conducted pursuant to a search warrant issued by a state court. Respondent filed a Motion to Suppress Evidence and Dismiss the Citation on the grounds that the warrant was issued without sufficient showing of probable cause. The ALJ denied the motion, holding that the determination of probable cause is a judicial function since the judiciary is the safeguard against unconstitutional executive action. The Department was prohibited from considering the probable cause issue by the constitutional requirement for a separation of powers of the three branches of government. The ALJ also rejected Respondent's contention that the inspection was invalid because the plant manager allowed the inspection under the "pressure" of the warrant, the inspector's proffering an article entitled "Putting the Boss Behind Bars," and the presence of a deputy sheriff. A MIOSHA inspection can be accomplished only by enforcement when the employer will not consent to it,

The parties entered into a settlement agreement concerning all items at issue.

340 ELECTRICAL

Energized Lines
Insulated

81-2417 Consumers Power Company (1984)

Respondent was cited for allowing employees to approach closer than 28 inches to energized live parts without personal protective equipment. The employees worked on one wire, energized to 14,400 volts, at a time. They wore rubber gloves and sleeves rated to protect against exposure to 20,000 volts. Respondent was cited because, while working on one wire, the employees came within 22 inches of other wires. Unprotected contact with two wires at the same time would result in exposure to 24,900 volts. The citation was dismissed because the wires the employees were not working on were covered and insulated by rubber blankets and hoses. The rule under which Respondent was cited, Part 16 of the CSS, Rule 1926.950(c)(1)(i)(ii)(iii), provided an exception if the energized part was insulated.

341 CRANES

Power Lines

ELECTRICAL

Crane Contact

83-3320 DeMaria Building Company (1984)

The ALJ affirmed a citation for a serious violation by Respondent of Part 10 of the CSS, Rule 1926.550(A)(15)(i), for allowing a crane to operate within the minimum clearance of ten feet of an energized power line. A routine inspection had been conducted at the job site resulting in a safety recommendation being issued to Respondent. Approximately two months later another routine inspection was made. Respondent's superintendent reported that the crane had struck the overhead energized lines. It was held that Respondent was on notice as to the overhead lines and that it was substantially probable that contact would most likely result in death or serious physical injury.

The decision was appealed to Ingham County Circuit Court and later abandoned. Jurisdiction was restored to the Department of Public Health for enforcement of the Board's Final Order.

342 PROCESS SPACE

TESTING

Process Space

83-3277 Southeastern Oakland County Incinerator Authority (1984)

The ALJ affirmed a citation for a serious violation of the Occupational Health Standards Rule 3301 by Respondent for failing to thoroughly ventilate and test the atmosphere of a process space or provide an approved supplied air respirator, self-contained breathing apparatus, safety harness, and lifeline before permitting an employee to enter a sump pit. It was held that a violation occurred when an employee entered the sump pit, succumbing to the nonrespirable atmosphere, resulting in his death. All Respondent provided was a rope and life line stored in a locker. It was substantially probable that the consequences of exposure would most likely lead to death or serious physical injury.

343 TRENCH

Trench Shield
Sloping

WILFUL VIOLATION

Definition
Prior Citations

82-3038 Barkman Contracting, Inc (1984)

The ALJ found Respondent in willful violation of the trench sloping rules, Part 9, Rule 408.40941(1), for failure to adequately slope a trench composed of clay and measuring 23 1/2 feet deep, 7 1/2 feet wide at the bottom, and 18 1/2 feet wide at the top. The angle was 74º on the east and 80° on the west. Respondent used two 8 foot high trench shields, stacked one on top of the other. The ALJ rejected Respondent's contention that the 16 foot trench boxes reduced the depth of the trench and made the angles of repose acceptable since the rule applies to depths of more than five feet. It was also held that the shields were inadequate to protect an employee waiting on the trench slope to enter the shields from a possible cave-in. Respondent's knowing disregard of the standard's requirements was shown by the fact that it had violated the standard on four prior occasions. A $1,500 proposed penalty was affirmed.

344 EMPLOYER DEFENSES

Ownership of Work Place

COKE OVEN EMISSIONS

PERSONAL PROTECTIVE EQUIPMENT

Respirator

84-3529 Furnco Construction Corporation (1985)

The ALJ affirmed an alleged violation for failure to provide a medical surveillance program, medical examinations, and doctors' reports for employees who, for more than ten days per year, performed maintenance work replacing a damaged wall on a steel mill coke oven, Additionally, Respondent did not have a physician determine whether employees were physically fit to wear respirators. Respondent's assertion that the cited standard only applied to the owner of the steel mill where the work was performed was rejected. Department of Public Health Rules 325.50123, 325.5012-7, and 3502(2)(d) were cited.

345 NOISE

Personal Protective Equipment

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

Lack of Knowledge
Operations Manual
Reduced to Other Than Serious

EVIDENCE

Operations Manual

OPERATIONS MANUAL

PERSONAL PROTECTIVE EQUIPMENT

Noise

84-3402 American Bumper & Manufacturing Company (1985)

Respondent was cited for a serious violation of the MIOSHA noise standard, Department of Public Health Rule 2401. Respondent's contention that it did not know of the violation was rejected. It was held that the knowledge element of a serious violation refers not to Respondent's knowledge of MIOSHA requirements but to knowledge of the physical conditions that constitute the violation. Respondent's management clearly knew of the noise in the plant. However, the citation was reduced from serious to OTS because the Department offered only its operations manual in support of its classification of the violation as serious. The manual provided that noise levels in excess of two times the allowable level without the use of hearing protection shall be classified as serious. The manual had not been promulgated as an administrative rule. No other evidence was offered to prove that the noise level in the plant could result in death or serious physical harm, as required by MIOSHA, for a serious violation. Therefore, the Department had not met its burden of proving that the violation was a "serious violation."

346 EMPLOYER DEFENSES

Economic Motives

SAFETY NETS

83-3172 Douglas Steel Erection Company (1984)

The ALJ found violations of Rule 408.42613(2) for failure to provide safety nets for employees erecting steel columns and trusses on a tiered building's second floor 37 1/2 feet above railroad tracks. Respondent argued that it was impossible to use nets above the railroad tracks because of the need to use the tracks. Nets could have been placed just below the floor and trains could have used the tracks, but Respondent argued that this would have had to be approved by Conrail.

It was held that the need for Conrail to approve Respondent's use of safety nets did not excuse compliance with the standard. Economic motives may not be used to compromise employee safety. Respondent neglected its duty by giving higher priority to the uninterrupted operation of the trains than to the safety of its workers.

347 SCAFFOLDS

Bridging
Safety Factor

WITNESSES

Credibility
Qualifications

83-3232 Owens-Corning Fiberglas Corporation (1984)

The ALJ ruled that the Department failed to establish an employer violation of Rule 408.41211(1) and (5), Part 12 of the CSS, by not providing bridging between scaffold trusses to hold them in proper alignment. The safety officer recommended a citation be issued based on his observation that the trusses were bowed. It was found, however, that the safety officer was not qualified to determine whether the trusses were damaged or weakened because he had no formal engineering education and only one-half day of in-service training in scaffold erection. Respondent's expert witness explained that the trusses were not weakened or damaged, since they were not kinked or bent beyond their elastic limit. A charge that the scaffold could not support four times its maximum load-bearing capacity as required by Rule 408.41211(3) was also dismissed. Complainant had claimed that the scaffold had a safety factor of 1.72 to 1 and was 233% overloaded. It failed to rebut the expert witness's calculation that indicated the safety factor was 4.27 to 1.

348 CRANES

Hard Hats
Part 18 Applicable Only to Overhead and Gantry

82-2680 GMC, Fisher Body Division (1985)

Respondent was cited for violation of Part 18 of the GISS, Rule 1859(2), which applies only to overhead and gantry cranes. The crane which was being operated had a top running bridge and an underlying hoist trolley. Based on a previous decision of the Board, which was affirmed by a Circuit Court, the AU held that the cited crane was not an overhead crane as the Department contended. Therefore, the citation was dismissed. See Whitehead and Kales v Director of Labor, Ingham County Circuit Court No. 77-20355-AA (1981); Board File NOA 76-18-AA (1977), par. 11.

The Board reversed the decision finding that an amendment to Part 18 effective 11/15/76 excluded Respondent's crane from coverage of Part 18. The Ingham County Circuit Court affirmed the Board's decision in an order dated 6/30/81.

349 JURISDICTION

Late Department Decision
Communication Problem Late Employer Petition/Appeal
Communication
Good Cause Test

84-3575 Alma Products Company (1985)

The Department argued that a mix up in communication delayed mailing the decision within the 15 working day period. This was not held to constitute good cause.

350 JURISDICTION

Late Employer Petition/Appeal
Contacting a Third Party
Good Cause Test
Small Employer
Vacations

84-3429 Down River Precision Piping (1984)

Good cause was not found where a small employer referred citations to the General Motors Safety Department for action, thereby delaying the filing of a petition. Later, a vacation and backlogged paperwork delayed filing of an appeal. It was concluded that Respondent did not act with reasonable diligence in pursuing its appellate rights.

351 JURISDICTION

Late Employer Petition/Appeal
Good Cause Test
Mail Handling

85-3756 Edgar Boettcher Masonry (1985)

Respondent asserted that he received the Department's citation later than shown in the record. It was argued that the date on the postal receipt was not when Respondent received the citation but when the post office received the document. This argument was rejected by the ALJ.

352 TRAINING

Tractors

WITNESSES

Credibility

84-3308 MSU, Park and Planning Department (1985)

The ALJ found that MSU did not train and qualify its employees to operate tractors as required by Part 22 of the GISS, Rule 2234. The citation was issued following an investigation of an accident in which an employee was injured after falling from and being run over by a tractor which hit a bump on a golf course. The driver's testimony that he had only been instructed not to allow anyone to ride on the tractor's hood contradicted the course maintenance supervisor's testimony that employees were instructed in safe operating procedures. The ALJ found that giving work rules and general university rules to each new employee did not ensure that they were trained in tractor operations.

353 JURISDICTION

Late Employer Petition/Appeal
Citation Lost After Employer Pickup
Good Cause Found
Citation Lost After Employer Pickup
Mail Handling

79-1257 Consumer's Power Company (1981)

Respondent filed an untimely petition for dismissal. The ALJ found that good cause was not presented for the late filing. The envelope containing the Department's citation fell behind the seat of Respondent's truck used to pick up the mail from the post office. The envelope was later discovered by another driver and routed to the proper person to file a response.

It was concluded by the ALJ that Respondent did not properly instruct its mail pickup person in proper mail-handling duties.

This decision was reversed, and the case remanded by the Board in an Order issued 1/30/81. All items appealed by Respondent were resolved and a settlement agreement approved on 5/8/81.

354 PERSONAL PROTECTIVE EQUIPMENT

Respirator

TESTING

Device - Removed by Employee
Reliability

82-3037 Duane Smelser Roofing Company (1985)

Respondent was cited for failure to provide a respirator to a kettle man working on a roofing operation, Rule 2101. Under the health standards, a respirator was required when an employee's exposure to hazardous materials exceeds certain maximum allowable concentrations. The kettle man testified that he had removed the testing equipment while the department's hygienist was in another part of the plant. For this reason, the ALJ concluded that the test data was unreliable, and the Department failed to prove that Respondent's exposure exceeded the maximum allowable concentration. Therefore, the citation was dismissed.

355 EMPLOYER DEFENSES

Greater Hazard

INTERLOCKS

SCAFFOLDS

83-3301 Venture Industrial Corporation (1985)

Respondent was cited for failure to interlock a safety gate on an injection molding machine with a mechanical device, as required by Rule 6234(1) of the GISS. The machine was interlocked with electrical and hydraulic devices. The ALJ concluded that there was no competent evidence to support Respondent's affirmative defense that compliance with the standard would cause a greater hazard than noncompliance. The citation was affirmed.

356 SETTLEMENT

Medical Records

Opposed by Union Group

MEDICAL RECORDS

84-3458 Kalamazoo Stamping and Die Company (1985)

The ALJ found no merit to the union objection to a settlement agreement where Respondent agreed to withdraw contest of the citation and provide all required medical records to employee representatives. The Department of Public Health also agreed to extend the abatement date. Local 70 of the UAW argued that Respondent was in violation of Rule 325.13460 and the citation should be upheld. It was asserted that the rule required Respondent to provide medical records in the hands of a third party in addition to records in its possession. The ALJ concluded that the union objection was without merit, since by withdrawing its notice of contest, Respondent had acknowledged a violation of the cited rule and the Department had certified that the violation was abated. Therefore, there was no further need for a hearing.

357 SCAFFOLDS

CITATION

Inspection Dates Limited to Cited Employer
Timeliness of Issuance - 90 Days

83-3113 Ovens-Corning Fiberglas Corporation (1985)

The ALJ dismissed two items of a citation alleging failure to comply with the standards for tube and coupler scaffolds. The case involved a multi-employer job site of which Respondent was one of the subcontractors. On-site inspections were performed from 10/82 through 2/83. The alleged violation took place on 11/9/82. The citation was issued on 2/18/83.

It was held that Section 33 of MIOSHA requires Complainant to issue citations at the time of inspection or within 90 days after the inspection. In the instant case, the citation was issued 102 days after the inspection. Furthermore, Complainant failed to designate the specific date of inspection on the citation. The citation contained all of the dates of inspection by the safety officer at the work site, contrary to the directions in W & K Erectors, Inc., NOA 78-827, par, 105, and Mundet Insulation Co, NOA 79-1293, par. 169.

358 JURISDICTION

Late Employer Petition/Appeal
Citation Issued to Wrong Company
Mail Handling
Oral Filing

85-3697 Dynamic Construction (1985)

Good cause was not found for late filing of petitions and appeals. Respondent argued:

1. A former employee thought petition was filed orally to safety officer.
2. No appeal was needed because citation was issued to the wrong company.
3. Supervisors concentrated on safety instead of paperwork.

A reasonably prudent employer would have established a system of citation review and appeal and communicated this policy to its employees. The explanation of Respondent shows carelessness, negligence, and a lack of reasonable diligence.

359 JURISDICTION

Late Employer Petition/Appeal
Automobile Accident
Death
Good Cause Found
Accident
Death

84-3568 Tanloy Motors Inc (1985)

Good cause for a late filing was found where sole stockholder and president was injured in an automobile accident during the summer of 1983 and later passed away on 9/4/84. The parties later settled all items on appeal.

360 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Key Employee
Illness/Death/Resignation
Key Employee
Illness/Death/Resignation

84-3513 Dan's Excavating (1985)

Good cause for a late petition was found where the person who handled MIOSHA matters had resigned. This caused delay in the performance of his duties.

It was reasonable for Respondent to assign responsibility for handling MIOSHA matters to a specific employee. Confusion can result if that person leaves employment. No carelessness, negligence, or lack of reasonable diligence was shown on the record.
The parties later settled all items on appeal.

361 PETITION TO MODIFY ABATEMENT DATE

Exceptional Circumstances for Late Petition

PMA 85-1535 Crystal Downs Country Club (1985)

Exceptional circumstances for a late filing were found where Petitioner was assured by two local hardware stores that ladder safety would be in "any day."

362 INSPECTION

Material Samples

WARRANTS

Material Samples

80-2105 GMC, Saginaw Steering Gear Division (1986)

Respondent refused to allow a safety officer to take one of many broken abrasive wheels observed during a complaint inspection. For that reason, the Department issued a citation alleging Respondent violated Administrative Rule 1325(2), Part 13, by failing to allow the Department's representative to take material samples related to the purpose of the inspection. The ALJ held that the administrative rule, which states that the Department may take air, environmental, and material samples, does not impose a duty on employers to allow the Department to take such samples. Based on both the administrative rules and Marshall v Barlow's. Inc, 436 US 307 (1978), employers may refuse to allow an inspection without an administrative search warrant. Moreover, the broken abrasive wheel was not a material sample within the meaning of the administrative rule.

The Department filed exceptions with the Board, but review was not directed.

363 JURISDICTION

Late Employer Petition/Appeal
Out of Town
Business
Small Employer

86-3965 Polsinelli Construction Company (1986)

Respondent argued that the petition for dismissal was timely prepared but not mailed on time because it had to be reviewed by a company official who was out of town on business. Respondent is a small company.

It was held, based on prior decisions, that a small employer is not given more than 15 working days to appeal. Also, there must be a reliable person designated during the absence of a primary company official to direct the handling of important mail. See DeMaat Brothers Painting Contractors, NOA 82-2754 (1982), and Power Seal Corporation, NOA 81-2612 (1982).

The appeal to the Board was dismissed.

364 **JURISDICTION**

Late Employer Petition/Appeal
Unaware of Appeal Rights

86-3973 Gage Products Company (1986)

Respondent argued that the appeal was filed late because they were not aware of a right to appeal.

Good cause was not found for the late filing because Respondent did not review the Department's decision, the reverse side of the citation, or the Board rules excerpt, all of which provided information concerning appeal rights.

Respondent's appeal to the Board was dismissed.

365 PETITION TO MODIFY ABATEMENT DATE

Exceptional Circumstances for Late Petition
No Explanation Filed

General Entry For Untimely Petitions With No Explanation

Respondent did not explain why the petition was filed more than one day following the end of the abatement period [Board Rule 441(3)].

Petition was dismissed.

366 JURISDICTION

Late Employer Petition/Appeal
Citation Amendment
Confusion

86-3931 Richard Mancini Equipment (1986)

Based on Respondent's petition for dismissal, the department issued an amended citation, clearly marked as such, and attached to it the Department's decision. The decision used the phrase "amended citation is being issued." Respondent believed the amended citation would arrive later. The attached citation was not examined.

Good cause for the late appeal was not found. Respondent did not act reasonably by failing to examine the amended citation attached to the Department's decision. The good cause test is based on the expectation of reasonable conduct.

The appeal to the Board was dismissed.

367 TRAINING

Lockout Procedures

LOCKOUT PROCEDURES

84-3453 GMC, A C Spark Plug Division (1986)

Respondent was in violation of machine lockout requirements, Rule 11(c) and 32(1) of the GISS, where an employee's finger was crushed during repair of a dry test filter machine which became activated. The employee never attended a safety orientation meeting, nor did she receive a copy of the company's safety rules or complete a safety induction sheet during her 17 years of employment. She had been lead to believe that "lockout" meant shutting off the main disconnect switch. Respondent issued a lock to the employee after the accident.

The ALJ rejected Respondent's assertion that it had established, maintained, and assured the use of a lockout procedure by making new employees attend a 45 minute orientation and giving them a card listing safety rules.

368 NOISE

Feasible Engineering Controls
Sound Level Meters
Required Even If Levels Not Reduced To Table G-16 Limits

IMPACT NOISE

82-2677 LeFere Forge Company (1986)

During an, inspection of Respondent's forging plant, department personnel used dosimeters to measure employee noise exposure ranging from 101 to 109 equivalent DBA. The ALJ rejected Respondent's contention that the noise standard requires use of sound level meters to measure noise, which is included in dosimeter measurements, from the prohibited exposure in excess of Table G-16 limits. Moreover, it was held that engineering controls which are technologically and economically feasible may be required even if noise exposure is not reduced to Table G-16 limits. Certain engineering controls recommended by the department were determined to be technologically and economically feasible. Respondent has appeal to Circuit Court.

369 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Mailroom Prior Practice
Mailroom Prior Practice

79-1730 GMC, Engineering Staff (1980)

Good cause for Respondent's late appeal was found where a legal secretary hand delivered the appeal to. Respondent's mailroom by 11:00 a.m. on 12/7/79. In the past, all mail delivered to the mailroom by 3:00 p.m. was postmarked the day of delivery. Respondent's explanation showed reasonable diligence and did not establish carelessness or negligence.

The parties later settled all items on appeal.

370 CONVEYOR

DUE PROCESS
Interpretation of Enforcing Agency

HEARING
Directed Verdict

STANDARD
Interpretation
Interpretation of Enforcing Agency

83-3131 GMC, Hydramatic Division (1985)

The ALJ issued an order dismissing the citation. The cited rule was 1427(2) of the GISS which provides:

> A hook or carrier used on a monorail and a trolley conveyor to carry objects shall be designed with a minimum safety factor of five and maintained to hold the object or carriers without creating a hazard.

No evidence was presented by the department concerning the safety factor of five. The item was dismissed by the ALJ on the record because the department did not prove all of the elements needed to find a violation. This ruling was repeated in a written order after considering post-hearing briefs from both parties.

370 (Continued)

The Board remanded the case for further hearing. It was concluded that a violation of either element set forth in the rule is a citable violation. The Board chose to give deference to the agency's interpretation of the rule since it is reasonable. Also, noted was the Board's belief that the department's interpretation better achieved the Act's objective of providing a safe and healthful work place.

On remand, the ALJ dismissed the citation (6/18/87) because Respondent was cited under the wrong standard,

Respondent's employees use an air-powered hoist to take 150 pound transmissions off a 200 to 300 foot conveyor system and place them in a shipping rack. An inspection was conducted because a transmission that had been removed from the conveyor and placed on a pneumatic hoist fell on an employee's toe after it bumped into a passing hi-lo truck.

Respondent should have been cited under the hoist standard rather than the conveyor standard.

After review, the Board issued a decision dated 11/20/87 reversing the ALJ and affirming the citation. The Board concluded that Respondent did not maintain the hooks in a manner to hold the transmissions. While visual inspections were made, there was no effort to be sure the hooks were in proper shape and not weakened with cracks. Respondent could install a hook-locking device to eliminate the risk of transmissions falling from the hooks. The hooks were found to be an integral part of the conveyor operation. Detaching them while the transmissions are being unloaded does not "sever [their] functional ties to the conveyor." The Department acted correctly in citing Respondent under the conveyor standard.

The Board found that transmissions frequently fell from the hooks while being suspended from the pneumatic hoist at the unloading station. As many as 200 to 250 fell during the five years preceding the Department's investigation.

371 WELDING & CUTTING

Restraining of Cylinders
Cutting Activities
Distribution & Supply Companies

85-3761 Miller Brothers Iron & Metal Company (1986)

GISS Rule 1223(1) requires that cylinders be prevented from falling by use of restraints.

A violation was upheld for unrestrained cylinders observed in the yard being used by employees engaged in cutting operations.

The violation was dismissed for unrestrained cylinders in a storage building because the rule was held not to apply to the storage and delivery of compressed gas cylinders by welding supply manufacturers and distributors. Respondent operates both a cutting operation and a distributor business.

It was concluded that the Department adopted an OSHA instruction letter STD 3-8.2 excluding distribution and supply activities from coverage.

The Department filed exceptions with the Board, but review was not directed.

372 JURISDICTION

Late Employer Petition/Appeal Mail Handling Postmarked

86-3938 Four Winns, Inc. (1986)

Good cause was not found where Respondent placed the petition in its internal mail system on the 15th working day. Administrative Rule 1351(1) requires that the petition be post marked within the 15 working day period. Placement in the company's mail system on the 15th day did not satisfy this requirement.

373 JURISDICTION

Late Employer Petition/Appeal
Employer Too Busy

86-4484 Motor City Electric (1987)

Good cause for Respondent's late appeal was not found where a heavy workload caused the appeal dates to be overlooked. A reasonably prudent business person would have read the Department's decision and attached excerpt from the Board's rules. These documents contained information for filing a timely appeal to the Board.

374 EMPLOYER

Control Over Work Area

STANDARD

Interpretation

Protection of Employees

84-3498 Dale Industries, Inc. (1986)

An employee was injured while working on an automatic roll form machine at Respondent's plant. The stop cable on the machine was not functional because one end was unattached. The ALJ affirmed the citation for violation of a rule that provides: a "stop cable shall be provided" on a roll form machine, Part 26 of the GISS, Rule 2641(1). Respondent's contention that the presence of a disconnected stop cable satisfied the rule, was rejected. The stop cable was not personal protective equipment which must be utilized by the employee. It was Respondent's duty to make sure the stop cable was connected and functioning.

375 EMPLOYER DEFENSES

Isolated Incident

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

Employer Knowledge Established

SUPERVISION

84-3467 Budd Company (1987)

Respondent was cited for failure to ensure by adequate supervision that correct operating procedures were followed by an employee assigned to a mechanical press, Part 24, Rule 2411(1), GISS. It was undisputed that the correct operating procedure was for employees to use hand tools rather than put their hands in the points of operation of mechanical presses. The employee's hand was amputated as she operated the press without a hand tool. The employee's supervisor had not instructed her regarding operation of the press, and he was absent from the area at the time of the accident. The ALJ affirmed the citation, holding that the standard was not vague in requiring Respondent to ensure correct operating procedures "by adequate supervision." This was not an instance of isolated employee misconduct because Respondent's enforcement of its safety policy was inconsistent and other employees operated presses without hand tools. Moreover, Respondent could have known of the violation with the exercise of reasonable diligence.

376 PETITION TO MODIFY ABATEMENT DATE

Exceptional Circumstances For Late Petition

Abatement by Ceasing Work

PMA 86-1557 Browning-Ferris Industries of Michigan (1986)

Petitioner filed an untimely petition for abatement extension [Board Rule 441(3)] but stated in a letter of explanation that work had ceased in the "cited area."

Based on this statement, it was concluded that abatement had been achieved and an abatement extension was not necessary.

377 JURISDICTION

Late Employer Petition/Appeal

Fifteen Working Days

Layoff Period

86-4036 Winter Seal of Flint, Inc (1986)

Good cause was not found for the late appeal due to a layoff and shutdown of operations during the 15 working day appeal period.

Section 6(a) of MIOSHA defines a working day as any day other than a Saturday, Sunday, or state legal holiday. MCL 435.101 lists the state legal holidays.

Respondent's layoff period cannot be excluded from the 15 working day computation.

378 PETITION TO MODIFY ABATEMENT DATE

Exceptional Circumstances For Late Petition

PMA 86-1566 Thornapple Township Fire Department (1986)

Board Rule 441(3) requires a petition for extension of abatement to be filed "no later than the close of the next working day following the date on which abatement was originally required. A late petition must have a statement of "exceptional circumstances" to explain the delay. The term "exceptional circumstances" was defined as requiring Petitioner to show that something out of the ordinary delayed the petition filing. A test of reasonableness is required.

Petitioner argued that "a small rural fire department and township, with only a part-time board and department and no staff presents exceptional circumstances to explain the delay.

378 (Continued)

It was concluded that even small employers must follow the MIOSHA Act, applicable safety standards, and promulgated rules. Employee safety cannot be conditioned on the size of the employer.

Exceptional circumstances were not found for the late filing.

379 PETITION TO MODIFY ABATEMENT DATE

Exceptional Circumstances for Late Petition

PMA 86-1562 Lite Manufacturing Company (1986)

Board Rule 441(3) requires a petition for extension of abatement to be filed "no later than the close of the next working day following the date on which abatement was originally required." A late petition must have a statement of "exceptional circumstances" to explain the delay. The term "exceptional circumstances" was defined as requiring Petitioner to show that something out of the ordinary delayed the petition filing. A test of reasonableness is required.

In this case, Petitioner argued lack of knowledge of abatement dates or the possibility of securing an extension.

Exceptional circumstances were not found for the late filing because Petitioner did not act in a reasonable fashion. Nothing out of the ordinary delayed a timely filing. The employer did not review the extension information on the reverse side of the citation.

380 JURISDICTION

Late Employer Petition/Appeal
- Human Error
- Key Employee
  - Illness/Death/Resignation
- Mail Handling

80-2091 L K Comstock & Company, Inc. (1981)

A file clerk who terminated employment inadvertently destroyed company correspondence including the citation. This caused the late filing.

Good cause was not found because Respondent has the obligation to promptly examine and answer important mail. Respondent is responsible for clerical errors even though there was no intent to file a late petition. Respondent knew of the 15 working day appeal period. The failure to ensure prompt action by the clerical staff is an act of omission that shows a lack of reasonable diligence.

381 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Key Employee
Illness/Death/Resignation
Key Employee
Illness/Death/Resignation

86-4108 A Z Shmina & Sons Company (1987)

Good cause for a late petition was found because the vice president in charge of field operations was ill, as noted in Dan's Excavating, NOA 84-3513 (1985), ¶360, it is reasonable for Respondent to assign responsibility for handling MIOSHA matters to a specific employee. When this employee becomes ill, delay in the filing of important documents can occur.

382 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Key Employee
Illness/Death/Resignation
Key Employee
Illness/Death/Resignation

84-3587 Venture Industrial Corporation (1988)

The plant engineer who previously handled Department citations retired. The paperwork regarding the citation was not discovered by the company administrator until after the appeal period had expired. Good cause for a late appeal was found. It is reasonable for Respondent to assign the handling of MIOSHA matters to a key employee. See Dan's Excavating, NOA 84-3513 (1985), ¶360.

383 JURISDICTION

Late Employer Petition/Appeal
Confusion
Good Cause Found
Confusion

86-3955 Plastic Masters, Inc (1987)

Good cause for a late appeal was found where Respondent filed a variance request within the appeal period. An appeal was not filed because Respondent believed the request for a variance was a continuation of the appeal procedure. Even though the variance procedure of Section 27 is separate from the appeal procedures of Sections 41, 42, and 46, Respondent's confusion was reasonable.

384 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Post Office Error Post
Office Error

86-3966 Polsinelli Construction Company (1987)

Good cause for a late petition was found where the post office delivered the citation to Respondent's neighbor.

385 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Written Inquiry Within Appeal Period
Written Inquiry Within Appeal Period

86-4027 Thompson-McCully Company (1987)

Good cause for a late appeal was found where Respondent sent a letter of inquiry within the 15 working day appeal period. This letter expressed dissatisfaction with the Department's denial and may be considered as the appeal even though it does not clearly request this result. Having asked the Department for an explanation of its denial of Respondent's petition, it was reasonable to wait for a Departmental response.

386 JURISDICTION

Late Employer Petition/Appeal
Confusion
Human Error

87-4287 Webcor Packaging Corporation (1987)

Good cause for a late petition was not found where the plant supervisor confused the date an abatement response was required with the date for filing a timely petition.

The reverse side of the citation sets forth the time periods for appealing a citation and asking for abatement extensions. Reference was made to Wayne County Road Commission, NOA 81-2247 (1981), ¶265, where human error did not constitute good cause.

387 JURISDICTION

Late Employer Petition/Appeal
No Explanation for Late Filing
Telephone Communication

87-4303 Ruggeri Electrical Contracting (1987)

Respondent filed a response to the Notice of Docketing and Order but did not explain why a late petition was filed. The submission argued a telephone conversation was held with the Department within the 15 working day appeal period. As noted on the reverse side of the citation, a petition must be filed in writing. A telephone call is insufficient to file a petition.

388 JURISDICTION

Late Employer Petition/Appeal
Out of Town
Business

87-4320 Design & Building Inc of Lansing (1988)

Good cause for a late petition was not found where the owner/safety officer/construction manager was out of town on business. Since Respondent knew of the inspection and areas of concern, it was unreasonable for the only safety officer of the company to leave town without assigning someone to respond to the citation if it came during his absence. Also, the company's key employee returned on 5/18/87. The petition needed to be postmarked by 5/28/87 to be timely. Respondent did not act reasonably by not filing a petition within this time period.

389 PETITION TO MODIFY ABATEMENT DATE

Exceptional Circumstances For Late Petition

PMA 87-1605 Unistrut Corporation (1987)

Exceptional circumstances were established by reduction in work force including the layoff of the company safety officer. The person in charge overlooked the deadline for filing. The test for determining exceptional circumstances is one of reasonableness.

390 PETITION TO MODIFY ABATEMENT DATE
Exceptional Circumstances For Late Petition

PMA 87-1619 Valley Company (1987)

Exceptional circumstances were established by unforeseen personnel problems, an increase in business, and purchase of another company. These events made it reasonable for Petitioner to miss the filing deadline.

391 PETITION TO MODIFY ABATEMENT DATE
Exceptional Circumstances For Late Petition

PMA 87-1632 Towne Robinson Fastener Company (1987)

Exceptional circumstances were established because one item was involved in a first step appeal. Although filing a first step appeal under Section 41 of MIOSHA does not stop the running of an abatement period, Respondent's confusion was reasonable. A timely PMA was requested for the remaining items.

392 PETITION TO MODIFY ABATEMENT DATE
Exceptional Circumstances For Late Petition

PMA 87-1620 Jackson Manufacturing & Design, Inc (1987)

Exceptional circumstances were presented because the person filing the request was also plant manager in charge of purchasing, production control, supervision of shipping and receiving, personnel, and safety. Because of these duties, the abatement extension request was filed late.

393 PETITION TO MODIFY ABATEMENT DATE
Exceptional Circumstances For Late Petition

PMA 87-1625 Towne Robinson Fastener Company (1987)

Exceptional circumstances were presented with evidence showing the citation does not have a time table for an "immediate" abatement date.

394 PETITION TO MODIFY ABATEMENT DATE

Exceptional Circumstances For Late Petition

PMA 87-1651 United Paint & Chemical Corporation (1987)

Exceptional circumstances were presented due to the illness and surgery of the person-in charge of correcting safety violations. No one was assigned to take over these responsibilities during this period of time.

395 JURISDICTION

Railroads

POSTING

PREEMPTION - SECTION 4(b) 1 OF OSHA

Railroads

79-1414 Grand Trunk Western Railroad (1980)

The citation for failure to post a summary of illnesses and injuries was dismissed based on preemption by the Federal Railroad Administration. Federal Rule 225.25(e) provides for posting of reports and requires information virtually identical to the State Rule 1114(4). Also, in the case of Consolidated Rail Corp, CCH Vol. 1978, par. 22763, a Federal Review Commission ALT dismissed a citation for failure to comply with OSHA Regulation Section 1904.7 which allowed access to OSHA required records.

The finding in the Grand Trunk case was effectively reversed by the Federal District Court decision in Norfolk and Western Railway v Department of Labor, 587 F Supp 161 (1984). The Court concluded MIOSHA was preempted by the Federal Railroad Safety regulatory scheme but only as to the railroad's tracks, roadbeds, and walkways. The requirement to post MIOSHA's required notices is not preempted. **(See Paragraph 409 where the Department agreed posting is also preempted.)**

396 FLOOR OPENING

86-3989 Pearless Gear (1986)

The Department alleged a violation of Part 2 of the GISS, Rule 220(1), after the safety officer observed an employee removing cables from the top of a bundle of steel bars, 5 1/2 to 6 feet above the floor. Rule 220(1) requires the use of stairs, ladders, or ramps to gain access to an elevation of more than 16 inches. The standard is directed at hazards created by persons, material, or equipment falling through or onto floors, wall holes, openings, or from stairways or runways. The ALJ concluded that the wrong standard was cited since no evidence was offered that the employee was in danger of falling through floor or wall openings.

397 EXPOSED TO CONTACT

Power Bender

STANDARD

Interpretation

85-3684 GMC, Saginaw Steering Gear, Plant #2 (1986)

Rule 2642(1) requires an operator using a power bender activated by a single stroke foot control to use both hands to hold the work piece remote from the point of operation. Respondent was cited for an alleged violation of this rule since only one of the operator's hands held the work piece.

The citation was dismissed by the ALJ because the Department failed to prove that an employee was exposed to a hazard. The evidence established that when an operator placed a work piece into the point of operation with one hand and activated the foot control, the other hand was holding the next work piece to be placed into the bender. Both hands, although not on the same work piece, were on work pieces remote from the point of operation and were not exposed to an amputation hazard as alleged. Since 1969, at least 20,149,864 work pieces had been processed on the bender without injury to an employee.

398 FOOT PROTECTION

Settlement Agreement

PRECEDENT

Res Judicata

RES JUDICATA

SETTLEMENT

Binding Nature

86-3918 Merillat Industries (1987)

The Department entered into a settlement agreement with Respondent permitting employees handling doors, cabinets, conveyors, and metal racks to wear substantial footwear - leather toes and a substantial sole.

After a subsequent injury to an employee's foot, Respondent was cited for failing to ensure that employees wear steel-toed shoes, Part 33 of the GISS, Rule 3385(1). The ALJ held that under the principle of res judicata, Respondent could not be cited for the same alleged violation after entering into a settlement agreement with the Department. It was concluded that fundamental fairness requires the Department be precluded from citing an employer engaging in conduct consistent with the settlement agreement.

399 EMPLOYER DEFENSES

Machine Not Built With A Guard

GUARDING

Saws

Band Saw

SAWS

Band Saw

86-3995 Hammer & Smith Electric Company, Inc (1988)

The ALJ affirmed the Department's citation of an OTS violation. One of Respondent's employees was seen using a horizontal metal cutting band saw with the unused portion of the blade unguarded. The Department demonstrated that there were at least five methods of guarding the unused portion of the blade. Respondent's defense that the saw was not built with guards was rejected. Rule 408.41963, Part 19, of the CSS was cited.

400 EMPLOYER DEFENSES

Equipment Not Plugged In

FLOOR MAINTENANCE

GUARDING

Grinder

HOUSEKEEPING

85-3712 Clawson Tank Company (1987)

Respondent was cited for failure to maintain a floor free of slip-and-trip hazards. The ALJ rejected Respondent's defense that it was impossible for the employee, who was performing a cutting operation, to pick up each piece of scrap as it fell. Part 1 of the GISS, Rule 15(3), requires only that scrap be picked up when it became a hazard.

Respondent also was cited for failure to guard a right-angle head portable grinder, Part 1A, Rules 122 and 123. The ALJ concluded that even if the grinder was unplugged, there was employee exposure to the hazard since an employee could have plugged the grinder in and used it.

401 EMPLOYER DEFENSES

Employee Violated Production Requirements Not Safety Rule

GENERAL DUTY CLAUSE

Air Hoses On Assembly Line

RECOGNIZED HAZARD

Actual Knowledge

WILFUL VIOLATION

Reduced to Serious

83-3051 GMC, Truck and Coach Division, Pontiac (1987)

During model changeover, Respondent revised the arrangement of air tools attached to air hoses hanging from overhead rails on the engine line. After the engine line resumed production, air tools frequently became caught on the conveyor's engine carriers. When this happened, the air hose would sometimes be stretched to its limit, come loose, and recoil. Respondent's management and maintenance personnel attempted to correct this problem on several occasions. After an employee was injured by a recoiling air tool, the Department cited Respondent for a "willful serious" violation of MIOSHA for failing to furnish a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm to employees [GDC, Section 11(a) of MIOSHA].

401 (Continued)

The ALJ held that the hazard was recognized because Respondent had actual knowledge. Moreover, the Department's failure to specify the safety precautions Respondent should have taken was not a defense since the evidence established that feasible measures were available to correct the hazard. Finally, it was held that the employee's alleged violation of a production requirement, as opposed to a safety rule, was not a defense. The violation was changed from "willful serious" to "serious" because Respondent did not act with intentional disregard or demonstrate plain indifference to MIOSHA.

The Wayne County Circuit Court affirmed the decision of the Board and the ALJ and found Respondent had actual knowledge of the violation with numerous complaints over a two week period, and that there was sufficient evidence in the record to show feasible measures were available to correct the hazard. It was also proper for the ALJ to consider the testimony of assembly line workers as to the existence of feasible methods for correcting the hazard.

402 JURISDICTION

Late Employer Petition/Appeal
Employer Too Busy

87-4487 Delta Tube & **Fabricating Corporation (1988)**

Good cause was not found where it was argued a small company was growing too rapidly for the safety manager to handle all tasks connected with the company plus file a timely petition. The decision pointed out that Department citations must be issued within 90 days after an inspection. A reasonable person would have been expecting a citation and planning the need to file a petition.

403 JURISDICTION

Late Employer Petition/Appeal
No Explanation for Late Filing

General Entry For Untimely Cases

Respondent filed a late petition for dismissal or appeal. Respondent submitted a response to the Order To Show Cause but did not explain the late filing.

404 JURISDICTION

Late Employer Petition/Appeal
Safety Officer

88-4531 Poley Masonry Construction (1988)

Good cause was not found where Respondent argued reliance on directions provided by the safety officer and assumed the citations were dismissed. Whatever the safety officer told Respondent's representative during the inspection, a citation was received by Respondent. This citation clearly stated how a protest could be filed and the 15 working day appeal period.

405 JURISDICTION

Late Employer Petition/Appeal
Confusion
OSHA vs MIOSHA Requirements

87-4474 CBI Industries, Inc (1988)

Good cause was not found where Respondent confused the OSHA appeal procedure with the Michigan requirements. Michigan has a two-step level of appeal, each of which must be filed within 15 working days. While Respondent's argument might have been accepted in the early days of the Michigan program, MIOSHA took effect on 1/1/75. Based on the time MIOSHA has been in existence, good cause is not established by pointing to differences in appellate procedures.

406 JURISDICTION

Manufacturer
Construction Operations

85-3640 Great Lakes Steel (1988)
85-3710
85-3797
86-3936

The ALJ held that the Department could not cite Respondent for violation of the CSS because Respondent was not engaged in construction activities. Respondent is a manufacturer, not a contractor. Its employees were engaged in force account construction (construction performed by an employer primarily engaged in a business other than construction, for its own benefit and use by its own employees).

Section 4(4) of MIOSHA defines construction operations as work activity in major groups 15, 16, and 17 of the Standard Industrial Classification Manual (SIC). The activities of Respondent's employees did not fall within this definition because Respondent is a manufacturer. Moreover, the manual states that it does not cover "force account construction."

406 (Continued)

The Board issued a Remand Order on 9/28/88, setting aside the ALJ's order. The Board held that the purpose of the SIC Manual is to classify industry by type for recordkeeping and analysis not to delineate jurisdiction. Reference was made to Section 19(1) of MIOSHA which gives the CSS Commission wide latitude to promulgate CSS according to generally-accepted nationwide engineering standards to prevent accidents and protect life in construction operations.

The Board relied on several decisions of the Federal Review Commission where standards were applied to employers based on the work in progress, not the type of company involved. Jurisdiction is determined by the work performed, not the classification of the industry.

The Wayne County Circuit Court found that since the Department used CSS against Respondent who is not primarily engaged in construction, the citations must be dismissed.

The Court of Appeals disagreed and found MIOSHA unambiguously applies construction and safety standards to construction activities regardless of the employer's classification. A business's SIC code designation classifies for statistical purposes only. "We refuse to read into the statute that the standards apply to the work activity of establishments designated in the applicable major groups."

407 CREDIBILITY

FALL PROTECTION

Power Press Work
Work From Solid Construction

PRESSES

Fall From

85-3798 GMC, BOC Metal Fabricating (1988)

Respondent was cited for violation of Part 5 of the GISS, Rule 511(1)(2), regarding scaffolding. This rule requires that an employee engaged in work that cannot be done safely from the ground or from solid construction be provided a scaffold from which to work or wear a safety harness or lifeline. Employees who worked on top of a power press were not provided a scaffold and did not wear safety harnesses or lifelines. The ALJ affirmed the citation because work performed on the slippery press without equipment to prevent a 14 foot fall was unsafe. Respondent's contention that a safety belt or harness was not required because the work station was not 25 feet above the floor, as specified in Part 33, Rule 3390(1), was rejected.

407 (Continued)

The Board reversed the ALJ's proposed decision and dismissed the alleged violation of Rule 511(1)(2).

The Board concluded that Part 5 of the GISS containing Rule 511 did not require use of scaffolding or harness and lanyard in operation of a power press. Part 24, which does cover power presses, does not require harnesses and lanyards. Rule 511(1) requires guarding only when the employee's work station is more than 25 feet high. The facts establish only a 12-14 foot height. The rule requires a scaffold when the work cannot be done from "solid construction." The Board concluded the power press was "solid construction."

The Board also gave greater weight to the testimony of Respondent's witnesses and found the power press work was performed safely.

The Ingham County Circuit Court affirmed the Board's decision to dismiss the citation against Respondent.

408 GUARDING

Saws

Band Saw

SAWS

Band Saw

STANDARD

Interpretation

86-4087 GMC, CPC Engine Operation (1988)

Respondent was cited for violation of Part 26 of the GISS, Rule 2635(1)(a)(3), which requires guards on metal band saws. Respondent's saws cut by descending on the stock. The ALJ held that the saws are not metal band saws, as defined in the standard, because the metal is not pushed against the blade of the saw. The citation was dismissed.

409 JURISDICTION

Railroads

POSTING

PREEMPTION - SECTION 4(b)(1) OF OSHA

Railroads

88-4613 Grand Trunk Western Railroad (1988)

The Department settled the case with Respondent and acknowledged jurisdiction of the Federal Railroad Administration relative to posting a summary of employee illnesses and injuries. Respondent's appeal contains an analysis of Norfolk and Western Railway v Burns, 587 F Supp 161 (ED Mich, 1984), arguing that the only issue before the Court was OSHA jurisdiction over walkways. The Court's finding that walkways were preempted did not mean walkways were the only matters preempted. The Department apparently agreed and dismissed the posting citation.

410 FLOOR MAINTENANCE

HOUSEKEEPING

84-3343 Oakland County Medical Facility (1988)

The ALJ affirmed two OTS violations of the GISS's Housekeeping Standards, Part 1, Rule 15(3)(4). Respondent failed to maintain the kitchen floor free of slip-and-trip hazards - water on the floor. Respondent also failed to provide drainage, false floors, platforms or mats in front of the sinks, potscrub area, dishwasher, and garbage disposal.

The Department's prima fascia case was substantiated by the employee's complaints of slipping and falling and the union's independent inspection. Respondent did not go forward and rebut the evidence.

411 AUTOMOBILE LIFT
Maintenance

84-3610 K-Mart Corporation (1988)

The ALJ affirmed a serious violation of Part 72, Automotive Service Operations, Rule 7211. Respondent had a Weaver automotive lift in operation that was not properly maintained. The lift or hoist was operated for several months in a low oil condition, causing it to suddenly jump or drop. There was substantial probability that death or serious injury could result from an employee being under the lift when it dropped or adjacent to it when it jumped and dropped a vehicle.

412 BURDEN OF PROOF
Burden of Going Forward
Prima Fascia Case

EVIDENCE
Admission by Party Opponent - Not Hearsay

85-3631 Oakland County Maintenance Operations (1988)

The ALJ affirmed a serious violation of the Woodworking Machinery Standard, Part 27, Rule 2722.

Respondent made a hearsay objection to the safety officer's testimony of what the employee representative said to her during the investigation.

The statements made by Respondent's representative to the safety officer are not hearsay. They are admissible as an admission by a party-opponent.

Rule 801(d)(2)(D) of the Michigan Rules of Evidence states:

> (d) Statements which are not hearsay. A statement is not hearsay if -
> (2) Admission by party-opponent. The statement is offered against a party and is (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship.

It was held that Respondent's representative was acting in the capacity of maintenance engineer. He was an employee of Respondent at the time of the investigation. His statements are an admission by a party, admissible against Respondent, concerning a matter within the scope of employment made during the relationship.

412 (Continued)

An employee sustained thumb lacerations using a circular saw without a guard. Respondent did not present rebuttal evidence. Once a prima facia case for a violation is presented, the burden of going forward shifts to the employer. The serious violation alleged was affirmed.

413 DEMOLITION

EMPLOYEE

Vice President of a Corporation

WILFUL VIOLATION

Violation in View of Safety Officer
Warning by Safety Officer

84-3554 Pitsch Wrecking Company (1953)

The ALJ affirmed a willful violation of the demolition standards, Part 20 of the CSS, Rule 2031(a), and the $4,000 penalty. Respondent was willfully working with hazards and unsafe conditions without correcting them by shoring, bracing, or other methods.

The safety officer had pointed out to Respondent the exposure to falling objects when anyone was inside the partially demolished building to run wire rope through the walls. A dozer was used to pull the wire rope and thereby demolish the walls. Respondent was told to avoid entry without first shoring or bracing.

Despite this advice, there were two incidents of entry, the second by Respondent's vice president in plain view of the safety officer. A cease operation order was prepared and served on Respondent after the second incident.

Respondent's actions demonstrated a conscious indifference to the known hazards. The entry was deliberate and intentional.

Respondent's argument that MIOSHA did not apply to the vice president of the company was rejected. An employee is any person permitted to work, and an employer is an individual or organization which employs one or more persons. Respondent was an employer covered by the Act.

413 (Continued)

Section 35(4) of MIOSHA contains the authority to assess penalties for a willful violation. Section 36 of MIOSHA authorizes the Board to assess penalties considering the seriousness of the offense, the employer's prior history, and the size of the employer.

The proposed penalty was found to be reasonable, incorporating the criteria of Section 36 which also attempts to provide similar penalty amounts for similar offenses for all employers.

414 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Post Office Error
Post Office Error

87-4483 Van Sullen Construction Company (1988)

Good cause was found where Respondent produced a postage meter log showing the petition was mailed early in the 15 working day appeal period and an affidavit of a bookkeeper that the log was "true and accurate." It seems likely that the petition was mailed but not received by the Department.

415 JURISDICTION

Late Employer Petition/Appeal
Death
Good Cause Found
Death

87-4416 Steel Service Company, Ltd (1988)

It was reasonable for the owners to overlook some business obligations such as filing a timely petition when faced with the serious illness of a close family member. Good cause was found.

416 AUTOMOTIVE

JURISDICTION

Late Employer Petition/Appeal
Mail Handling
Settlement
At Any Stage of Proceeding
Proposed Settlement Agreement

SETTLEMENT

At Any Stage of the Proceeding

87-4490 Motor City Manufacturing, Regal Stamping (1988)

A late petition was filed because company officials believed the citation was received later than actual receipt and also because of mishandling by an employee. Good cause was not found because the mail handling showed carelessness, negligence, or lack of reasonable diligence.

Respondent filed exceptions and the Board directed review of the order dismissing Respondent's appeal. The matter was remanded to consider the settlement agreement of the parties. Board Rule 442(1) encourages settlement at any stage of the proceedings. A settlement was ultimately approved and the file closed.

OSHA decision Madden Construction, Inc v Hodgson, 502 F2d 278 (CA 9, 1974) and Marshall v Sun Petroleum, 622 F2d 1176 (CA 3, 1980), held that the Department has broad powers to settle even when a late petition is filed.

The Board did not find good cause for the late filing based on Respondent's arguments that the citation was not specifically directed to Respondent's occupational health and safety officer.

417 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Post Office Error
Post Office Error

87-4293 Walter Toebe Construction Company (1987)

Although the Department's postal receipt card showed a citation receipt date of 4/28/87, Respondent produced a copy of a post office notice slip showing pick up on 4/29/87. Faced with the difference in dates, good cause was found.

418 PETITION TO MODIFY ABATEMENT DATE

Exceptional Circumstances For Late Petition

Business Closed

PMA 89-41 Detroit Public Schools (1988)

A late PMA was filed because the schools were closed during the summer months. The citation was received in early June 1988. Exceptional circumstances were found for the late filing.

419 ELECTRICAL

Roofing Work

Flagging System

EMPLOYER DEFENSES

Roofing Work

Flagging System

GENERAL DUTY CLAUSE

Roofing Work

Waste Material Chute

ROOFING WORK

Waste Material Chute

87-4248 P F LaDuke & Sons (1988)

During the inspection of Respondent's roofing job, the safety officer noticed a waste material chute at the edge of the roof. The chute was approximately 31 feet 2 inches from ground level. The ground surface was concrete or asphalt. There were no guardrails as required by the standards. Employees who would need to use the chute were required to walk within only a few inches from the edge of the building. A citation was issued alleging a serious violation of Section 11(a) of the Act. It set a penalty of $280 and required immediate abatement.

The ALJ found that a safe working area was not provided. A flagging system and a supervisor were not sufficient when the chute was located at the edge of the roof. Falling from roofs is a recognized hazard. Barrier guarding is the method employed by the industry to prevent falls. A flagging system is a warning system to prevent someone from coming to the edge. In order for this system to be effective, it should be at a distance of six feet from the edge. In the present case, it was only a matter of inches from the roof.

419 (Continued)

The ALJ also concluded that the hazard was serious in nature and Respondent did have knowledge of the condition through the presence of a supervisory employee on the scene. The 31 foot 2 inch height creates a hazard that would likely cause death or serious physical harm. The citation was affirmed.

420 JURISDICTION

Barges
Coast Guard Regulations

LIFE JACKETS

PERSONAL PROTECTIVE EQUIPMENT

Life Jackets

PREEMPTION - SECTION 4(b)(1) OF OSHA

Barges

86-4044 Luedtke Engineering Company (1988)
86-4045

Facts:

A safety officer observed Respondent's employees loading a barge and rebuilding a break water. One employee came out of the engine room to talk to another employee in a boat. The man in the boat was wearing a life jacket; the man standing near the edge of the barge was not. The water depth at this area was seven feet. The barge was tied down and only moved when the crane was being operated. A serious citation was issued because of the possibility of drowning.

Issues:

1. Whether Coast Guard regulations applicable to uninspected commercial barges preempt MIOSHA's jurisdiction over uninspected vessels;
2. Whether the facts establish a serious or OTS violation of Parts 6 and 13 of the CSS, Rules 636(1) and 1301.

420 (Continued)

Conclusions - Issue 1:

The vessel in question was a barge not carrying passengers for hire. It was being operated in the waters of the Great Lakes and its tributaries. No specific evidence was introduced showing that the Coast Guard has asserted regulatory control over this activity. Complainant submitted an affidavit from the commander of the Coast Guard district, The affidavit stated that under 46 U.S.C. 4102(b) and 46 CFR 25.25-1(d), uninspected, commercial barges are not required to have life preservers on board unless they are carrying passengers for hire as defined in 46 U.S.C. 2101(21)(D),

In regards to the inspection of Norfolk Dredging Co, 783 F2d 1526 (CA 11, 1986), addresses the preemption argument under Section 4(b)(1) raised by Respondent. The Norfolk Court concluded that the Coast Guard's regulation of safety aboard uninspected vessels is so circumscribed that it does not preempt OSHA's jurisdiction over uninspected vessels.

At the federal level, the Occupational Safety and Health Commission has consistently held that the OSHA requirement of wearing personal floatation devices has not been preempted by Coast Guard Regulation. In the recent case of B B Riverboats Inc, 1987 OSHA, par. 27.975, the charges of violating OSHA standards during welding work on a tug boat were affirmed over the employer's preemption argument. It was held that the Department had jurisdiction over Respondent's barge.

Conclusions - Issue 2:

Respondent argued that the employee was a boilerman who worked within the boiler room inside the crane. Respondent argued that this employee did not work in an area where drowning was a possibility. It was concluded that the employee was working at an unguarded edge of the barge where the water depth was seven feet and there existed a possibility of drowning. The violation was not for not wearing a life jacket in the boiler room; the violation was for not wearing a life jacket while standing at the edge of the barge. The serious violation was affirmed.

The Board directed review of the ALJ's decision and issued an order affirming on 11/22/88.

421 RIGHT TO KNOW

Hazard Communication Program
Material Safety Data Sheets
Location
Maintained in Systematic and Consistent Manner
Training

87-4486 Norris Schmidt Imports, Ltd (1988)

Complainant conducted an investigation of Respondent's new and used car dealership. During the investigation, the safety officer asked to see material safety data sheets (MSDS) for oxygen, acetylene, welding rod, gasoline, and cleaning solvents since all of these chemicals are used extensively at car dealerships. The MSDS forms provided were identified by car part numbers. They were not identified by subject matter so they could be quickly located. During the investigation, Respondent's safety manager went next door to an automotive parts dealer and obtained a two inch list of parts supplied to Respondent's place of business. This list was later submitted as part of Respondent's MSDS file.

The Department issued citations for failure to:

1. Organize MSDS forms in a systematic and consistent manner;
2. Train employees in locating particular MSDS forms;
3. Develop and implement a written hazard communication program;
4. Compile a complete list of hazardous chemicals known to be present in the work place;
5. Maintain copies of the required MSDS forms for each hazardous chemical in the work place, and;
6. Provide employees with the required information and training on hazardous chemicals in the work area.

The MIOSHA Act has been amended to include requirements for the communication of information regarding the safe handling of hazardous chemicals present in Michigan work places. These amendments are known as the Michigan Right To Know Law.

422 ELECTRICAL

Open Wire Conductors

ELEVATED WORK PLATFORM

FALL PROTECTION

Aerial Work Platforms

INSPECTION

Annual Equipment

LANYARD

SAFETY NETS

85-3714 GMC, Buick Motor Division (1987)

ER was found in violation of Rule 408,40631(1) for failing to ensure an EE was secured by a harness and lanyard or a safety net while working from an unguarded work surface more than ten feet above the floor. The SO observed an EE working on a mezzanine-type platform elevator approximately sixteen feet above the floor unloading electrical cables from a box which was sitting on a forklift. Another EE was observed standing on a six inch wide beam approximately fourteen feet above the floor taking measurements to install piping. Although both EEs were wearing Buick hard hats and work uniforms and identified themselves as Buick EEs, ER claimed that no Buick EEs were assigned to or authorized to be in that area on the date of inspection. In finding that sufficient evidence had been presented to establish a violation of the cited rule, the ALJ concluded that it was unlikely that persons other than GMC EEs would masquerade in "Buick" hard hats and work uniforms and identify themselves as Buick EEs. Since MIOSHA failed to present proof that a serious violation had occurred, the penalty proposed was dismissed. The item was held to be OTS.

ER was also in violation of Rule 408.401001 for failing to maintain annual inspections on two pieces of equipment. The repair orders offered as evidence of annual inspection records did not satisfy the annual maintenance requirement of the rule.

The ALJ dismissed the citation for an alleged violation of Rule 408.41258(2) because MIOSHA's witness acknowledged that the cited equipment was not an elevating work platform. He related that the equipment was a self-propelled elevated and rotating work platform used in the industry. The scope section of the rule clearly states that this part does not apply to a self-propelled vehicle-mounting elevating and rotating platform. Similarly, a citation for a serious violation of Rule 408.41258(3) was also dismissed since the standard cited by MIOSHA did not apply to the equipment in question. Alleged violations of Rule 408.41258(7) and Rule 408.41259(12) were dismissed for the same reason.

422 (Continued)

An alleged violation of Rule 408.41719(1), Ref. NFPA 70-1975, par. 320-6, was affirmed. Open wire conductors were dropped over beam and bar clamps. In the process of stringing the wire, the overhead beams could have been energized.

423 FLOOR OPENING
Trash Pit

HEARING
ALJ Dismissed sua sponte

WITNESSES
Safety Officer Not Essential

84-3345 City of Warren, Sanitation Department (1987)

Respondent was charged with failing to guard open floor areas, Part 2 of the GISS, Rule 215(2)(5).

The ALJ rejected Respondent's argument that an unguarded area at its refuse trash burning pit was a loading platform exempt from the guarding requirements. The area in question was not a platform - which by definition is elevated above the surrounding floor - but a depression in the floor appropriately referred to as a pit. Trucks enter the upper level and dump waste material into 10 to 15 foot concrete pits where it is compacted into tractor trailers and hauled away.

The safety officer was not held to be an essential Department witness since a supervisor was present during the inspection and testified as to her observations. A preliminary order concluded that an earlier hearing should have taken evidence from both parties instead of dismissing the citation (without a motion to dismiss) after hearing only the Department's case. The ALJ concluded that consideration of the record at one time reduced possibility of needless review and remand.

424 JURISDICTION

Late Employer Petition/Appeal

Last Day

Mail Handling

Deposit in Employer Mail System vs U.S. Mail

88-630 Posen Construction, Inc (1989)

Good cause was not found where Respondent placed the petition for dismissal in Respondent's internal mail system on the last day of the petition period.

It was not reasonable to wait until the last day especially since three days had been lost due to illness.

425 JURISDICTION

Late Employer Petition/Appeal

Mail Handling

88-466 Pacer Contracting Corporation (1989)
88-467

Respondent filed a late petition for dismissal because no one was assigned the task of responding to Department citations. It is reasonable to expect an employer to establish mail-handling procedures and assign necessary staff to respond to important mail in a timely manner. Good cause was not found.

426 JURISDICTION

Late Employer Petition/Appeal

Citation Issued to Wrong Company

89-57 Kubas & Son Plumbing Company (1989)

Good cause was not found where Respondent argued the citation was issued to the wrong employer. As noted in the case of Dynamic Construction, NOA 85-3697 (1985), par. 358, the employer's remedy was to protest the citation.

427 JURISDICTION

Late Employer Petition/Appeal

Mail Handling

No Instruction to Employees

89-465 Inprecon Structures, Inc (1989)

Good cause was not found where the secretary gave the citations to the wrong person. An employer must train employees in proper mail-handling procedures.

428 JURISDICTION

Late Employer Petition/Appeal Vacations

89-1334 Meram's Construction, Inc (1989)
89-1335

Respondent's secretary was on vacation when the citation was received. Good cause was not found for the late filing because it is expected an employer will have a reliable person assume the duties of a vacationing employee.

429 JURISDICTION

Late Employer Petition/Appeal

Key Employee

Replacement

89-788 State-Wide Excavating, Inc (1989)
89-789

Good cause was not found where the office manager's temporary replacement did not file a timely appeal. The office manager had filed a timely petition. It is Respondent's responsibility to have a reliable person in charge during the absence of a key employee.

Exceptions were filed by Respondent. No Board member directed review. The ALJ 's proposed decision became a Final Order of the Board on 12/5/89.

430 EMPLOYEE

Partners

EMPLOYER

Partnership

88-4526 Hankinson's Radiator Shop (1989)
88-4527

An Order Denying Motion For Summary Disposition was issued in response to Respondent's claim that there were no employees at Respondent's place of business, only six partners.

Section 5(2) includes an "organization" within the definition of employer. A partnership is an organization. A broad interpretation of employee is justified by Section 2(1) which makes MIOSHA applicable to all places of employment except domestic employment and mines. Section 18 of OSHA requires a state plan to provide at least as effective coverage as OSHA. Section 46(6) of MIOSHA also requires the MIOSHA Board to follow federal decisions. Federal decisions include partnerships within the definition of employers subject to OSHA.

Respondent withdrew its appeal without further litigation.

431 JURISDICTION

Late Employer Petition/Appeal
Telephone Communication

89-1616 Tru-Fit Trouser, Inc (1989)

Good cause for a late second appeal was not found where Respondent relied on a telephone call to establish the appeal. Neither Section 41, nor Rule 408.22354, permits a telephone appeal. Also, see paragraph 387, Ruggeri Electrical Contracting, NOA 87-4303 (1987), where the same conclusion was reached. Respondent filed an exception, but no Board member directed review.

432 JURISDICTION

Late Employer Petition/Appeal
Meritorious Defense

89-1216 Ovidon Manufacturing Company (1989)

Respondent filed a late petition and an explanation for the late filing but did not present a meritorious defense. The case of Lanzo Construction Co v Michigan Department of Labor, 87 Mich App 408; 272 NW2d 662 (1978), required both good cause for the late appeal and a meritorious defense. Respondent's appeal was dismissed.

433 JURISDICTION

Late Employer Petition/Appeal
Communication
Mail Handling

89-1763 Utility Contractor Company (1989)

Respondent has the responsibility to train staff on the correct citation review and appeal procedure. Here the foreman who disagreed with the citation did not alert management of this fact. The person who could have filed a petition did not know there was a defense to the citation. Good cause for the late petition was not found.

434 FALL PROTECTION

Work from Solid Construction

SCAFFOLDS

Solid Construction

86-3984 GMC, CPC Grand Rapids Metal Fabrication Plant (1989)

Respondent was cited because an employee was working and standing on an I-beam without a safety harness, lifeline, or scaffold. The employee was involved in installation of I-beams as part of the construction of a new press line. The I-beam was 8 1/2 inches wide. Its top was 13 feet above the floor below and 18 inches above another beam, which was 32 inches wide. Based on expert opinion, Respondent's safety record, and industry practice, it was concluded that the employee was engaged in work that was being done safely from solid construction, which was allowed under Rule 511(1)(2). On 8/17/90, the Ingham County Circuit Court affirmed the decision of the Board and ALJ.

435 ELECTRICAL

Open Electrical Boxes

EMPLOYER DEFENSES

Anning-Johnson

EXPOSED TO CONTACT Open Electrical Boxes

FLOOR MAINTENANCE

Scrap/Debris

Objective Evidence

FLOOR OPENING

Roof

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

Knowledge

88-20 Turner Construction Company (1989)
89-158

Three items were at issue:

1. Did Respondent fail to pile, stack, or place scrap debris; Rule 119(1)?

The ALJ cited Bechtel Power Corp., NOA 77-710 (1978), and concluded no objective evidence was presented to show debris. No photographs were presented. The item was dismissed.

On appeal, the Board reinstated the violation concluding the safety officer's testimony concerning debris was credible. Photographs would have been helpful, but since Respondent did not refute the safety officer's testimony, objective evidence was not required.

2. Rule 727(2) - A serious violation was found for uncovered electrical panels owned by Cobo Hall.

Respondent argued it did not have the authority to reattach the covers and alerted subcontractors to the presence of these boxes.

Respondent was construction manager for the project and had the job of enforcing MIOSHA compliance.

The Anning-Johnson/Grossman rules include citation for a general contractor who fails to prevent violations. Here Respondent's employees and subcontractor employees were exposed to contact with the energized interiors.

This violation was serious because death or serious injury could have resulted and Respondent knew of the violation. It was unreasonable for Respondent to wait before taking action to protect employees. Subcontractors were first alerted to the danger on 2/15/88. The boxes were still uncovered on 3/31/88 when the complaint inspection took place. The facts did not establish how many times the issue was raised with Cobo.

3. Rule 2141(1) - A serious violation was found for failure to guard floor openings. Subcontracting hole guarding functions were proper but did not excuse Respondent's obligation to oversee compliance with MIOSHA standards.

Safety meeting sheets for 8/15, 8/22, 8/29, and 9/6/88, all show subcontractors were directed to cover floor and roof openings. Photos in 7/88 showed caution tape used to block off areas with floor holes. Even after the inspection on 9120/88, the holes remained unguarded until Subcontractor Smelser was directed to cease work on 9/28/88. A fall would have caused death or serious physical injury.

The Board affirmed the violation for Rules 727(2) and 2141(1).

436 EMPLOYER DEFENSES

Equipment not Plugged In
Machine not Built with Guard
No Employees
No Objection to Equipment by Insurance Company or Union Group
Prior Inspections

FAILURE TO ABATE

PENALTIES

After Hearing vs Settlement Before Hearing

88-4568 D L Reynolds Manufacturing, Company (1989)

Respondent was cited for 14 violations alleging failure to abate earlier citations. All violations and penalties were affirmed.

Respondent raised the following defenses:

1. Mr. Reynolds is the owner and sole employee. The equipment is his personal equipment which he uses as a hobby. While he did have employees during the 1986 inspection, this work force was reduced to only the owner, Mr. Reynolds, shortly after.

2. The electricity had been disconnected from the equipment prior to the 10/87 Inspection. The equipment could not have been used.

3. One saw still carried the guard provided by the manufacturer. Respondent argues this guard should be sufficient.

4. A prior Department safety officer did not cite the same equipment cited in 10/86.
5. Respondent's insurance company awarded the company for its safety record.

Argument #1: As noted in D D Barker Construction, NOA 78-779 (1979), Section 5(2) of MIOSHA defines "employer" to be "an individual or organization, including the state or political subdivision which employs one or more persons." The term employee is defined in Section 5(1) as "a person permitted to work by an employer."

After the 10/86 inspection, Respondent continued to work with the assistance of his son and employee, Roger Vanderlip.

It is noted that as in Barker, the employer could not lay sewer pipe by himself, Respondent could not operate the Cant Mill by himself. He testified he operated the saw while Mr. Vanderlip performed the tailing operation. This establishes there was an employee on site.

Argument #2: Equipment was not locked out. It was ready for use and electricity was turned on and off as needed.

Argument #3: This was previously addressed in Hammer & Smith, Inc., NOA 86-3995 (1988). In that case, it was found "immaterial" that the saw was not built with an adjustable guard. Employers are required to examine the safety standards and provide required safety equipment. The fact that the saw did not have the required guarding when purchased did not mean it could be used without modification.

Argument #4: What a prior safety officer did is not a defense for Respondent's current violation. Employers must continually evaluate the safety standards and provide the required safety features. Respondent was in violation in 10/86 and continued to be in violation at the reinspection in 10/87.

Argument #5: It is Respondent's responsibility to comply with promulgated safety standards. MIOSHA gives no authority to insurance companies to approve equipment. A similar conclusion was found in United Materials Co, NOA 80-1834 (1980).

Penalties: Section 35(2) permits a penalty of not more than $1,000 per day for failure to abate violations. The Department concluded the violations continued a minimum of five days after abatement was required. Each initial penalty was multiplied by five to reach the failure to abate proposed penalty.

Section 36(1) requires the Board to assess penalties considering the size of the business, the seriousness of the violation, and the history of previous citations. The Department considered these factors for initial penalties. Multiplying initial penalties by five is permitted by Section 35(2) which permits a $1,000 per day penalty.

Respondent's argument that the penalties in a proposed settlement agreement were considerably less than those set forth on the citation does not change the result. During settlement negotiations, the Department is free to propose a settlement that would consider limited employee exposure and the fact that no hearing would be necessary. The proposal of lower penalties during settlement negotiations does not warrant reduction of the penalty amounts after hearing. Respondent did not accept the Department's settlement proposal. It was this inability to settle that required a hearing.

437 JURISDICTION

Late Employer Petition/Appeal

Good Cause Found

Service on Attorney or Representative

Service on Attorney or Representative

89-416 CBI Industries, Inc (1989)

A late appeal was filed because the Department did not mail its decision to Respondent's representative. This Department failure delayed the appeal. Good cause was found.

After further discussion, the case was settled by the parties.

438 JURISDICTION

Late Employer Petition/Appeal

Good Cause Found

Employer's Attorney/Representative Schedule

87-4462 Luedtke Engineering (1988)

Respondent filed a late petition for dismissal because his attorney was involved in trial preparation and two trials during the appeal period. Good cause for the late petition was found. Respondent and its attorney acted reasonably but were delayed due to circumstances beyond their reasonable control.

After further discussion with Complainant, Respondent withdrew its appeal.

439 JURISDICTION

Late Employer Petition/Appeal

Failure to Use Proper Postage

Good Cause Found

Failure to Use Proper Postage

88-4574 Century Dodge, Inc. (1989)

Good cause was found where the appeal was returned to Respondent due to insufficient postage. The remailed appeal was late. The failure to use proper postage was held to be excusable.

The parties settled the appeal in a settlement agreement.

440 PREEMPTION

Specific Standard Over General

PROCESS SPACE

Testing

STANDARD

General vs Specific

TESTING

Manholes, Excavations, Confined Spaces

TOXICITY

Testing

88-82 Michigan Bell (1990)
89-1078
89-1189
89-1190

The ALJ affirmed a citation of **CSS**, Rule 408.4121, for failure to test toxicity in manholes, excavations, and confined spaces. Respondent argued that routine procedures for entry into manholes and confined spaces specified in the Telecommunication Standards preempt the general rule.

The general rule is not preempted unless a specific standard required protection against a particular hazard. The Telecommunication Standards addressed the hazard of combustibility and oxygen deficiency but did not address toxicity. Even though Respondent tested for combustibility and force ventilated in confined spaces, as required by the specific standard, Respondent was properly cited under the General Rule for failing to test for toxicity.

Respondent filed an appeal with the Wayne County Circuit Court. On July 20, 1990, the Court found that the ALJ "erred as a matter of law in holding that Part 30 of the Telecommunications Standards did not pre-exempt the Construction Safety Standards when entering a manhole." Accordingly, the AL's decision was reversed and the Department's citation was set aside.

441 WELDING & CUTTING

Screens, Curtains

WILFUL VIOLATION

Repeated Employee Complaints

83-3202 GMC, Hydramatic Division (1990)

The ALJ affirmed a citation alleging a willful OTS violation of the GISS, "Welding and Cutting," Rule 1211(1)(d), for failing to provide protective devices in a welding area.

Respondent's failure to ensure that screens or curtains were erected during welding operations constituted a willful violation, demonstrating a conscious indifference to employee safety.

Welders and millwrights erecting overhead hangers cut and rewelded tilt racks and conveyors, often immediately adjacent to the plant's main aisle used by 800 employees.

Employees had been splattered with slag and sparks and received flash burns. Screens/curtains could easily have been erected to stop flash and spray of slag, sparks, and other foreign bodies during welding operations. The willfulness was supported by Respondent's disregard of the employees' repeated complaints.

442 ASBESTOS

Removal of Street Clothing
Respirators

CONSTITUTIONAL ISSUES

EMPLOYER DEFENSES

Isolated Incident Defense Rejected

MOTION TO DISMISS

Constitutional Issues

PERSONAL PROTECTIVE EQUIPMENT

Respirator

PREHEARING PROCEDURES

Motion to Dismiss

88-4585 Action Services, Inc (1990)
88-4586

A citation alleging OTS violations of construction asbestos requirements for failing to ensure that employees removed street clothing before entering a negative-pressure enclosure was affirmed.

Employees wore half-mask dual exposure respirators, but full faceplate air-purifying respirators with high-efficiency filters were required. Air monitoring results revealed airborne asbestos concentrations in excess of two fibers per cubic centimeter for an eight hour time-weighted average (TWA).

Employees removed their respirators in the equipment room and wore street clothing in the negative-pressure enclosure, equipment room, and clean room. Respondent's isolated employee misconduct defense was rejected because there was no evidence that the employees had been disciplined for not using required equipment or failing to follow established hygiene and decontamination procedures. Respondent did not demonstrate that it had taken steps to discover violations and to effectively enforce the rules.

Respondent filed a Motion to Dismiss before the hearing arguing that it could not be cited for an employee's failure to use safety equipment and also that the citation was unreasonable since it subjected Respondent to sanctions for actions Respondent could not control. The motion was denied since an isolated incident defense could only be established based on proof at hearing. Also, the ALJ had no authority to decide constitutional questions.

443 CHEMICALS

Exempt From Material Safety Data Sheets

MATERIAL SAFETY DATA SHEETS

Exempt
Hazardous Chemical

89-801 GMC Hydramatic Division, Willow Run (1990)

An alleged violation of 29 CFR 1910.1200(g)(1), failure to keep a MSDS for an aluminum alloy transmission case cover was dismissed.

Respondent contended that a MSDS was not required because the transmission case cover was exempt as an "article."

At issue was whether the aluminum alloy transmission case caused exposure to a hazardous chemical.

The standard defines a hazardous chemical as any chemical which is a physical or health hazard. The Department based its allegation on the observation that there were metal chips and other metal particles on the machinery. There were no air samples, wipe samples, or any other kind of monitoring to determine the type of exposure. A toxicologist with over 16 years of experience viewed this operation and testified that the aluminum could not become soluble in the cutting fluid. There was no exposure as defined in the field of toxicology. There was no exposure from the aluminum shavings and chips since the skin acts as a barrier. There was no inhalation exposure because the particles were too big.

The citation was dismissed because the aluminum alloy transmission cover is an article as defined by the Hazard Communication Standard and is exempt from the requirements of the standard. Processing of the case cover did not result in any health hazard.

444 EMPLOYER

Control Over Work Area

RECORDKEEPING

Responsible Employer

86-4051 GMC, GM Photographic, Livonia (1990)

The ALJ affirmed a citation alleging two regulatory violations of Part 11, "Recording and Reporting of Occupational Injuries and Illnesses." Respondent's defense that the injured employee was not its employee was rejected. The temporary employee was assigned to run one of Respondent's trimmer presses and amputated his left thumb.

Respondent was found in violation because of its responsibility and power to control the workers, their activities, and to modify working conditions. Respondent also was responsible for the routine repair, service, and maintenance of the trimmer presses. Respondent was in the best position to prevent the accident.

Federal cases dealing with employer identity were also examined.

445 BURDEN OF PROOF

Prima Facia Case

WITNESSES

Credibility

86-4165 Adamo Contracting Company (1990)

The ALJ dismissed citations alleging serious violations by Respondent of the CSS, "Excavating, Trenching, and Shoring," for use of a closed stepladder extending approximately two feet above the excavation as a means of access and use of an excavation not cut to the angle of repose.

Prior cases have held that Complainant must establish a prima facia case in order to sustain the citation. The safety officer's testimony was inconclusive, inconsistent, and lacked the required quantum of proof to meet the required burden.

446 HEAD PROTECTION

Employer Responsibility to Enforce
Hot Day

88-575 Pitsch Wrecking Company (1990)

The ALJ affirmed a serious violation of the CSS, "Personal Protective Equipment," Rule 622(1), for failing to enforce the wearing of hard hats where a hazard exists from exposure to falling or flying objects.

The safety officer observed two of Respondent's employees working from a basket attached to a load line, suspended from a crane, demolishing a chimney. The employees were wearing cloth caps because of the heat.

There was substantial probability that death or serious physical injury would result when an employee was struck in the head from a blow by an eight pound sledge hammer, three or four bricks held together by mortar, or from the 75 pound headache ball hanging directly above their heads. The foreman knew of the need for hard hats. Their use was not excused because the day was hot. Respondent did not attend the hearing. See par. 231 in Digest.

447 BACK-UP ALARM

Flag Person as Substitute

BURDEN OF PROOF

Burden of Going Forward

EVIDENCE

Burden of Going Forward

FLAG PERSON

Substitute for Back-up Alarm

HEARING

Burden of Going Forward

TRENCH

Sloping

87-4362 Scarlett Gravel Company (1990)

The ALJ affirmed a serious violation of the CSS, "Excavation, Trenching, and Shoring," and "Mobile Equipment," for operating a front-end loader in reverse with an obstructed rear view [Rule 941(1)] and no functioning backup alarm or signal man [OSHA 1926.602(a)(9)(ii)].

Respondent's argument that a flag person positioned behind the loader to direct vehicular traffic also gave hand signals to the equipment operator was rejected. It was reasonable to conclude that the flag person's concentration would not be solely directed toward protecting employees behind the machine because of road traffic distractions.

The trenching charge was also affirmed as to a serious violation. The trench had a 77 degree angle of repose at one end and 80 degrees at the other end. The soil was fill sand, gravel, and moist, medium-to-firm brown clay. The maximum angle of repose permitted by the depth, width, and soil conditions would be between 45 and 56 degrees. Respondent's evidence did not refute the trench conditions.

448 TRENCH

Sloping
Penetrometer Tests

WILFUL VIOLATION

Intentional Disregard Reduced to Serious

88-4517 Smith Plumbing & Heating (1990)
88-4532

The ALJ reduced a willful violation of the CSS, Rule 941(1), for failure to slope, shore, or otherwise support the sides of a trench to a serious violation for lack of evidence that Respondent acted with intentional disregard of the requirements.

Respondent was previously cited for failing to slope a trench to a 45 degree angle of repose more than 6 feet deep in unstable sand. The willful citation was issued after a follow-up inspection revealed a second violative trench, 7 feet deep in firm clay with a 74 degree angle of repose on one side and a 60 degree angle of repose on the other.

Two of the inspector's penetrometer tests showed soil strength values of 3.0, permitting an angle of repose greater than 63 degrees, close to the actual measurements made by the safety officer. Respondent was trying to widen the top of the trench to correct the sloping at the time of inspection.

449 EMPLOYER DEFENSES

Anning-Johnson
Employee Compliance Required
Isolated Incident

GUARDING

Open-Sided Floor or Platform

WILFUL VIOLATION

Indifference to Requirements

84-3606 Walbridge Aldinger & Company (1990)
85-3637 Williams & Richardson Company, a Joint Venture
85-3757
85-3789
85-3872

The ALJ affirmed two serious and three serious willful violations of the CSS, Rule 2143(1), "Guarding of Walking and Working Areas." Respondent was erecting 100 foot long, 100 ton precast concrete beams used to form the guideway of the 2.9 mile "People Mover" in Detroit. The beams were set on pillars/towers independent on each other until the enclosures were poured, the beams post-tensioned, and the transposing of stress to the pillars was completed.

The planned sequence of three beams to a completed segment was abandoned because of problems with the beams' fabrication and inability to deliver the beams on schedule. Respondent was forced to skip beams in a segment or entire sections. The beams could not be post-tensioned and pulled together.

The safety officer was at the job site on several occasions. As a result of these inspections, five separate citations were issued over a nine month period. The safety officer had observed Respondent's employees working 25 to 30 feet above ground without guardrails or other methods of fall protection.

Respondent and the safety officer discussed various methods of providing fall protection. These included beam clamps, floor cables, a manufactured guardrail system, and even a swing scaffold. All were employed at various times throughout the project.

Respondent admitted that some of the employees did not care to use the beam clamp and safety belt for fall protection. It was also difficult to enforce making compliance difficult.

449 (Continued)

Respondent's defenses, Anning-Johnson and the isolated incident were rejected. Respondent was obligated to provide reasonable safeguards and did so; however, they were not used on all occasions. Respondent provided safety equipment and instructions and established and communicated a safety training program. Respondent did not actively require employee compliance. An "isolated incident" cannot reoccur several tunes within such a short period of time and still be "isolated."

450 TRENCH

Sloping
Trench Shield
Utilities

WILFUL VIOLATION

Reduced to Serious

87-4493 Barnhart & Son, Inc. (1989)

A citation alleging a willful violation of trenching requirements was recharacterized as serious and affirmed by the ALJ

The owner and employee working on top of a 48 inch sewer pipe was covered with 7 feet of sand. The depth of the trench was 15 feet. They were approximately 6 feet from the top of the trench. CSS, Part 9, Rule 408.40941(1), requires sloping of trench more than 5 feet. The angle of the slope measured 81 degrees which was in excess of the 56 degree slope required for firm clay.

The ALJ found that Respondent did not act with intentional disregard or demonstrate plain indifference. During the project, no employee worked on the bottom of the trench without a trench box or within the sewer pipe for protection. The safety officer testified that the probability of a cave-in injury was much less for an employee on top of the sewer pipe 6 feet from the top of the trench than for one working on the bottom of the trench. The only reason the owner and employee were working on top of the sewer without a trench box was because underground utilities prevented its use.

451 TRENCH

Sloping

WILFUL VIOLATION

Prior Citations

Violation in View of Safety Officer

88-4576 Pacentro Construction Company (1989)

The ALJ affirmed a trenching charge as willful and serious.

The safety officer observed the president of the company exiting the trench. The depth of the trench was in excess of 5 feet. The slope required by the standard was 45 degrees. CSS, Part 9, Rule 408.4094 1(1), requires sloping a trench more than 5 feet. The angle of the slope measured between 56 degrees and 85 degrees which is in excess of the 45 degree slope required for a clay and sand mixture.

The ALJ also found a willful violation. Respondent's prior history of 5 prior willful/serious citations demonstrated an intentional disregard and indifference. The record supported the conclusion that there was a substantial probability of serious physical harm if a cave-in occurred.

452 EMPLOYER DEFENSES

Economic Motives
Intentional Acts of Employee
Isolated Incident

SUPERVISION

Guarantee Against Isolated Deviant Employee Behavior

TRAINING

87-4459 Schaller Corporation (1989)

The ALJ found that the violation of GISS, Part 24, Rule 2411(1), was the result of unpreventable employee misconduct.

An employee injured his hand after moving the hand control panel for a 300 ton press to facilitate hand feeding the parts. The hand injury occurred immediately after moving the control panel.

The injury was found to be an isolated event. Respondent established that there were company rules which could have prevented the injury. These rules were communicated to employees as shop rules. Monthly safety meetings, as well as visual inspections and supervision, took place.

Respondent's supervision was adequate and reasonable under the circumstances. Reasonable supervision does not mean that Respondent is a guarantor against isolated deviant behavior. The only reason that the worker moved the control panel was for his own convenience. The machine had been properly set up and checked by the supervisor. The employee had worked on this machine for over two hours when lie decided to move the control panel. There is no production standard or other reason to benefit Respondent by moving the control panel. The injury occurred immediately after the worker moved the control panel, leaving no opportunity for the supervisor to detect the violation.

453 EMPLOYER DEFENSES
Union Employees

HEAD PROTECTION

PERSONAL PROTECTIVE EQUIPMENT
Hard Hats

SCAFFOLDS

Guardrails
Removed Temporarily to Load Materials

UNION MEMBERS

Disciplining Other Members

88-4584 Pontiac Glass, Inc. (1989)

A citation charging Respondent with failure to require head protection for workers under a scaffold on which other workers were installing 50-100 pound glass panes was affirmed. Respondent's argument that the foremen were skilled glaziers who were not allowed to reprimand other union members was rejected.

Also affirmed were two serious scaffolding charges. At one site, a partial guardrail was missing from a scaffold platform 16 feet above ground. At a second, an employee worked on a scaffold with no guardrails approximately 15 feet above ground, without using a lanyard or safety rope.

There was a substantial probability that death or serious physical harm could result from the violations.

A charge of failure to guard the perimeter of the second floor of a building was dismissed for lack of evidence. The testimony presented showed that there were workers on the second floor and a worker on the scaffold. They were installing windows which involved the handling of materials. The evidence presented was not sufficient to establish exposure of serious physical harm to the workers. The guardrail had been removed only temporarily to facilitate loading and unloading of materials.

454 JURISDICTION

Late Employer Petition/Appeal
Citation Must be Issued Within 90 Days of Inspection No Explanation for Late Filing
Vacations

89-1874 Chrome Craft Corporation (1990)

Good cause for a late petition- for dismissal was not found after written argument and a hearing.

The Department's inspection took place on 5/25/89. The citation was issued 6/9/89 and received 6/14/89. Respondent's representative left on vacation on 6/25/89 and returned 7/9/89 or 7/10/89. No explanation was provided why the petition was not filed before the vacation.

Prior Board decisions have found that an employer must have a reliable person in charge during a vacation absence or to periodically call in to direct the handling of important mail. Also, since Section 33(1) of MIOSHA requires a citation be issued within 90 days of inspection, Respondent should have known the citation would be coming and be prepared to respond.

455 JURISDICTION

Late Employer Petition/Appeal
Key Employee
Availability
State Legal Holidays
Vacations

89-1870 Engineered Heat Treat, Inc. (1990)

The citation was received on 6/22/89 and mailed to the company president. Since he was on vacation, the communication was unopened until his return.

Good cause for the late petition for dismissal was not found. Respondent must arrange for important mail to be answered during a vacation. Also, there was a period after the vacation when a timely petition could have been filed. Respondent's extended July 4th holiday is not good cause since only state legal holidays are exempt from the working day count. See Section 6(9).

456 JURISDICTION

Late Employer Petition/Appeal
Employer Too Busy Key
Employee
Newly Hired
No Knowledge of 15 Working Day Period
Small Employer

90-183 National Element, Inc. (1990)

Good cause was not found for a late petition for dismissal caused by:

1. Respondent is a very busy small business.
2. A new superintendent did not know of the citation.
3. The company did not know of the 15 working day petition period.
4. The company purchased the assets of another business in 12/89 which contributed to the delay.

Notice of the 15 working day appeal period is listed on the citation. Prior decisions have denied late filing due to an employer's workload.

457 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Key Employee
Poor Job
Key Employee
Poor Job

89-1287 Lawrence Masonry (1990)

Good cause for a late petition for dismissal was found where Respondent assigned safety responsibilities to a single person who did not do a good job and was later discharged. After the separation, Respondent found the citation and filed a late petition. The ALJ concluded that it was reasonable for the company to assign safety responsibilities to a single person.

The parties settled the appeal after the prehearing conference.

458 PETITION TO MODIFY ABATEMENT DATE

Exceptional Circumstances for Late Petition

Department wide Compliance

PMA 90-621 Department of Corrections (1990)

It was reasonable to file a late PMA where Respondent arranged a department wide asbestos training program on a single date.

459 JURISDICTION

Late Employer Petition/Appeal

Written Petition/Appeal is Required

90-1591 Reibro Development Corporation (1990)

Good cause was not found for a late appeal where Respondent argued he was told by a Department review officer a written appeal was not needed. As noted on the reverse side of the citation and in the material sent with the Department's decision, an appeal must be filed in writing. See Administrative Rule 408.22351.

Respondent appealed the Board's final order to the Ingham County Circuit Court but agreed to a dismissal of the petition for review.

460 JURISDICTION

Late Employer Petition/Appeal

Mail Handling

No Instruction to Employees

90-1655 SCI/Steelcon (1990)

Good cause was not found where mail was not properly forwarded by Respondent's employees. Respondent may choose to send Department citations and decisions to other employees for response, but these corporate decisions cannot extend the statutory 15 working day period. It is Respondent's burden to train employees in correct mail-handling procedures.

461 JURISDICTION

Late Employer Petition/Appeal

Citation/Decision Sent to "Wrong" Address

Mail Handling

90-1750 Barton Malow Company (1990)

Good cause was not found where the employer representative did not know the citation had been sent to the job site before being forwarded to him. The Department mailed the citation to the address supplied by the job site foreman. Respondent's job site representative must be trained to supply an address that will give the maximum amount of time for filing a response.

462 JURISDICTION

Late Employer Petition/Appeal

Oral Filing

Telephone Communication

90-1770 Metro Dynamics, Inc (1990)

Good cause was not found where Respondent placed a telephone call to the Construction Safety Division after receipt of the Department decision. A written appeal was not filed. A phone call does not satisfy the appeal requirements for filing an appeal to the Board. Section 41, the citation, the decision, and Administrative Rule 408.22351, all alert the employer to the written requirement.

463 JURISDICTION

Late Employer Petition/Appeal

Citation/Decision Sent to "Wrong" Address

Employer Too Busy

Mail Handling

90-475 Townsend & Bottum, Inc. (1990)

Good cause was not found where an "extremely hectic" work schedule plus late citation receipt caused a late filing. Respondent's representative was present during the inspection and knew citations were coming. Section 33(1) requires issuance within 90 days of the inspection. Also Respondent bears responsibility for training staff in correct mail-handling procedures. Citation receipt was delayed because they were first sent to the main office and then to the site for response.

464 JURISDICTION

Late Employer Petition/Appeal

Not Remembering Receipt

90-1228 Scribner Masonry, Inc. (1990)

Good cause was not found where Respondent did not remember receipt of the citation. The postal receipt shows receipt by "B. Scribner." Contrary to Respondent's assertion that the time element "is a minor item," a timely petition is required by the Act.

465 JURISDICTION

Late Employer Petition/Appeal

Contacting a Third Party

90-1115 G & M Builders, Inc. (1990)

Good cause was not found where the petition was delayed to obtain a statement from the foreman. A Board appeal does not require a foreman statement.

466 JURISDICTION

Late Employer Petition/Appeal

No Explanation for Late Filing

Out of Town

90-1326 Universal Power Wash (1990)

Respondent returned from an out-of-town trip on 2/16/89. The Department's decision was received by Respondent on 2/17/89, providing the full 15 working day appeal period. The appeal was filed on 5/16/90, over a year later, No explanation was provided for this delay.

467 JURISDICTION

Late Employer Petition/Appeal

Appeal Cannot be Filed by Signing Abatement Papers

90-1113 Lake Orion Roofing, Inc. (1990)

A petition or appeal cannot be filed by signing and mailing the citation abatement pages unless this intent is expressed. Respondent's mistaken belief does not establish good cause for the late filing.

468 JURISDICTION

Combined Penalties
Late Employer Petition/Appeal
Confusion
Good Cause Found
Confusion

90-250 Lapeer Metal Products Company (1990)

Good cause was found where Respondent appealed one item of a two item combined penalty citation. The two items also alleged violation of the same standards. It was reasonable for Respondent to confuse the two items. Respondent withdrew the appeal after a prehearing conference with the Department.

469 JURISDICTION

Late Employer Petition/Appeal
Business Shutdown
Fifteen Working Days

90-949 Great Lakes Plastics (1990)

The Department's citation was picked up on 12/26/89. The 15 working day period began on 12/27/89 and expired on 1/18/90. Respondent's extended plant closing cannot extend the appeal period. A "working day" is defined in Section 6(9) as "any day other than a Saturday, Sunday, or state legal holiday." See MCL 435.101. Good cause was not presented.

470 JURISDICTION

Late Employer Petition/Appeal
No Knowledge of the 15 Working Day Period
Unaware of Appeal Rights

90-792 Moiron, Inc. (1990)

Respondent's misunderstanding or failure to read appeal information does not establish good cause.

471 JURISDICTION

Late Employer Petition/Appeal
First Inspection
Business Not Usually Inspected
Good Cause Found
First Inspection
Business Not Usually Inspected
Key Employee
Illness/Death/Resignation
Key Employee
Illness/Death/Resignation

89-1926 Paul Benson, D O (1990)

Respondent acted reasonably by dictating a petition and waiting for his transcriptionist to return from sick leave. The leave became longer than expected. Respondent was unfamiliar with the appeal process because the business had not been traditionally inspected by MIOSHA (a doctor). Good cause was found. The parties settled the case after a prehearing conference.

472 AMENDMIENT

By Motion
Freely Given – Prejudice

89-995 Port Service Company (1990)

The Department's motion to amend from serious to willful/serious was approved. Respondent had sufficient time to prepare a defense since a hearing had not been set. In the absence of employer prejudice, amendments may be freely granted. Several Court decisions are cited. Ultimately, the Department dismissed all items.

473 ASBESTOS

Removal
Regulated Area
Janitorial Work

STANDARD

Interpretation

APPLICATION OF GENERAL LANGUAGE TO ALL SUBPARTS

88-4528 Specialty Systems of Michigan, Inc. (1990)

An other-than-serious violation of 29 CFR 1926.58(j)(2) was dismissed. Respondent did not have a separate decontamination area. This was not found necessary because the areas being cleaned were not "regulated" areas as defined in 1926.58(b). In order to be considered regulated, it was necessary for air quality to exceed the permissible exposure level (PEL). This did not occur. Although Respondent's work could be loosely termed 'removal," a federal interpretation considered removal of deteriorated and flaked-off asbestos containing materials above ceilings as janitorial-type work and not a removal operation.

Section 1926.58(e)(1) requires the PEL to be exceeded before an area will be considered regulated and, therefore, in need of separate decontamination. The Department argued this provision only applied to Subparts (e)(1)-(5) but not (6). This was rejected.

474 EVIDENCE

Admission By Party Opponent - Not Hearsay

HEAD PROTECTION

HELMETS

Inspection

LADDER

SLOPING

TRENCH

Accident Prevention Program
Inspection
After Trench Filled

WALKWAY OR BRIDGE

Employee Required to Use

WALL OBSTRUCTION

WEIGHT

89-695 L J S Company (1990)

Respondent was assessed serious violations of CSS Rule 114(1) relating to accident prevention program, Rule 622(1) helmets, Rule 932(4) trench inspection, Rule 933(1) trench wall obstructions, Rule 933(5) ladder or ramp, Rule 941(1) sloping, and Rule 951(6) trench walkway. Respondent did not have an accident prevention program, did not inspect the trench, provide a ladder, ramp, or properly slope. These items were affirmed. The rest were dismissed.

The Department presented the city inspector as a witness. The injured employee and a co-worker were not called. The safety officer inspected the site after work was finished and the trench filled. MRE 801(d)(2)(D) concerning admissions by a party opponent was considered. Evidence was admitted but given little weight.

475 SCAFFOLDS

Cable Guardrail System

VARIANCE

Issued by Federal OSHA

89-56 CBI Services, Inc. (1990)

The ALJ dismissed the citation to CSS Rule 448.41213(1) because the state standard did not include guidance on how hard the cable must be stretched to determine slack. The federal rule requires a 200 pound load to test slack. Since each safety officer will differ in the force used to test slack, employers are denied equal enforcement. The Board disagreed and reversed. The Board concluded the standard provided sufficient specificity and notice to Respondent. A perimeter cable must be installed not less than 36 nor more than 42 inches from the platform floor with a deflection of not more than 6 inches at the span midpoint. Since there was a 9 inch deflection, the violation was affirmed.

The federal variance was violated by the 9 inch deflection, but the ALJ did not find this sufficient to establish a violation of the state rule.

476 JURISDICTION

Late Employer Petition/Appeal
Citation Issued to Wrong Company
Contacting a Third Party

91-521 Chris Benjamin, Inc. (1991)

Good cause for a late appeal was not presented where Respondent gave the citation to a subcontractor. The burden is on the cited employer to appeal an adverse Department decision. It was not reasonable conduct to delay the appeal knowing the Department still held Respondent responsible.

477 JURISDICTION

Late Employer Petition/Appeal
Deposit in Employer Mail System vs U.S. Mail

91-543 J A Jones Construction Company (1991)

Administrative Rule 448.22351 requires a petition for dismissal to be postmarked within the 15 working day appeal period. The citation was received on 9/11/90 and deposited in Respondent's internal mail system on 9/19/90. The petition for dismissal was not postmarked until 11/9/90. No explanation was provided for this delay. Good cause was not established. Depositing the petition for dismissal in the internal mail system does not satisfy the Administrative Rule.

478 JURISDICTION

Late Employer Petition/Appeal
Contacting a Third
Party

91-113 Coke Steel Erectors, Inc. (1991)

Good cause for a late petition was not found where Respondent investigated citation and interviewed an employee. Section 41 provides only 15 working days to file a petition for dismissal. This period may not be extended for investigation or employee interviews.

Respondent filed exceptions to the ALJ's proposed decision, but no Board member directed review.

479 HEARING

Burden of Going Forward

90-1227 Otis Elevator Company (1991)

Respondent attended the hearing but did not cross-examine Complainant's witnesses or present any evidence in rebuttal. Respondent's motion for a hearing continuance was denied.

Based on the unrebutted, believable, and sworn testimony of Complainant's safety officer and supervisor, two alleged violations of the CSS were affirmed.

480 EMPLOYER DEFENSES

Isolated Incident Defense Rejected

SCAFFOLDS

Lumber Grade Used

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

Reduced to Other Than Serious
Reasonable Diligence
Supervisor's Temporary Absence

87-4280 Capital Steel & Builders Supply, Inc. (1990)

Respondent was cited for a serious violation for failure to require scaffold grade lumber on a scaffold platform, Part 12, CSS, Rule 408.41217(1). An employee was killed when a plank broke and he fell 14 feet. Respondent's affirmative defense of isolated employee misconduct was rejected because Respondent failed to prove it had established, communicated, or enforced a work rule prohibiting the employee's conduct. The citation

was reduced to OTS since the supervisor's absence from the operation for 10 to 15 minutes was not a failure to exercise reasonable diligence.

481 BARRICADE

To Keep Employees From Hazardous Area

GENERAL DUTY CLAUSE

Bin Filled With Slag

RECOGNIZED HAZARD

Hazard Without Known Cause Not Recognized

88-4612 Millgard Corporation (1990)

Respondent was cited for failure to furnish employees a place of employment free of recognized hazards, Section 11(a) of MIOSHA, the GDC, and also for failure to provide a barricade around a hazardous area, Part 22 CSS, Rule 408.42224(2). Respondent had constructed a bin filled with approximately 400 tons of slag to test the strength of pilings. The bin collapsed and an employee working nearby was killed. The GDC violation was dismissed because the evidence did not establish the cause of the hazard. It could not be concluded that the hazard was recognized as required by Section 11(a). The citation for failure to provide a barricade was affirmed.

A Board member directed review of the dismissal of the GDC violation, The Board vote was tied resulting in affirming the ALJ decision to dismiss.

482 BACK-UP ALARM

CHAINS - CONSTRUCTION SITE

Field Repair Link
Untagged

EMPLOYER

Co-Owners

TRENCH

Sloping
Storage of Spoil

WILFUL VIOLATION

Warning by Safety Officer

88-434 Barker Brothers Construction Company (1991)
88-435
88-672

Respondent was cited for violations of the MIOSHA rules regarding:

1. Use of an untagged chain with a field repair link, Rule 408.40837(2)(4).
2. Storage of trench spoil next to trench, Rule 408.40933(2).
3. Failure to slope trenches, Rule 408.40941(1).
4. Use of a front-end loader without a back-up alarm, outside observer or flag person, Rule 408.41301, Ref. OSHA 1926.602(a)(9)(ii).

Respondent's defense that only the owners, not employees, worked in the trenches was rejected. The ALJ cited Hankinson's Radiator Shop, NOA 88-4526 and 88-4527 (1988), holding that working partners in a partnership are covered by MIOSHA. There was no reason to distinguish between partners and co-owners for MIOSHA coverage. Moreover, the safety officer observed an employee exiting the trench.

Willful violations were upheld because the safety officer notified Respondent of the trenching violations and gave them a copy of the standard before the willful violations were issued.

Respondent filed exceptions to the All's decision, but no Board member directed review. Respondent appealed to circuit court and in an order issued 3/25/92, the Ingham County Circuit Court affirmed the Board's decision.

482 (Continued)

Respondent appealed to the Court of Appeals. On July 14, 1995, the Court, in a unanimous decision, affirmed the Circuit Court, Regarding the issue as to whether partners can also be found to be employees under MIOSHA, the Court held:

> This argument has been raised before and summarily rejected. See Dep't of Public Health v Hankinson's Radiator Shop, NOA 88-4526, 88-4527 (1988) (six working partners were employees for purposes of MIOSHA). See also Sec'y of Labor v Howard M Clauson, d/b/a Howard Clauson Plastering Co, 5 OSHC 1760 (1977) (federal OSHA does not exclude business owners or their families from coverage); Sec'y of Labor v Horning's Chair Shop, 1986-1987 OSHD 36,344 (1986) (under liberal construction of definition of `employee, working partners who were generally treated as employees were covered under federal OSHA); Sec'y of Labor v Nat'l Window Cleaning, 12 OSHC 1532 (1985) (small company that employed only family members did not preclude it from falling within broad coverage of the federal OSHA); Sec'y of Labor v Mangus Firearms, 3 OSHC 1214 (1975) (silent partner in business who occasionally substituted for principal owner was an employee for purposes of bringing employer within coverage of the federal OSHA). We find these decisions highly persuasive in light of our deferential stance toward administrative expertise and discretion. (footnote omitted.)

483 HEAD PROTECTION

Construction Site

PROMULGATED RULE

Employers Must Comply

STANDARD

Compliance Required
Effect of Law

TRENCH

Ladder in Trench
Sheeting-Tie Backs
Sloping
Storage of Spoil

87-4413 Bore Excavating, Inc (1990)

A hearing was conducted involving five MIOSHA violations at a boring operation where Respondent was installing electrical lines:

1. Helmets, Part 6, CCS, Rule 408.40622(1);
2. Excavated and other material stored closer than two feet from excavation, Part 9, Rule 408.40933(2);
3. Ladder in trench, Rule 408.40933(5);
4. Trench sloping, Rule 408.941(1);
5. Sheeting tiebacks, Rule 408.942(3).

The evidence established violations for each item. Respondent contended that compliance with the rules was not necessary for the safety of employees. It was held, however, that an ALJ has no authority to excuse noncompliance with a properly promulgated rule unless the employer satisfies a recognized affirmative defense.

484 JURISDICTION

Late Employer Petition/Appeal

Mail Handling

Citation/Decision

91-53 St Charles Lumber Products, Inc (1991)

Respondent believed the citation was received one day later than the date shown on the receipt card. No explanation was provided for this "postal error." Good cause for late filing was not presented. It was unreasonable for Respondent to wait until the last minute to file.

485 AMENDMENT

By Motion

Prejudice

ELECTRICAL

Conflict Between Standards

Energized Lines

GENERAL vs SPECIFIC Conflict Between Standards

STANDARD

Conflict Between Standards

Interpretation

89-1933 City of Detroit, Public Lighting Department (1990)

Respondent was cited for a serious violation of Part 17, CSS, Rule 1724(3). This rule prohibits an employee from proximity to a power circuit unless protected by de-energizing, locking out, or guarding. One of Respondent's employees was injured when exposed to 240 volts and not using insulated Louis or equipment. The circuit was not energized.

The citation was dismissed because both Parts 16 and 17 of the CSS and Part 33 of the GISS applied to Respondent's place of employment. Part 16 permits employees to work near "exposed energized parts" and use the "live-line, bare-hand technique." Part 33 requires employee protection for more than 750 volts. The broad construction of Part 17 argued by Complainant would nullify Parts 17 and 33. The standards contain no language to support Complainant's position that Part 16 applies to high voltage areas such as power stations while Part 17 applies to areas not exceeding 440 volts. Complainant's motion to amend the alleged violation from Part 16 of the CSS, Rule 408.41627, to Part 17, Rule 1727(3), was approved before the hearing and after the prehearing conference. Respondent did not show prejudice would result from granting the motion.

485 (Continued)

Complainant filed exceptions to the AL's proposed decision, but no Board member directed review.

486 INSPECTION

Private Interview of Employee
Participation of Authorized Employee Representative

JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Interoffice Mail System
Interoffice Mail System

84-3544 GMC Detroit Diesel Allison Parts Distribution Center (1985)

Order Finding Good Cause For Late Appeal:

Respondent's interoffice mail system was utilized every day to send important and confidential mail between company offices. No employee could be blamed for the error that delayed a communication from being received by Respondent's legal staff in a timely fashion.

Respondent acted reasonably and relied on a system that worked for many years. There was no showing of carelessness, negligence, or lack of reasonable diligence. Good cause was found for the late appeal.

Issue:

Could Complainant privately question employees during a plant inspection with a union representative present, but excluding the employer representative?

Conclusion:

Complainant argued that its operation manual allows the safety officer to determine when a private interview is appropriate.

The ALJ ruled that the operations manual had not been promulgated. Administrative interpretations of statutes are not conclusive and cannot be used to overcome the statute's plain meaning.

486 (Continued)

The ALJ found that Section 29 of MIOSHA does not permit participation of an authorized employee representative in the private questioning of an employee. MIOSHA narrowly prescribes the rights of the authorized employee representative. A lack of any reference to the authorized employee representative in Section 29(1) can only mean that such participation was not contemplated by the Michigan legislature. The common usage of the word "privately" does not contemplate the attendance of the authorized representative without the employer representative.

The ALJ dismissed the citation. Exceptions were filed by Complainant. No Board member directed review. This matter became a final order of the Board on 1/14/91.

487 EMPLOYER DEFENSES

Trench Was Safe - Slope Not Needed

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

Type of Injury if Accident Occurred

TRENCH

Sloping

Required Even If Employer Believed Safe

90-119 NTH Consultants, Ltd (1991)

The safety officer observed two workers in a trench in the basement of a future three-story office building. The excavation measured 15 feet long and 15 feet wide with a variable depth between 4 feet 5 inches at the southeast corner to 9 feet deep at the west side. Respondent's employee was seen in the trench at a depth of 5 1/2 feet, also in the 9 foot depth portion.

Respondent admitted that they were in violation of the standard but argued that the trench was safe. They objected to the citation as serious because they believed that the slope was in no danger of caving in. The employee was only in the bottom of the trench for approximately 5 minutes to take soil samples.

The ALJ affirmed as serious a charge of failure to slope or support an excavation more than 5 feet deep, Part 9, CSS, Rule 941(1), over Respondent's argument that the trench was safe. There was substantial probability that an employee working in the trench could suffer death or serious injury in the event of a cave-in. The serious characterization of a violation is based on the type of injury that would result if an accident occurred rather than the probability of an accident occurring.

488 ASBESTOS

Records
Respirators
Showers
Storing Contaminated Material

90-381 Action Services, Inc. (1991)

Respondent conducted an asbestos abatement project at a Pontiac school.

Complainant conducted an investigation and cited Respondent for the following:

> Failure of employees to take adequate decontamination showers after completing asbestos abatement work, not storing material properly, not providing hot water for showers, not keeping accurate records, not storing respirators in sealed bags, and not properly storing asbestos.

The ALJ dismissed the citations. The citation for the discharge of air into a restricted area was dismissed because the discharged air was filtered asbestos free, MCL 408.1060. The citation for failure of employees to take adequate decontamination showers was dismissed because no shower was required. All of the gross removal was done, and the employees were doing a final wash down prior to pre-inspection, MCL 408.1060.

The citation for not storing contaminated material properly was dismissed because the decontamination procedures used were within the policy of the school district. Aggressive air sampling determined that no airborne asbestos particles were present. The room had limited access and was restricted. Respondent's procedure to wash down the room with all of the equipment daily and then spray and encapsulate was the common practice of the industry.

The citation for not providing hot water for showers was dismissed because a shower was not necessary on that day, 29 CFR 1926.58(j)(2)(iii).

The citation for not keeping accurate records was dismissed because the proof failed to show this violation. Records were kept by the independent air monitoring specialist. These records were present on site but not specifically requested by the inspector, therefore, not provided, 29 CFR 1926.58(n)(ii).

The citations for not storing respirators in concealed bags and not properly storing asbestos were dismissed because the area is not a disposal site. The proofs did not show that the bag was filled with asbestos. The bag contained some stones, gravel, and rocks from another job site. The bags were sampled and no contamination was found, 29 CFR 1910.134(d)(6). For all of the above reasons, the citations were dismissed.

489 ELECTRICAL

Safety Equipment For Employees

EMPLOYEE

Misconduct

SUBCONTRACTORS

Education on Job Hazards Safety Equipment

88-361 Detroit Edison Company (1990)

The ALJ dismissed a citation charging a violation of Rule 408.41651(2). The citation stated, in part:

> The employer failed to enforce: When work is to be done in an energized sub-station, the following shall be determined: (a) What facilities are energized, (b) What protective equipment and precautions are necessary for the safety of personnel.

In this case, Respondent had a contract with Gray Electric which required certain construction and electrical installation work to install two new cubicles and switch gear positions. From time to time, Respondent hires outside contractors to do construction work. When this happens, a request for shut-down and a protection contract is signed. A "request for shut-down" means that a part of the substation being repaired, constructed, given maintenance, and/or modified is to be de-energized to permit performance of the work. In a protection contract, both the operator and the protection leader must sign the agreement. The operator signs to indicate that adequate protection to do the job has been provided. In every request for shut-down and a subsequent protection contract, there exists "the limits of protection." The "limits of protection" is the area where it is safe to work. No place outside of that area is considered safe.

The ALJ found that the work site for Gray Electric employees was de-energized. Respondent provided adequate protection pursuant to the cited rule. Respondent's employees reviewed the protection required; walked the Gray Electric employee through the protection; and cautioned them time and again about the existence of the safety red-tag protection and its perimeters. They warned against extending beyond the protection limits because everything else was to be considered energized. No hazard was created by Respondent since the hazardous area was known to be off limits.

The evidence at the hearing indicated that there was misconduct on the part of an employee because he was storing Micarta board in an area declared to him to be off limits, hazardous, and energized. For those reasons, the citation was dismissed.

489 (Continued)

The Board directed review and issued a decision on 5/15/91. The Board held Respondent knew what facilities were energized and communicated this information to employees but did not provide safety equipment and precautions to ensure employee safety. An employee could come into contact with the zone of danger. A barrier rope or other guard placed between cubicles P and 0 would have created a physical barrier. Respondent was found in serious violation of the cited rule.

490 PRESSES

Pull Backs
Wrist Fit
Willful Violation
Reduce to Serious

88-240 Multifastener Spring Division (1990)

On or about 1/8/88, an employee of Respondent was operating a Bliss Power Press. The employee was not using wrist attachments to pull the operator's hands away from the point of operation. By not using wrist attachments, the employee severed the tip of his left index finger.

Based upon the employee's statement that he was unable to wear the wrist attachments because they were too small to fit comfortably on his wrists, a willful and serious violation of Rule 2461(1), Part 24 of the GISS, was issued.

The ALJ found the citation should be changed from willful to serious. The ALJ found that Respondent did require the use of wrist attachments when operating the Bliss Press. This employee had been advised of this policy and was warned about the use of guards on two prior occasions when supervisors caught him using the press without guards. One supervisor had punched holes in the leather straps so that they would fit on the employee's wrists. The proofs did not establish the intentional disregard or plain indifference required for a willful violation. A serious violation was found.

491 FIRE EXTINGUISHERS

FLOOR DEBRIS

FLOOR OPENING
Stairwell

GUARDRAIL

HOUSEKEEPING

PERIMETER CABLE/GUARDRAIL

89-716 SME Wrecking, Inc (1990)

1. The construction safety inspector inspected a demolition project on East Jefferson, Trenton, Michigan, on 12/6/88. Citations were issued for four alleged violations. Employees were working in an elevator shaft pit using a cutting torch. There was a build-up of grease and oil in the elevator. No fire extinguisher was provided, Part 7, Rule 408.40761(4).

2. Respondent's employees were working on two different levels of the building site and were not protected with a guardrail or perimeter cable.

3. Employees were walking through demolition debris covering the floors, landings, and stairways, Part 21, Rule 408.42159(1).

4. There was also a floor opening formerly used as a stairway, Part 21, Rule 408.4214 1(1).

The ALJ found that the open floors and platforms should have been guarded and that a fire extinguisher provided for the welding operation. He also found the employees were exposed to a slipping/tripping hazard. All of the violations were termed "serious" since they could cause death or serious physical injury.

492 ACETYLENE & OXYGEN TANKS

Storage vs Use

STORAGE

Acetylene & Oxygen Tanks

75-81 GMC, Detroit Assembly Plant, Parts Division (1977)

Approximately 10 units consisting of 1 tank acetylene and 1 oxygen were observed throughout the plant. The tanks are used by 100 to 150 millwrights per shift. The tanks are capped and chained to a cart. They cannot be used until an employee removes the caps and attaches a regulator, hoses, and torch.

The ALJ found these units were not stored. There was no violation of Part 12 of the GISS, Rule 1222(6), requiring gases to be separated when stored.

493 JURISDICTION

Late Employer Petition/Appeal

Good Cause Found

Key Employee

Illness/Death/Resignation

Key Employee

Illness/Death/Resignation

90-1322 Sterk Brothers Redi-Mix (1991)

Good cause was found where the company president suffered an emergency condition also involving the office manager, the president's wife.

The item on appeal was ultimately dismissed by the Department.

494 JURISDICTION

Late Employer Petition/Appeal

Good Cause Found

Post Office Error

Post Office Error

89-1942 Central Michigan University (1991)

Good cause was found where Respondent deposited the petition for dismissal in the U.S. mail on the last day of the appeal period. It was reasonable to expect the postmark to be the deposit date. Respondent later learned that mail from Mt. Pleasant is date stamped in Lansing. This caused the postmark to be one day later than expected. Respondent acted reasonably.

Respondent ultimately withdrew the appeal.

495 DISCOVERY

Depositions
Interrogatories

PHOTOGRAPS/VIDEOTAPES

87-4433 GMC, Hydramatic Division (1990)

An interim order granted Complainant's request to conduct discovery including interrogatories, depositions, and production of documents, but denied the request to view, photograph, and videotape the inspection scene. The case was ultimately closed with a settlement agreement.

496 DUE PROCESS

Particularity of Citation

MOTION TO DISMISS
Particularity of Citation

87-4434 GMC, Hvdrarmatic, Willow Run Plant (1991)

Respondent's Motion to Dismiss for a lack of particularity (Section 33) was dismissed. Respondent argued the citation failed to identify:

1. The plant department at issue;
2. Employees who needed training on conveyor lockout procedure - Part 4; GISS, Rule 1411(1) and 1431(1)-(2);
3. Conveyors involved; and,
4. Time period.

The order dismissing was based on the decision of B W Harrison by the 5th Circuit Court of Appeals, 1978 OSHD, par. 22,626. The Court held particularity defects in a citation may be cured at hearing. Also, the Review Commission held in Gold Kist, Inc., 1979 OSHD, par. 23,998, that a citation may be dismissed for lack of particularity only when the employer has shown prejudice in its ability to defend on the merits.

All issues were later resolved in a settlement agreement.

497 GENERAL CONTRACTOR

Protection Duty for All Employees

90-478 Design/Build Associates, Inc. (1991)

Respondent, a general contractor, was held in violation of Part 9 of the CSS, Rule 408.40941(1), regarding subcontractor employees working in a trench 10 1/2 feet deep with no shoring or trench boxes. The duty of the general contractor to enforce MIOSHA standards is not limited to its own employees but extends to all employees at the worksite.

498 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Post Office Error
Post Office Error

90-1858 Layne-Northern Company (1991)

Respondent acted reasonably believing an appeal mailed in Lansing on 9/14/90 would receive a postmark on or before 9/17/90, the last day of the appeal period. Good cause was found. Complainant later dismissed the citation as a result of the prehearing conference.

499 JURISDICTION

Late Employer Petition/Appeal
Contacting a Third Party
Waiting for Department Written Response

91-1386 J Verrette Company (1991)

It was unreasonable for Respondent to ignore the information on the Department's decision on how an appeal could be filed, including reference to the 15 working day period, and wait for a written Department response to an earlier letter. Good cause for a late appeal was not found.

500 JURISDICTION

Late Employer Petition/Appeal

Christmas Holiday Distractions

Mail Handling

Two-Step Review Process

91-1002 Buckeye Die & Engineering Co, Inc (1991)

Section 41 provides a two-step review process. Respondent should have known a Department decision would soon follow its petition and that a further appeal could be needed. It was not reasonable for Respondent to rely on "the distraction of the Christmas holidays" to avoid filing a timely appeal.

501 JURISDICTION

Late Employer Petition/Appeal

Communication with Attorney

91-831 Shelton Pontiac-Buick, Inc (1991)

Good cause for a late petition was not found where the delay was due to miscommunication between Respondent and its attorney.

502 JURISDICTION

Late Employer Petition/Appeal

Citation Must be Issued Within 90 Days of Inspection

Confusion

Over Business Ownership

91-882 Gencon Services, Inc. (1991)

Section 33(1) requires citations to be issued within. 90 days of inspection. Respondent should have known a citation would follow within this period and have taken steps to respond in a timely manner. Statutory appeal time periods cannot be extended based on ownership issues. Respondent was a subsidiary of another company and argued this blurred responsibilities over who would file the petition. Good cause was not found.

503 JURISDICTION

Late Employer Petition/Appeal
Confusion
With Abatement
Employer Too Busy

91-944 Earl St John Forest Products (1991)

Good cause was not found where Respondent confused abatement with filing a petition for dismissal. A reasonably prudent employer would have read the citation appeal information.

504 JURISDICTION

Late Employer Petition/Appeal
Vacations
Witness Statements

91-1082 Lake Shore Marine Construction (1991)

Good cause was not found due to a business shutdown and the perceived need to obtain witness statements before filing a petition for dismissal. All Section 41 requires is a statement disagreeing with the citation and requesting review.

505 JURISDICTION

Late Employer Petition/Appeal
Confusion
With Abatement

91-1284 Tel-Ex Cinema (1991)

Good cause is not presented when Respondent confuses abatement with filing a petition for dismissal. It is reasonable to expect Respondent to promptly examine and answer important mail. This includes reading the reverse side of the citation.

506 ASBESTOS

Department of Defense Facility

JURISDICTION

Department of Defense Facility

89-250 Dore & Associates Contracting. Inc. (1989)

The Department of Public Health issued a citation to Respondent for work at the Wurtsmith Air Force Base, a federal enclave. A 6/30/89 preliminary order found jurisdiction because the Department received federal authority to enforce MIOSHA on the base. This finding was based on the Michigan State Plan and the lack of any asserted authority by the Department of Defense under Section 4(b)1 of OSHA.

After hearing and briefs, a 6/5/90 decision was issued finding a violation of three items regarding asbestos exposure. One item was dismissed.

In 12/91, the Bay County Circuit Court reversed, finding that the Department of Public Health did not have jurisdiction to issue or enforce the citations at issue. The Department of Defense regulations permitted Department inspections, but no citations. See CCH Vol. 1, par. 516.316.

507 RES JUDICATA

90-96 Oakland Co, Walled Lake Novi Sewage Treatment (1991)

The Department issued a citation alleging that Respondent failed to guard an open-sided platform with a standard barrier, Rule 408.10213, Rule 213(2)(5). The facts were undisputed that the required standard barrier was not in place. Respondent contended that the citation should be dismissed based on the doctrine of res judicata. A previous citation against Respondent involving the same standard had been dismissed by the Department. A later citation against Respondent involving the same standard had been dismissed pursuant to the doctrine of res judicata. The ALJ concluded that the issue in this case was not the same as the issues in the previous cases because the same equipment and locations were not involved. Therefore, the case was not dismissed due to res judicata. The item at issue was affirmed.

Respondent filed exceptions with the Board, but no member directed review.

508 FLOOR MAINTENANCE

Scrap/Debris

90-1112 Granger Construction Company (1991)

Respondent violated CSS Part 1, Rule 408.40119(1), regarding hazardous placement of material including scrap and debris. Respondent's argument that the floor debris was not sufficient to warrant a citation was rejected. Respondent chose not to have a representative with the safety officer on the walkaround. Therefore, the safety officer's observations were unrebutted.

509 CONVEYOR

Inspection

EMPLOYER

Absolute Liability

88-590 GMC, Truck & Bus Operation, West Plant #5 (1991)

Respondent was cited for violation of Part 14 GISS, Rule 1411(2), regarding a conveyor inspection program "which does not constitute a hazard to an employee."

The citation was dismissed because the Department did not establish hazardous conveyor components caused by a poor inspection program. The injury incidents presented were unconvincing. Also, the rule does not create absolute employer liability. The conveyor merge problems presented were not shown to be related to the conveyor inspection program required by Rule 1411(2).

510 BOARD REVIEW

Remand for Settlement

SETTLEMENT Board

Remand

90-349 Ralston Purina Company (1991)

The ALJ issued an Order Approving Withdrawal based on a letter from Respondent. However, the parties had settled and were preparing a settlement when the case was closed. Exceptions were filed by both parties, and a Board member directed review.

The case was remanded to receive the settlement. A settlement was submitted and the case was closed based on this resolution.

511 GUARDING

No Source of Power
Saws

90-29 Janush Brothers Moving and Storage (1991)

The ALJ affirmed a serious violation of GISS Rule 2730(1)(2)(3)(8) regarding guarding of the lower exposed portion of a radial saw. The Board reversed finding the saw was inactivated. The cord cap was removed and the saw had been placed in a storage area. Since there was no source of power, no guard was necessary.

512 BOARD REVIEW

Tie Vote = Affirmance

EMPLOYER DEFENSES

Anning-Johnson

WILFUL VIOLATION

Prior Citations
Reduced to Serious

89-1631 Concrete Wall Company (1992)

Respondent was cited for several violations at a 14 foot excavation. The ALJ held that Respondent had a duty to take reasonable measures to protect its employees even though Respondent did not excavate the site. One item was reduced from willful serious to serious. Previous citations issued more than two years earlier at a different site did not establish that Respondent's actions at this site were deliberate, voluntary, and intentional. The Board reviewed this decision and issued a Board decision with three members affirming the ALJ's decision and three opposed. A tie vote results in affirmance.

First Aid Kit, Placement
Underground Work Area

90-925 M & M Contracting of Michigan (1991)

The ALJ affirmed an OTS violation of Part 2 of the OHSS, Rule 325.50205(2), regarding failure to keep a first aid kit and woolen blanket in the underground work area of a 42 foot deep shaft and a 25 foot tunnel. Respondent argued the entire complex inside a surface fence was an "underground work area." Since a fi[r]st aid kit was inside this area, there was no violation.

The rule must be reasonably interpreted. At the stage of tunnel construction encountered by the hygienist, it was reasonable for the kit to be in a surface trailer. At some point in tunneling, however, the first aid kit has to be underground, close to the employees most in danger. The tunnel was eventually to be 6,700 linear feet. Since the rule also requires a woolen blanket and a stretcher and neither were in the surface trailer, the violation was affirmed.

514 AMENDMENT

By Motion

Prejudice

CONCRETE

Prompt Clean Up

HOUSEKEEPING

Concrete, Forming Clean Up

MOTION TO DISMISS

Issues of Fact

89-1288 Ceco Corporation (1992)

The ALJ dismissed an alleged serious violation of Part 25, CSS Rule 2521(4), regarding removal of stripped forms and shoring after use. The safety officer observed employees carrying plywood for stacking and walking over pieces of 4 x 4s and plywood.

Employees were in the process of removing and storing stripped material when visited by the safety officer. The description of the forming process, including the removal afterward, shows that a large amount of debris is formed when an entire 16 x 16 section falls to the floor.

Employees immediately begin piling the plywood, 4 x 4s and 4 x 6s on piles. The cleanup process takes approximately 30 minutes. Rule 2521(4)'s "prompt" requirement must be interpreted reasonably. In this case, a 30 minute clean up period was found to be compliant with the rule,

The ALJ also issued a prehearing order denying Respondent's motion to dismiss. This motion was based on the Department's failure to respond to "facts" claimed by Respondent. Respondent also objected to the Department's motion to amend. It was held that an amendment in an administrative setting should he freely granted unless prejudice can be shown by the employer. The employer does not have a right to go to trial on a specific charge.

515 JURISDICTION

Late Employer Petition/Appeal
Death
Co-Owner and Friend
Good Cause Found
Death
Co-Owner and Friend

91-597 Like New Auto Body Repair, Inc (1992)

Good cause for a late appeal was found where the surviving co-owner, not well versed in the law, was reasonably affected by the accident and death of his friend and co-owner. The delay in filing was not based on carelessness, negligence, or a lack of reasonable diligence. After a prehearing conference, the parties signed a settlement to resolve the appeal.

516 JURISDICTION

Late Employer Petition/Appeal
Abatement
Does Not Nullify Citation

91-1146 Tenibac-Graphion, Inc. (1992)

Good cause for a late petition was not presented where Respondent alleged poor communication between the maintenance supervisor and the Department caused the delay. Respondent believed immediate abatement would nullify the citation and penalties. A hearing was scheduled on the good cause issue at Respondent's request, but Respondent failed to appear or request an adjournment.

Ignoring the information on the citation concerning how an employer can appeal shows lack of reasonable diligence. Whatever Respondent thought the Department said, the citation said something different. A reasonable employer would have checked out the different advice. Respondent's failure to appear at the hearing also shows a lack of reasonable diligence.

517 BACK-UP ALARM

Bi-Directional Machines

INSPECTION

Union Member as Employer. Representative

90-790 Consumers Power Company (1992)
90-1191

Violations of CSS Rule 1926.602(a)(9)(i) regarding back-up alarms on "bi-directional machines" were dismissed. A comparison of the facts to the Second Circuit decision in S J Groves & Sons Co, 648 F2d 95 (CA 2, 1981), supported this finding. The Groves Court set four factors to determine when earth-moving equipment was required to have a back-up alarm. The record in these cases does not have enough evidence to satisfy these factors. These factors are:

1. Be able to perform functions in either gear;
2. Change direction frequently;
3. Have a shuttle shift transmission permitting change of direction without a complete halt; and,
4. Have an obstructed view to the rear.

Also, Respondent's argument concerning employer representation during the inspection was rejected. At each inspection, an employee told the safety officer that he was "in charge." In both cases, the person "in charge" was a union member and not a management representative. The ALJ concluded that if Respondent does not want union members representing its interests during the inspection, employees need to be told to contact someone else to take part. The burden cannot be placed on the safety officer to determine if the person who says he is "in charge" is "really" in charge.

518 ASBESTOS

Competent Person
Guidelines vs Requirements
Respirators
Written Procedures for Use and Selection

DUE PROCESS

Employer Must Know What is Prohibited

STIPULATION OF FACTS

91-254 Fuller Asbestos Abatement Removal (1992)

This case reviews three sections of the asbestos standard: 29 CFR 1926.58(e)(6)(ii); 58(n)(3)(ii)(B) and (D); and 1910.134(b)(1). The parties submitted the case for decision based on a stipulation of facts and briefs.

1. 58(e) - The standard requires the employer to designate a competent person to perform or supervise several specific duties. The ALJ found that the rule does not require the competent person to be on the site at all times. This item was dismissed.

2. 58(n) - Medical surveillance "requirements" are listed in the standard. In Appendix 1, the same "requirements" are listed as "nonmandatory guidelines." The ALJ found that a rule must clearly tell an employer what is required or prohibited before an employer can be held in violation. See Bartos Construction Co, NOA 75-12 (1976). This item was dismissed.

3. 134(b) - The stipulation established that the employer did have written operating procedures. The rule does not require the procedures to be "specific" as argued by the Department. Also, the procedures were not supplied for review. This item was dismissed.

519 JURISDICTION

Late Employer Petition/Appeal
Key Employee
Leave of Absence

92-908 R E S T, Inc (1992)

Respondent's secretary took an unexpected leave of absence. The ALJ held an employer is responsible for providing enough staff to answer mail. A reasonable employer takes steps to continue necessary business communication when a crucial employee leaves for whatever reason.

520 JURISDICTION

Late Employer Petition/Appeal
Confusion
Appeal Rights Hard to Understand

92-851 Superior Glass Erectors (1992)

Respondent argued he did not understand the right to appeal. The ALJ found that good cause for a late petition was not presented. A reasonable person faced with something hard to understand will seek help to understand the process. The citation contains information on how to protest. The safety officer also covers the appeal process during the inspection.

521 JURISDICTION

Late Employer Petition/Appeal
Business Shutdown
Fifteen Working Days

92-742 Snover Stamping Company (1992)

Respondent received the citation on 11/12/92 and claims to have mailed the petition on time if the day after Thanksgiving is not counted as a working day. The business was closed on that day." Section 6(9) defines a state legal holiday as any day other than a Saturday, Sunday, or a state legal holiday. The day after Thanksgiving is not listed as a state legal holiday in MCL 435.101, 1865 PA 124. Respondent did not mail the petition on time. Good cause for the delay was not found.

522 JURISDICTION

Late Employer Petition/Appeal
Mail Handling
Service on City

92-751 Highland Park, Department of Public Safety (1992)

Respondent's attorney argued MCL 600.1925(2) requires citation service on the mayor, city clerk, or city attorney, The ALJ found that the Revised Judicature Act does not apply to citation service because this is not equivalent to filing a civil suit. Section 33(1) of MIOSHA requires the citation to be sent to the employer by registered mail. The mailing address was obtained from Respondent's Deputy Director during the inspection. The employer has an obligation to train employees in correct mail handling procedures. Good cause for the late petition was not presented.

523 JURISDICTION

Late Employer Petition/Appeal
Key Employee
Illness/Death/Resignation

91-1277 Meram's Construction, Inc (1992)

A late petition was filed because the person in charge of the office was on a temporary sick leave when the citation was received. Good cause was not found. The employer has an obligation to assign replacement employees during the absence of a key employee. Respondent knew or should have known that a citation would be issued within 90 days of the inspection [Section 33(1)] and taken steps to promptly respond.

524 JURISDICTION

Late Employer Petition/Appeal
Contacting a Third Party

92-740 Michigan Roll Form, Inc (1992)

Respondent argued good cause by needing to contact the Michigan Tooling Association. This group changed safety vendors at the beginning of 1992 causing a delay in filing the appeal.

Good cause was not found for the late filing. Respondent can consult with any source to assist with MIOSHA compliance. However, Respondent is still bound by the 15 day appeal period. Also, since Respondent had already filed a timely petition, any investigation to determine Respondent's position had presumably already been made.

525 JURISDICTION

Late Employer Petition/Appeal
First Inspection/Citation

91-1858 Garfield Construction Company (1992)

Good cause for the late petition was not found. Respondent was advised during the inspection of the likelihood a citation would be issued. The process of preparing a defense could have started at that time. Moreover, the reverse side of the citation and the information provided by the safety officer advised of the 15 day appeal period. The fact that Respondent had not been previously cited does not excuse Respondent's unreasonable conduct in not reading the appeal information provided. There is no exception in the Act for employers inspected for the first time or for small employers.

526 JURISDICTION

Late Employer Petition/Appeal
Mail Handling
Citation/Decision
Vacations

92-186 Paramount Fabricating, Inc (1992)

The failure to record the actual date the postal receipt card was signed shows a lack of reasonable diligence. It is reasonable to expect an employer to train office employees in correctly marking mail for actual receipt date. Also, it was not reasonable for Respondent to leave the business on vacation without having a reliable person in charge during the absence. Good cause for late petition was not established.

527 JURISDICTION

Late Employer Petition/Appeal
Citation Mailing Unopened
Vacations

92-42 Agri Sales (1992)

Respondent received the citation mailing and then the facility manager left for a two week vacation without opening the mail from the Department of Public Health.

Good cause was not found. It is not reasonable business practice to sign for a certified. delivery from the Department of Public Health and then to leave for a vacation without opening the mail. Despite the practice of not opening certified mail regarding customer liens, this mail identified it as not from a customer.

528 JURISDICTION

Late Employer Petition/Appeal
Out of Town
Small Employer

92-329 Lit-Pac, Inc (1992)

Respondent was out of town on a last-minute trip. Also, the company is small with no one but the owner able to sign the abatement forms. Good cause was not found for the late petition. An employer leaving the business for a vacation or out-of-town business trip must check back periodically to handle important mail or leave a reliable person in charge. There is also no exception in the Act for small employers. All employers are expected to file timely petitions and appeals. Also, certification of abatement is not the same as filing a petition. Abatement must be filed within the time permitted for correction stated on the citation. A petition for dismissal must be postmarked within 15 working days from the employer's receipt of the citation. This confusion does not satisfy the good cause test.

529 JURISDICTION

Late Employer Petition/Appeal
Mail Handling
Citation/Decision

92-167 Farmer Jack, A & P #26 (1992)

The person in charge of filing appeals was not sure when the store received the citation because he was on vacation at that time: This person also understood the 15 day appeal period requirement because he had filed four to five prior appeals since becoming Group Safety Manager. Good cause was not presented for the late filing because the manager acted unreasonably in not expediting the petition.

530 JURISDICTION

Late Employer Petition/Appeal
Business Shutdown
Fifteen Working Days

92-525 Lamar Construction Company (1992)

Good cause for a late petition was not found where the hunting season took some of the 15 day appeal period. The language on the reverse side of the citation informs how a petition may be filed and the 15 working day limit. Thanksgiving is not counted but the hunting season is because these days are not considered state legal holidays. See Section 6(9) of MIOSHA. The fact that those needed to file the petition were out hunting is not good cause for the delayed filing.

531 JURISDICTION

Late Employer Petition/Appeal
Appeal Cannot be Filed by Posting

92-695 Pi-Con, Inc. (1992)

Good cause for a late appeal was not found where Respondent argued a belief that filing and posting the petition for dismissal was all that was needed to further the appeal. Michigan has a two-step level of appeals. Respondent has properly filed prior appeals. The Department's decision and enclosures of the Board rules state how an appeal may be filed.

532 EVIDENCE

Admission by Party Opponent - Not Hearsay
Corroborative
Credibility

RIGHT TO KNOW

Hazard Communication Program
Employee Information and Training
Nonroutine Tasks

90-1845 L & L Products (1992)

Respondent was cited with two violations from the Right To Know Law, 29 CFR 1200(e)(1)(ii), regarding the hazard communication program and (h) regarding providing employees with information and training on new hazardous chemicals. An explosion occurred when a trial batch of product was being mixed. One employee was killed and a second injured.

The testimony of Respondent's witness established that the company has a written communication program, but it does not have a nonroutine task section. Respondent was unsure how to comply with the requirement for a nonroutine task portion in the written program and, therefore, left it out. The ALJ found that Respondent acted unreasonably. At the least a reasonable employer would have sought assistance from the Department of Public Health. This violation was affirmed.

The second violation, providing employees with information and training, was dismissed. The injured employee was provided with information on chemicals being used by the company. Respondent's witness also testified concerning the employee's on-the-job training. The hygienist's testimony as to what the injured employee told him during the inspection were found to be admissions by a party opponent permitted by Rule 801(d)(2)(D) of the Michigan Rules of Evidence. The employee related to the hygienist matters within the scope of his employment. These statements were not hearsay. On the other hand, this evidence was due little weight. The statements were not written and signed by the employee at the time they were made. The employee was not available for cross-examination at hearing.

533 CRANES

Riding the Load

CREDIBILITY

EMPLOYER DEFENSES

Anning- Johns on

EVIDENCE

Corroborative
Credibility

FLOOR MAINTENANCE

Concrete
Scrap/Debris
Work Area or Aisle

IMPALEMENT

MOTION TO DISMISS

Premature

WALL OPENINGS

89-878 Ceco Corporation (1992)

Respondent was a subcontractor installing concrete forms on a multi-employer worksite for a correctional facility, A Motion to Dismiss prior to hearing was dismissed as premature. Respondent alleged facts not yet established to support the motion. Section 42 of MIOSHA gives the Department a chance to prove its case at hearing.

A violation of Rule 408.40119(1) concerning concrete scrap and debris was dismissed. The Department took no photographs of this material. As noted in Drake Industries, Inc., NOA 78-857 (1979), reasonable people will differ as to what amount of debris is a hazard. With no corroborating evidence, a violation was not proved. A violation of Rule 408.40119(3) concerning material stacking in a work area or aisle was dismissed. No hazard was proven. The narrow aisle was outside. No photographs were taken to corroborate the testimony.

533 (Continued)

A violation of Rule 1926.550(b)(2) preventing an employee from riding in a trash box being lowered to the ground was affirmed. The safety officer, an employee with 19 years' experience, testified that he saw the foreman in the trash box being lowered by the crane. This direct evidence was not rebutted by Respondent's argument that the observation took place during lunch. Section 29 does not require a safety officer to ignore a plain sight serious violation just because the employer representative was not present. Although the employer representative did not believe the safety officer, he did not investigate by interviewing the foreman, crane operator, and others in the area at that time.

A violation of Rule 408.42146(1) regarding guarding wall openings was affirmed. The safety officer testified that he saw Respondent's employees within two feet of an unguarded wall opening talking to other workers. Although Respondent did not create this hazard, an employer has an obligation to protect employees from hazards even if the employer did not create them. See Utley-James. Inc., NOA 78-848 (1979),¶143.

A violation of Rule 408.42518(3) concerning protection from impalement on vertically protruding steel rods was dismissed. Respondent did comply with Anning-Johnson requirements by preventing employees from working in proximity to uncapped rods and by repeatedly raising the issue with the general contractor.

Respondent filed exceptions to the ALJ's report but no Board member directed review. Respondent then appealed only Item 4 to the Circuit Court. Item 4 alleged a violation of R 408.42146(1) requiring wall openings to be guarded. Ingham County Circuit Court Judge Giddings reversed this finding. The Court held that Respondent satisfied the Anning-Johnson tests required for a subcontractor who did not create the hazard. In addition, the Court found that there were no Respondent employees working in the vicinity of the unguarded wall openings. The Judge reviews federal and state cases and writes a good decision on the subject.

534 JURISDICTION

Late Employer Petition/Appeal
Business Closed
Good Cause Found
Business Closed

91-470 Homestead Lumber (1992)

Good cause for a late petition was found where Respondent's business closed and the owner had to move out of the lumber yard. With no secretary, the paperwork was delayed. The ALJ found that Respondent acted reasonably considering the business closure and move. A prehearing conference was held, but the appeal was dismissed when Respondent did not attend the hearing.

535 CONVEYOR

DISCONNECT

Electrical
Fixed vs Variable Electronic Equipment

ELECTRICAL

Fixed vs Variable Electronic Equipment
Post Sparking Distance

FLOOR OPENING

LOCKOUT PROCEDURE

Robots

PAINT MODULES

Cleaning
Guarding

ROBOTS

Lockout Procedure

88-4540 GMC, Pontiac East Assembly (1992)

Respondent failed to guard the conveyor at the transfer or lift point. Although Respondent corrected the situation, it was not a defense to the citation. Also, Respondent failed to guard a floor opening 100 feet long, 11 inches wide and 20 inches deep.

The other citations were dismissed. Respondent did not fail to enforce the lockout procedure while cleaning the paint modules because the cleaning operation had never taken place while power to the robots was on. The citation for violation of the post sparking distance on fixed electronic equipment was dismissed because the apparatus was variable and not fixed. There was no hazard to the employees because the process was intrinsically safe and the sparks were automatically defeated before they even occurred.

The citation for failure to install permanent guarding in the paint module was dismissed because any permanent guarding would interfere with the movement of the vehicles into the paint modules. The trough where the employees worked was not a standard work area but was only used when it was time to clean the paint booths or service the robots.

536 GUARDING

Point of Operation Guard or Device
Access to Die
Remote

LOCKOUT PROCEDURE

Unexpected Motion

PRESSES

Used as a Riveter

STANDARD

Conflict Between Standards

87-420-0 GMC, Fisher Guide (1992)

The safety officer observed an employee changing a roll of velcro while standing inside the machine framework with the air supply in the off position. A citation was issued for failure to lockout, Rules 11(c) and 32(1)(2). The citation was dismissed because Complainant failed to show how unexpected motion could occur. Respondent presented evidence that a quick dump air valve shut off all air coming to the machine and discharged or bled all air in the machine. This relieved all pneumatic pressure.

A citation for failure to provide a point-of-operation guard on a mechanical power press was affirmed. Respondent's argument that, if the door had been in the position as indicated by a photographic exhibit, no citation would have been issued. This argument was not accepted. Even if the guard had been in place, it would still have been a violation of the standard because the opening allowed access to the die.

A citation for failure to provide guarding on a Niagara Mechanical Power Press was dismissed because it was not used as a press. The press was used as a riveter and the guarding rules of Part 26 applied. The rivet introduced at the hearing illustrated that the machine was used as a riveting machine. Forging hammers, molding or riveting machines, and metalworking machinery are all governed by Part 26. Part 26 does not require guarding when the point of operation is inaccessible or remote from the operator.

537 ELECTRICAL

Ground Fault Interrupter

GRINDING vs SANDING

GUARDING

Abrasive Wheel

HEAD PROTECTION

Falling Tools

90-609 Michigan Industrial Metal (1991)

The safety officer observed an employee using a Milwaukee Offset Grinder without a guard on the abrasive wheel. This grinder was used to trim metal edges during stair installation. Respondent's argument that the machine was used as a sander was not accepted because the machine was being used as a grinder. Since the employee was working with metal, there was a danger that the wheel could chip and explode.

The safety officer also observed the grinder being used outdoors without a ground fault interrupter. There was a wet atmosphere and puddles of water nearby. Two workers, one in the basement and one on the upper level, were observed working without hard hats. These employees were exposed to the risk of falling tools.

All three serious violations were affirmed by the ALJ.

538 JURISDICTION

Late Employer Petition/Appeal

Abatement

Confusion

92-1168 Efficiency Production, Inc. (1992)

A late appeal was filed because of confusion related to abatement of another item. This was not found to be good cause. Also, the appeal was typed before the end of the 15 working day period but not mailed on time. These factors point to carelessness, negligence, or a lack of reasonable diligence.

539 JURISDICTION

Late Employer Petition/Appeal
Abatement
Confusion
Penalty Payment

92-1161 E L Painting Company, Inc. (1992)

Good cause was not found where the employer abated and paid penalty amounts. Also, confusing these items on appeal with those abated is not good cause,

540 JURISDICTION

Late Employer Petition/Appeal
Mail Handling
Field Staff/Administrative Employees

92-859 Gladwin Waste Water Treatment Plant (1992)

Good cause was not found where the citation was served on water plant staff instead of city administrative employees. The employer has a duty to train employees in correct mail handling procedures. The Department sent the citation to the address provided by the employer's representative at the inspection.

541 JURISDICTION

Late Employer Petition/Appeal
Fifteen Working Days
Out of Town

92-961 K & K Stamping Company (1992)

Good cause for a late filing was not found where employer was closed during the holiday season. Only state legal holidays, Saturdays, and Sundays are excluded from 15 working day appeal period. Also, good cause was not found where the owner was out of town. The employer must have a reliable person in charge or call in to direct handling of important mail.

542 JURISDICTION

Late Employer Petition/Appeal
Key Employee
Illness/Death/Resignation
Mail Handling

92-959 Madias Brothers Painting Company, Inc. (1992)

Good cause was not found where the employer's secretary went on sick leave after expiration of the appeal period. Also, mail receipt problems would not affect sending a timely appeal.

543 JURISDICTION

Late Employer Petition/Appeal
Confusion
Mail Handling

92-1079 Michigan Mechanical Contracting, Inc. (1992)

Good cause was not found where the employer argued the Department's decision was not recognized as new correspondence and thought to be a copy of the original citation.

544 GUARDING

Point of Operation Guard or Device
Operator Exposure
Possibility of Injury

INJURY

Possibility

PRECEDENT

Federal Cases Section 46(6)

RES JUDICATA

85-3657	**Gilco, Inc**	**(1992)**
85-3860	**Gilco, Inc**	
87-4203	**Michigan Spring Company**	
87-4404	**Quality Spring Products**	
88-666	**Quality Spring Products**	
88-4592	**American Coil Spring Company**	
90-849	**Associated Spring Barnes Group, Inc**	

Violations of Part 1 of the GISS Rules 34(3) or (9) were dismissed.

Respondent's colter and torsion machines were found to be metalworking machinery covered by Part 26. Point-of-operation guarding was not required because this area was inaccessible or remote from the operator, Rule 2602.

Also, based on Section 46(6) of MIOSHA, the Board is required to follow the precedent established in the OSHA program. In Rockwell International Corp, 1980 CCH OSHD 24, 979 (1980), citations to the Federal Standard 29 CFR 1910, 212(a)(3)(ii) virtually identical to Rule 34(3) was dismissed because the employees were not exposed to point-of-operation injury. A possibility of injury is not enough to establish a violation.

Respondent's argument related to the Department's prior dismissal of citations as mandatory dismissal of the current citations was rejected. Some discretion must be left to the Department to decide which cases to take to hearing.

545 HEAD PROTECTION
Construction Site

LADDER

Construction Site
In Trench

PENALTIES

Good Faith Effort
Reduced

RAMP

Construction Site

TRENCH
Sloping

WILFUL VIOLATION

Actions of Foreman Imputed to Employer
Indifference to Requirements
Prior Citations
Violation in View of Safety Officer

90-255 Angelo Iafrate Construction Company (1992)

Three violations were affirmed. The first concerned Part 6 of the CSS Rule 622(1). Employees were observed not wearing helmets. They were exposed to being hit by the pipe, earth, or sling. A serious violation was found.

The second concerned Part 9, Rule 933(5). Another serious violation was upheld because a ladder was not in the trench. The earth ramp provided did not satisfy Rule 933(6).

A serious/willful violation was found for Rule 941(1). The trench was not sloped to 45 degrees, the required slope. Neither shoring nor a trench box were used. Based on the presence of the foreman and the history of prior citations of Rule 941(1), the violation was properly designated willful. The penalty was reduced based on the petition of Respondent's new safety director. The company is trying to turn its record around and follow the safety standards.

546 JURISDICTION

Late Employer Petition/Appeal
No Knowledge of the 15 Working Day Period

92-628 Total Building Services, Inc. (1992)

A late petition was filed because substantial compliance with an earlier citation had taken place and the employer was unaware of the 15 working day deadline. Management did not notice the fine print of the citation advising that the second citation would become final if not protested.

Respondent's failure to read the citation appeal rights information or consult with the Department or attorney for guidance is not good cause. These are not the actions of a reasonably prudent person.

547 JURISDICTION

Late Employer Petition/Appeal
Employer Too Busy

92-1587 Antrim Machine Products. Inc. (1993)

The employer's business demands prevented a timely filing. The ALJ concluded that the appeal actually filed, two paragraphs with seven lines, could have been filed within the statutory appeal period. Good cause was not found.

548 JURISDICTION

Late Employer Petition/Appeal
Contacting a Third Party

92-1767 Angus McIntyre Construction, Inc. (1993)

The employer gave the citation to the company they were performing the work for. Later, the citation was returned with advice to pay it. The employer had no previous experience with MIOSHA citations.

Good cause was not found. The cited employer has the responsibility for answering citations. While assistance from others may be sought, the 15 working day appeal period must be met. It was also found that it is the employer's responsibility as a business operating in Michigan to comply with the Michigan Occupational Safety & Health Act. This includes reading the appeal information on the citation and appealing on time. The Act gives no extra time for small employers.

549 ABSENCE OF EMPLOYER/RESPONDENT DURING PORTION OF INSPECTION

ACCIDENT PREVENTION PROGRAM

Employee Interviews

Photographs

ELECTRICAL

Ground Fault Interrupter

EVIDENCE

Weight

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

Accident Prevention Program

WITNESSES

Credibility

91-447 Les Cheneaux General Contracting Inc. (1993)

The safety officer presented photographs showing employees, including the employer's president, working adjacent to water without vests. The employees were walking near a break in the guardrail system and were stepping over wood, rope, and welding material. The planking was also at two levels. Another photo showed a ladder with a missing rung, bent side rails without a three foot extension above the landing. Employee interviews also confirmed the absence of an accident prevention program. This violation was found to be a serious violation of Rule 114(1).

The test of the safety officer presented a violation of Rule 1725(11) concerning use of a ground fault interrupter. The employer argued that the employees used a different extension cord which did have a ground fault interrupter. The employer left the inspection when the safety officer tested the receptacle, talked to employees, and examined the cords. This test is more credible than Respondent's denial.

550 HEARING

Failure to Appear

Good Cause Not Presented

92-1766 W L Richardson, Inc. (1993)

Respondent failed to attend a prehearing conference and hearing. Testimony was taken from the Department's witness. Within the ten day period provided in Board Rule 428, Respondent filed a request to reschedule. There was a mix-up between Respondent and the prime contractor as to who would represent Respondent at the prehearing conference and hearing; and, for that reason, no one came to the prehearing conference and hearing. Good cause for the nonappearance was not presented. The notice for the prehearing conference and hearing was mailed early enough so Respondent had ample time to decide the representation issue.

551 HEARING

Failure to Appear

Good Cause Not Presented

JURISDICTION

Late Employer Petition/Appeal

Bankruptcy

Budget Problems

Good Cause Found

Bankruptcy

Budget Problems

Personnel Changes

Personnel Changes

92-1647 Pacer Contracting Corporation (1993)

Good cause for late petition and appeal was found where budget problems caused bankruptcy and personnel changes.

Respondent failed to attend the prehearing conference and hearing. Testimony was taken from the Department's witness. Respondent filed a request for rescheduling within the ten day period permitted by Board Rule 428. The employee scheduled to attend had car trouble related to bad weather and reached the company office after 1:00 p.m. The prehearing conference and hearing were scheduled in Lansing at 1:30 p.m. Respondent made a call to the Office of Hearings at 2:30 p.m.; but, by that time, the record had been closed and the Department's people dismissed.

Good cause for the failure to appear or promptly call was not found. Respondent did not act reasonably. There was no call early in the day to report the car trouble.

552 HEARING

Employer

Co-Owners
Failure to Appear

92-1478 Byler Custom Sawing (1993)

The Respondent failed to attend a scheduled hearing. The hearing proceeded pursuant to Section 72(1) of the Michigan Administrative Procedures Act (APA). Testimony was taken from witnesses presented by the Department and the evidence considered concerning the items appealed.

Respondent did not file a request for rehearing within ten days as permitted by Board Rule 428(2).

Respondent's argument concerning owner operation was rejected. Prior decisions have held co-owners and partners are organizations falling within MIOSHA jurisdiction.

553 HEARING

Failure to Appear

JURISDICTION

Late Employer Petition/Appeal Abatement
Safety Officer Advice Good Cause Found
Safety Officer Advice

92-1180 Mills Manufacturing Company (1993)

Respondent failed to appear at a scheduled hearing. The hearing proceeded pursuant to Section 72(1) of the Michigan Administrative Procedures Act (APA). Testimony was taken from witnesses presented by the Department and the evidence considered concerning the items appealed.

Respondent did not file a request for rehearing within ten days as permitted by Board Rule 428(2).

Prior to scheduling the hearing, an order was issued finding good cause for a late appeal. Respondent believed filing a request to extend the abatement date also extended the time for filing an appeal. The Safety Officer advised the company to resubmit the appeal after completing abatement.

554 JURISDICTION

Late Employer Petition/Appeal Key
Employee
Availability
Replacement

93-93 Wyatt Construction Company (1993)
93-1690

Good cause for a late petition was not found where the company president left office work behind when he took over field work responsibilities. However, evidence presented at a hearing showed that the change in jobs took place in the spring of 1992; the citation was received on 11/5/91.

The Board remanded to consider Respondent's written statement submitted after the hearing and sent to the Department instead of the Office of Hearings. After further review, the prior conclusion was affirmed. Good cause for the late petition has not been presented.

555 JURISDICTION

Late Employer Petition/Appeal
Abatement
Does Not Nullify Citation Small
Employer

93-859 Adgravers Inc. (1993)

Good cause for a late petition was not found where a small company with limited resources concentrated on abatement and did not file a timely petition.

556 JURISDICTION

Late Employer Petition/Appeal
Citation/Decision Sent to Wrong Address
Last Day
Mail Handling
Citation/Decision
Settlement
At Any Stage of Proceeding
Proposed Settlement Agreement

SETTLEMENT

At Any Stage of Proceeding

93-80 Quaker State Minit-Lube, Inc. (1993)

Good cause for a late petition was not found where the citation was not sent to Respondent's resident agent. The citation was sent to the address provided at the closing conference. The store manager erred in advising company officials the citation was received on August 6, instead of the correct date, August 5. Respondent also waited until the very last day to file the petition when it was known at the closing conference that citations would probably be issued and an appeal would be needed. This was not reasonable conduct.

Board Rule 442(1) encourages settlement at any stage of the proceedings. The parties were encouraged to consider settlement even though Respondent's appeal had been dismissed.

557 JURISDICTION

Late Employer Petition/Appeal
Business Move
Good Cause Found
Business Move

92-256 Mason's Excavating (1993)

Good cause for a late petition was found where the citation was misplaced during a move in business locations. Respondent is a sole proprietorship and the owner handles all paperwork. The parties settled after the prehearing conference.

558 JURISDICTION

Late Employer Petition/Appeal
Citation Must be Issued Within 90 Days of Inspection
Human Error
Out of Town

92-1837 Infinite Designs (1993)

Good cause for a late petition was not found where the owner was out of town. Prior decisions have held that an employer must have a reliable person examine and answer important mail during vacations or business trips. Secretary error in presenting the citation for response also does not present good cause.

559 JURISDICTION

Late Employer Petition/Appeal
Employer Too Busy Human
Error
Small Employer

93-304 Seng Tire Company (1993)

Good cause for a late appeal was not found where it was argued Respondent is a small company and very busy in September, October, and November. The need to appeal was overlooked.

It was held that all businesses, including small companies, must meet the 15 working day appeal period. Overlooking important mail and being too busy do not satisfy the good cause test.

560 JURISDICTION

Late Employer Petition/Appeal
Business Shutdown
Fifteen Working Days

93-445 Tru-Line Metal Products Company (1993)

Good cause for a late petition was not found where the petition was delayed by days the employer closed at year's end. These days are not included as state legal holidays in MCL 435.101. The employer must have a reliable person answer mail during vacations or holiday periods.

561 JURISDICTION

Late Employer Petition/Appeal
Appeal Cannot Be Filed by Signing Abatement Papers
Confusion
With Abatement
Human Error

93-133 J & M Machine Products, Inc. (1993)

Good cause for a late petition was not found where the delay was caused because the employer believed the 15 day appeal period ran from after abatement and that proof of abatement had to accompany the appeal.

This was not a reasonable error in view of the language on the citation and safety officer information at the closing conference.

562 EMPLOYER

Required to Train Employees

EMPLOYER DEFENSES

Intentional Acts of Employee
Short Cut Instead of Using Ladder

PENALTIES

Affirmed

Section 36 Followed: Size, History, and Seriousness

TRAINING

Hazards and Safeguards
Union Assurances Insufficient

91-1628 Stewart Contracting Corporation (1993)

Two rules were cited; one was affirmed and one was reversed.

The ALJ found a serious violation of Rule 114(1) in Part 1 of the CSS. The employer did not provide an accident prevention program for employees. MIOSHA requires the employer to train employees. Here a new employee was given a generic booklet provided by the Department of Labor. There was no attempt to determine whether the employee understood the hazards of the job. The employer relied on statements by the union that the employee had been trained.

A citation to Rule 1121(1) of Part 11 was reversed. The employer did provide safe access by ladder to reach the main beam. The employee took a short cut and attempted to walk across a Z Purlins which was unstable and fell. The employee could have walked the beam to where the ladder was in place.

A penalty was affirmed because the Department considered the size of the employer, the seriousness of the violation, and the history of the prior violations before reaching the proposed penalty amount. These are the factors listed in Section 36 of MIOSHA.

563 DUE PROCESS

Employer Must Know What is Prohibited
Exiting Elevated Work Platform

ELEVATED WORK PLATFORM
Exiting

91-913 Roy Ness Contracting & Sales, Inc (1993)

A citation to Part 10 of the CSS, Rule 408.41001, Federal Standard 29, CFR 1910.67(c)(2)(iv) vas reversed. One of Respondent's employees exited an elevated work platform while it was at the second floor. The employee did not climb over the guardrails but walked through a gate on the platform side and stepped onto the guarded second floor. The rule requires employees to stand firmly on the basket floor and not sit or climb on the edge of the basket. It was held that the rule did not make it clear that an employee could not exit the platform through a gate onto a guarded surface. An employer should not have to guess at what conduct is forbidden.

564 GENERAL DUTY CLAUSE

Material Handling, Racks of Finished Stampings, Crushing Racks

REPEAT VIOLATION

STANDARD

Cover Intentional and Accidental Employee Actions

WILFUL VIOLATION
Reduced to Repeat

WITNESSES
Credibility

89-1768 GMC, Cadillac Motor Car Division (1993)

An alleged willful serious violation of the General Duty Clause Section 11(a) was found to be repeat serious. The ALJ found employees did not always use a "post system" to prevent incoming racks of finished stampings from being placed in track-like channels. Without the posts in place, tow motor drivers are in danger of being crushed when new racks are placed in the channel while they are removing racks for box car transport. The employer was not found to have willfully failed to enforce a worker protection system.

565 JURISDICTION

Late Employer Petition/Appeal
Mail Handling
Citation/Decision

93-1213 City of Charlotte DPW (1993)

The Department's decision was signed for by the city attorney's secretary on 4/6/93, but she was instructed to place 4/30/93 on the office ledger as the date by which an appeal had to be filed. This was an error since 4/30 is more than 15 working days from 4/6/93.

A copy of the Department's decision was also sent to the city manager's office. This copy was postmarked 4/7/93 and received 4/9/93. It seems likely that the 15 working day count was taken from this later receipt, but Section 41 requires the appeal within 15 working days from receipt of the decision. This means the earliest receipt, not the latest.

566 JURISDICTION

Late Department Decision
Budget and Staff Reductions
Mailroom Delay

93-725 Consumers Power Co, Palisades Nuclear Plant (1993)
93-1056 Hansen Machine Company, Plant #2 (1993)
93-1062 Gast Manufacturing Corporation (1993)
93-1277 Inverness Casting Group – Davis (1993)

In these four cases, the Department issued decisions more than 15 working days after mailroom receipt of the employer's petition for dismissal.

The Department argued good cause was present because the enforcement division could not issue a decision until the petition was received by the Division. Also, it was argued that budget and staff reductions had impacted response times.

It was held that the Department must spread resources so that all levels of enforcement activity have staff to do the job. Since it is known that time is lost from mailroom receipt until Division receipt, decisions must be issued within the reduced time. Budget and staff reductions, while initially providing good cause, cannot continue to do so.

567 JURISDICTION

Late Employer Petition/Appeal
Inexperience

93-593 Eckhoff & Devries (1993)

Good cause was not found where Respondent argued that the appeal was filed late due to inexperience and not knowing the proper procedure for appealing. The ALJ held that appeal information is contained on the citation. This information is also provided by the safety officer during the inspection.

568 JURISDICTION

Late Employer Petition/Appeal
Post Office Error

93-599 Prudential Painting & Cleaning (1993)

Good cause was not found where Respondent blamed the mail for the delay but did not provide a copy of the appeal that he argues was sent timely and "delayed" by the postal service.

569 JURISDICTION

Late Employer Petition/Appeal
Employer/Owner Not Present During Inspection

93-726 Miller Broach (1993)

Good cause was not found where Respondent explained a late filing by arguing that the owner was not present during the inspection. The ALJ held that the owner's absence during the inspection has nothing to do with filing a timely appeal. The citation paperwork contains information on filing timely petitions and appeals.

570 JURISDICTION

Late Employer Petition/Appeal
Abatement
Communication with Attorney
Confusion
With Abatement
Mail Handling
Delay in Forwarding to Owner

93-655 Nickels Boat Works, Inc. (1993)

Good cause was not found where several errors delayed the petition for dismissal. First, employees receiving the certified citation did not treat this receipt as important and delayed five days before advising the owner. Second, the employer should have anticipated the citation and have been prepared with a response. A citation must be issued within 90 days of the inspection. Safety officers discuss their findings during the closing conference. Third, abatement is not a substitute for filing a timely petition. These are different concepts. Finally, Respondent remailed citation information to its attorney in the same manner after learning that the first mailing had been lost. With the 15 working day petition period running, it was unreasonable to remail in the same manner.

This case was directed for review, and the Board affirmed the decision of the ALJ.

571 JURISDICTION

Late Employer Petition/Appeal
Death
Co-Owner and Friend
Good Cause Found
Death
Co-Owner and Friend
Key Employee
Illness/Death/Resignation
Key Employee
Illness/Death/Resignation

91-838 Mago Construction Company (1993)

Good cause was found where the filing was delayed because of the death of a partner and a retirement. Paperwork was lost. Prior cases have found good cause when a late filing is caused by death or retirement of a key employee.

This case was scheduled for a prehearing conference and hearing, but Respondent failed to appear. The appeal was dismissed based on Respondent's failure to prosecute the appeal and Complainant's presentation of prima facia case at hearing. See paragraph 231.

572 JURISDICTION

Late Employer Petition/Appeal
Mail Handling
Citation/Decision

93-1287 Micron Manufacturing Company (1993)

Good cause was not found where the Respondent was confused as to when the 15 working day period would begin.

573 JURISDICTION

Late Employer Petition/Appeal
Contacting a Third Party
Waiting for Air Monitoring Results
State Legal Holidays
Other Days Off

93-861 S P Kish Industries Inc (1993)

Good cause was not found where the petition was delayed while waiting for air monitoring results. Respondent also argued that the holidays prevented a timely response. All employers are required to meet the 15 working day appeal period. Only those holidays listed in MCL 435.101 are excluded from the count. The appeal period may not be extended for investigation or testing purposes.

574 JURISDICTION

Late Employer Petition/Appeal
Attorney, Failure to Contact
Confusion
With Abatement
Small Employer

93-839 Great Lakes Laboratories (1993)

Good cause was not found where Respondent delayed while concentrating on abatement. Ignoring the information on the citation concerning how to appeal a citation showed a lack of reasonable diligence. Respondent's failure to contact an attorney also does not present good cause. An attorney may be contacted, but failure to do so cannot extend the 15 working day petition period. Finally, the Act does not give a small employer more time to file a petition. All employers are required to read the citation material and file a timely petition or provide good cause for a late filing.

575 JURISDICTION

Late Employer Petition/Appeal
Department Contact Within Appeal Period

93-821 G M Kassem Roofing System (1993)

Good cause was not found where Respondent attempted to contact the Department during the 15 working day petition period but did not receive a response. The citation provides information on how to file a petition. This matter is also covered by the safety officer during the closing conference. Department employees cannot extend the petition period.

576 ARGYRIA

SILVER DUST EXPOSURE

STANDARD

Compliance Required

TYTIN

91-841 Kerr Manufacturing Company (1993)

The issue presented is whether tytin, an alloy dust, is subject to the silver dust regulations.

Respondent argued that tytin is a compound of copper/tin and silver/copper. It is not a silver-bearing dust. Respondent contended that tytin is an insoluble compound that cannot be separated into base metal components by the human body so as to cause argyria, a discoloration of the skin and eyes. However, the testimony of Respondent's expert did not conclude that tytin was incapable of interacting with the human body.

The ALJ concluded that there is uncertainty in the scientific community as to the causes of argyria. Accordingly, standards have been developed to protect employees from all forms of silver exposure. While these may not be infallible, they are the existing safety requirements and must be followed. The violation was upheld.

577 INJURED EMPLOYEES

Licensed Health Professional
Transportation
Treatment

TRAINING

Fire Drill
Planning

90-721 Wayne County Public Service Airport (1993)

Employees were injured while engaged in a training exercise. Respondent adequately planned a live fire training exercise. A kinked hose caused a handline to fail, but this was not discovered, despite pressure testing beforehand, until after the exercise.

The licensed health professionals on site decided that the injured employees could drive themselves to the hospital. This is in accord with 1978 PA 368. Respondent was not required to transport the injured workers in an emergency medical vehicle.

This decision was directed for review and affirmed by the Board.

578 BOARD REVIEW

Remand for Settlement
To Set Aside ALJ Order

SETTLEMENT

Remand to Receive

92-1333 Poncraft Door Company (1993)

The case was closed in error with an order approving the employer's withdrawal of appeal. In actuality, the parties agreed to settle the case. The Board remanded the matter to permit the settlement to be received. After reopening the file, the settlement was received and the case properly closed.

579 BOARD REVIEW

Remand for Correct Order

To Set Aside ALJ Order

92-1608 Fastdecks, Inc (1993)
93-1508

The case was closed in error with an order approving a Department dismissal. In actuality, at the prehearing conference, the employer agreed to withdraw the appeal. The Board remanded to permit the proper order to be issued.

580 JURISDICTION

Late Employer Petition/Appeal

Business Move

Good Cause Found

Business Move

92-1210 G T Einstein Electric (1993)
92-1211

Respondent filed a late petition for dismissal, but good cause was found for the late filing because mail was lost during an employer move. When a company moves, it is not unreasonable for mail receipt problems to occur. This can happen even with the best of intentions and employee training.

The case was set for a prehearing conference and hearing, but the employer did not attend. Evidence was received from the Department and the employers appeal was dismissed. See paragraph 231.

581 ACCIDENT PREVENTION PROGRAM

BACKHOE

Electric Power Line

CRANES

Annual Inspection
Guarding Radius of Superstructure

ELECTRICAL

Backhoe
Energized Lines
Ground Fault Interrupter

FRONT-END LOADER

Restricted View

PROCESS SPACE

Manhole
Testing

TRAINING

Accident Prevention Program

TRENCH

Employee Exposure

90-1860 Pitsch Companies (1993)
91-413
91-488

NOA 90-1860

The ALJ affirmed two serious violations relating to failing to conduct an annual crane inspection and failure to guard the swing radius of the crane.

The crane had a kink in the load line. There was no annual inspection. The Respondent conducted an inspection after the safety officer's inspection, not before.

The safety officer observed an employee exposed' to the swing radius. There was no blockade protecting an employee from walking or backing into the swing radius. The crane could swing 360 degrees.

NOA 91-413

The ALJ affirmed serious violations relating to no accident prevention program, operating a backhoe within ten feet of an electrical power line, not testing a confined space for hazardous atmosphere, improper trench slope, operating a front-end loader with a restricted view, and failing to use a ground fault circuit interrupter.

Respondent's argument that it met with employees on a regular basis on the job site was rejected. The employee interviewed at the job site was not aware of any accident prevention program.

Respondent's argument that exposure to a 110 volt traffic light would not result in serious injury was rejected. This conduct was in violation of the rule; an employer is not allowed to decide whether to follow a properly promulgated rule.

Respondent did not check the manhole for a hazardous atmosphere. A visual check is not sufficient. The employees were in the confined space before a proper ventilation hole was made.

The safety officer measured the trench at a 76 degree angle. The formula in the standard required a 45 degree angle of repose. There was heavy equipment in the area. Photographs were submitted as evidence of the violation.

Respondent's argument that the front-end loader was operated by a nonemployee was rejected. The safety officer observed Respondent's employees working and walking the excavation. They were exposed to operation of this equipment which had a restricted view and no backup alarm.

The safety officer observed an employee using a Rota Hammer to enlarge the hole within a manhole. There was no ground fault interrupters in place. There was some water where the employees were standing and the soil was damp.

NOA 91-488

A serious trench-sloping violation was affirmed; employees were working in this trench. Respondent was installing an apartment building water service pipe. Respondent argued that no employee was instructed to go into the trench. The safety officer interviewed an employee who was working in the trench; this person identified himself as Respondent's employee.

Serious violations of failing to provide and maintain an accident prevention program and working from an elevated platform without a railing or being tied off were dismissed for lack of evidence.

581 (Continued)

NOA 91-488 (Continued)

The fact that a violation to provide an accident program was found on another site is not sufficient to find a violation at this site. The violation was based upon the safety officer's feeling that the presence of violations on the site resulted from a failure to provide an accident prevention program. This is not sufficient evidence.

Although there was evidence that a worker was on an elevated platform without a railing or being tied off, it was not clear that this employee worked for Respondent. When he was interviewed by the safety officer, he indicated he was self-employed.

This decision was directed for review and affirmed by the Board. The case was appealed to Kent County Circuit Court in September 1993.

582 JURISDICTION

Late Employer Petition/Appeal
Overlooking/Misinterpreting Appeal Rights

93-734 Ken Daly, Inc. (1993)

Good cause was not found where the employer overlooked or misinterpreted the time required for filing a timely appeal. The Department decision refers to the 15 working day appeal period. A copy of relevant Board rules is also enclosed with the decision.

583 JURISDICTION

Late Employer Petition/Appeal
Contacting a Third Party
Freedom of Information
Out of Town

93-1366 T H Eifert, Inc. (1993)

Good cause was not found where the employer filed a Freedom of Information request six days after receipt of the Department's decision. The late appeal did not refer to the material requested from the Department. The 15 working day appeal period cannot be extended to investigate or contact a third party, even the Department. Also, good cause was not found where the owner was out of town on the last day of the appeal period.

584 JURISDICTION

Late Employer Petition/Appeal
Administrative Oversight

93-1384 U S Air (1993)

"Administrative oversight" was not found to be good cause for a late appeal.

585 JURISDICTION

Late Employer Petition/Appeal
Misplaced
Short Staffed

93-1364 Vito Beato Painting (1993)

Good cause was not found where the employer argued it was short staffed and the citations were misplaced.

586 JURISDICTION

Late Employer Petition/Appeal
Investigation
Overlooking/Misinterpreting Appeal Rights

93-1255 Stephenson & Son Roofing (1993)

Good cause was not established where the employer overlooked the time needed for filing the appeal. The employer's need to investigate also does not establish good cause.

587 JURISDICTION

Late Employer Petition/Appeal
Abatement
Overlooking/Misinterpreting Appeal Rights
Settlement
At Any Stage of Proceeding
Proposed Settlement Agreement
Small Employer

SETTLEMENT

At Any Stage of Proceeding

93-1190 Olga's Kitchen (1993)

Good cause was not found where the employer concentrated on abatement and the citation was the company's first. The employer argued it misinterpreted the deadline for protesting the penalties. The parties were encouraged to pursue settlement in line with prior Board decisions.

588 JURISDICTION

Late Employer Petition/Appeal
Abatement
Settlement
At Any Stage of Proceeding
Proposed Settlement Agreement

SETTLEMENT

At Any Stage of Proceeding

93-1163 International Windows, Inc. (1993)

Good cause was not found based on the time and cost required to abate. The parties were encouraged to pursue settlement in line with prior Board decisions.

589 EYE PROTECTION

Quick Drenching Facilities

MATERIAL SAFETY DATA SHEETS

Injurious Corrosive Material Quick Drenching Facilities

92-467 National Steel, Great Lakes Division (1993)

An other-than-serious violation was found of Department of Public Health Rule 4401(3) regarding suitable facilities for quick drenching or flushing of the eyes, Employees were using a chemical, Chemcoa C-1497, to clean rollers. It was held that since the MSDS states the chemical has a pH of 12.1, and prescribed water flushing for 15 minutes, the employer was required to provide this protection. The employer argued that no tests were performed to conclude Chemcoa is an injurious, corrosive chemical, but the ALJ held none were required. The Department properly relied on the manufacturer's own analysis of its product.

590 GENERAL DUTY CLAUSE

School Bus Garage Roof

WILLFUL VIOLATION

Reduced to Serious

91-551 Standish-Sterling Community Schools (1993)

A willful serious violation of the General Duty Clause, Section 11(a) of MIOSHA was reduced to serious; the proposed penalty was reduced from $10,000 to $1,000. It was not willful because the safety officer did not issue a citation on his first visit and the superintendent ordered the bus garage vacated by the time a 'cease operations" tag had been placed on the building. However, the employer did maintain an unsafe place of employment. Considering the condition of the roof, the probability of injury was only a matter of time. Allowing this condition to continue unabated increased this probability, thereby supporting a finding of "serious." The condition of the roof created a "recognized hazard" based on the fact that the tire room ceiling had already fallen. In addition, loose ceiling tiles were shown on exhibits presented at the hearing, makeshift supports had been installed to prevent overhead beams and doorways from collapse, and loose electrical wiring was exposed to falling rain.

A board member directed review; and, at a meeting of the Board, the members reviewed and affirmed the decision of the ALJ.

591 PRECEDENT

Federal Cases
Preemption

PREEMPTION - SECTION 4(b)l OF OSHA
Natural Gas Pipeline Safety Act

PUBLIC vs EMPLOYEE PROTECTION

91-1174	**Consumers Power Company**	**(1992)**
91-1804		
92-232		
92-342		
93-211	**Michigan Consolidated Gas Company**	**(1993)**

The Department's citations were dismissed because the MIOSHA enforcement is limited to the authority delegated by the Federal OSHA program. See Section 4(b)1 of OSHA. Based on the cases of Columbia Gas of Pennsylvania Inc. v Marshall, 636 F2d 913 (CA 3, 1980) and Secretary v Enersch Corp (Lone Star Gas Co), 1982 OSHD, paragraph 25,838, it was concluded that the United States Department of Transportation exercised statutory authority over the same conditions cited by the Department.

This conclusion is not changed by the Department's argument that the Natural Gas Pipeline Safety Act and its Michigan counterpart, 1969 PA 165, are concerned with public as opposed to employee protection. Section 46(6) of MIOSHA requires the Board to follow the lead of the Federal Review Commission. Since the Commission has decided in Enersch that this field is preempted, Michigan must follow this decision.

592 DUE PROCESS

Employer Must Know What is Prohibited

NATIONAL ELECTRICAL CODE

Adoption

STANDARD

Interpretation

Notice of What is Prohibited

Unreasonable Demands on Industry

89-405 GMC, Hydramatic-Warren (1993)

The ALJ dismissed an "other-than-serious" violation for failure to maintain a 42 inch clearance in front of control panel boxes on a vehicular transmission manufacturing system. The ALJ ruled that the 1971 National Electric Code (NEC) adopted by reference by MIOSHA in 1975 did not specifically require a 42 inch clearance.

The total cost to General Motors Corporation for the installation of the Powertrain facility was in excess of $700 million. The equipment was not altered between the 1982 installation and approval by the City of Warren and the 1988 inspection resulting in the citation. There are over 1,700 electrical panels at the Powertrain facility, and the cost to renovate them to conform to a 42 inch standard would be in excess of $50 million.

The ALJ rejected the Department's interpretation of the standard as requiring a 42 inch clearance around the control panel boxes because the first paragraph of the standard only states that sufficient space be provided, and the following paragraphs only set forth the methods. The fact that a 42 inch requirement in certain circumstances' is a prima facia finding that the working- space is safe does not mean that a clearance of less than 42 inches is not safe when work is performed by qualified employees. These control panel boxes cannot be inadvertently touched because the doors are bolted shut.

The ALJ found that the Department's interpretation did not inform employers what conduct is prohibited. Such an interpretation would make unreasonable demands upon industry; abatement would be required not only for this plant, but for every plant in the state,

The ALJ's decision was reviewed and affirmed by the Board.

593 JURISDICTION

Late Employer Petition/Appeal
Fifteen Working Days
Good Cause Test
Mail Handling
Citation/Decision

79-1619 Maul Manufacturing Company (1981)

Good cause for a late petition for dismissal was not found where the employer argued that the citations had been received later than the date appearing on a postal receipt card.

In this early case, the concept of good cause is reviewed and the test used by the Michigan Employment Security Commission is repeated, the kind of cause that would prevent a reasonably prudent person from the performance of an important obligation. It does not include conduct that shows carelessness, negligence, or a lack of reasonable diligence. This test was adopted by the Board in Smelser Roofing Co, NOA 78-947-R (1980).

Also discussed in this decision is the concept of a "working day" used in Section 6(9) of MIOSHA. See MCL 435.101 for the recognized list of state legal holidays. Also discussed is the jurisdictional nature of this issue. If the late employer filing or Department decision does not satisfy the good cause test, the case cannot go forward even if the other side agrees.

This decision was reviewed and affirmed by the Board.

594 APPEAL

Abandonment

EMPLOYER

Abandonment of Appeal

91-1389 B & F Excavating, Inc. (1994)

Settlement Agreements and letters of inquiry sent to Respondent were not answered. Attempts to locate Respondent were unsuccessful. The company was out of business.

The appeal was dismissed based on Respondent's abandonment of the appeal. Respondent has an obligation to take part in appeal procedures.

595 WITHDRAWAL OF APPEAL

91-973 Lafere Forge & Machine Company (1994)

Respondent abated the item on appeal. A letter was sent asking if the abatement could be considered an appeal withdrawal. The letter advised that failure to respond would be treated as a withdrawal. No response was filed and the appeal was dismissed.

596 JURISDICTION

Late Employer Petition/Appeal
- No Knowledge of the 15 Working Day Period
- Overlooking/Misinterpreting Appeal Rights
- Unaware of Appeal Rights

94-544 Van Straten & Sons, Inc. (1994)

Good cause was not found where the employer did not read the "fine print" to learn the petition had to be filed within 15 working days. The employer argued that there was a "good faith" effort to complete and mail the paperwork. As in prior cases, it was held that it is reasonable to expect the employer to read the citation to learn about appeal rights. These rights are also explained during the inspection by Department safety officers.

597 JURISDICTION

Late Employer Petition/Appeal
Vacations

94-310 L & L Interior Construction Company, Inc (1994)

Good cause was not found where the employer filed a late petition due to a vacation. Prior cases have concluded that it is reasonable conduct to have a reliable person in charge during the absence or call in periodically to direct the handling of important mail. In this case also, the vacation ended before the end of the 15 working day appeal period.

598 JURISDICTION

Late Employer Petition/Appeal
Citation Issued to Wrong Company

94-302 Brewer Roofing & Siding Company (1994)
94-373

Good cause was not found for an appeal filed over four years from receipt of the Department's citation in file 94-302 and for a petition filed over two years from receipt of the Department's citation in file 94-373. The employer argued that the late filings occurred because those observed in violation were subcontractors and not employees of the cited employer. It was held, based on prior decisions on the same subject, that it is not reasonable for an employer who receives such a citation to ignore it. The employer's remedy is to appeal the citation and show it was issued in error.

599 JURISDICTION

Late Employer Petition/Appeal
Abatement
Not a Substitute for Appeal

94-236 Powers Distributing Company (1994)

Good cause for a late petition was not found where Respondent argued the petition was filed late because of abatement efforts. Abatement is different from an appeal. Many employers choose to abate rather than protest. The employer chose to abate and then decided too late to appeal as well. However, good cause for the late filing was not presented.

600 GUARDING

Point of Operation Guard or Device
Presence-Sensing Device
Access to Die

HAZARD - ASSUMED IF RULE IS PROMULGATED

PRESSES

Point of Operation
Device

STANDARD

Compliance Required
Effect of Law

92-165 Kalamazoo Stamping and Die Company (1994)

The Department alleged a serious violation of Part 24 of the GISS Rule 2463(3)(f) concerning a 1600 ton Niagara press. The point of operation was protected against employee contact by a presence-sensing device, but the protection began 30 inches above the floor.

As a properly promulgated standard, Part 24 was found to have the effect of a statute and was binding on the employer's use of the 1600 ton Niagara press.

Rule 2463 covers point-of-operation devices and requires a device to protect the operator by one of the methods listed. Rule 2463(3) addresses the presence-sensing point-of-operation device and directs that the device must prevent or stop normal press stroking if the operator's hands are inadvertently placed in the point of operation.

Respondent's light curtain performs this function. If an employee's hands enter the light field, the press stops. The problem here is the 30 inch area below the field. Rule 2463(3)(t) requires guarding for all areas not protected by the presence-sensing device.

Respondent defended by arguing that only with intentional effort to injure himself or herself could an employee enter the point of operation. The employee would have to crawl below the light curtain. However, once on the other side, the employee could reach the point of operation. Respondent refers to Rule 2463(3)(e) to support this argument. This rule allows employers to use a point-of-operation device that prevents "the operator from inadvertently reaching into the point of operation at all times." Respondent argues that this rule is satisfied because an employee could not inadvertently crawl under the light curtain. Respondent also raises the unassailable argument that any guard or device will not prevent an employee who is determined to injury himself or herself.

600 (Continued)

The ALJ discussed the issue of "intention" and wrote:

> The problem with the concept of "intention" is that an employee can intend to enter a hazardous area such as a point of operation not to cause injury but to get the job done faster, to avoid shutting down the machine, to cover up an error or any number of other reasons related to the job. The rules promulgated by the Commission are not foolproof; they can be ignored and guards can be removed. But rules promulgated by commissions comprised of members from the industry being regulated are the best way we know to protect employees.

In this case, Respondent chose a presence-sensing device to protect the operator from point-of-operation exposure. But Respondent did not follow all the rules required in order to use this method. Rule 2463(3)(f) must also be followed when a presence-sensing device is used. This rule requires guards for all areas not protected by the presence-sensing device.

A serious violation was upheld because it was found to be substantially probably that death or serious physical injury would result if an employee suffers a point-of-operation injury. In addition, this rule violation was in clear sight and known to the Respondent. See Section 6(4) of MIOSHA.

In summary, it does not matter that there have been no injuries or incidents where employees have crawled under the light curtain. Rule 2463(3)(f) requires guarding for areas not protected by the presence-sensing device. Promulgation of the rule presumes a hazard. Also, the rule requires this guarding. The clear language cannot be ignored.

This decision was directed for Board review and affirmed at the May 13, 1994, meeting.

601 JURISDICTION

Late Employer Petition/Appeal
No Explanation For Late Filing
Oral Filing

94-584 Busch's Valu Land (1994)

Respondent's statements in response to the late appeal notification rely on telephone contacts to the Enforcement Division. But a verbal notification of intent to appeal does not satisfy the statutory requirement (Section 41) that the appeal be in writing.

602 HEARING

Failure to Appear
Good Cause Not Presented

94-315 Great Lake, Inc. (1994)

Respondent failed to attend a scheduled prehearing conference and hearing. Testimony was taken from the Department's safety officer and argument from the Department's representative.

Respondent sent a letter to the Department's General Industry Safety Division stating he would not attend the hearing on August 17, 1994, due to health reasons. This letter was received by the General Industry Safety Division on August 17, 1994.

Good cause for the nonappearance was not found. See Rule 428(2). It was not reasonable to send a last-minute letter to the wrong place. A reasonable person would have contacted the Office of Hearings by telephone.

603 APPEAL
Abandonment

EMPLOYER
Abandonment of Appeal

93-735 International Window Company, Inc. (1994)

Respondent's appeal was dismissed because mail sent to Respondent's address was returned. The information operator had no telephone listing for Respondent's business. Part of Respondent's obligation in filing an appeal is to take part in appeal procedures - prehearing/settlement conferences and hearings. Respondent's appeal was dismissed.

604 DUE PROCESS

Subpoenas
Unredacted Department Records

HEARING

Adjournment
Denied

SETTLEMENT

At Any Stage of the Proceedings

SUBPOENAS
Enforcement
Unredacted Department Records

93-289 American Bumper & Manufacturing Company (1994)
93-324
93-391
93-755

During pretrial procedures, a subpoena was issued for unredacted Department records. The Department refused to provide the requested records relying on Sections 28(1)(3) and 63(2) of MIOSHA and Section 74(2) of the APA. These sections protect employee identification during and after complaint-based inspections and also when responding to FOIA requests. The ALJ issued an Order denying the Department's Motion to Quash. He held that, once a case is appealed to the Board under Section 41, due process requires employer access to all Department records. Respondent filed a Circuit Court petition for subpoena enforcement, and Ingham County Circuit Judge Collette ordered compliance with the subpoena.

Hearings were held over ten days but these files were ultimately settled before decision as part of a Settlement Agreement covering eight American Bumper cases. See Settlement Agreement on file.

At the outset of trial, Respondent made a Motion To Adjourn until conclusion of the criminal case against Respondent. Respondent asserted that some witness might invoke their Fifth Amendment privilege against self-incrimination in the criminal case and yet be called to testify in the civil action. The ALJ denied the Motion.

605 JURISDICTION

Late Employer Petition/Appeal
Mail Handling
Routing Problems

94-974 Ameritech (1994)

Good cause was not found where the employer argued the late filing occurred "due to problems in routing." Every employer must establish a mail routing system designed to promptly answer important mail. Failure to properly train employees who receive certified mail in correct routing procedures shows carelessness, negligence, and a lack of reasonable diligence.

606 JURISDICTION

Late Employer Petition/Appeal
Small Employer
Vacations

94-975 Schaefer Screw Products Company (1994)

Good cause was not found where the employer filed a late appeal due to a vacation. Prior cases have concluded that the employer must have a reliable person in charge during an absence from work due to a vacation or call in periodically to direct the handling of important mail. There is also no exception in the Act that would give a small employer more than 15 working days to file an appeal. In this case, the employer had already filed a petition for dismissal and the Department issued a decision. A reasonable employer would have been expecting the decision and prepared a response within the appeal period.

607 JURISDICTION

Late Employer Petition/Appeal
Mail Handling
Routing Problems

94-986 John M. LaFata, Ltd (1994)

Good cause was not found where the employer argued the late filing occurred because the field superintendent did not review the citation noting that a written response was required within 15 working days. It was only when the citation was routed to the administrative staff that a petition was filed. Every employer must establish a mail routing system designed to promptly answer important mail. Failure to properly train employees who receive certified mail in correct routing procedures shows carelessness, negligence, and a lack of reasonable diligence.

608 JURISDICTION

Late Employer Petition/Appeal
Key Employee
Illness/Death/Resignation

94-680 Jackson-Merkey Contractors, Inc. (1994)

Good cause was not found for an appeal filed late because a key office employee was ill. The employer had already filed a petition for dismissal. It was unreasonable conduct not to expect the decision would be received shortly and to prepare for a timely response. Even where a key employee is ill, the employer must take some steps to continue functioning. In this case, no steps were taken to address this problem.

609 JURISDICTION

Late Employer Petition/Appeal
Contacting a Third Party

94-1038 B & V Construction, Inc. (1994)

Good cause for a late petition was not found where Respondent filed late because the employer was waiting for a letter from Detroit Edison. Prior cases have not found good cause in such a case. All the employer needs to do to perfect an appeal or petition is to send a writing with the words "I appeal" within 15 working days. While a third party's statement may be helpful at the prehearing conference or hearing, it is not necessary for filing an appeal.

610 JURISDICTION

Late Employer Petition/Appeal
Abatement

94-983 Warren Dental Associates (1994)

Good cause was not found where the employer argued abatement could not be achieved without a computer. The concepts of "abatement" and "filing an appeal" are different. The citation and decision contain information explaining the 15 working day appeal period.

611 JURISDICTION

Late Employer Petition/Appeal
Abatement

94-1130 Tecumseh Products Company (1994)

The employer asserted confusion between abatement and filing a petition for dismissal as the reason for filing a late petition. This does not establish good cause for filing a late petition. These are different concepts and each is explained on the material accompanying the citation. The petition can be as simple as "I appeal," Abatement is the correction of the violations cited in the citation.

612 JURISDICTION

Late Employer Petition/Appeal
Mail Handling
Personnel Changes

94-1236 Wessels Company (1994)

The employer argued that personnel changes caused the late filing but did not provide any specificity or detail. Simply making this claim does not necessarily make it so. Respondent has the burden to establish "good cause." Respondent has the obligation to train employees in mail handling procedures. Changing personnel duties carries with it the burden of training employees in their new duties.

613 JURISDICTION

Late Employer Petition/Appeal
Abatement

94-1168 DeLau Fire & Safety, Inc. (1994)

The employer asserted confusion between abatement and filing a petition for dismissal as the reason for filing a late petition. This does not establish good cause for filing a late petition. These are different concepts and each is explained on the material accompanying the citation. The petition can be as simple as "I appeal." Abatement is the correction of the violations cited in the citation. Respondent's assertion that they believed they had 30 days to file an appeal is unreasonable based on a reading of the citation information.

614 JURISDICTION

Late Employer Petition/Appeal
Settlement
At Any Stage of the Proceeding
Proposed Settlement Agreement

94-1200 Saturn Electronics & Engineering, Inc. (1994)

After the employer sent in the petition for dismissal, the Department sent a decision and a proposed settlement agreement. The employer agreed with the agreement's terms but did not send it in within the 15 working day appeal period causing the decision to become final, The employer argued that since they agreed with the proposal, they did not understand that the same deadline applied as if they intended to appeal. However, the agreement contained the following language with the emphasis in the original:

> The agreement must be signed on or before the final order date, which is the last day of the 15-working day contest period, provided for by the Michigan Occupational Safety and Health Act,

Based on this language, good cause for the late appeal was not found.

615 JURISDICTION

Late Employer Petition/Appeal
Department Contact Within Appeal Period

94-1159 Custom Converting Company of Michigan (1994)

After receiving the citation, the employer called the Department and inquired about an "informal settlement program." The Department representative did not call back. Good cause for the late petition was not found. The burden for filing a timely petition is on the employer. The citation provides information on how to file a timely petition and references the 15 working day period.

616 JURISDICTION

Late Employer Petition/Appeal
Out of Town
Small Employer

94-1166 Universal Plastic Industries, Inc. (1994)

Despite being out of the country when the citation arrived, the employer had a duty to assign someone the task of responding to important mail in his absence. There is no exception in the Act to permit a late filing by small employers. Good cause was not found.

617 JURISDICTION

Late Employer Petition/Appeal
Small Employer
Union Negotiations

94-1070 Voigt & Schweitzer Galvanizers, Inc. (1994)

Respondent did not explain why a late petition was filed, but one letter referred to the company being a small firm where employees must handle a variety of tasks and that union negotiations are very time consuming. In accordance with prior decisions, good cause was not found. Filing a timely petition does not require a full-time office employee. There is no exception in the Act to give small employers or those involved with union negotiations more time to file a petition. The statutory 15 working day period applies to all. Good cause was not found.

618 JURISDICTION

Late Employer Petition/Appeal
Bankruptcy
Small Employer

94-1196 Standard Stampings, Inc. (1994)

Filing a timely appeal does not require a full-time secretary or other clerical assistance. There is no exception in the Act to permit late filing by small employers or those in bankruptcy. Good cause was not found.

619 JURISDICTION

Late Employer Petition/Appeal
Abatement

94-1131 Plastic Engineered Components, Inc. (1994)

The employer attempted to abate and did not contact an attorney during the petition period. The concepts of "abatement" and "filing an appeal" are different. The citation and decision contain information explaining the 15 working day appeal period. Good cause for the late filing was not found.

620 JURISDICTION

Late Employer Petition/Appeal
Abatement

94-1032 Becker Orthopedic (1994)

Good cause was not found where the employer believed all abatement invoices had to be in hand before a petition could be filed. The concepts of "abatement" and "filing an appeal" are different. The citation and decision contain information explaining the 15 working day appeal period.

621 AMENDMENT

By Motion

BOARD REVIEW

Board Decision Must State Findings of Fact and Conclusions of Law

BORING OPERATION

GENERAL DUTY

Boring Operation

91-104 State-Wide Excavating (1994)

Respondent was originally cited for violation of Rule 931(2) - Part 9 of the CSS. This rule requires care when working close to an underground utility.

The ALJ granted a Department motion to amend to a GDC violation - Section 11(a). During a boring operation under a roadway, Respondent's bore punctured the underside of a 6" high pressure gas line.

The ALJ found that there was no specific rule to cover the danger of hitting a utility from below. Rule 931(2) only addresses the danger from surface digging. Therefore, amendment to a GDC violation was proper. It was also found recognized that puncturing a gas line will likely cause death or serious physical harm. Faced with this recognized hazard, Respondent needed to take reasonable precautions to isolate the gas line from possible underground auger contact.

A Board member directed review and the Board reversed the ALJ's decision. The Department has appealed this decision to the Ingham County Circuit Court.

The Ingham County Circuit Court reversed and remanded to the Board because the Board did not issue Findings of Fact and Conclusions of Law to justify reversing the ALJ's proposed decision. At another Board meeting, the members made Findings of Fact and Conclusions of Law to reverse the ALJ's proposed decision. The Board concluded that Respondent used reasonable care while working close to an underground utility. Respondent did not violate MIOSHA's General Duty Clause.

622 GUARDING

Molds

Falls

MOLDS

Variance

VARIANCE

Denied

Petitioner Presented No Alternative to Rule

Director Review

Case Calendared

Equivalent Protection (as safe as)

Molds

As Work Platforms

VA 93-1616 Betz Industries (1994)

Petitioner requested a variance from GISS, Part 2, Rule 213(2)(a)-(c) relating to guarding the edges of molds four feet or more above the floor. The rule requires guarding for open-sided floors, walkways, platforms, or runways four foot or more above an adjacent floor.

The Petitioner uses molds that are over four foot high. Employees must pack sand while standing or kneeling on top of these molds.

In dicta, the ALJ opined that the rule did not apply to the Petitioner's work because the molds were not a floor, platform, walkway, or working surface, terms used in the rule. In this case, the working surface is a kind of tool not intended for coverage by the rule.

Petitioner appealed the ALJ denial to the Director for review, pursuant to Part 12 Variances, Rule 1239.

Petitioner also appealed the Department's citation for violation of Rule 213(1)-(3) pursuant to Section 41 of MIOSHA.

The Director ordered that the variance case be calendared until after review of a citation appeal regarding the same rule, The ALJ dismissed the citation in NOA 94-1494. Based on this conclusion, Petitioner withdrew the variance request.

623 CUMULATIVE TRAUMA DISORDER

APPEAL

Circuit Court 60 Day Appeal Period

GENERAL DUTY CLAUSE

Cumulative Trauma Disorder

JURISDICTION

Department Decision - Timely Issued

90-1588 Aetna Industries. Inc. (1994)

The ALJ issued an Order Denying Respondent's Motion To Dismiss. Respondent argued the Department's decision in response to the Petition for Dismissal was not issued within 15 working days. See Section 41 of MIOSHA. Respondent's Petition was received by the Department on June 22, 1990. The decision was issued on the 15th working day, July 16, 1990; and, therefore, it was timely. This Order was reviewed by the Board and affirmed.

The employer's appeal of the Department's GDC citation was also considered and affirmed by the ALJ. Cumulative trauma disorders (CTD) were found in metal assembly operations - reaching, twisting and turning of the spine, reaching above the shoulders, excessive work rates, ulnar deviation of the wrist, excessive and repetitive lifting and stepping.

Respondent produced no witnesses and relied for its case on cross-examination of Complainant's hygienist and a video tape of job functions.

The ALJ affirmed the Department's citation finding a GDC violation finding that Respondent should not have remained oblivious to ergonomic concepts in its industry when the Big Three, Respondent's industry leaders, include ergonomic information in its bargaining agreements. The CTD alleged violation was, therefore, a recognized hazard.

> Respondent's argument [that] there is no duty to act when no standard has been promulgated lacks reasonableness. In the absence of a specific standard the General Duty Clause of MIOSHA has its purpose, in a broader sense, an intent to protect the health and safety of the injured worker. It is subject to reasonable interpretation and should be construed broadly.

623 (Continued)

Respondent filed a circuit court appeal 106 days after notice of the Board's final decision. The appeal was dismissed by the Macomb County Circuit Court citing MCL 24.304, the APA which provides 60 days to file a circuit court appeal after mailing of a final decision.

624 INSPECTION

Advance Notice

WITNESSES

Credibility

Safety Officer/Hygienist

94-555 Johnson Products Company (1995)

Based on the believable testimony of the Department's industrial hygienist, several citation items were affirmed. This finding was based on the hygienist's clear and convincing evidence based on three days of inspections and interviews and his training, including a doctorate in industrial hygiene.

Section 29(1) requires inspections to be unannounced. The hygienist could not come back the next day when the owners would be present even if requested to do so by the representative on site.

625 SERIOUS VIOLATION

Footings as Tieback
Reduced to Other Than Serious

TRENCH

Basement
Footings as Tieback

92-535 Clark Foundation Company (1995)

Violations of Part 9, Rule 941(1) were found. Respondent sloped the sides of a basement excavation 84 degrees. Table 1 in Part 9 permits only rock to have slope of 75 degrees or greater.

These violations were not found serious because the facts did not show "substantial probability" that death or serious physical injury could result from the violation. See Section 6(4). The exposed walls at each of two locations were 4-6' long. Also, at each location, Respondent had placed a concrete footing 16" wide, 4' deep, and 70' long. These footings stabilized the two 4-6' long wall lengths. This, plus the stiff clay soil consistency and evidence that there had been no wall cracks or flaking during the month the excavation had been open, all supported the other than serious finding.

626 LOCKOUT PROCEDURE

Robots

ROBOTS

Lockout Procedure

89-918 GMC, Cadillac Motor Car Division, BOC Detroit (1995)

The ALJ found serious violations of Rules 11(c) and 32(1) in Part 1 of the GISS regarding failure to lockout robot operations. In each case, power could be shut off during service or repair, but Respondent did not require a lockout procedure. The ALJ found the approximate 10 second time lapse to warn an employee of robot activation insufficient to obviate adherence to the lockout rules. In addition, the number of people having access magnified the possibility of inadvertent or intentional reactivation.

627 JURISDICTION

Late Employer Petition/Appeal
Waited Until Last Day

95-53 Schwarb Foundry, Inc. (1995)

Good cause was not found where the employer waited until the last day of the 15 working day petition period to date and mail the petition. It *was* unreasonable for Respondent to expect the petition would also be postmarked on the 15th day.

628 JURISDICTION

Late Employer Petition/Appeal
Out of Town
Family Emergency
Small Employer

95-103 La Michoacana, Inc. (1995)

Good cause was not found where the employer fled a late petition because lie had to leave town to handle a family emergency. It is reasonable to expect that when a key employee leaves the business, someone will be designated to handle important mail. In the alternative, the key employee can call in periodically to issue instructions. Also, Respondent offered no explanation for the appeal filed 38 working days after receipt of the Department's decision. The Act provides no exception for small employers with respect to filing timely petitions and appeals.

629 JURISDICTION

Late Employer Petition/Appeal
Mail Handling
Delay in Forwarding to Owner

94-1528 Great Lakes Power, Inc. (1995)

Good cause was not found where the employer argued the receptionist misplaced the citation and several days were lost before the citation was given to the owner. Every employer must establish a mail routing system designed to promptly answer important mail. Failure to properly train employees who receive certified mail in correct routing procedures shows carelessness, negligence, and a lack of reasonable diligence.

630 JURISDICTION

Late Employer Petition/Appeal
Key Employee
Out of Town
Seminar
Vacation

94-1536 Husky Envelope (1995)

Good cause was not found for an appeal filed late because a key employee was on vacation for one week and at a one week seminar. Statutory time periods do not stop running for these reasons. A reasonable employer would designate someone to respond to important mail during the absence or call in periodically to give instructions. The Department citation contains information on the 15 working day petition period.

631 JURISDICTION

Late Employer Petition/Appeal
Contacting a Third Party

94-1382 Fred Dykstra (1995)

Good cause for a late petition was not found where the employer was waiting for advice from an attorney, Prior cases have not found good cause when the filing is delayed to contact or receive information from a third party. All the employer needs to do to perfect an appeal or petition is to send a writing with the words "I appeal" within 15 working days.

632 JURISDICTION

Late Employer Petition/Appeal
- Abatement
- Key Employee
  - Newly Hired
- Out of Town
  - Vacation

94-726 City of Detroit, Public Lighting Department (1995)

Good cause was not found where the late filing occurred because the employer representative was on vacation, that the representative was newly hired, and the employer's understanding that the violation had to be corrected before the appeal could be presented.

The concepts of "abatement" and "filing an appeal" are different. The citation and decision contain information explaining the 15 working day appeal period. Nothing on the citation requires abatement before a petition can be filed. Also, when absent for a vacation, a reasonable employer representative will delegate responsibility for answering important mail or call in periodically with instructions. The time sheet provided by Respondent did not show vacation time during the 15 working days following receipt of the citation. Finally, Respondent's submissions show the inspection took place on October 26, 1993. The employer's representative was present at the closing conference and received permanent status on October 5, 1993. Respondent should have been prepared to respond to the citation since Section 33(1) requires it to be issued within 90 days of the inspection.

633 JURISDICTION

Late Employer Petition/Appeal
- Short Staffed
- Strike

94-1434 Peninsula Furniture (1995)

Good cause was not found where the employer asserted the company's employees went on strike and all efforts were spent in hiring replacement production employees. The employer can file a petition which can be as short as "I appeal." Efforts at hiring replacement production employees have nothing to do with filing a timely petition.

634 JURISDICTION

Late Employer Petition/Appeal
Delay in Forwarding to Owner
Employer Too Busy
Erroneous Belief as to Citation Receipt Date
Out of Town

95-201 W W A, Inc. (1995)

Good cause for a late petition was not found where project manager's duties kept him out of town. The office manager did not understand the importance of noting the date of citation receipt.

It is the employer's job to train employees in how to handle sensitive certified mail. The project manager's many duties cannot extend a statutory appeal period. Finally, it is the employer's responsibility to contact the office while away to direct the processing of important mail.

635 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Key Employee
Illness/Death/Resignation
Key Employee
Illness/Death/Resignation

92-1723 J F Jacobs Contractors, Inc. (1995)

Good cause was found where Respondent's safety coordinator went to California to visit a sick mother. The Department ultimately dismissed the citation.

636 JURISDICTION

Late Employer Petition/Appeal

Budget Problems

Good Cause Found

Budget Problems

Key Employee

Newly Hired

Key Employee

Newly Hired

92-1227 Dept of Natural Resources, State Fair Exposition Center (1995)

Good cause was found where the Fairgrounds took a $500,000 budget reduction. Also, both maintenance supervisors were lost. The new supervisor overlooked the 15 working day petition period. The ALJ held:

> Having key people leave an organization is disruptive. New people, even if trying their best, often make mistakes during training. This is especially true when there is no one with knowledge to train the new people.

The case was ultimately settled by the parties.

637 JURISDICTION

Late Employer Petition/Appeal

Written Petition/Appeal is Required

95-416 Debacker & Son, Inc. (1995)

Good cause was not found for a late petition where the petition was not received by the Department and Respondent could not supply a copy. The Act and rule requires a written petition.

638 APPEAL

Abandonment

EMPLOYER

Abandonment of Appeal

92-1885 Fuel Economy Contracting Company (1995)

The notice of hearing sent to Respondent was returned. Attempts to secure a new address were unsuccessful. Respondent has an obligation to keep the Office of Hearings advised as to the correct address. The appeal was dismissed.

639 CITATION

Permitted Alter First Inspection

EMPLOYER DEFENSES

Lack of Knowledge

Machine Not Built With a Guard

INSPECTION

Complaint from Former Employee

PENALTIES

Abatement Does Not Require Dismissal
Permitted After First Inspection

SMALL EMPLOYER

All Employees are Protected

STANDARD

No Need to Give Rules to Employer Before Inspection

92-1772 Printing Systems, Inc (1995)

The Department inspected based on the complaint of a former employee. Thirteen items on one citation were issued. All were affirmed as serious violations. Respondent raised the following defenses:

1. Penalties should not have been issued until the rules had been provided.
2. Small employer.
3. Abatement should eliminate penalties.
4. The inspection was requested by a discharged employee.
5. Several cited machines were manufactured without guards.

Section 33 requires a citation if the inspection discloses a violation of the Act or rule. MIOSHA does not permit a "free" inspection. The Act does not allow for penalties to be dismissed when the employer abates. Employers are expected to review their businesses before an inspection and make necessary changes to comply. The Act has no exception for small employers. Even employees of small employers have the right to full protection of the Act. The fact that a former employee filed the complaint does not taint the inspection. Section 29(1) gives the Department full authority to inspect any place of business. Finally, purchasing a machine without all required guarding is not a defense. The employer has the obligation to review all rules covering the business and make whatever changes are necessary.

640 JURISDICTION

Late Employer Petition/Appeal
Fifteen Working Days
State Legal Holidays
Other Days Off

95-662 Quality Plating Company, Inc. (1995)

The employer closed the company for an extended period during the Christmas and New Year's holidays and argued these days off should not be counted for the 15 working day petition period.

Section 6(a) of MIOSHA defines a working day as any day other than a Saturday, Sunday, or state legal holiday. The days the company was closed were not state legal holidays. See MCL 435.101. Accordingly, good cause was not found.

641 GUARDING

Garbage Truck

92-1780 Painter & Ruthenberg, Inc. (1995)

A serious violation of Part 17, Rule 1724(6) was found. An employee suffered a left hand finger injury. During a demonstration of the equipment, the safety officer observed a rule violation because the truck did not provide a two-cycle operation or stop the blade during cycle. The demonstration did not show that a separate reactivation was needed to complete the cycle.

642 JURISDICTION

Late Employer Petition/Appeal
Mail Handling
Delay in Forwarding to Owner

95-411 I X L Glass & Auto Trim (1995)

Respondent explained the late petition by stating that the Department's citation was not given to the company president. The postal receipt was signed by a company employee.

The ALJ concluded that the employer must train people who sign for company mail in correct mail handling procedures. A mail clerk's loss of mail is not good cause for a late petition. Respondent is bound by the actions or inactions of its employees.

643 JURISDICTION

Late Employer Petition/Appeal

Language

95-352 Munoz Machine Products (1995)

Good cause for a late petition was not found where the Respondent misunderstood the closing conference instructions. All those present at the conference were Hispanic. Respondent argued that he believed a penalty petition could only be filed after abatement.

It was concluded that the citation provided information on the 15 working day petition period. Nowhere in this information does it state that a petition regarding penalties may be filed only after abatement.

Respondent's language difficulties do not establish good cause. As an employer, Respondent must follow all laws including MIOSHA. This includes the need to read the information sent with the citation.

644 JURISDICTION

Late Employer Petition/Appeal

Mail Handling

Field Staff/Administrative Employees

95-905 John E Green Company (1995)

Good cause was not found where the citation was sent to a branch office and forwarded to the corporate office. The citation was sent to the address provided during the inspection. Failure to properly train employees who receive certified mail in correct routing procedures shows carelessness, negligence, and a lack of reasonable diligence.

645 JURISDICTION

Late Employer Petition/Appeal

Confusion

Posting

95-1033 Crocker, Ltd (1995)

Good cause was not found where the employer mistakenly believed that the Department denied the petition because the petition had not been posted.

The ALJ found that the decision clearly denied the petition. Appeal requirements and an excerpt from the Board's rules explained how to file an appeal. In a separate letter, the Department pointed out that the employer had not posted the petition for dismissal. The ALJ held it was not reasonable conduct for Respondent to ignore the decision letter. A telephone call to the Department could have cleared any confusion.

646 JURISDICTION

Late Employer Petition/Appeal
Two-Step Review Process

95-990 Federal Express Corporation (1995)

Respondent argued that the Michigan two-step appeal system is unusual and cumbersome and discourages appeals. The ALJ reviewed MIOSHA's appeal requirements and concluded that the Department decision included information on how to file a Board appeal. Also, a prior case involving Respondent was appealed in a timely manner. Good cause for the late filing was not found.

647 JURISDICTION

Late Employer Petition/Appeal
Abatement
Employer Too Busy
Informal Settlement Process
Overlooking/Misinterpreting Appeal Rights

95-972 Metal Services, Inc. of Western Michigan (1995)

Good cause was not found where the employer argued the late filing occurred because the company concentrated on abating the violations, a lack of knowledge of the settlement and appeal process, a hectic business period including a new office manager, and because this was Respondent's first inspection after becoming the owner.

The ALJ concluded that the answer to each of these arguments is that a reading of the reverse side of the citation would have advised the employer of the 15 working day petition period. Prior cases have not found good cause when an employer concentrates on abatement. All businesses, even small companies, and even though they are busy, must meet the 15 working day appeal period.

648 JURISDICTION

Late Employer Petition/Appeal
Slow Periods
Vacations

95-1054 Souter Asphalt Paving (1995)

Good cause was not found where the employer filed a late petition for dismissal due to a vacation during an annual business slow period. Prior cases have concluded that the employer must have a reliable person in charge during an absence from work due to a vacation or call in periodically to direct the handling of important mail. There is also no exception in the Act that would give a small employer more than 15 working days to file a petition. All Michigan businesses must file documents within statutory time periods. Vacations and slow periods cannot extend statutory appeal periods.

649 JURISDICTION

Late Employer Petition/Appeal
Employer Too Busy
Out of Town

95-1034 Thumb Area Harvestore Systems Inc. (1995)

Good cause was not found where the employer argued the late filing occurred because the general manager was out of town. Other key employer resource people were unavailable during the appeal period. Prior Board decisions have held that an employer must have a reliable person in charge during an absence or call in periodically to direct the handling of mail. Also, a busy work period does not excuse a late filing.

650 ABATEMENT

Intent to Appeal Included

95-170 Dohm Enterprises (1995)

Two citations were issued as a result of an inspection of Respondent's facility. Respondent filed a letter stating that the grinder at issue on one citation was not in use but that the guard had been reinstalled. The Department did not consider this as a petition for dismissal believing it only concerned abatement. The ALJ found that this was a timely petition and directed the matter be scheduled for a prehearing conference where the parties settled the case. The second citation was not appealed in a timely manner. Respondent did not provide any explanation for the late appeal.

651 PETITION TO MODIFY ABATEMENT DATE

Exceptional Circumstances for Late Petition
Unaware of Rule 441(3)

PMA 96-1 L & M Fund Raising, Inc. (1995)

Petitioner's lack of knowledge concerning Board Rule 441(3) did not establish exceptional circumstances for filing a late petition for extension of abatement.

652 HEARING

Failure to Appear
Good Cause Not Presented

95-309 Skyline Erectors, Inc. (1995)

Respondent failed to attend a prehearing conference and hearing. Testimony was taken from the Department's witness. Within the ten day period provided in Board Rule 428, Respondent filed a request to reschedule. Respondent's representative was not advised of the prehearing conference and hearing date until after it had passed. Good cause for the nonappearance was not presented. The notice for the prehearing conference and hearing was mailed early enough so that Respondent could have notified the representative. An in-house communication problem does not present good cause for failing to attend the prehearing conference and hearing.

653 VARIANCE

Equivalent Protection (as safe as)
Portable Grinders
Metal Backing Plate

VA 1-76 Detroit Stoker Company (1977)

A variance from Part 1A of the GISS, R 408.10124 (Rule 124) was denied. The Petitioner sought the variance for portable right angle head grinders using cup wheels. These wheels are housed in and attached to metal that covers the wheel back and extends up the wheel side approximately 1/2 inch.

Petitioner argued that the metal backing plate provides "adequate" operator protection if the wheel shatters or breaks.

A variance can only be granted if the method proposed provides a place of employment as safe as if Petitioner complied with the standard. See Section 27(4) of MIOSHA. The ALJ held that the guarding required by Rule 124 protects the operator not only from shattered wheel fragments, but also from body contact with a moving wheel. Petitioner agreed at hearing that the metal backing did not provide employee equivalent protection to what Rule 124 required.

654 VARIANCE

Buffing Machine
    Cotton Disc
Equivalent Protection (as safe as)
Table Saw
    Small Stock

VA 12-76 Latchaw Enterprise, Inc. (1977)

A variance from Part 11 of the GISS, R 408.11115 (Rule 1115) was granted with conditions. A variance from Part 27, R 408.12722 (Rule 2722) was denied.

Petitioner's buffing machine sits on a floor stand and has a cotton-buff disc approximately 8" in diameter in a shaft that turns 1,730 revolutions per minute. It is used to smooth only minor scratches to secure a mirror finish. This variance was granted because of the pliability of the cotton disc provided that protective gloves or hand pads are worn to protect against burns.

With regard to guarding the table saw, Petitioner argues the guard creates a more hazardous operation. Petitioner is unable to push short or narrow stock with a push stick because the stock gets lost under the guard. Also, a plastic guard distorts the stock's image and a metal guard blocks the view. Finally, a push stick increases the chance for a kick back.

A variance can only be granted if the method proposed provides a place of employment as safe as if Petitioner complied with the standard. See Section 27(4) of MIOSHA.

The ALJ held Petitioner did not demonstrate "as safe as" protection by not guarding the saw. The inconvenience or difficulty of applying a standard does not justify not following the standard.

655 VARIANCE

Portable Air Blow Gun

VA 16-76 Standard Match Plate Company (1977)

A variance from Part 38, R 408.13832(1) [Rule 3832(1)] was approved with conditions. A two year variance for up to 125 lbs. was granted for five areas: sectional molding, single section, frame cleaning, metal casting, and plate cleaning.

656 VARIANCE

Equivalent Protection (as safe as)
Grinding Heavy Castings

VA 19-76 Cadillac Malleable Iron Company, Inc. (1977)

A variance from Part 1 of the GISS, Rule 34(3) for use of a power assist mechanism for snag grinding heavy castings was granted. The power assisted grinding operation was found as safe as hand-held grinding of heavy castings concerning the point of operation hazard.

657 VARIANCE

Overhead Sprinkler System

VA 32-77 Industrial Metal Fabricators (1979)

A variance from Part 9 of the GISS, R 408.10914 (Rule 914) was approved. Petitioner demonstrated that protections protected employees to the same extent as an overhead sprinkling system. These protections were:

1. Little painting in a large area and only after regular working hours;
2. No workers other than painters present;
3. No sources of ignition;
4. Little/no chance spray will reach explosive levels;
5. An overhead system would not provide any more protection in an explosion than fire extinguishers close to area.

658 VARIANCE

Employee Training
Equivalent Protection (as safe as)
Intentional Employee Effort to Injure
Presses
Safety Record

VA 78-80 United Steel & Wire Company (1982)

A variance from Part 24 of the GISS, Rule 2461(1) was denied.

Petitioner wanted to use three power press clippers with the front guard located 1/2 inch from the blade. The parties agreed that these presses did not comply with the rule. Respondent argued that the operation is so inherently safe that any violation would be de minimus. Absent an intentional act, an employee could not be injured. During normal operation, the operator's hands are away from the feed hole. During operation, pieces are inserted into the feed hole, entirely occupying the opening.

658 (Continued)

No matter how safe the operation or how well trained the employees, Respondent's operation is not as safe as compliance.

659 VARIANCE

Bolt Saw
Impossibility of Compliance Defense

VA 60-79 O J Briggs Lumber Company (1980)
VA 63-79

A variance from Part 52 of the GISS, Rule 5247 was denied. Petitioner argued that the bolt saw was guarded to the extent possible. But the result did not protect employees the same as if the guarding requirements of Rule 5247 were followed. The step taken included manufacture of a plexiglass upper hood guard, moving the log loading deck far in front of the blade as possible and placing operator controls 40" away from the blade.

Petitioner argued that any further guarding would make it impossible to do the job. But "impossibility of compliance" is an affirmative defense to a Section 41 citation review proceeding. It has no place in a variance application.

660 VARIANCE

Equivalent Protection (as safe as)
Rule Amendment
Stilts

VA 82-88 Tri-County Accoustical Company (1982)

A variance from Part 12 of the CSS, R 408.41221(c) [Rule 1221(1)(c)] was denied. The Petitioner filed exceptions with the Department Director who issued an Order also denying the application. Petitioner filed a request for rehearing which was also denied by the Director.

Petitioner wanted to use stilts up to 36" high while installing accoustical ceilings and studs for 9 foot ceilings. Rule 1221(1)(c) permits only 20" high stilts.

Petitioner did not present equivalent protection for employees using the 36" stilts. Petitioner was referred to the CSSC to seek an amendment to the rule.

661 VARIANCE

Double Lanyard Procedure
Elevated Work Platforms
Equivalent Protection (as safe as)
Exiting

VA 83-92 Warwick/Triangle Electric Company (1983)

A variance from Part 12 of the CSS, R 408.41258(3) was approved with conditions. The parties then submitted Stipulation for Amendment of the proposed decision and an Order was issued approving the Stipulation.

The rule prevents an employee from entering or exiting an elevated work platform except while at ground level.

Petitioners presented a proposal to allow employees to exit the lift while tied off with a specific double lanyard procedure. Exiting was necessary to install electrical conduit among the steel girders of the Poletown project. The Petitioners' proposal for employee training and use of a double lanyard procedure was found to be equivalent protection.

662 VARIANCE

Equivalent Protection (as safe as)
Impossibility of Compliance Defense
Presses

VA 84-105 American Coil Spring Company (1985)

A variance from Part 24 of the GISS, Rule 2461(1) was denied.

Petitioner simply wished to deviate from the rule. No other employee safeguards were proposed. Petitioner argued that the cutting job cannot be performed with guards or devices in place. The fact that employees using the press must hold the spring in both hands is not equivalent protection. See Section 27(4).

663 VARIANCE

Equivalent Protection (as safe as)
Proposed Rule
Steel Erection
    Connectors
    Temporary Floor

VA 84-107 Douglas Steel Erection Company (1985)

A variance from Part 26, R 408.42613 [Rule 2613(6)] was denied.

Rule 2613(6) requires a temporary floor within two stories or 30', whichever is less; below bolting operations. The Petitioner argued that a temporary floor would interfere with the connection process, but Petitioner did not present any process to protect the connectors to the same degree as if the rule were followed. Reliance on a proposed amendment to the rule was premature since many steps remained before the rule could take effect.

664 VARIANCE

Department Decision Not Promptly Issued
Employee Training
Equivalent Protection (as safe as)
Presses
    Anti-Repeat
    Hand Controls
Safety Record

VA 86-115 W C McCurdy Company (1987)

A variance from Part 24 of the GISS, R 408.12445(c)(d) [Rule 2445(c)(d)] was denied.

Rule 2445(c) requires a press control system to incorporate an anti-repeat feature. (D) requires release of all operator hand controls before a second stroke can be initiated. The variance proposal would allow controls to be tied down and thus circumvent the anti-repeat requirement.

Petitioner did not present any method to protect employees in the same manner as if the rule were followed. Petitioner expected a 50% running time reduction if required to follow the rule. This plant has historically been a safe place to work; no employee injury has occurred due to malfunctioning equipment. Petitioner also has an ongoing safety program, regular maintenance, and internal inspections. The variance application was filed on June 21, 1983, and not denied by the Department until June 5, 1986. There is nothing in the variance rules that imposes a time limit for Department decisions.

665 VARIANCE

Equivalent Protection (as safe as)

Scaffolds

Platform Extending Beyond Forks
Pettibone Hi-lift

VA 91-324 J Verrette Company (1991)

A variance from Part 12 of the CSS, R 408.41243(6) was denied.

The rule limits a platform overhang to two feet in any direction.

Petitioner wanted to use a Pettibone hi-lift with a 6,000 pound capacity. This device can be hydraulically tilted in any direction to compensate for a sloped terrain. The Department objects because there are no operating controls on the platform. Movement depends on the depth perception of the operator and the platform could be dislodged if pushed into a building. There is also a danger of tipping because of the platform's distance from the forks.

Petitioner did not present a procedure to protect employees as well as if the rule were followed. In addition, several safety issues were presented by use of the Pettibone hi-lift.

666 VARIANCE

Portable Grinders
Guard

VA 91-1626 Welded Construction Company (1992)

A variance from Part 19 of the CSS, R 408.41962 [Rule 1962] was denied.

The rule requires a guard on a portable grinder to be between the operator and abrasive wheel.

Petitioner claimed the guard obstructs the operator's view forcing the operator to lean over the grinder to see. Petitioner uses the grinders to clean rust from pipe bevel, to smooth the bevel, and remove slag after welding.

Petitioner did not present any method to protect employees while not using the guard. The rule exists to prevent the first injury. The rule's promulgation assumes the existence of a hazard.

667 DISCRIMINATION

Burden of Proof
    Motivating or Substantial Factor
        Established
    Request for List of Chemicals
Discharged
    Right to Know Request
Right To Know Information Request

MI-DI 87-160 Moore v Uni-Dig, Inc. (1988)

Complainant was discharged for requesting information under the Right To Know amendments to MIOSHA. He had been working under chemical storage tanks removing chemical substances from catch pits for Respondent's customer when his skin began to feel as though it was burning and he began to cough. Complainant refused to work on this job the next day. After testing, Respondent's safety department told the employees to wear respirators and other safety equipment and to work with the substances only when they were wet.

Complainant's attorney filed a request with Respondent's customer for a list of the chemicals in the pit where Complainant was working. On his next day back to work, Complainant was discharged because Complainant was "suing" Respondent's best customer.

The ALJ found the attorney's request was the substantial factor behind the discharge. This request was found to be protected activity under Section 65. While Respondent presented other job-related reasons for the discharge, the ALJ held that the incidents related occurred more than 30 days before the discharge. This explanation was only an excuse to explain the discharge. Back pay from discharge until Complainant found other employment, interest, and attorney fees were ordered.

668 DISCRIMINATION

Discharged
Absenteeism
Employment
Diver/Pile Driver
Whirlpool Decision Discussed
Unreasonable Work Refusal

MI-DI 79-10 Grochocki v Bultema Dock & Dredge Company (1982)

Complainant Grochocki worked as a diver/pile driver. On September 8, 1978, he received a letter from the employer warning that further absences or tardiness would result in discharge. He was discharged on September 26, 1978, for excessive absence. He had not come to work on September 25 or 26, 1978, and had left early on September 24, 1978, due to dissatisfaction with the employer's handling of safety issues and, in particular, the employer's failure to give a fellow diver proper decompression.

The ALJ found no evidence that Respondent resented Complainant's efforts to promote diver safety. Complainant was not reprimanded, disciplined, or discharged for his safety complaints. Complainant was also allowed or directed to act as lead diver and instruct other employees on diving safety. The evidence did support Complainant's discharge for absenteeism.

Relying on Whirlpool Corp v Marshall, Secretary of Labor, 445 US 1; 100 S Ct 883; 63 L Ed 154 (1980), the ALJ found that the Complainant had the right to refuse to work in a dangerous condition if there was insufficient time to eliminate the danger through statutory channels. The issue raised by Complainant was omitted decompression and inadequate treatment. The evidence showed that Complainant could have avoided this danger by refusing to dive without retaliation from Respondent. Instead, Complainant refused to work at all. He did not file a MIOSHA complaint to test Respondent's actions regarding decompression and treatment.

The ALJ's decision was approved by the Department Director.

669 DISCRIMINATION

Back Pay Award Reduced
    Discharged Refusal to Work
Employment
    Press Operator
Whirlpool Decision Discussed
    Reasonable Work Refusal
Hands in Die Area

MI-DI 79-13 Whiting v Redall Industries, Inc. (1982)

Complainant was discharged because she refused to work on a Warco press. This press had previously cycled improperly. Two coworkers also testified to examples where the same press had cycled without being activated. The ALJ concluded that Complainant had a reasonable fear of serious injury if she continued to operate this press. The job required her to place her hands in the die area to clear out waste parts.

Based on the decision in Whirlpool, (see paragraph 667 for cite), the Complainant did not have sufficient time prior to her discharge to secure an inspection by the GISD. Section 65 gave Complainant the right to refuse to work under the facts presented. It is not necessary that the press actually be proved hazardous if a reasonable person would conclude a real danger was present.

The back-pay award was reduced by 34 months because the Department delayed in scheduling the hearing and writing the decision. A rehearing had to be ordered because of an error in recording the first hearing.

The ALJ's decision was approved by the Department Director.

670 DISCRIMINATION

Administrative Law Judge Decision More Than 30 Days from Hearing
Employment Firefighter
Suspension Job Refusal
Whirlpool Decision Discussed
Reasonable Work Refusal

MI-DI 79-14 Conn v City Royal Oak (1982)

Complainant was given a two week suspension for failure to grease Fire Truck 931. Complainant had learned that Truck 930 had been greased in an unsafe manner. Specifically, 930 was raised with a small jack and placed on a 4 x 4 wood block. A fellow firefighter crawled between the wheels, used an acetylene torch to loosen tight grease fittings and then greased the fittings. The Complainant made several suggestions to improve the safety of this operation and told the captain he would not grease 931 without safety changes.

When Complainant returned from a morning assignment, he learned that 931 had been greased without jacking up the vehicle. A firefighter used a "creeper" to position himself. A grease gun nozzle was used to apply the grease. No acetylene torch was used, but Complainant was discharged for refusing to work on the truck.

The ALJ held that Complainant exercised rights provided by Section 65. The employee lawfully refused to grease the truck with the unsafe method used on 930. This refusal was protected under the Whirlpool case (see paragraph 668 for cite).

This decision was approved by the Department Director. The decision was appealed to the Oakland County Circuit Court which affirmed. The Court held that contrary to Respondent's arguments, there was an imminent danger as discussed in Whirlpool, supra. Complainant's belief that the same unsafe procedure followed for 930 would be used for 931 was reasonable and made in good faith. Complainant attempted to change the procedure by discussing the matter with the chief and the captain.

The Respondent also sought dismissal because there was a 27 month delay between the hearing and decision. Section 65(6) sets a 30 day period after hearing for the decision. The Court referred to the case of Impact, Inc. v Dept of Treasury, 104 Mich App 520; 305 NW2d 253 (1981), where the Court of Appeals held that actual prejudice, not mere speculation of prejudice, must be shown to result from a delayed decision. In the cited case, the Board of Tax Appeals delayed three and one-half years before issuing a decision despite a requirement that a decision be issued within 20 days from hearing. The Circuit Court found no prejudice to Respondent from the decision delay.

speculation of prejudice, must be shown to result from a delayed decision. In the cited case, the Board of Tax Appeals delayed three and one-half years before issuing a decision despite a requirement that a decision be issued within 20 days from hearing, The Circuit Court found no prejudice to Respondent from the decision delay.

671 DISCRIMINATION

Employment
    Union Steward
Suspension
    Talking to Safety Officers
    Timekeeping Rules

MI-DI 79-17 White v U S Auto Radiator (1980)

Complainant, chief steward for her union local, called the Department to complain about a hole in the floor without a barricade to prevent employees from falling. An employee did fall in the hole the next day and was taken to the hospital. Two days after the call to the Department, the Department's safety officers came to inspect Respondent's place of business. Complainant talked to them while on a restroom break. She also spoke to the Respondent's safety director. She was given a three day suspension for violating timekeeping rules. Respondent argued she had been given permission to use the restroom but not to talk to the safety officers or the safety director. She returned to her work 15 minutes late.

Respondent knew that Complainant had previously filed a safety complaint with the Department.

The ALJ held that Complainant exercised a right granted by MIOSHA when as a union steward she discussed plant safety issues with the safety officers and Respondent's safety director. The allegation of violating timekeeping rules was a made-up reason for disciplining Complainant.

This decision was approved by the Department Director.

672 DISCRIMINATION

Grievance

Accepted Settlement

MI-DI 79-18 Ainsworth v General Motors Corporation (1981)

Complainant received a disciplinary layoff, He filed a grievance which cleared his record and paid him for the time he was on layoff. He did not pursue the matter to seek job reinstatement.

The ALJ held that Complainant had settled his dispute by accepting the grievance decision without appeal. This settlement will not be set aside.

673 DISCRIMINATION

Discharged

Absenteeism

Evidence

No Employer Knowledge of Complaint

Safety Complaints to MIOSHA

No Employer Knowledge of Complaint

MI-DI 79-19 Blake v Ferndale School District (1981)

Complainant was employed as a custodian for Respondent. He was injured when a ladder collapsed under him on March 6, 1979. While off work, he worked as a substitute teacher on March 8, 22, 23, 27, and 30, 1979. The Department conducted an inspection in March 1979. Respondent was not aware until April 11, 1979, that anyone had filed a complaint with the Department. By April 11, 1979, Respondent had started disciplinary proceedings against Complainant. Respondent had ample cause for discharging Complainant based on his conduct during his medical leave. The ALJ found no violation of Section 65.

674 DISCRIMINATION

Attorney Fees
Back Pay Award
Incarceration
MESC Benefits
Discharged
Refusal to Work
Employment
Electrician
Whirlpool Decision Discussed
Reasonable Work Refusal
Electrical Relay Installation

MI-DI 79-22 Goodloe v Ford Motor Company (1982)

Goodloe was discharged for refusing to remove an electrical relay from Number 7 furnace and install it in the Number 12 furnace. The Number 12 furnace was in operation. Goodloe alleged the presence of energized or "hot" wires made the job too dangerous. To de-energize Number 12 furnace would have required completely shutting down the furnace.

The ALJ concluded that it was reasonable for Goodloe to be apprehensive in performing this job. There was a real danger of death or serious bodily harm. The ALJ relied on the U.S. Supreme Court Whirlpool decision (see paragraph 667 for cite) and held that Goodloe refused in good faith to expose himself to a dangerous condition.

This proposed decision was approved by the Department Director and affirmed by the Macomb County Circuit Court.

After the Circuit Court decision, several hearings were held on the back-pay issue. The following matters regarding back pay were discussed in two additional ALJ decisions:

1. Goodloe's eligibility for MESC benefits;
2. The effect on his award of his leaving the state and subsequent incarceration;
3. Supplemental unemployment benefits; and,
4. Trade Adjustment Act benefits.

The ALJ ordered attorney fees for Goodloe's attorney as permitted by Section 65(5) of MIOSHA.

675 DISCRIMINATION

Attorney Fees
Back Pay Award
MESC Benefits
Burden of Proof
"But For" Test
Established
Complaints
Chemicals
Discharged
Fear of Working With Chemicals
Employment
Chemical Stock Room Attendant
Parol Evidence
Safety Complaints to Employer
Witnesses
Failure to Call
Presumption

MI-DI 80-26 Stark v Wayne v State University (1982)

Stark was a probationary stock clerk assigned to work in the science store. The probation period was to last six months. This work included rebottling chemicals, transferring chemicals and solvents from 55 gallon drums into smaller containers, and work in the lethal chamber where often science lab chemicals came for storage and repacking. Stark worked from September 1979 until January 4, 1980, when he was discharged because of his "unnatural dislike or fear of chemicals." During his employment, Stark made several complaints about job safety and filed two requests for transfer.

The ALJ concluded that Stark's complaints to his employer were a protected activity under Section 65. To establish a violation, the record must contain competent, material, and substantial evidence to conclude Stark's discharge was the result of his safety and health complaints and would not have occurred "but for" his complaints. Respondent's argument that Stark had been discharged for unsatisfactory performance was contradicted by the good evaluation shortly before the discharge. Parol evidence cannot be used to change the effect of a complete and unambiguous written instrument. Also considered was Respondent's failure to call as a witness Stark's immediate supervisor. Failure to call a witness under a party's control creates a presumption that evidence produced by the witness would have been against Respondent. The ALJ ordered attorney fees pursuant to Section 65(5).

This decision was appealed to the Wayne County Circuit Court but dismissed with prejudice after the parties entered into a settlement agreement.

676 DISCRIMINATION

Assault
Discipline
Retaliation
Safety Complaints to MIOSHA

MI-DI 80-39 Kalish v Lake Shore, Inc. (1981)

Kalish alleged that he had been disciplined, assaulted, and denied seniority right to a transfer because lie filed a safety complaint with the Department. The ALJ concluded that the confrontation with a foreman was not due to Complainant's having filed a complaint. Concerning failure to transfer the Complainant, the ALJ found that Kalish had received 13 transfers, some during the period of the Department's investigations. This shows that he was able to exercise seniority rights notwithstanding the filing of a complaint. Concerning discipline, the record shows that the employer kept track of production mistakes in a "production book." The book contained six incidents involving Kalish. There was no evidence that Kalish had been disciplined for these mistakes. Other employees were listed in the book as well. There was no evidence that the errors listed did not occur.

The ALJ concluded that Kalish was not discriminated against because of his having filed a safety complaint.

677 DISCRIMINATION

Burden of Proof
Leaving Work to Call MIOSHA
Suspension
    Violation of Plant Rules

MI-DI 81-50 Hodge v Industrial Building Panels, Inc. (1982)

The ALJ found no violation of Section 65. Complainant failed to establish that his safety complaints were a substantial factor in the nine day suspension. Respondent's plant rules provided ample justification for the suspension.

Complainant left his job to call MIOSHA, disobeying a direct order of his supervisor. This was not protected activity.

In order to establish a violation, Complainant must show that his activity was protected by the Act and that the protected activity was a substantial factor in the discharge or suspension. The burden then shifts to the employer to establish that the same discipline would have been issued even without the protected conduct.

678 DISCRIMINATION

Discharged
    Refusal to Work
Whirlpool Decision Discussed
    Unreasonable Work Refusal

MI-DI 81-51 Roberson v Adamo Equipment Rental Company (1983)

Complainant was discharged for refusal to work as a laborer. He had been hired to work as a safety man. He refused to work as a laborer because he believed the work unsafe.

The ALJ held the refusal unjustified based on the Whirlpool decision (see paragraph 667 for cite). Complainant was not confronted with a "grave personal threat" or imminent danger as faced the workers in Whirlpool, supra. In that case, the employees justifiably refused to walk on a 20 foot high wire mesh screen through which a coworker had fallen to his death. Complainant also did not face an imminent danger situation as in Goodloe (see paragraph 673 for cite) who justifiably refused to install an energized electrical relay. Here Complainant had a reasonable alternative to refusing work. In addition to complaining to the employer about the alleged unsafe conditions, he had sufficient time to complain to MIOSHA.

679 DISCRIMINATION

Complaint Must be Filed Within 30 Days By
    Telephone
Evidence
    Rehired After Learning of Complaint
Failure to Recall

MI-DI 82-56 Williams v Richardson Asphalt Company (1982)

The ALJ found a timely complaint filing based on a record of telephone calls to the Department. Section 65(2) does not require an employee to file a complaint with a specific division in the Department or in writing. An employee should not be denied relief because of the Department's failure to record phone calls or transmit complaints to the proper division. Since the Department accepts complaints by telephone, Complainant's calls constitute timely filing. The ALJ found no violation of Section 65 based on Respondent's failure to rehire Complainant in May 1981 based on a July 1979 complaint to the Department of Public Health. Respondent knew of this complaint when it rehired Complainant for work during the 1980 paving season.

680 DISCRIMINATION

Layoff

Budget Reductions

MI-DI 82-61 Moss v Traverse City Regional Psychiatric Hospital (1982)

On February 22, 1980, Complainant filed a MIOSHA complaint concerning a doorway in Respondent's building. On December 17, 1980, Complainant was notified that his position was being abolished due to budget reductions. The ALJ found no violation of Section 65. Respondent's explanation for the layoff is believable in view of the undisputed budget reductions and numerous layoffs. Also, Complainant was employed for a substantial period of time after the complaint.

681 DISCRIMINATION

Discharged

Refusal to Work

Whirlpool Decision Discussed

Unreasonable Work Refusal

MI-DI 82-62 Driskell v GMC, Hydramatic Division (1983)

Complainant refused an assignment to Department 331 to work as a welder. Complainant did not report as directed because he was not issued a film badge and the machine radiation monitoring procedures were not being followed and records were being falsified.

The ALJ found Complainant was not faced with an imminent hazard as were the employees in Whirlpool (see paragraph 667 for cite). Complainant was provided a film badge even though the ionization rules did not require one. There was no actual threat to safety, only those perceived by Complainant.

682 DISCRIMINATION

Complaint Must be Filed Within 30 Days
Jurisdictional Requirement

MI-DI 82-66 Hass v Vaneerden Produce Company (1983)

The Complainant was discharged after complaining to the employer about working conditions and stating he was going to try to change "unsafe" conditions. Complainant did not file his MIOSHA discrimination complaint within 30 days as required by Section 65. The ALJ held this filing requirement is jurisdictional and dismissed the appeal from a Department finding of no jurisdiction. Complainant filed a Circuit Court appeal which was dismissed.

683 DISCRIMINATION

Suspension
Leaving Work Station
Refusal to Perform Work Assignment
Whirlpool Decision Discussed
Unreasonable Work Refusal

MI-DI 83-67 Ricketts v Watervliet Paper Company (1983)

Complainant was suspended on July 23, 1982, for one day because she left her department to find a union representative. The ALJ found that MIOSHA did not give Complainant the right to leave her work area to get a union representative of her choosing. This is the case even though she had raised a safety issue and mentioned MIOSHA.

Complainant was suspended for 21 days on July 30, 1982, because she refused to perform a work assignment as directed. As noted in. Whirlpool, (see paragraph 667 for cite), an employee may refuse an assignment if a reasonable person would conclude that there is a real danger of death or serious injury and there is insufficient time to eliminate the danger through statutory channels, such as filing a request for inspection.

The ALJ held that Complainant was not exposed to the type of imminent danger that would justify job refusal. A subsequent MIOSHA inspection did not cite the hazard perceived by Complainant.

Accordingly, Complainant's suspensions were not a Section 65 violation.

684 DISCRIMINATION

Discharged
    Complaints About Smoking
Protected Activity
Safety Complaints to Employer
Smoking

MI-DI 83-68 Ponce v Ardmore Acres Hospital (1984)

To be protected from discharge or discrimination, an employee's complaints must be based on "a right afforded by this Act," Section 65(1). Complaints are protected activity if they relate to a promulgated standard or the General Duty Clause of the Act, Section 11(1)(a). Complainant was discharged for complaining about smoking during staff meetings.

No standards have been promulgated to regulate cigarette smoking or smoke in the workplace. Also, Complainant presented no evidence that smoking is a General Duty Clause violation, that is, a recognized hazard. Without this evidence, the ALJ held that the Complainant failed to present a prima facia case of a Section 65 violation.

685 DISCRIMINATION

Discharged
    Refusal to Work
Welding
Whirlpool Decision Discussed
    Unreasonable Work Refusal

MI-DI 83-69 Audia v Michigan Boiler & Engineering Company (1983)

On June 3, 1982, Complainant was assigned the task of working in a steel drum measuring 5 feet in diameter and 24 feet long. His work was in close proximity to 2 arc welders using high pressure are gougers, The work of the are welders generated sparks, smoke, ultraviolet light, and noise. Complainant discussed his concerns over working in this environment with his foreman. Since no other work was available, Complainant went home. This occurred again on June 4, 1982. Complainant was laid off on June 6, 1982. Complainant alleged he was laid off because lie complained about unsafe working conditions.

In order to prevail, the Complainant must show that his activity was protected and that the activity was a substantial factor in the decision to discharge or discipline.

685 (Continued)

The ALJ held the Complainant failed to show his complaints were a substantial factor in the decision to lay him off. Complainant's refusal to work on June 3 and 4, 1982, provided justification for the employer's action. The working conditions in the drum did not pose an imminent risk of serious injury or grave personal threat as discussed in the Whirlpool decision (see paragraph 667 for cite). Complainant had ample time to file a request for inspection with the Department of Labor.

686 DISCRIMINATION

Carbon Monoxide
Discharged
    Swearing
    Tardiness
Safety Complaints to Employer Safety
Complaints to Other Agencies

MI-DI 83-70 Cruickshank v Blazo's Country Fair Restaurant (1984)

Complainant called in a complaint to the city of Dearborn on March 27, 1981, regarding carbon monoxide coming from Respondent's furnace. When the city made an inspection on March 27, 1981, Complainant was asked to sign a complaint form in the presence of Respondent's manager. On April 28, 1981, a violation notice was issued to Respondent. The furnace and hot water heater were turned off. Complainant was discharged on April 6, 1981. Respondent argued Complainant was discharged for tardiness and swearing. There was nothing in Complainant's file to support these incidents. Later Respondent produced "file documents" showing 22 occasions of tardiness from January 4, 1981, through April 12, 1981. These contained many inaccuracies.

The ALJ found Complainant was discharged for filing a complaint with the city concerning Respondent's furnace. The explanations offered by Respondent were not supported by the evidence produced at hearing. There was a loud argument on April 6, 1981, between Complainant and the owner over the furnace. This was found to be reasonable, considering the serious condition of the furnace. A violation of Section 65 was found.

687 DISCRIMINATION

Burden of Proof
Safety Complaints to Employer
Suspension
Failure to Complete Job
Out of Assigned Area

MI-DI 83-107 Cutliff v Ford Motor Company (1985)

Complainant complained about dripping oil from a press on which he was assigned to work, Complainant slipped and fell on the oil and suffered a burn when an alien wrench, being used in the welding operation, fell down his sleeve. Complainant was given several days off as a suspension for not completing a job and being out of his work area. Complainant argued the suspension was due to his safety complaints.

The ALJ found no violation of Section 65. The evidence supported Respondent's claim that Complainant failed to complete an assignment. Complainant failed to establish that his complaints were a substantial factor in the decision to suspend. This conclusion was reached because Complainant was unable to account for his time after receiving the assignment. Also, Complainant had a history of being disciplined for failure to complete assignments.

688 DISCRIMINATION

Discharged
Failure to Wear Freezer Gloves

MI-DI 83-109 Moglovkin v Midwest Natural Foods Distribution, Inc. (1983)

Complainant was discharged for refusing to wear insulated freezer gloves in a freezer. The refusal was due to a dispute regarding whether the employee was required by the collective bargaining agreement to pay for lost gloves. The ALJ dismissed the complaint because MIOSHA did not give Complainant the right to refuse to wear insulated gloves in a freezer.

689 DISCRIMINATION

Discharged
Uncooperative Behavior
Yelling at Supervisor Evidence
No Employer Knowledge of Complaint
Safety Complaints to Employer
Safety Complaints to MIOSHA

MI-DI 83-110 Kirkwood v Courtesy Dodge (1983)

Complainant made several complaints to management about air quality. He also filed a complaint with the Department of Public Health regarding lack of adequate ventilation. Respondent agreed there was a problem and contacted an outside contractor for assistance.

Respondent did not know of the complaint with the Department of Public Health until after Complainant had been discharged. Complainant was discharged for uncooperative behavior with supervision and coworkers, for being argumentative, and the final incident when he entered the sales area and yelled at his immediate supervisor. No violation of Section 65 was found.

690 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Not Established
Employee Laid Off/Lack of Work Laid Off
Lack of Work
Rehearing Request
Safety Complaints to MIOSHA

MI-DI 83·111 Wilson v Smith Hoist Manufacturing Company (1983)

The Department's dismissal of the complaint was affirmed. The ALJ - found that Complainant was laid off on December 30, 1982, due to a lack of work and not for filing an October 15, 1982, MIOSHA complaint. A request for rehearing was denied. The decision was affirmed by the Cass County Circuit Court. The Court observed that the employee must prove that protected conduct was a motivating or substantial factor in the employer's decision to discriminate.

On January 3, 1983, Respondent started a four day week due to a lack of work. This was less than a week after Complainant was laid off. In February 1983, all production employees were laid off. As concluded by the ALJ, the Court also found that, although Respondent's management resented Complainant's MIOSHA complaint, Complainant did not prove that this was a motivating or substantial factor in the decision to lay him off. Complainant would have been laid off even if he had not filed the complaint.

691 DISCRIMINATION

Quit
Refusal to Work on Video Display Terminals
Video Display Terminals
Whirlpool Decision Discussed
Unreasonable Work Refusal
Video Display Terminals

MI-DI 83-112 Romano v Ford Motor Company (1984)

Complainant was not justified in refusing work on the word processor. She was not confronted with a situation of imminent danger as faced the workers in Whirlpool (see paragraph 667 for cite). Complainant was advised not only by Respondent but also by MIOSHA representatives that operation of VDTs did not pose an imminent risk of serious injury or death or violate any health or safety standard.

692 DISCRIMINATION

Discharged
Unsatisfactory Service
Jurisdiction
State Employees
Safety Complaints to Employer

MI-DI 83-114 Brown v Michigan Department of Transportation (1985)

Complainant was hired as a laborer on December 8, 1980, and discharged May 20, 1983, for violation of rules and unsatisfactory service. The ALJ found that Complainant and Respondent had a long history of antagonistic relations. This relationship resulted in part from Respondent's failure to adequately train and provide for Complainant's job- safety and Complainant's complaints concerning these failures, The ALJ also found jurisdiction over Complainant, a state employee.

The Ingham County Circuit Court reviewed Respondent's appeal and found Department of Labor jurisdiction over a MIOSHA discrimination complaint from a state employee. The Court affirmed the ALJ's decision. An appeal to the Court of Appeals also resulted in affirmance of the ALJ's decision.

693 DISCRIMINATION

Discharged
Refusal to Perform Assigned Job
Uncooperative Behavior
Swearing
Whirlpool Decision Discussed
Unreasonable Work Refusal

MI-DI 83-116 Bothei v Kendor Steel Rule Die, Inc. (1984)

The ALJ found no MIOSHA discrimination where the Complainant was discharged for refusing to clean a press pit filled with water and oil. Complainant argued he feared falling in the pit or being electrocuted while standing in the water under the press. The ALJ concluded that Complainant was not directed to enter the pit but to remain at floor level and use a long handled mop and bucket to remove the oil and water. Complainant was not faced with the imminent threat of death or serious injury faced by the employees in Whirlpool, (see paragraph 667 for cite). Under the finding in that case, the condition causing the job refusal must be such that a reasonable person would conclude that an imminent danger was present. Here, there was sufficient time to file a MIOSHA complaint and request an inspection.

694 DISCRIMINATION

Discharged
Failure to Report to Work
Evidence
No Employer Knowledge of Complaint
Safety Complaints to MIOSHA
No Employer Knowledge of Complaint

MI-DI 83-118 Klepadlo and Price v Automotive Service Center (1984)
MI-DI 84-120

Complainants were hired in May and June 1983 and discharged on September 19, 1983, for not coming to work on that day. The Complainants filed a request for inspection on September 12, 1983. MIOSHA safety officers inspected Respondent's place of business on September 20, 1983. Respondent did not know of the complaint until advised by the safety officers during the inspection. The ALJ found that the Complainants were discharged for not coming to work on September 19, 1983. This was one day before the inspection and before Respondent knew of the complaint.

695 DISCRIMINATION

Employment
    Union Representative
Fringe Benefits Deducted
    Vacation Benefits
Inspector
    Right to Resolve Inspection Participation Disputes
Union Representative
    Accompaniment on Inspection

MI-DI 84-119 Cedregren v Clinton Valley Center (1984)

Complainant was president-elect of the union. She took part in a MIOSHA inspection of her place of employment. The employer deducted vacation benefits from Complainant for her participation arguing that she did not have supervisory approval as required by the collective bargaining agreement.

The ALJ held that the employer's failure to challenge her participation at the time of inspection waived any right to object. Section 29(4) gives the safety officer the right to resolve objections as to participation. Section 29(10) specifically prohibits an employer from deducting fringe benefits from one who takes part in an inspection.

It is a statutory right for a union representative to take part in an inspection. This right is independent of a collective bargaining agreement. It was unnecessary for Complainant to receive management approval to take part in the inspection.

The fringe benefits were ordered credited to Complainant plus expunging her personnel file.

696 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Not Established
Employee Misconduct
Stealing

Discharged
Theft

MI-DI 84-121 Smith v Kalamazoo Stamping & Die Company (1985)

Complainant was discharged on September 21, 1983, for taking paper towels from the plant to soak up water in his car. Complainant had worked since July 6, 1978. During his employment, Complainant was very involved with his union. He was a member of the bargaining committee and filed over 50 grievances relating to safety and health issues during the two years prior to his discharge.

Complainant was terminated by the personnel director who started in July 1983

The ALJ found that the discharge was not based on Complainant's exercise of a protected activity. Complainant did not present a prima facie case of MIOSHA discrimination. The personnel director had no personal involvement with Complainant's safety and health activities. There was no evidence that the personnel director was concerned with Complainant's safety and health activities.

697 DISCRIMINATION

Complaint Must be Filed Within 30 Days
Jurisdictional Requirement
Tolling of Limitation Period
Insanity

Discharged

MI-DI 84-122 Graves v Eastern Michigan (1984)

On January 4, 1984, Complainant filed a MIOSHA discrimination complaint. Complainant was discharged on October 5, 1983. Between these two dates, Complainant was not hospitalized or under a doctor's care for insanity. See Section 5851 of the Revised Judicature Act, 1961 PA 236, which provides for tolling of a limitation period if the person entitled to bring the action is "insane."

The ALJ concluded that the 30 day complaint filing period in Section 65(2) is mandatory. Complainant argued that he did not know of the connection between his discharge and his

MIOSHA activities within the 30 day period. The ALJ held that ignorance of the right to sue does not postpone the limitation period.

698 DISCRIMINATION

Carbon Monoxide
Discharged
Illness
Employment
Cook/Waitress
Safety Complaints to Other Agencies

MI-DI 84-124 Perry v Rambeau Cuisine (1985)

Complainant was discharged after she became ill when exposed to carbon monoxide from a defective heater. Respondent argued that Complainant was too delicate to return to work because seven other employees had worked under the same conditions without complaint. Complainant filed a complaint with the Detroit Department of Health.

The ALJ held that the Complainant was discharged because of her complaint. Had she not complained, she would not have been discharged.

699 DISCRIMINATION

Complaint Must be Filed Within 30 Days
Jurisdictional Requirement
Suspension

MI-DI 84-126 Jordan v C & O Railroad and Ford Motor Company (1985)

Complainant began employment with C & O in January 1976 as a car inspector at the rail loading operations at Ford's Wayne Assembly Plant. He was involved in several disputes with Ford personnel regarding nonsafety matters. Complainant filed a MIOSHA discrimination complaint on February 29, 1984. He was suspended from December 1, 1983, until January 25, 1984, due to a negative test for drugs.

The ALJ found the Complainant's February 29, 1984, complaint was filed more than 30 days from the alleged act of discrimination (the December 1, 1983, suspension). Complainant's safety activities were not a factor in his assignment to a different location when he returned on February 1, 1984. This new assignment was based on an agreement between the Complainant, his union, and management.

700 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Established
Complaint Threatened
Discharged
Bathroom Facilities Complaint
Employee or Independent Contractor
Employment
Cab Driver

MI-DI 85-127 Cunningham v Port City Cab Company (1985)

Complainant worked as a cab driver from April 21; 1983, He was discharged on February 7, 1984, after he threatened to report Respondent to the Health Department if no restroom was provided for the drivers. Respondent's restrooms had been locked from the end of December; drivers were told to use the public restrooms in nearby businesses.

The ALJ found Complainant to be an employee relying on the economic reality test and control issues. The case of Foster v MESC, 15 Mich App 96 (1968), was also considered.

Complainant's threat was a substantial factor in Respondent's decision to discharge. By complaining about an absence of toilet facilities, Complainant exercised a right afforded by MIOSHA. Rule 4201(3) of the administrative rules requires an employer to provide toilet facilities. Respondent was ordered to pay Complainant his lost wages from discharge until October 8, 1984, when he found other employment.

701 DISCRIMINATION

Discharged
Refusal to Work
Whirlpool Decision Discussed
Unreasonable Work Refusal

MI-DI 85-128 Oberlin v Bennett Builders (1985)

Complainant was discharged because he refused to work on a roofing repair job. He preferred to work on a pole barn project. There was no imminent hazard to justify refusing to work on the roofing job as required by the, Court in Whirlpool (see paragraph 668 for cite). The Complainant was authorized to purchase the safety equipment necessary to work on the roof. The ALJ held that the discharge was not due to Complainant's exercise of a right afforded by MIOSHA.

702 DISCRIMINATION

Discharged

Refusal to Work

Employment

Oil Derrick

Whirlpool Decision Discussed

Unreasonable Work Refusal

MI-DI 85-130 Kappler v A-1 Tool Services, Inc. (1988)

Complainant refused to work on a "defective" stabbing board. The Court in Whirlpool (see paragraph 667 for cite), established standards for a work refusal. An employee can, in good faith, refuse to work in a dangerous situation. The condition must be of a nature that a reasonable person would conclude there is a real danger of death or serious injury and that filing a MIOSHA complaint would not have immediately corrected the hazard. The employee must also have sought and been unable to obtain relief from the employer.

The ALJ found that the Complainant could have filed a MIOSHA complaint to review his concern over the stabbing board. This was not the kind of issue that presented a danger of immediate death or serious injury to justify a work refusal. Complainant was not discharged because of his exercise of a MIOSHA protected right.

703 DISCRIMINATION

Discharged

Insubordination

MI-DI 85-135 Hunter v Artcraft Poster Display, Inc (1986)

Complainant was discharged due to a long-standing personality conflict with her supervisor. On May 31, 1985, this conflict resulted in a showdown just short of violence. Complainant was not discharged for refusing to perform her job but because of her insubordination and threatening behavior toward her supervisor. The ALJ found no evidence that Complainant was discharged for making safety complaints or because she refused to work under circumstances presenting an imminent risk of death or serious injury.

704 DISCRIMINATION

Discharged
Insubordination
Refusal to Work
Whirlpool Decision Discussed
Unreasonable Work Refusal

MI-DI 86-137 Rocheleau v MOLMEC, Inc. (1986)

Complainant refused to fill the hopper on the injection molding machine because he claimed he would have to walk over a chain 32 inches above the floor. The chain was used to hold Machine 5, which was not securely anchored to the floor, to Machine 6, There was a way to load the machine hopper without stepping over the chain.

The ALJ found that Complainant could have performed the job without crossing the chain. Complainant was not confronted with an imminent danger situation as were the employees in Whirlpool (see paragraph 668 for cite) or the Complainant in Goodloe (see paragraph 673 for cite). Complainant's refusal to load the hopper was not protected activity under Section 65(1) of MIOSHA.

705 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Established
Talking to Safety Officer
Discharged
Lack of Work
Hearing
Failure to Appear
Proceeding in Absence of Party
Respondent's Failure to Appear
Discrimination Case
Safety Complaints to MIOSHA

MI-DI 86-139 Ostrander v Jack Inc (1987)

Respondent failed to appear at the hearing. The case continued based on Section 72(1) of the APA. Evidence was presented by the Complainant and Department.

During a MIOSHA inspection, Complainant told the safety officer about hot water leaking, slippery floors, having to stand on an empty barrel to unload hoists, and damage to his boots from acids and chemicals. Respondent's supervisor told Complainant that if he had kept to himself he would have been a foreman but now he faced layoff. Complainant was later laid off for lack of work.

The ALJ held that Complainant was discharged for presenting safety complaints to the safety officer. This activity was a substantial factor in Respondent's decision to layoff and eventually discharge Complainant.

706 DISCRIMINATION

Discharged
- Complaints About Smoking

Hearing
- Failure to Appear
  - Proceeding in Absence of Party

Relief Under Section 65
- Back Pay
  - Exactitude Not Required
  - Mitigation of Damages
  - Unemployment Compensation – No Credit
- Expungement of Personnel File
- Reinstatement

Safety Complaints to Employer
- Cigarette Smoke

MI-DI 86-142 Eskenazi v Merit Systems, Inc. (1987)

Complainant was hired as a computer programmer at a pay rate of $35,000 per year. Respondent contracts out its programmers individually or in teams.

The Department found the Complainant was discharged for complaining about the smoking environment in Respondent's business and that of Respondent's clients. The Department's Order directed Respondent to expunge Complainant's personnel file of all references to his discharge. Only the Complainant appealed. Accordingly, the finding of discrimination was not reviewed. Respondent's failure to appeal the Department's Order is acceptance of the finding of Section 65(1) violation. The remaining issue was whether Complainant was entitled to reinstatement with back pay and costs.

The ALJ found that Section 65 creates a presumption in favor of awarding back pay as a form of restitution to restore Complainant to his rightful economic status to offset the effects of unlawful discrimination. See the case of *Albermarle Paper Co v Moody*, 422 US 405 (1975), where the Court found that back pay should be denied only for reasons which would not frustrate the central statutory purpose of eradicating discrimination and making people whole for injuries suffered by past discrimination.

The ALJ ordered three months of back pay without credit for unemployment compensation benefits received. Reference was made to *Pennington v Whiting Tubular Products, Inc.*, 370 Mich. 390 (1963), where the Court reasoned that the purpose of unemployment compensation is the promotion of the public good and general welfare. There is nothing in the act to support a finding that compensation should be construed as payment in lieu of wages. The ALJ found no need for exactitude in computing back pay. Reinstatement was not ordered because Respondent cannot guarantee Complainant's placement in a nonsmoking environment. The ALJ also found Complainant had not diligently sought employment to mitigate damages.

707 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Established
Complaints
Chemical Exposure
Discharged
Complaints About Working Conditions
Relief Under Section 65
Back Pay
Exactitude Not Required
Mitigation of Damages
Expungement of Personnel File
Reinstatement
Safety Complaints to Employer
Validity of No Consequence to a Section 65 Action

MI-DI 87-143 Woods v Continental Water Systems (1987)

Complainant was discharged after a period where he sought medical attention for an alleged exposure to chemical fumes. The Department found a Section 65 violation but limited relief to expungement of Complainant's personnel file. Both the Complainant and Respondent appealed.

The ALJ found that complaints to an employer about safety and health conditions are protected activities under MIOSHA. Whether these complaints are found to be valid is of no consequence in a Section 65 complaint. Respondent's claim that Complainant was discharged for failing to provide a medical diagnosis and clearance was found to be a subterfuge to cover up a discharge for voicing concerns over suspected fumes. These complaints were a substantial reason for the discharge.

The ALJ ordered reinstatement and back pay. The Act creates a presumption in favor of awarding back pay as a form of restitution to restore those wronged to their rightful economic status. Exactitude in computing back pay is not required and uncertainty in determining the correct amount should be resolved against the discriminating employer. Back pay at the rate of $240 per week from December 10, 1985, through March 27, 1987, was ordered ($12,240). Respondent was given credit for weeks the Complainant worked. Complainant's duty to mitigate did not preclude him from quitting positions that paid less money than was earned with Respondent.

708 HEARING

Complainant's Failure to Appear
Discrimination Case
Failure to Appear
Proceeding in Absence of Party

General Entry for Complainant Nonappearance Cases

Complainant appealed an adverse Department Determination but did not attend the hearing. Both the Respondent and Department were present. Based on Section 72(1) of the APA, the hearing continued in Complainant's absence. Without the Complainant, no evidence was presented no evidence was presented in opposition to the Department's Order. Accordingly, the Order was affirmed and the Complainant's appeal dismissed.

709 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Established
Complaints
Defective Mall Gate
Discharged
Complaints About Working Conditions
Relief Under Section 65
Back Pay
Exactitude Not Required
Mitigation of Damages
Expungement of Personnel File
Reinstatement
Safety Complaints to MIOSHA

MI-DI 86-149 Morrison v General Nutrition Center, Inc. (1987)

Complainant was a part-time sales person at Respondent's store in the Genesee Valley Mall from September 1983 until laid off May 5, 1984. Her final pay was $4.87 per hour. On March 7, 1984, a complaint concerning a defective entrance gate was filed with MIOSHA by one of Respondent's employees. A MIOSHA inspection took place on March 19, 1984.

The ALJ found that the complaints by the Complainant and two other employees were substantial factors in Respondent's decision to lay off the Complainant. Respondent had already brought in a new employee on March 20, 1984. This employee was given more hours than the three employees with the most seniority who had talked to the safety officer during the inspection.

709 (Continued)

With regard to the mitigation of damages issue, the ALJ concluded that Complainant must make reasonable efforts to mitigate, but it is Respondent's burden to show Complainant has not made reasonable efforts. Based on MIOSHA's presumption favoring back pay awards and the holding in Albermarle Paper Co v Moody, 422 US 405 (1975), the ALJ found no statutory duty to mitigate damages. It was also held that Complainant had made reasonable efforts to mitigate. Complainant had no duty to reapply to Respondent's store when she left with the reasonable impression that Respondent did not want her to work any longer. Respondent's liability was tolled when Complainant accepted a job paying $5.50 per hour on August 1, 1985.

The ALJ ordered $3,210.67 in back pay which is the difference between her earnings after lay off and her separation wage plus interest.

710 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Not Established
Employee Production Below Standards
Discharged
Production Below Standards

MI-DI 87-150 Esman v Duke Industries Inc. (1987)

Complainant started on September 8; 1986, and worked initially cutting round pieces of steel. His production was substantially below that required. From September 11 through 15, 1986, he was given welding jobs. Again, his production was less than required. He was discharged on September 16, 1986.

The ALJ found that Complainant's performance justified his discharge. Although Complainant did ask for a new welding shield, this was not found to have been a substantial reason for the discharge.

711 DISCRIMINATION

Discharged

Refusal to Work

Whirlpool Decision Discussed

Unreasonable Work Refusal

MI-DI 87-151 Howard v Georgia Pacific (1987)

After Complainant developed dermatitis because of the heat while painting operating paper machines, she was assigned to work in the utility crew. Complainant refused contending that she would be assigned to paint on operating paper machines. An arbitrator's decision found that Respondent did not violate the collective bargaining agreement by assigning Complainant to the utility crew, Complainant failed to report to work and was discharged.

The ALJ found that Complainant's refusal to work was not justified under the standards established in Whirlpool (see paragraph 667 for cite). Even if dermatitis justified work refusal, Complainant could have worked on the utility crew until investigation by the Department of Public Health. There was no showing that this work constituted a danger of death or serious injury.

712 DISCRIMINATION

Burden of Proof

Proximity of Employer Action and Safety Complaint

Complaint Must be Filed Within 30 Days

Discharged

Sexual Harassment

Suspension

MI-DI 87-152 Feldt v Gibraltar School District (1987)
MI-DI 88-744 (1989)

On July 9, 1987, the ALJ found that the Respondent's alleged violations of MIOSHA occurred on September 3, September 5, and October 31, 1986. Complainant filed his complaint on November 10, 1986, within the 30 day complaint period. It was on October 31, 1986, that he was ordered to take a medical leave of absence. The case was remanded to the Department for investigation.

A second Department determination was issued and appealed by Complainant. Complainant was first suspended and later placed on a medical leave of absence concerning sexual harassment charges brought against him by female students. Shortly before this action, the Complainant sent a letter to the Department detailing his concerns about safety. Complainant alleges that the adverse action was taken as a result of his safety complaint.

The ALJ noted that the sexual harassment charges were investigated almost simultaneously with the Department's inspection. This proximity alone is not enough to establish a violation of Section 65. The witnesses called by Complainant denied knowing of his Department complaint.

713 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Established
Reasonable Job Refusal
Discharged
Refusal to Work
Safety Complaints to Employer
Validity of No Consequence to a Section 65 Action
Whirlpool Decision Discussed
Reasonable Work Refusal
Unguarded Band Saw

MI-DI 87-155 Treynor v General Mould Products (1988)

Respondent instructed Complainant to enlarge a slot in support blocks using an unguarded bandsaw. Several thousand blocks had been returned by a customer because the slots were not large enough. Complainant was to do the job while hand holding the blocks. Complainant refused this job and was fired. A later MIOSHA inspection found a violation of Part 26 of the GISS regarding metal working machinery.

The ALJ held that Complainant acted reasonably in refusing to cut the support blocks with an unguarded bandsaw while hand holding the blocks. This task placed her in an imminent danger of serious physical harm. There was no time to call MIOSHA and continue the operation. Her complaints to the employer alone were not enough to protect her. Complainant was discharged because of her refusal to use the saw. Her refusal was the substantial factor behind the discharge.

714 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Not Established
Employee Misconduct
Insubordination
Swearing
Discharged
Uncooperative Behavior
Abusive Language

MI-DI 87-157 Sheldon v Lease Management, Inc (1988)

The ALJ found the Complainant was discharged for refusal to accept a job assignment, for use of abusive language to the supervisor, voiced dislike of the company, and prior similar expressions of dissatisfaction with the job. Complainant did not establish that his safety complaints were a substantial reason for his discharge. He was unable to point to specific complaints that led to his discharge.

715 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Not Established
Employee Production Below Standards
Discharged
Lack of Experience
Evidence
No Employer Knowledge of Complaint
Safety Complaints to Fire Department
No Employer Knowledge of Complaint

MI-D1 87-159 Kemp v McFarland's Florist & Greenhouse (1988)

Complainant was hired as a part-time employee and was discharged during his third week because his supervision was taking up too much time. During the last week, Complainant observed some wires near water on the ground and asked the owners' daughter and his supervisor whether the wires were conducting electricity. That night, he told his father about the wires and the father called the local fire department who conducted an inspection.

The ALJ found that the owners did not know that the Complainant had anything to do with the inspection. The Complainant was discharged because of his lack of experience in the florist business and mistakes based on this lack of experience. The complaint was not found to be a substantial factor in the discharge.

716 JURISDICTION

Late Employer Petition/Appeal
Including All Items
Partial Appeal
Search Warrant
First Impression

94-1143 Balsa USA (1995)

Good cause for a late petition was found where Respondent filed a timely petition for some items. The ALJ concluded that a more complete review would be made if all items were included. Also, the search warrant issue was a matter of first impression causing uncertainty in how to proceed.

717 BOARD REVIEW

Direction for Review
Late

EMPLOYER

Nonappearance at Scheduled Hearing
General Entry for Nonappearance Cases

HEARING

Failure to Appear
No Compliance with Board Rule R 408.21428(2)

92-214 Northern Tool & Engineering (1995)

The ALJ issued a Report dismissing ER's appeal because ER did not appear at a scheduled hearing. The hearing proceeded pursuant to Section 72(1) of the APA. Testimony was taken from MIOSHA witnesses.

ER did not file a request for rehearing within 10 days as permitted by Board Rule 428(2).

A Board member directed review after expiration of the 30 day Board review period in Section 42 of MIOSHA. This review was not considered and the ALJ's Report was considered to have become a final order of the Board.

718 DISCRIMINATION

Appeal
Attorney Carelessness
Fifteen Working Days
Good Cause
Same as Section 41 Cases
Good Cause Not Found
Attorney Carelessness

MI-DI 88-88 Kalfsbeek v Dri-Side Inc (1988)

Respondent's attorney filed a late appeal and argued that the "good cause" test stated in Section 65(4) should be construed differently from the application in citation appeal cases under Section 41.

The ALJ concluded that the reasonable person test used for Section 41 cases is also applicable to discrimination cases. Good cause is the kind of cause that would prevent a reasonable person from the performance of an important obligation. It does not include conduct that shows carelessness, negligence, or a lack of reasonable diligence.

718 (Continued)

Good cause was not found where Respondent's attorney waited until the last day of the appeal period before attempting to file the appeal. The appeal period cannot be extended based on the carelessness of Respondent's attorney.

719 DISCRIMINATION

Appeal
Change of Address
Oral
Good Cause Not Found
Change of Address

MI N 88-62 Deeb v Michigan Cleaning & Restoration Company (1988)

Good cause for a late appeal was not found where the Department's decision was sent to the address supplied on the complaint filed by the Complainant. Complainant argued that the decision was sent to the wrong address and that he had called the Department and verbally changed it. Four documents had been sent to the address used by the Department; none were returned by the postal authorities. Complainant never filed a written change of address. The ALJ found that a verbal statement was not sufficient to change the address, Good cause for the late appeal was not presented.

720 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Not Established
Employee Misconduct
Attitude
Discharged
Probation Period
Accident
Attitude
Timeliness
Employment
Bus Driver

MI-DI 88-163 Abram v SEMTA (1988)

The Complainant was discharged during a probationary period as a bus driver. During the probation period, the Complainant had an accident, timeliness problems, and attitude issues. The ALJ affirmed the Department's finding that Complainant was not discharged for making safety complaints.

721 DISCRIMINATION

Complaint to Department of Civil Rights

Not Protected Activity under Section 65

Protected Activity

MI-DI 88-164 Perry v Ford Motor Company (1988)

In November 1986, Complainant filed a civil rights complaint because she was transferred although she had more seniority than a coworker. The ALJ and that Section 65 does not protect an employee who files a civil rights complaint.

722 DISCRIMINATION

Burden of Proof

Motivating or Substantial Factor

Not Established

Employer Adverse Action Must be Response to Complaint

Not Citation Abatement

Discharged

Change in Work Crew Number

MI-DI 88-439 Ritchey v Economic Opportunity Committee (1989)

Complainant filed a complaint which led to a MIOSHA inspection and citations. Included was a violation for using a metal folding chair between the two standard seats in a Ford cab van. To address this citation, Respondent concluded it was not feasible to add a third seat. Instead, a laid-off foreman was recalled and three two-man crews were used instead of two three-man crews. Complainant was laid off because as a crew leader, his wage was comparable to what a foreman would be paid. Also, Complainant had received a written reprimand and warning for falling in sick and then working with his brother-in-law.

In order to prevail, the facts must show that the employee's protected activity was a "substantial reason" for the discriminatory action. The ALJ found that Respondent had a choice of abating by adding a secured seat or eliminating the use of three-man crews. The choice made - to cease three-man crews - did not violate Section 65. The fact that Complainant had received a written reprimand and an oral warning within the past two months made him vulnerable during a staff reduction. The employer's action - to lay off the Complainant - was not in response to the complaint but to the citation. Therefore, the complaint was not, a substantial reason for the job loss.

(Paragraph number 723 was not assigned.)

724 DISCRIMINATION

Settlement
Complainant Refusal to Sign Agreement
On the Record

MI-DI 89-23 Martin v Pepsi-Cola Bottling Group (1989)

Complainant filed two claims against Pepsi-Cola relating to disciplinary actions. During the second day of hearing, the parties reached agreement and stated the terms, of their settlement on the record. The agreement was put in writing, but Complainant refused to sign claiming that it was incorrect and also that Respondent had violated the settlement placed on the record.

The ALJ concluded that Complainant's oral agreement can be enforced. The ALJ reviewed the case law and concluded that the oral agreement on the record formed a contract with an offer, acceptance, and consideration. Complainant was ordered to sign the agreement.

725 DISCRIMINATION

Discharged
- Drug Test Positive

Evidence
- Consistent Employer Treatment
- Other Complaining Employees Not Discharged

MI-DI 89-401 Coleman v Focus Hope (1989)

Complainant was discharged for testing positive for marijuana use. He claimed he was discharged because he complained about having to use leather gloves instead of rubber gloves while working with mineral spirits. The ALJ found that Complainant's complaint was only one of many raised at a routine staff conference. There was no evidence that anyone else suffered retaliatory actions. Moreover, Complainant's discharge was consistent with Respondent's treatment of other employees who tested positive for drugs.

726 DISCRIMINATION

Discharged
- Disruptive Effect on Work Force
- Not Recalled From Layoff
- Reduction in Force

Evidence
- Employer's Son Worked in Area of Job Refusal

MI-DI 89-660 Couch v Chrysler & Koppin Company (1989)

Complainant alleged that he was not recalled from layoff because he requested material safety data sheets and advised fellow employees to file MIOSHA complaints. Respondent argued that he was not recalled because Complainant formed a disruptive presence in the work force and because of the employer's need to reduce its work force.

The ALJ found no causal connection between Complainant's refusal to do the foam job (Respondent's son worked on this job), his MIOSHA complaints, and his urging of co-employees to file MIOSHA complaints. Complainant was not recalled from layoff because there was a reduction in force and because of his disruptive presence in the work force. This included threatening foremen who advocated eliminating seniority.

727 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Not Established
Employee Misconduct
Absenteeism
Shifts to Employer
Discharged
Absenteeism
Pretext
Evidence
Boasting About Job Protection
Safety Complaints to M10SHA
Job Protection

MI-DI 89-1123 Shanks & Dennison v Prestole Corporation (1991)
MI-DI 89-994

The ALJ found that Complainant Dennison was discharged for absenteeism; Shanks quit to protect her employment record which also had excessive absenteeism. Respondent had ample justification to discharge the Complainants before the MIOSHA inspection since their attendance did not improve after repeated warnings. Dennison boasted of having a secure job because he filed a MIOSHA complaint. He requested that his name be revealed to the employer to advance his job protection claim.

728 DISCRIMINATION

Evidence
Other Employees Did Not Refuse Work
Refused to Work
Whirlpool Decision Discussed
Unreasonable Work Refusal

MI-DI 89-1149 Smith v Contemporary Services of Michigan, Inc. (1989)

While working for Respondent, a temporary employment service, Complainant was assigned to Pack-Rite. The job required Complainant and five other employees to clear shrubs, trees, and debris from a railroad dock area. Employees had to work in approximately two feet of standing water while wearing knee high rubber boots. After working for four hours, he left the job expressing fear of glass in the water and falling through a drain. The Complainant did not see glass or a drain in the water. None of the other employees expressed this fear.

728 (Continued)

The ALJ found that Complainant was not justified in refusing work. He was not confronted with a life and death situation as were the workers in Whirlpool (see ¶668 for cite). In order to be justified, a job refusal must be such that a reasonable person would conclude that there is an imminent threat of death or serious injury.

729 DISCRIMINATION

Evidence
Shop Rule Did Not Prevent Phone Use
Safety Complaints to Union
Suspension
Leaving Work Station

MI-DI 89-1209 Memom v General Motors Corporation (1990)

Complainant was given a 13-hour disciplinary suspension for leaving his work area to call his union about safety concerns. The ALJ found a violation of Section 65. A complaint to the union is a protected activity. See Marshall v P & Z Co, CCH Vol. 1978, paragraph 22.577. Complainant was not wasting time or loitering. His use of the foreman's phone was not the cause of the suspension because Complainant had used the phone previously without discipline. There was no shop rule prohibiting press operators from using this phone.

730 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Established
Request for List of Chemicals
Discharged
Request for Material Safety Data Sheet
Right to Know Information Request
Material Safety Data Sheets

MI-DI 89-1210 DePue v General Motors Corporation (1990)

Complainant refused to work with substance in a pail until he received a material-handling label or safety data sheet. The ALJ found a violation of Section 65.

731 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Not Established
Safety Suggestion Award
Failure to Pay Safety Award

MI-DI 89-1326 Eichbauer v General Motors Corporation (1990)

Complainant claims an award for a safety suggestion. He claimed Respondent's failure to pay this award was a violation of Section 65, Complainant asserts the payment was denied because of his safety complaints.

The ALJ found no connection between Complainant's safety complaints and the failure to pay the award. Respondent had decided to install light curtains before Complainant's suggestion. His input was that of active supporter. He suggested a way to wire the operation.

732 DISCRIMINATION

Discharged
Refusal to Work
Evidence
Inspection Did Not Support Complaint
Other Employees Did Not Refuse Work
Whirlpool Decision Discussed
Unreasonable Work Refusal
Leaking Ceiling

MI-DI 89-1692 Street v Ram's Horn Restaurant (1989)

Complainant walked off the job after unreasonably refusing to work anywhere in the kitchen. He was concerned that rainwater would leak into the deep fryer and cause a grease fire. Complainant was not confronted by an imminent risk of death or serious injury as the employees in Whirlpool (see ¶668 for cite), and Goodloe (see paragraph 673 for cite). A subsequent inspection by the Bureau of Safety and Regulation did not find any evidence that the ceiling had been leaking.

733 DISCRIMINATION

Discharged
Refusal to Work
Fall Danger
Relief Under Section 65
Back Pay
Mitigation of Damages
Claims Not Allowed
Mileage
Telephone Charges
Reinstatement
Whirlpool Decision Discussed
Reasonable Work Refusal
Fall Danger

MI-DI 90-63 Castor v Creative Sandblasting, Inc. (1990)

Complainant was discharged for refusing to move a safety line while not tied off. This was a life threatening situation since an 18 to 50 foot fall was involved. There was no time to file a complaint with MIOSHA. Complainant was justified under Whirlpool (see ¶ 668 for cite), to refuse this job.

734 DISCRIMINATION

Discharged
Refusal to Perform Assigned Job
Delivery of 300 Pound Container
Whirlpool Decision Discussed
Unreasonable Work Refusal
Delivery of 300 Pound Container

MI-DI 90-323 Setterington v Special Service Delivery (1990)

Complainant was directed to deliver a 300 pound drum of soap. He was told to wait until a hi-lo was available or ask other employees for help in loading the drum on a truck. Complainant refused to wait for the hi-lo and the employees he asked refused to help. The ALJ found that this was not a life-threatening job as faced by the employees in Whirlpool (see ¶ 668 for cite). Complainant could have waited for the hi-lo, asked other employees, tipped the barrel into a van, or rolled it off the deck onto a truck.

735 DISCRIMINATION

Discharged
Complaints to Employer
Working Conditions
Hearing
Failure to Appear
Proceeding in Absence of Party
Safety Complaints to MIOSHA

MI-DI 90-850 Supinger & Hernandez v Andrew Lanoum, Inc. (1990)
MI-DI 90-851

The ALJ found that Complainants were discharged for complaining to the employer and calling for a MIOSHA inspection about working conditions. The job concerned sandblasting and painting bridges. The order to fire the employees was made by the employer to the union business agent over a speaker phone overheard by the Complainants and the agent, all of whom testified at the hearing. Respondent did not appear and the hearing proceeded with those parties in attendance.

736 DISCRIMINATION

Inspection
Payment for Accompaniment
Only If During Scheduled Work Time
Relief Under Section 65
Payment for Inspection Accompaniment
Only If During Scheduled Work Time

MI-DI 90-944 Condon v City of Taylor (1991)

Complainant claimed 3 and 3/4 hours pay for time spent accompanying a MIOSHA inspector on an inspection of Respondent's place of employment. This was not part of Complainant's normal schedule and the employer did not authorize Complainant to attend the inspection.

The ALJ considered Section 29(10) of MIOSHA and concluded that Complainant did not suffer a loss of wages because he was not scheduled to work when the inspection took place. Complainant had a duty to request employer approval to work during the inspection or find another employee to accompany the safety office. Cedregren (see paragraph 695 for cite), cited by Complainant, ordered compensation for an employee who participated during scheduled work hours.

737 DISCRIMINATION

Burden of Proof
"But For" Test
Established
Complaints
Training
Safety Complaints to Employer
Lack of Training

MI-DI 90-960/94-452 Hauben v Mazda Motor Manufacturing Corp (1991)

Complainant began work on August 15, 1988. The first two days consisted of an orientation program. On the third day, Complainant began on the production line's evening shift. On-the-job training was provided by a coworker. From the beginning of her time on the line, Complainant complained that she was not adequately trained and frequently pulled a yellow cord for assistance. On August 19, 1988, Complainant injured her finger. On August 22, 1988, Complainant was written up for pulling the yellow cord too often.

On August 26, 1988, Complainant reported to employer's clinic because her right wrist, arm, and finger tips were swollen and she had neck pain. She was off work for three days and returned to the clinic on August 30, 1988, complaining that she had not been trained well and was being required to perform jobs which caused injuries to her neck, arm, and wrist. She was diagnosed as having carpal tunnel syndrome. On September 6, 1988, Complainant returned to the clinic still complaining of right wrist pain. She was ordered to turn in her identification badge and placed on inactive status.

The ALJ found that Respondent placed Complainant on inactive status because of her complaints about inadequate training. Despite her complaints, she was placed on assembly lines that operated-at full speed and expected to keep up. She was disciplined when she couldn't. After her injury, she was denied medical treatment and not offered restricted work. Placing her on inactive status after her injury and repeated complaints about lack of training presented a prima facia case of MIOSHA discrimination.

Respondent presented no evidence to establish that "but for" her complaints, she would have been placed on inactive status.

The ALJ decision was affirmed by the Wayne County Circuit Court citing Brown v Dept of Transportation (see paragraph 692 for cite). The matter was appealed to the Court of Appeals who remanded to the Department of Labor for a determination of damages owed Complainant. The parties ultimately settled this matter in MI-DI 94-452.

738 DISCRIMINATION

Administrative Law Judge
Decision Assigned to Another
Burden of Proof
Motivating or Substantial Factor
Not Established
Employee Misconduct
Absenteeism Circuit Court
Remand
Discharged
Absenteeism
Evidence
Other Complaining Employees Not Discharged
Hearing
Circuit Court Remand
Safety Complaints to MIOSHA
No Employer Knowledge of Complaint

MI-DI 90-1118/94-887 Taylor v Epworth Manufacturing Company (1991)

Complainant filed a MIOSHA complaint in October 1988. Citations were issued in November. He was discharged for excessive absence in March 1989. The ALJ found that Complainant would have been discharged even without the MIOSHA complaint. The employer didn't know Complainant filed the MIOSHA complaint until after the discharge. Other employees who filed work complaints were not discharged.

The Circuit Court remanded the matter for another hearing because the ALJ who decided the case was not the same ALJ who heard the evidence. The Court determined that this procedure was flawed. Upon remand, the parties settled in MI-DI 94-887.

739 DISCRIMINATION

Burden of Proof
"But For" Test
Established
Discharged/Suspended
After Inspection
Motivating or Substantial Factor
Established
Complaints
Discharged/Suspended
After Inspection
Shifts to Employer
Discharged
Complaints to Employer
Chemical Inhalation
Layoff
Lack of Work
Pretext
Safety Complaints to Employer
Safety Complaints to MIOSHA

MI-DI 90-1504 Pugh & Reyna v Action Tote Cleaners, Inc (1991)
MI-DI 90-1505

Complainant Pugh and other employees were sent home the day after a Department of Public Health inspection took place. The ALJ found this discharge to be a prima facia case of discrimination. Moreover, his safety complaints to his supervisor and the Department's hygienist were protected activity and were a substantial reason for the layoff. This action would not have occurred "but for" the complaints. Respondent's claim that the layoff occurred because of a business decline was found to be a pretext concocted after the fact.

Complainant Reyna was discharged because of his safety complaints about methylene chloride inhalation while cleaning totes without proper ventilation. "But for" these complaints, he would not have been discharged. His complaints were protected activity.

740 DISCRIMINATION

Discharged
Probation Period
Performance Problems
Evidence
No Employer Knowledge of Complaint
Safety Complaints to MIOSHA
No Employer Knowledge of Complaint

MI-DI 90-1599 Newton v Lescoa, Inc. (1990)

The ALJ held that Complainant, a probationary employee (within 90 days of hire), was discharged for poor work performance. Several employer witnesses and internal company memos pointed to performance problems. The discharge decision was made before the arrival of the safety officer and before Respondent knew who filed the complaint.

741 DISCRIMINATION

Burden of Proof
"But For" Test
Established
Discharged/Suspended
After Inspection
Innocent Party Umbrella
Discharged
MIOSHA Complaint
Innocent Party Umbrella
Protected Activity
Relief Under Section 65
Reinstatement
Good Faith
Retaliation
Employer Believed Employee Filed Complaint

MI-DI 90-1166/90-1696/92-1328 Francis v N/C Servo Technology (1992)

Complainant was responsible for repairing industrial motor controllers and circuit boards. The ALJ found that although Complainant did not file a complaint, the reasonable inference to be drawn from his discharge within hours of a MIOSHA inspection is that it was related to the inspection. A prima facia case of discrimination was established. As in the case of Peter Zimmer, 1982 OSHD, paragraph 26.154 (US Dist Ct SC), Respondent suspected Francis had filed a complaint which resulted in a MIOSHA inspection. The employer knew Francis had filed a complaint against his former employer, and the Complainant had spoken with the inspector during an earlier inspection. Complainant was subjected to private lectures about how the employer felt towards those who file safety complaints. The ALJ found Complainant is protected by

741 (Continued)

the "innocent" party umbrella. In Zimmer, the employer discharged three employees as suspected of filing a complaint. The Court found the discharge of all three notwithstanding the employer's mistake as to two, brought the "innocent" parties under the umbrella of protected activity.

Respondent asserted that Complainant resigned to take another job and that the Electronics Department was losing money and risked being closed. The ALJ noted that the job taken by Complainant paid less than he earned at Respondent and concluded he did not resign but was, in fact, discharged. His discharge would not have occurred but for his protected activity.

A verbal offer of reinstatement and a follow-up letter were not found to have been made in good faith. Respondent did not comply with the Department's direction to make a written offer of reinstatement. .

The decision was appealed to the Wayne County Circuit Court which affirmed but remanded for a determination as to the amount of pension and profit-sharing benefits Complainant earned during his employment with Respondent. After rescheduling the matter for an additional hearing, the parties settled.

742 DISCRIMINATION

Burden of Proof
"But For" Test
Not Established
Employee Misconduct
Fighting
Motivating or Substantial Factor
Not Established
Employee Misconduct
Fighting
Leaving Without Permission
Discharged
Leaving Job
Shopping on Company Time
Uncooperative Behavior
Pushing Supervisor
Evidence
No Employer Knowledge of Complaint
Safety Complaints to MIOSHA
No Employer Knowledge of Complaint

MI-DI 90-1757 Berlick v Kellermeyer Building Services, Inc. (1990)

The ALJ found that Complainant's discharge was due to his having pushed his supervisor and leaving the job without permission, as well as an earlier incident where he was observed shopping on company time. While Complainant did file a MIOSHA complaint, the employer did not know of this when the discharge occurred.

743 DISCRIMINATION

Discharged
Refusal to Work
Employee Did Not Raise Safety Issues
Trench
Evidence
No Retaliation for Prior Work Refusal
Protected Activity
Employee Did Not Raise Safety Issues

MI-DI 91-121 Reid v Manifold Services (1992)

Complainant refused to work on a trench but did not tell the employer that the refusal was based on his belief the trench was unsafe. The ALJ held the Complainant's discharge was not based on protected activity but based on his refusal to perform an assigned job. Complainant had previously refused to work on a roof while it was raining and told the employer he feared twisting his foot. The Complainant was not discharged or disciplined for that job refusal.

744 DISCRIMINATION

Discharged
Probation Period
Pretext
Refusal to Work
School Bus Driver
Employment
School Bus Driver
Safety Complaints to Employer
Whirlpool Decision Discussed
Reasonable Work Refusal
School Bus Driver

MI-DI 91-238 McGhee & Lenear v D H T Transportation (1993)
MI-DI 91-239

Both Complainants, probationary employees, were discharged for refusal to drive a school bus with what they claimed was excessive play in the steering. Prior to, discharge, they each voiced their concern to the terminal manager. An inspection by the Michigan State Police Motor Carrier Division the day after the discharge found excessive play in the steering. While the employer argued the discharges occurred because Complainants did not complete satisfactory probationary periods, the ALJ found this was not the real reason for discharge. The refusal was found to be reasonable based on the guidelines by Whirlpool (see ¶ 668 for cite).

745 DISCRIMINATION

Discharged
- Insubordination
- Uncooperative Behavior

Safety Complaints to Employer

MI-DI 91-929 Williams v Wayne County - Division of Roads (1991)

Complainant was discharged for offensive behavior, improper conduct, and insubordination. He complained to his supervisor that his assigned van was stalling out. While the van was being checked, Complainant was directed to work on maps. Complainant became incensed that he was told to work on maps instead of being given another vehicle. This incident was the last in a history of disruptive behavior and refusal to follow the supervisor's directions.

746 DISCRIMINATION

Protected Activity

Safety Complaints to Employer

Suspension
- Cutting Cable - Tripping Hazard

MI-DI 91-332 Sandlin v National Steel Corporation (1991)

Complainant was given a five day suspension for cutting a cable he observed along a conveyor walkway. Complainant was a union safety representative.

The ALJ found that there was no imminent hazard presented by the cable. Complainant should have contacted supervision or the safety department and blocked off the area. Complainant was not suspended for identifying a safety hazard. He was disciplined for destruction of a cable. This was not a protected activity.

747 DISCRIMINATION

Discharged
- Absenteeism
- Equitable Considerations
- Not Retaliatory

Evidence
- Other Employees Discharged for Absenteeism

Safety Complaints to Employer
- Carbon Monoxide

MI-DI 91-372 Cook v International Toilers, Inc. (1991)

Complainant told Respondent's president on December 11, 1989, that the hospital found she had been exposed to carbon monoxide at work. Complainant and three other employees were discharged in December for excessive absence. Complainant was a one pack-a-day cigarette smoker; and, on November 17, 1989, she was experiencing cold and flu-like symptoms and taking over-the-counter medications.

After the call from the Complainant regarding carbon monoxide exposure, Respondent had the plant tested on December 12, 1989, by two companies. Both found no carbon monoxide in the plant. The Department of Public Health performed an inspection on January 4, 1990, and found no carbon monoxide problem. The ALJ held that Complainant's discharge was not in retaliation for her carbon monoxide notice. The fact that three other employees with poor attendance were also discharged supported the employer's position. While Complainant's discharge was unfair, it was not a violation of Section 65.

748 DISCRIMINATION

Discharged
- Insubordination
- Refusal to Work

Protected Activity

Summary Judgment

MI-DI 91-613 Pitts v Detroit River Paper Company (1991)

Complainant was directed to move barrels of hazardous chemicals when the machine he normally operated was down. The police department was called to remove Complainant from the plant. At the hearing, Complainant testified that he did not refuse to move the barrels out of concern for safety. The ALJ granted the Department's and Respondent's Motion For Summary Judgment since Complainant did not claim his discharge was related to protected activity.

749 DISCRIMINATION

Safety Complaints to MIOSHA
No Employer Knowledge of Complaint
Suspension
Union Representative
Accompaniment on Inspection

MI-DI 914052 Paducha v Mobil Oil Corporation (1992)

Complainant alleged he was given a two week suspension because he filed an October 23, 1990, MIOSHA complaint and accompanied the inspector on the walk-around inspection as the union representative. The Complainant grieved this suspension but it was upheld and not pursued to arbitration.

On October 19, 1990, Complainant did not properly unload a transport truck. Complainant admitted to having this job, failing to gauge the tank before and after product receipt, and failing to visually inspect the truck to determine whether it was empty before allowing it to leave the facility.

The ALJ held that Complainant was disciplined because of his violation of company rules concerning truck unloading. The employer did not know the Complainant filed the MIOSHA complaint.

750 DISCRIMINATION

Circuit Court Review
Standards
Discharged
Probation Period
Performance Problems
Unsatisfactory Service
Rehearing Request
Safety Complaints to Employer
Request for MSDS

MI-DI 91-1302 Belisle v Venture Industries (1992)

Complainant was hired on September 25, 1989, and discharged on October 25, 1989, for poor job performance. The ALJ found that her questions concerning the contents of material being used by Respondent, her visit to a clinic, and her complaint about a machine giving off vapors did not cause her discharge. A rehearing request was denied.

750 (Continued)

This decision was affirmed by the Macomb County Circuit Court. The Court found the ALJ's decision was supported by competent, material, and substantial evidence on the whole record. The fact that other evidence on the record supported Complainant's position does not preclude the ALJ's decision.

751 DISCRIMINATION

Layoff
Lack of Work
Not Recalled
Economic Reasons
Safely Complaints to MIOSNA
No Employer Knowledge of Complaint

MI-DI 91-1336 Kubiac v Metro-Detroit Signs, Inc (1992)

Complainant earned $16 per hour as a lead man journeyman sign erector/installer. He was laid off in July 1990 because there was a slowdown in large jobs for which Complainant was qualified. In September 1990, Complainant was told he would not be recalled because of a loss of large jobs, the higher pay earned by Complainant, and the noticeable improved change in work atmosphere while Complainant was on layoff. Another employee was hired in September 1990, for $12 per hour to handle the smaller jobs.

The Complainant's assertion that he was not recalled because he filed a MIOSHA complaint was rejected by the ALJ. The employer did not know Complainant filed the complaint.

752 DISCRLMINATION

Appeal
Fifteen Working Days
Good Cause
Same as Section 41 Cases
Good Cause Not Found
Filing Responsibility

MI-DI 91-1488 Good v Ingham County Sheriff Department (1991)

Good cause for Respondent's late appeal was not found where Respondent's attorney believed that the client would file the appeal. The appeal was filed because a Department employee called the employer and inquired as to the steps being taken to comply with the Department's order. The good cause test used in MIOSHA citation appeal cases was applied to Section 65 late appeals: the kind of cause that would prevent a reasonably prudent person from the performance of an important obligation. It does not include conduct that shows carelessness, negligence, or a lack of reasonable diligence.

753 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Not Established
Employee Laid Off/Lack of Work
Layoff
Protected Activity
Safety Complaints to Employer
Safety Complaints to MIOSHA

MI-DI 91-1773 Kennedy v Tri-Mation, Inc. (1993)

Complainant filed several complaints with his employer and to the Departments of Labor and Public Health. Complainant alleged that a poor evaluation and lay off were caused by these complaints. The ALJ found that Complainant's protected activity was not a substantial reason for the layoff. The layoff was due to reduction in force caused by a decline in incoming work orders. This would have taken place even without any protected activity.

754 DISCRIMINATION

Burden of Proof
"But For" Test
Not Established
Employee Misconduct
Leaving Without Permission
Department Decision
Ninety Day Limit
Discharged
Complaints to Employer
Leaving Job Without Permission

MI-DI 92-45 Chambers v American Bumper & Manufacturing (1992)

Respondent discharged Complainant for leaving his job without permission. Chambers claimed that a coworker was loading bumpers too quickly and he was concerned a bumper would hit his arm. He left the line without arranging for a relief operator to complain about this unsafe working condition. He did not tell anyone, including the lead worker, that he was leaving. No evidence was presented to support Chambers' allegations concerning unsafe working conditions. The ALJ denied Respondent's Motion To Dismiss because the Department issued its decision more than 90 days from the complaint.

755 DISCRIMINATION

Discharged
Complaints to Employer
Requests for Safety Gloves
Jurisdiction
Complaint Closed Without Investigation

MI-DI 92-234 Spurlock v American International Airways (1993)

The ALJ found Spurlock was discharged for complaining about unsafe working conditions, specifically because she and a coworker requested gloves to protect their hands during grinding operations. This is a protected activity under Section 65. The evidence showed Spurlock's supervisors resented her requests and called her a trouble maker. Although discharging her because she missed a day without calling in, another employee testified that he had missed between 15 to 20 times without calling in and had not been discharged. Respondent was ordered to reinstate Spurlock with back pay and to pay Complainant's attorney fees.

The ALJ also found jurisdiction to hold a hearing on Complainant's appeal, even though the Department closed the case administratively instead of making a decision after investigation. Since the Department made a decision that the claim was without merit, the Complainant could appeal and the ALJ could hear the matter.

The case was appealed to the Washtenaw County Circuit Court but settled.

756 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Not Established
Employee Misconduct
Insubordination
Discharged
Disobeying Order
Unsafe Vehicle
Jurisdiction
After Arbitration
Safety Complaints to Employer
Safety Complaints to MIOSHA
Safety Complaints to State Police

MI-DI 92-384 Bonkowvski v Wiegand Disposal (1993)

Complainant was discharged by Respondent for disobeying an order. Complainant asserted it was because he had filed several complaints about truck safety and, specifically, one dated December 10, 1990. This last letter was sent to the employer, Complainant's union, the State Police, and MIOSHA. During the seven months before his termination, Complainant filed approximately thirteen grievances with the employer. The discharge was considered by an arbitrator who found the Complainant's actions to have been gross insubordination. The ALJ agreed with this conclusion but also held the Department had jurisdiction. Contractual agreements, including the collective bargaining process, does not preempt state law, Alexander v Gardner-Denver, 415 US 36, 49-50 (1974). The ALJ found no violation of Section 65. The December 10, 1990, safety complaint letter was not a substantial reason for the discharge. Given Complainant's history with the company, he would have been discharged for insubordination even if there had been no protected activity.

757 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Established
Reasonable Job Refusal
Discharged
Failure to Remove Safety Guard
MESC Finding
Relief Under Section 65
Appropriate Relief
Includes Prejudgment Interest
During Delay in Administrative Law Judge's Decision
Whirlpool Decision Discussed
Reasonable Work Refusal
Removing Guards

MI-DI 92-1252/95-146 Cosgrove v Wait Industries (1994)

Complainant operated buffing lathes, buffing machines, polishing machines, and belt grinders. Until a MIOSHA inspection, Complainant had removed guards to polish certain parts. After the inspection and reading a MIOSHA pamphlet provided by the inspector, Complainant became aware of the potential consequences of operating machinery without guards. When he refused to remove a guard to polish parts as directed by a foreman, Complainant was discharged. Complainant denied yelling at the foreman or the superintendent on the day of discharge. A coworker's testimony supported Complainant's position. The ALJ rejected Respondent's argument that Complainant was discharged for excessive absenteeism or tardiness.

The ALJ found that Respondent wanted Complainant to operate machinery without guards in direct violation of a properly promulgated standard, Part 11 of the GISS. Section 65(1) prohibits an employer from discharging an employee for exercising a right afforded by the Act. Insisting on working with guards, as required by Part 11, was found to be a right afforded by the Act. Complainant reasonably believed working without guards would present an imminent danger of serious harm. His refusal was a substantial reason for the discharge.

Respondent appealed to the Wayne County Circuit Court which affirmed the ALJ's decision and remanded for testimony on Complainant's earnings and unemployment compensation receipts since discharge. Walt Industries appealed to the Court of Appeals which on April 11, 1997, issued its decision affirming the Circuit Court. The Court held:

1. Cosgrove had a right to refuse work on the machine. Citing Whirlpool, the Court found that the employer may not discipline an employee for refusing to work under dangerous conditions.

2. The Department was not estopped from finding Cosgrove had been discharged for exercising a right protected by MIOSHA even though the Michigan Employment Security Commission had previously found him to be discharged for excessive absenteeism and tardiness. Determinations by MESC cannot be the basis for collateral estoppel in a subsequent civil proceeding.

3. The Department did not err in finding an amount due the Complainant based on his hourly wage. The record supported a finding that he earned $7 per hour and that he worked 40 hours per week.

4. Cosgrove was entitled to interest on the back pay award. While this right does not come from a statutory grant of interest, Section 65(2) permits "all appropriate relief." This includes prejudgment interest.

On June 5, 1997, the Court of Appeals denied Walt Industries' Motion For Rehearing.

The April 11, 1997, Court of Appeals' Order remanded to the Department to:

> Reconsider the interest issue focusing on interest as an element of `appropriate relief.' While doing so, the department should specifically consider whether such award is appropriate for the thirteen-month delay in the issuance of the hearing officer's decision.
>
> Affirmed, but remanded to the department for reconsideration of the interest issue, and recalculation of the employer's credit, as ordered by the circuit court.

Pursuant to this remand order, the Department reconsidered its position on interest, provided a breakdown for its determination, and requested input from the parties. Respondent's replies took issue with all the Department proposed without offering alternatives. On October 7, 1998, the Department issued a Determination directing payment of $42,010.17 plus interest of 7.61 percent from November 1, 1998, to December 31, 1998, and annually thereafter until payment is made.

This decision was appealed to the ALJ who on December 3, 1998, requested Respondent's brief within 30 days. Respondent filed a brief dated January 5, 1999, beyond the 30 day period. On January 5, 1999, before receipt of Respondent's brief but after the 30 days permitted for filing, the ALJ issued an Order finding that the Department's October 7, 1998, decision followed the "mandate of the Court of Appeals" which did not require relitigation of the question of Respondent's liability. "Respondent failed to provide input to the Department and cannot now complain of any lack of due process." A further Order was issued on January 8, 1999, finding that a review of Respondent's brief "discloses nothing which requires changing the first Order Affirming Department's Determination dated January 5, 1999."

757 (Continued)

Respondent filed a January 26, 1999, Motion For Clarification and Complaint For Superintending Control with the Court of Appeals. The Court denied these Motions on April 28, 1999. Respondent also filed a March 8, 1999, appeal with the Circuit Court.

After further hearings in Circuit Court, the parties signed a Settlement Agreement, The Agreement called for payment of $26,206.29 in principal and $13,800 in interest. The amount was to be paid 50 percent by December 1, 1999, and 50 percent by March 1, 2000. Complainant also agreed to sign a release of claims form. On October 13, 1999, the Circuit Court issued an Order of Dismissal. On October 27, 1999, at the request of the parties, the ALJ issued an Order of Dismissal.

758 DISCRIMINATION

Discharged
    Refused Direct Order
Employment
    Hi-Lo Driver
Protected Activity
    Causal Connection
Whirlpool Decision Discussed
    Unreasonable Work Refusal
    Hi-Lo Truck

MI-DI 95-1177 Morse v Georgia Pacific Corporation (1996)

Complainant Morse was employed by Respondent for 30 years. On a holiday, while working for premium pay and with low plant traffic, Morse refused an order to drive the hi-lo with a double load. A double load was within the rated capacity of the hi-lo. The ALJ found that Complainant's refusal was not justified based on the requirements of Whirlpool (see ¶ 668 for cite). Complainant refused to tell the employer what safety condition existed. Complainant was not in imminent danger if he continued to perform the assigned work.

759 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Established
Complaints
Chemical Exposure
Discharged
Questions About Chemical Use
Protected Activity
Asking Questions About Chemical Use

MI-DI 92-1536 Lee v Best Packaging (1993)

Lee expressed discomfort over exposure to a type wash used by Respondent. She was sick from exposure to this chemical and lost time from work. Respondent believed a MIOSHA complaint would be or had been filed.

The ALJ found a causal link between the protected activity - complaining about the exposure, obtaining a can label, requesting information about the chemical, and having her doctor's receptionist call regarding the chemical - and the discharge. Respondent's position that Complainant would have been discharged for poor attendance was rejected. There was no record of any discipline over poor attendance. There was not even an attendance policy until after the separation.

This decision was appealed to the circuit court but settled.

760 DISCRIMINATION

Discharged
Refusal to Perform Assigned Job
Employment
Hi-Lo Driver

MI-DI 92-1683 Turner v Guardian Industries (1994)

Complainant worked as a hi-lo driver. He asserted that he had been discharged for refusing to double stack glass. Turner believed double stacking was unsafe. Because the double stacking was a new procedure, Respondent called two meetings with employees and met separately with Turner on three occasions to discuss the new procedure and safety concerns. Turner did not contact MIOSHA about his concerns. He simply refused to do the job. Complainant was discharged only after the third meeting with Respondent. On the first two refusals, he was sent home to think about his decision. The ALJ found no violation of Section 65.

761 DISCRIMINATION

Appeal

Good Cause Not Found

Refusal of Certified Mail

MI-DI 92-1796 Keene v Varga Building Services (1993)

The Department's July 20, 1992, decision finding a violation of Section 65 was sent to Respondent by certified mail and, after three attempted deliveries, was sent back to the Department as unclaimed. The appeal was received August 17, 1992, more than 15 working days from July 20, 1992. Respondent argued that the decision was not received until it was remailed on August 7, 1992.

In prior cases, the term "good cause" has been interpreted to be the kind of cause that would prevent a reasonably prudent person from the performance of an important obligation. It does not include conduct that shows carelessness, negligence, or a lack of reasonable diligence. See Kalfsbeek (see paragraph 718 for cite). The ALJ did not find good cause for the late appeal. Respondent made at least three decisions to refuse delivery of the Department's decision. This conduct shows carelessness, negligence, and a lack of reasonable diligence.

The Ingham County Circuit Court affirmed the ALJ's finding and ordered compliance with the Department's decision.

762 DISCRIMINATION

Discharged

Leaving Defective Mask in Service

Employment

Firefighter

Evidence

Other Complaining Employee Not Discharged

MI-DI 92-1964 Poe v Village of Columbiaville Fire Department (1993)

Complainant Poe was a volunteer fire fighter. She was discharged because the members of Respondent Fire Department believed Poe purposely left a defective face mask in service. Poe and another fire fighter filed a complaint with MIOSHA. One of the Department's findings concerned use of an air mask with a frozen exhalation valve. The membership voted to discharge Poe because they believed she left a defective mask in service. She was not discharged for exercising rights granted by MIOSHA, including the filing of a MIOSHA complaint. It was noted that the other fire fighter who signed the complaint was not discharged.

763 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Established
Complaints
Chemical Exposure
Not Established
Employee Laid Off/Lack of Work
Valid Nondiscriminatory Reason
Circumstantial Evidence
Discharged
Chemical Fumes in Darkroom
Evidence
Circumstantial
Protected Activity
Safety Complaints to Employer

MI-DI 93-159 McAllister and Angers v New York Carpet World (1994)
MI-DI 93-160

Complainant Angers set up ads and signs produced in house. She also used the photographic darkroom and was exposed to chemicals in the fix and acid bath. She began work on April 24, 1989. On October 8, 1991, she developed a severe headache, nausea, dizziness, and became "beet red" and felt very hot. A visit to the doctor determined she had allergic dermatitis. Complainant Angers never worked in the darkroom anymore and was discharged on October 25, 1991.

Complainant McAllister was employed from May 1989 and was also discharged on October 25, 1991. She also worked building ads and signs. She also used the darkroom and was exposed to the chemicals used in the fix and acid bath. After Angers was taken away from darkroom duties, McAllister and others were told to share in performing Angers' work. McAllister refused to do this work.

Respondent asserts that both Complainants were laid off (discharged) based on a decision to contract out the in-house insert operation. This work transfer would save money and allow the elimination of two employees. The fact that this took place shortly following Angers' allergic reaction and McAllister's refusal to work in the darkroom was contended to be coincidental and unrelated.

The ALJ held the terminations in violation of Section 65. The protected activity of each Complainant was a substantial reason for their separations.

764 DISCRIMINATION

Discharged

Economic Reasons

MI-DI 93-458 Surma v Stanley-Carter Company (1993)

Complainant was employed as a truck driver and also worked in the shop repairing equipment and using a pickup truck for delivery of materials to and from the job site.

From May to November 1991, Respondent expanded the work force from 25 to 96. Complainant was hired in October 1991. Work declined during early 1992. Surma asserted that his discharge on May 1, 1992, was caused by his having filed a MIOSHA safety complaint in March 1992. The ALJ found Complainant's layoff due to financial and economic reasons, not because Complainant had filed a MIOSHA complaint.

Respondent reduced the work force from 96 to 65 employees by April 1992. Neither the Complainant nor another employee discharged at the same time were replaced by the June 1993 hearing.

765 DISCRIMINATION

Complaint Must Be Filed Within 30 Days

Evidence

No Employer Knowledge of Complaint

Jurisdiction

Workers' Compensation Rate

MI-DI 93-857 Bankston v Keeler Brass Company (1993)

Complainant was employed as a press operator. She suffered back injuries in 1984 and 1992. Her workers' compensation rate was reduced after the second injury because it was considered new. A revised lower weekly earnings rate was computed because Bankston had been performing light duty work at a lower rate. Complainant claims she was harassed by Respondent when moved from job to job until she was re-injured. She claimed reinstatement of her prior workers' compensation rate. This issue was being addressed in a Workers' Compensation hearing to be held in September 1993.

Complainant testified that she filed two anonymous complaints with MIOSHA, one with the Department of Public Health and one with Labor.

The ALJ found that Respondent did not know of Bankston's complaints. He also found that Complainant did not file her discrimination complaint on a timely basis. Complainant was returned to her press operator job on September 14, 1992. The complaint was filed on November 16, 1992, more than 30 days from September 14, 1992. Also, the remedy requested, increasing the workers' compensation rate, is not within the jurisdiction of Section 65.

Evidence
    No Employer Knowledge of Complaint
Retaliation
    Classification Reduction
Safety Complaints to MIOSHA
    No Employer Knowledge of Complaint

MI-DI 93-1354 Carrington v Fretter, Inc (1993)

Complainant was employed as a senior salesperson. Within a month of his starting, he complained several times to the store manager about the building's condition - painting, cleaning, water in stock room, mosquitoes, and floor tile. In December 1992, Complainant filed a MIOSHA complaint that concerned both Health and Labor matters. The Department of Labor's Safety Officer visited Respondent's location in January 1993. This was the first time Respondent knew of the complaint.

Because of excess draws, the employer decided in December to reduce classifications of eight to twelve salespersons. Complainant was included because he drew more than he earned in commissions.

The ALJ found that the employer did not know of the MIOSHA complaints when it reduced Complainant's classification. The complaints to the store manager were transmitted to Respondent's Building Division. The Vice President who decided to reduce classifications had no knowledge of these complaints. Also, many of Complainant's building complaints were addressed because the store manager agreed.

767 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Not Established
Employee Misconduct
Insubordination Discharged
Misconduct
Unequal Enforcement
Nondiscriminatory Reasons
Hearing
Motion to Dismiss
Nonjury Case

MI-DI 94-711 Purtee v The Brand Companies, Inc. (1995)

After the close of proof from the Department and the Complainant, Respondent made a Motion To Dismiss arguing that there had been a failure to present a prima facia case on which one could reasonably find a Section 65 violation. After review of the transcript and briefs from the parties, the Motion To Dismiss was granted.

Purtee was hired February 1993 and discharged in April 1993. He filed a MIOSHA complaint on March 24, 1993. The ALJ found no causal relationship between the complaint and the discharge. Complainant was discharged for misconduct consisting of insubordination, breaking windows, throwing equipment, leaving a vacuum hose unattended, and falsifying entries on a hot zone log, not because he filed a MIOSHA complaint.

768 DISCRJMINATJON

Burden of Proof
Motivating or Substantial Factor
Not Established
Employee Misconduct
Insubordination
Discharged
Refusal to Perform Assigned Job
Presumption of Violation
Safety Complaints to MIOSHA
Discharge - Presumption of Section 65 Violation
Safety Complaints to Other Agencies

MI-DI 94-1484 Rice v Request Foods (1995)

Complainant worked for Respondent from December 11, 1989, until July 5, 1994, when she was discharged. At that time, Rice's job involved cleaning the cafeteria, locker rooms, and plant bathrooms. The ALJ found Complainant was discharged as a result of her refusal to follow an order to work on the line and was not attributable to any health or safety consideration. While a discharge closely following a MIOSHA complaint leads to an understandable inference that the discharge was prompted by the complaint, this inference is rebuttable. The ALJ concluded the Complainant's own testimony rebutted the presumption. Rice's complaints to the USDA related to handling of food for consumption by others. These were not MIOSHA protected complaints.

769 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Not Established
Employee Misconduct
Confrontation
Employee Production Below Standards
Discharged
Confrontation
Employment
Truck Driver
Safety Complaints to Employer
Truck

MI-DI 95-63 Cooper v Rensen Products (1995)

Cooper answered an ad for a truck driver with flatbed/steel-hauling experience. He drove Respondent's truck to Detroit but had difficulty. Upon his return, he gave Respondent a list of "problems" with the truck. Respondent had these problems checked out and determined that nothing was wrong with the truck. Because of Complainant's driving difficulties, Respondent placed Cooper low on the list of truck drivers. When Cooper had not been called for several weeks, he came to the business and argued with Respondent. Based on this confrontation, Complainant was discharged. The ALJ found that Complainant was not called back because of the difficulty he had in driving the truck, not because of his complaints. The list of problems was not a substantial factor in placing Cooper low on the list of truck drivers.

770 DISCRIMINATION

Arbitration
Res Judicata

MIDI 95-175 Pena v Whitehall Leather Company (1995)

The Department deferred making a Section 65 decision because the case was pending before the National Labor Relations Board. The Complainant appealed. The arbitrator issued a decision ordering Complainant's reinstatement with back pay and benefits. The MIOSHA Section 65 appeal was dismissed because all MIOSHA issues had been decided by the arbitrator.

(Paragraph number 771 was not assigned)

(Paragraph number 771 **was not assigned.)**

772 JURISDICTION

Late Employer Petition/Appeal
Not Received by Department
Affidavit

96-1223 G & R Masonry Inc. (1996)

Respondent asserted that a timely petition for dismissal was filed but this petition was not received until enclosed with the late petition. Respondent did not provide an affidavit asserting that the petition was properly mailed with a correct address and postage and deposited in the United States mail.

773 JURISDICTION

Late Employer Petition/Appeal
Address Change
Attorney
Mail Handling
Delay in Forwarding to Owner

96-1200 Incas Construction, Inc. (1996)

Upon receipt of a citation, Respondent contacted an attorney who the moved to a different state. In the meantime, Respondent also moved and did not change the business address with the Department. Mail was received by the owner's mother who often failed to forward it in a timely manner.

Good cause for the late appeal was not found. It is Respondent's responsibility to have a reliable mailing address. Respondent must also take responsibility for choosing an attorney and the attorney's failure to change Respondent's address with the Department.

774 JURISDICTION

Late Employer Petition/Appeal
Fifteen Working Days
State Legal Holidays
Other Days Off

95-1283 Oakley Industries, Inc. (1996)

Respondent argues it was closed the Friday before and Monday after Easter, but these days are not state legal holidays. They must be counted for determining the 15 working day period for filing a petition for dismissal. See MCL 435.101.

775 JURISDICTION

Late Employer Petition/Appeal
Abatement
Different from Appeal
Employer Too Busy

95-1365 Wixom D P W Garage (1996)

Respondent argued a late petition was filed because the foreman concentrated on abatement, Respondent did not understand the appeal process, Respondent is a busy, growing city, and despite many inspections and citations, this was Respondent's first appeal. The ALJ concluded that Respondent did not exercise reasonable diligence by not reading the reverse side of the citations which advised of the 15 working day petition period. It was also held that abatement and filing a petition are different concepts.

A Board member directed review. After review, the Board affirmed the Order Dismissing Appeal.

776 JURISDICTION

Late Employer Petition/Appeal
Informal Settlement Process

95-1282 Williamston Department of Public Works (1996)

The Informal Settlement Agreement signed by the parties permitted Respondent to continue an appeal for two items, but the appeal was not filed within the 15 working day period. Good cause for the delay was not presented.

Although Respondent filed exceptions, no Board member directed review of the ALJ's Order Dismissing Appeal.

777 JURISDICTION

Late Employer Petition/Appeal

Abatement

Different from Appeal

Overlooking/Misinterpreting Appeal Rights

96-128 Delta Tube & Fabricating Corporation (1996)

The ALJ did not find good cause where Respondent concentrated on abatement and misunderstood the difference between abatement and appeal. Respondent filed both a late petition and appeal. Both the citation and Department decision give information on how to file a timely petition and appeal, respectively. Both also specify the 15 working day period.

Although exceptions were filed, no Board member directed review of the ALJ's decision.

778 JURISDICTION

Late Employer Petition/Appeal

Fax Submission

Proof of Receipt

95-1417 Burger King (1996)

Although Respondent alleged a fax transmission was filed during the petition period, none was found in the Department's file. The original document allegedly mailed through the United States mail system was also not found. Respondent had no proof that the fax transmission or the document mailed were received by the Department.

Good cause for the late filing was not found.

779 WITHDRAWAL OF APPEAL

95-534 Mechanical Heat & Cold, Inc. (1996)

Respondent agreed to withdraw while present at the prehearing conference but did not send in a withdrawal statement. An Order To Show Cause was issued directing Respondent to show cause why the appeal should not be dismissed, The Order stated that failure to respond would result in dismissal of the appeal and affirmance of the Department's decision. No response was filed and the appeal was dismissed as withdrawn.

780 BOARD REVIEW

Affirmance

Nonappearance at Scheduled Hearing

EMPLOYER

Nonappearance at Scheduled Hearing

General Entry for Nonappearance Cases

HEARING

Failure to Appear

Board Review

No Compliance with Board Rule R 408.21428(2)

General Entry for Nonappearance Cases and Affirmance by Board

ER failed to appear at a scheduled hearing. The hearing proceeded pursuant to Section 72(1) of the APA. Testimony was taken from witnesses presented by MIOSHA and the evidence considered concerning the items appealed.

ER did not file a request for rehearing within ten days as permitted by Board Rule 428(2).

ER filed exceptions and the case was directed for Board review. The Board voted to affirm the ALJ's proposed decision.

781 BOARD REVIEW

Request for Reconsideration

EMPLOYER

Nonappearance at Scheduled Hearing

HEARING

Failure to Appear

93-292/96-1398 Yacht Repair & Renovations, Inc. (1995)

The ALJ issued a Report dismissing Respondent's appeal because Respondent did not appear at a scheduled hearing. The hearing proceeded pursuant to Section 72(1) of the APA. Testimony was taken from Department witnesses.

Respondent did not file a request for rehearing within ten days as permitted by Board Rule 428(2).

No Board member directed review within the 30 day Board review period. However, on Respondent's motion, the Board voted to grant a request for reconsideration and remanded the matter for a prehearing conference and hearing. The case was settled at the prehearing conference.

782 BOARD REVIEW
Failure to Direct

EMPLOYER
Nonappearance at Scheduled Hearing
General Entry for Nonappearance Cases

HEARING
Failure to Appear
No Compliance with Board Rule R 408.21428(2)

General Entry for Nonappearance Cases & No Board Member Directs Review

ER failed to appear at a scheduled hearing. The hearing proceeded pursuant to Section 72(l) of the APA. Testimony was taken from witnesses presented by MIOSHA and the evidence considered concerning the items appealed.

ER did not file a request for rehearing within ten days as permitted by Board Rule 428(2).

Although ER filed exceptions, no Board member directed review. The ALJ's

Report, therefore, became a final order of the Board based on Section 42 of MIOSHA.

783 EMPLOYER
Nonappearance at Scheduled Hearing
General Entry for Nonappearance Cases
Good Cause

HEARING
Failure to Appear

JURISDICTION
Late Employer Petition/Appeal
Good Cause Found
Department Mailing Error

95-1031 Detroit Door & Hardware Company (1996)

Good cause was found because MIOSHA sent the citation to the semi-retired CEO instead of the company president, as requested at the inspection. MIOSHA did not dispute ER's position.

The case was set for a prehearing conference and hearing, but ER did not appear and the appeal was dismissed. Also see paragraph 231.

784 HEARING

Failure to Appear

JURISDICTION

Late Employer Petition/Appeal

Fax Submission

Good Cause Found

Key Employee

Family Illness

Key Employee

Family Illness

96-308 The Oscar W Larson Company (1996)

Respondent failed to appear at a scheduled hearing. The hearing proceeded pursuant to Section 72(1) of the APA. Testimony and argument were received from Department witnesses. Respondent's appeal was dismissed and the Department's citations affirmed.

Respondent did not file a request for rehearing within ten days as permitted by Board Rule 428(2).

Prior to scheduling the hearing, an order was issued finding good cause for a late petition. At the end of the filing period, with Respondent's safety director off work due to family illness, the vice president attempted to call the Department and fax the petition but could not obtain the fax number.

785 HEARING

Failure to Appear

JURISDICTION

Late Employer Petition/Appeal

Change in Ownership/Management

Good Cause Found

Change in Ownership/Management

96-263 Precision Slitting Service Company (1996)

Respondent failed to appear at a scheduled hearing. The hearing proceeded pursuant to Section 72(1) of the APA. Testimony and argument were received from Department witnesses. Respondent's appeal was dismissed and the Department's citation was affirmed.

Respondent did not file a request for rehearing within ten days as permitted by Board Rule 428(2).

Prior to scheduling the hearing, an order was issued finding good cause for a late appeal. Respondent experienced a change in ownership and management after filing the petition for dismissal.

786 BOARD REVIEW

Interlocutory Review

DISCOVERY

Interrogatories

HEARING

Orders of ALJ

Failure to Follow

94-299 Michigan Steel Erectors, Inc. (1996)

An interim order granted Respondent's request to have the Department answer interrogatories and produce documents. Complainant filed an interlocutory appeal to the Board, The Board decided that it would not consider an interlocutory appeal. Respondent filed a Motion to Default Complainant and Dismiss the Citation. Complainant did not file a response. Based on Complainant's failure to provide the ordered answers to interrogatories and production of documents, the citation was dismissed.

787 JURISDICTION

Late Employer Petition/Appeal

Mail Handling

Decision Misplaced

95-1508 Jay Dee Contractors, Inc. (1996)

Good cause was not found where the Department's decision was "inexplicably" misplaced. It is reasonable to expect an employer to establish a uniform and reliable internal mail system. The fact that a piece of mail was misplaced and later discovered where it didn't belong does not establish good cause.

788 JURISDICTION

Late Employer Petition/Appeal
Abatement
Concentration On
Confusion
Appeal Rights Hard to Understand
Communication with Department
Small Employer

96-67 Freedom Industrial Finishing Inc. (1996)

Good cause was not found where the employer argued the late filing occurred because the company concentrated on abating the violations, a lack of knowledge of the appeal process, confusing telephone calls to the Department, and the fact that Respondent is a small employer.

The ALJ concluded that the answer to each of these arguments is that a reading of the reverse side of the citation would have advised the employer of the 15 working day petition period. Prior cases have not found good cause when an employer concentrates on abatement. All businesses, even small companies, and even though they are busy, must meet the 15 working day appeal period.

789 JURISDICTION

Late Employer Petition/Appeal
Key Employee
Illness/Resignation
Mail Handling
Mail Handling
Illness of Key Employee

96-223 Atlas Service Company, Inc. (1996)

Good cause was not found where the employer filed a late petition for dismissal due to the illness of a secretary, a key employee.

When a key employee becomes ill, a reasonable management response must be to make sure all mail is properly routed and answered. Temporary help or training backup staff may be necessary. In this case, Respondent did not demonstrate a reasonable response to the illness. The company president was out of town and the son had to cover for the president, as well as the secretary, and do field work.

790 JURISDICTION

Late Employer Petition/Appeal
Telephone Communication
Appeal
Informal Settlement Agreement
Written Petition/Appeal is Required

96-173 H & J Manufacturing Services, Plant #2 (1996)

Good cause was not found where the employer argued he telephoned the Department and expressed his intent to appeal. Respondent points to a letter sent with the citation. This letter permits a telephone call to accept an informal settlement agreement, not to file an appeal.

The information on the reverse side of the citation clearly requires a writing to file a petition for dismissal. Administrative Rule 408.22351 also requires a writing.

It was unreasonable for Respondent to rely on information permitting a telephone call for an informal settlement to file an oral appeal.

Although Respondent filed exceptions, no Board member directed review of the ALJ's Order Dismissing Appeal.

791 JURISDICTION

Late Employer Petition/Appeal
Computer Malfunction
Hard Drive Failure

96-22 Metalist International, Inc. (1996)

Good cause was not found where the employer claimed to have sent a timely appeal but was unable to produce a copy due to a computer malfunction involving a hard drive failure. It was found that while anyone can experience a computer malfunction and hard drive failure, it was unreasonable not to have tape backups or file copies of important documents such as an appeal relating to $3,800 in penalties.

Respondent filed exceptions and a Board member directed review. The full Board voted to affirm the ALJ's dismissal of Respondent's appeal.

792 JURISDICTION

Late Employer Petition/Appeal

Mail Handling

Citations Filed by Part-Time Employee

96-841 Robert M Price & Sons, Inc (1996)

Good cause was not found where the citations were sent to the address supplied by the employer during the closing conference. Upon receipt, the citations were filed away by the vice president's mother who worked part-time. The ALJ held that it is Respondent's job to hire and train staff in proper mail handling procedures.

Although Respondent filed exceptions, no Board member directed review of the ALJ 's proposed decision. This resulted in the All's decision becoming the Board's final decision.

793 JURISDICTION

Late Employer Petition/Appeal

Computer Calendar Mistake

96-803 Rochester Manufacturing Company (1996)

Good cause was not found where the employer made a mistake in entering the correct reply deadline on his computer calendar. Respondent also erroneously believed the appeal period was 30 days. The ALJ reviewed the information sent with the Department's decision and concluded that the appeal period is always stated as 15 working days. Prior Board decisions have not found good cause where the employer made a mistake as to receipt date. Respondent did not act with reasonable diligence.

Although Respondent filed exceptions, no Board member directed review of the ALJ's proposed decision. This resulted in the ALJ's decision becoming the Board's final decision.

794 JURISDICTION

Late Employer Petition/Appeal

Contacting a Third Party

Employer Too Busy

96-753 McLouth Steel Products (1996)

Good cause was not found where the president who received the citation delayed in sending it to the safety director who also delayed in sending it to the attorney. These delays were caused by both the president and safety director being busy with issues relating to the company's survival, Respondent also argued that the Lanzo decision gave the Board discretion to determine what "good cause" means. The ALJ observed that the Board has already adopted a "good cause" test as the kind of cause that would prevent a reasonably prudent person from the performance of an important obligation. It does not include conduct that shows carelessness, negligence, or a lack of reasonable diligence. Respondent's explanation did not satisfy this test. The ALJ also pointed to several Board decisions that found "being too busy" does not satisfy the good cause test.

795 JURISDICTION

Late Employer Petition/Appeal

Contacting a Third Party

Independent Contractor

96-550 Red Apple Supermarket (1996)

Good cause was not found where the employer gave responsibility for abatement and filing the necessary paperwork, including a petition for dismissal, to an independent contractor. The ALJ observed that prior Board decisions have not found good cause when the employer delays the necessary petition or appeal while waiting for a third party to do something. It is the employer's responsibility to follow the directions on the citation for filing an appeal. Giving this assignment to a third party cannot extend a statutory time period.

796 JURISDICTION

Late Employer Petition/Appeal

Business Purchase

96-609 Venoy Nursing Center (1996)

Good cause for a late appeal was not found despite the inspection taking place on the day a new owner took over and this being the first inspection in eleven years. Since the new owner was present during the inspection, the owner received the appeal procedure from the safety officer. Moreover, the petition for dismissal was filed properly showing Respondent understood the need for a timely filing. The Department's decision contained information on how a timely appeal could be filed. The late filing had nothing to do with Respondent's recent purchase of the company or the lack of prior inspections.

797 JURISDICTION

Late Employer Petition/Appeal

Final Board Order

96-554 Exemplar Manufacturing Company (1996)

Respondent argued that a late petition for dismissal was filed because no "final Order" was ever sent. The citation states that proposed penalties are required to be paid within 15 days after becoming the final order of the Board. Good cause was not found because Respondent did not follow the clear directions on the citation on how to file a petition for dismissal.

Although Respondent filed exceptions, no Board member directed review of the ALJ's proposed decision. This resulted in the ALJ's decision becoming the Board's final decision.

798 SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

Lack of Knowledge

Trench

TRENCH

Road as Tie Back

Sloping

Penetrometer Tests

93-1585 Bacco Construction Company (1996)

Respondent was cited for serious violation of the sloping standard, Rule 941(1). The trench was sloped to 57°. The safety officer took six penetrometer tests, one of which was at 1.75, one at 1.0, and four below 1.0. Respondent's superintendent took several tests which measured from 1.0 to slightly in excess of 1.75. At least one side of the trench went through a road. The ALJ found that the trench should have been sloped to 45° but that the Department did not prove employer knowledge to establish a serious violation. Several facts would have led a reasonable superintendent to conclude a steeper slope satisfied the rule. These included the short time the trench was open, the effect of cutting through a road, the dry conditions and lack of cracks or breaking from the sides, and a photo demonstrating trench stability by showing the teeth of the backhoe on the trench side.

799 SERIOUS VIOLATION

Knowledge

Imputed to Employer

Substantial Probability

WILLFUL VIOLATION

Evil Intent Not Necessary

Indifference to Requirements

Intentional Disregard

88-536/96-35 Johnson Controls, Inc, Plastic Container Division (1996)

Respondent was cited for a serious/willful violation of Part 62 of the GISD Rule 408.16211(2), which prohibits an employee from using an unguarded machine or a machine with a defect. An employee was injured while cleaning flash on a molding machine. This machine had not been operating properly.

The AU found a serious violation, but not willful, concluding the evidence did not show intentional disregard or plain indifference. The proposed penalty was reduced from $1,120 to $112.

The Board reviewed the ALJ's decision. The Board adopted the ALJ's Findings of Fact and agreed that the violation was serious finding both a substantial probability that death or serious physical harm could occur and employer knowledge based on the supervisor's knowledge. The Board also found a willful violation concluding the evidence showed a plain indifference to employee safety. The proposed penalty was increased to $1,120.

The Board also denied Respondent's request for rehearing.

The case was appealed to the Oakland County Circuit Court which vacated the Board's decision and remanded for rehearing. After a further prehearing conference, the parties settled. The employer withdrew the appeal after the Complainant reduced the proposed penalty to $840. The violation stayed willful/serious.

800 JURISDICTION

Late Employer Petition/Appeal

Abatement

Does Not Nullify Citation

Vacations

96-442 Amor Sign Studios, Inc. (1996)

Good cause was not found where the employer concentrated on abatement. There was delay because the electrician was busy and the owner went on vacation. Prior decisions have found a delay to concentrate on abatement to be a lack of reasonable diligence. Also, a vacation cannot extend the appeal period.

Although the Respondent filed exceptions, no Board member directed review. Without a direction for review, the ALJ's proposed decision became a Final Order of the Board.

801 JURISDICTION

Late Employer Petition/Appeal

Abatement

Does Not Nullify Citation

96-316 E C M Specialties, Inc. (1996)

Good cause was not found where the employer argued the late filing occurred because the company understood that abatement by the date imposed on the citation would nullify the need to pay the proposed penalty.

The ALJ concluded that a reading of the reverse side of the citation would have advised the employer of the 15 working day petition period. Prior cases have not found good cause when an employer concentrates on abatement.

802 JURISDICTION

Late Employer Petition/Appeal

Proof of Service

MCR 2.107

96-318 Hercules Drawn Steel (1996)

Good cause was not found where the employer argued that a timely appeal was filed. This "appeal" dated August 4, 1995, was not in the files of the Office of Hearings, GISD, or the MIOSHA Appeals Division. Respondent provided no proof that a timely appeal was filed, not even a copy. Moreover, although Respondent referred to MCR 2.107, a Proof of Service referred to in (D) was not presented to show the appeal was prepared and inserted in an envelope with the proper address and postage and placed in the United States postal system.

A Board member directed review of this decision, but the Board decided to affirm the AIJ's Order.

803 JURISDICTION

Late Employer Petition/Appeal

Abatement

Employer Too Busy

96-269 Grand Traverse County Parks & Recreation (1996)

Good cause was not found where the employer argued he concentrated on abatement and was too busy to file the words "I appeal." The 15 working day appeal period is a statutory requirement, not within the control of the enforcement agency. Prior decisions have concluded that concentrating on abatement and being too busy do not present good cause for a late filing.

Although the Respondent filed exceptions, no Board member directed review. Without a direction for review, the ALJ's proposed decision became a Final Order of the Board.

804 JURISDICTION

Late Employer Petition/Appeal

Confusion

Many Working on Citation

95-1498 Western Correctional Facility (1996)

A late appeal was filed because many people became involved in the citation, each believing someone else would file the appeal. This explanation shows carelessness, negligence, or a lack of reasonable diligence. Respondent has a responsibility to assign MIOSHA matters for prompt action. Employers have an obligation to promptly examine and answer important mail.

Respondent filed an exception and the case was directed for Board review. The Board voted to affirm the proposed ALJ 's decision.

805 SIGNAGE

Fuel Dispensing

WELDING & **CUTTING**

Near Flammable Materials

93-1051 Lansing Public Service Garage (1996)

Respondent was cited for two violations, Part 12 of the GISS, "Welding and Cutting," Rule 1261(1), and Part 1910.106, "Flammable and Combustible Liquids," Rule 1910.106(g)(8).

The first prohibits cutting or welding near flammable materials. The ALJ found a violation because the tank contained oil and welding took place within 20 to 25 feet. The tank was being used by a subcontractor and Respondent argued no knowledge of its contents. The ALJ held it to be Respondent's duty to be aware that its own employees were welding near an oil tank.

The second rule prohibits smoking or open flames in an area used for fueling. Signage is required in such areas. The ALJ dismissed this violation because fueling was not performed in the area.

806 EMPLOYER DEFENSES

Isolated Incident

No Employer Rule

No Employer Training

EVIDENCE

Eyewitness

Photographs

INSPECTION

Photographs Before Safety Officer Identification

Safety Officer Observations Before Opening Conference

WITNESSES

Eyewitness

94-754 C & H Landscaping Company (1996)

While inspecting another subcontractor on a multi-employer site, the safety officer observed Respondent's employee driving a piece of equipment with an employee standing on the front bucket and another on the rear. This piece of equipment was also observed with a raised bucket while employees were working in the area.

The ALJ found serious violations of Part 1, General Rules, 408.40115(2)(c), concerned with employees riding a piece of equipment without a seat or seatbelt, and Part 13, Mobile Equipment, OSHA Standard 1926.600(a)(3)(1), regarding employees working near a raised bucket.

Respondent argued that the photograph and observation of the employees riding the piece of equipment occurred before the safety officer identified himself and started the inspection. Respondent also argued this violation was an isolated incident. It was concluded that the violation took place in plain sight. The safety officer was properly on the work site. Cases from OSHA and MIOSHA were reviewed. The violation was not isolated because the Respondent did not present evidence that the employees were trained concerning the rule preventing employees, other than the operator, from riding a piece of equipment. Also, Respondent did not have a rule preventing this activity.

Regarding the raised bucket issue, Respondent argued that employees were cleaning debris and needed the bucket raised for this purpose. However, only the safety officer was present as an eye witness. The photograph taken by the safety officer does not support Respondent's argument because the bucket is tipped down. Employees could not put material in the bucket while in this position.

807 GENERAL vs SPECIFIC

Grinders

Precision vs Off-Hand

GUARDING

Grinder

Precision vs Off-Hand Grinding

93-1705 Severance Tool Industries, Inc. (1996)

Respondent was cited for two violations of Part 1A, Abrasive Wheels, Rules 114(1) and 125. The ALJ dismissed both violations because Respondent was cited under the wrong standard. Respondent was cited under the off-hand grinding rules because the employer did not have a peripheral guard or work rest, but the ALJ found the work to be precision grinding which requires different guarding. The grinding in this case is of a precision finished piece with a specific form as defined in Rule 104(5) and Rule 105(5).

808 JURISDICTION

Late Employer Petition/Appeal

Informal Settlement Process

96-918 A B A Auto Parts Inc. (1996)

Good cause was not found where the employer filed a petition for dismissal and included a request for an informal settlement. When the Department sent its decision denying the petition, the employer did not file a timely appeal expecting another communication regarding a negotiated settlement agreement.

The ALJ pointed to the clear information sent with the decision that advises the employer how to file a timely appeal. Also, the information sent with the citation stated that an informal settlement had to be requested within five days. Instead of following this instruction, Respondent filed a petition for dismissal after the five day period.

Although Respondent filed an exception, no Board member directed review.

809 JURISDICTION

Late Employer Petition/Appeal

Abatement

Concentration On

Business Disruptions

96-804 Woodworth Industries, Inc. (1996)

Good cause was not found where the employer turned abatement issues to the maintenance supervisor and wanted to take part in negotiations for an informal settlement. However, no request was ever made to pursue an informal settlement. A late filing occurred because of a management shakeup and company move. The ALJ pointed out that the language on the reverse side of the citation advised of the 15 working day period. Prior Board decisions have not found good cause where the employer confused abatement with filing an appeal.

810 JURISDICTION

Late Employer Petition/Appeal

Mail Handling

Sending the Citation to the Project

96-425 Christman Company (1996)

Good cause was not found where a temporary receptionist sent the citation to the job site instead of giving it to the safety director. Even with the delay, Respondent still had ten working days to file a timely petition. An employer must train employees in correct mail handling procedures. Failure to do so shows carelessness, negligence, and a lack of reasonable diligence.

811 JURISDICTION

Late Employer Petition/Appeal

Contacting a Third Party

Interviewing Workers

96-947 Affordable Roofing & Sheet Metal, Inc. (1996)

Good cause was not found where the employer delayed filing the appeal in order to interview workers on the project. The statutory time for filing an appeal may not be extended to permit employee interviews. Prior Board decisions have reached the same conclusion.

812 INSPECTION

Authority

PENALTIES

Determination
Grouping
Use of Department Penalty Schedule

PRECEDENT

Section 46(6)

SERIOUS VIOLATION - TWO-PRONG TEST OF SECTION 6(4)

Employer Knowledge
Substantial Probability

93-651 Burnette Foods, Inc. (1996)

The ALJ affirmed ten serious violations and their proposed penalties. The violations established were:

1. Item 1 - a violation of Part 6, Fire Exits, Rule 632(2), because an exit door was locked.
2. Item 2 - a violation of Part 7, Guards For Power Transmission, Rule 727(1), because a belt and pulley less than seven feet above the floor were unguarded.
3. Item 3 - a violation of Part 7, Rule 731(1), regarding an unguarded sprocket and chain drive.
4. Items 4 through 8 - violations of Part 14, Conveyors, Rule 1442(2), because nip points on belt conveyors were unguarded.
5. Item 9 - a violation of Part 33, Personal Protective Equipment, Rule 3312(1), regarding a lawn mower operator not wearing safety glasses with side shields.
6. Item 10 - a violation of Part 54, Powered Groundskeeping Equipment, Rule 5413(4), because the lawn mower operator did not wear foot protection.

The ALJ also found the following:

1. Section 29(1) gives the Department full authority to inspect for any reason.
2. Not necessary to prove there is a substantial probability an accident will occur. Only necessary to prove an accident is possible and death or serious physical harm could result if an accident occurred.
3. As a state plan approved by OSHA, the ALJ and Board are required to follow OSHA's interpretation - Section 46a(6).
4. Employer knowledge was established by prior inspections where the plant manager was present and compliance with the rules at other plant locations.

812 (Continued)

5. The rating system used by the safety officer and penalty conclusions of the review officer resulted in a fair penalty computation procedure.
6. Grouping of violations for the same rule reduced total penalties.

A Board member directed review. The Board modified Items 9 and 10 to Other Than Serious with no penalty.

813 EMPLOYER

Nonappearance at Scheduled Hearing
General Entry for Nonappearance Cases

HEARING

Failure to Appear
No Compliance with Board Rule R 408.21428(2)

JURISDICTION

Late Employer Petition/Appeal
Business Liquidation
Good Cause Found
Business Liquidation

96-834 Tooling Components, Inc. (1996)

Good cause for a late appeal was found where the ER mistakenly believed that business liquidation would eliminate proposed penalties. It was reasonable for ER to miss filing deadlines during a liquidation.

The case was scheduled for a prehearing conference and hearing but ER failed to appear. The hearing proceeded pursuant to Section 72(1) of the APA. Testimony was taken from witnesses presented by MIOSHA and the evidence considered concerning the items appealed.

Respondent did not file a request for rehearing within ten days as permitted by Board Rule 428(2).

814 EMPLOYER

Nonappearance at Scheduled Hearing

General Entry for Nonappearance Cases

HEARING

Failure to Appear

No Compliance with Board Rule R 408.21428(2)

JURISDICTION

Late Employer Petition/Appeal

Department Advice

Good Cause Found

Department Advice

Informal Settlement Process

Informal Settlement Process

96-958 Netcon Enterprises. Inc. (1996)

Good cause for a late petition for dismissal was found where ER asserted that the company was told by the inspector, the supervisor, and the informal settlement department to take no action until the informal settlement agreement was received. This statement was unopposed by MIOSHA.

The case was scheduled for a prehearing conference and hearing but ER failed to appear. The hearing proceeded pursuant to Section 72(1) of the APA. Testimony was taken from witnesses presented by the MIOSHA and the evidence considered concerning the items appealed.

ER did not file a request for rehearing within ten days as permitted by Board Rule 428(2).

815 ADJOURNMENT

Denied

Safety Officer

BURDEN OF PROOF

Department Required to Prove Violation

Citations Dismissed

Safety Officer Unavailable

94-890 Mechanical Heat & Cold, Inc. (1996)

Citations were dismissed without prejudice because Complainant requested an adjournment the day before a prehearing conference and hearing. The adjournment was requested due to the continued long-term illness of the safety officer. Prior to scheduling the case, the Complainant advised that the safety officer had returned from sick leave but this was an error.

(Paragraph number 816 was not assigned.)

817 JURISDICTION

Late Employer Petition/Appeal

Telephone Communication

96-1203 Dave Cole Decorators, Inc. (1996)

Respondent filed a petition for dismissal and received the Department's decision. Respondent called the Department to discuss the matter. He was told the citation was properly issued but Respondent did not file a timely appeal. Good cause was not found because the Department's decision contains information on how to file an appeal. The 15 working day time limit is specifically referenced. A telephone call does not meet the requirements of Section 41 or Rule 408.22354.

818 JURISDICTION

Late Employer Petition/Appeal

Contacting a Third Party

Citation Given to General Contractor

96-1205 Jason Construction Company, Inc. (1996)

Good cause was not found where Respondent gave the citation to Lanzo Construction and was told that Lanzo would tell the Department Respondent was not the subcontractor on the site. The citation was issued to a specific employer. It is that employer's responsibility to address the citation.

819 DUE PROCESS

Employer Must Know What is Prohibited

PRESSES

Die Tryout

Production Operation Definition

SETTLEMENT

At Any Stage of the Proceeding

After Appeal to Circuit Court

91-1802 American Bumper & Manufacturing Company (1996)

The Complainant responded to a complaint alleging that 14 employees were feeding a power press while a 15th employee activated the press, all without a point of operation guard or device to protect (lie employees. The safety officer determined that all 14 employees were to be behind a yellow line before the 15th employee activated the press.

The Complainant contended that the press was in production mode. Respondent argued that it was a tryout process, not production. The bumpers being produced had not yet been approved by Ford Motor Company.

The ALJ found that since Rule 2461(1) uses the phrase "on every production operation performed on a press," the rule is limited to "production operations." Respondent was not in a production mode, Accordingly, the citation was dismissed.

The Board reversed the ALJ's proposed decision finding instead that Respondent's employees were engaged in a production activity, not die tryout. Respondent filed a circuit court appeal.

This case was included in the settlement of seven other American Bumper cases. See Settlement Agreement on file.

820 DISCOVERY

Depositions Order Ending

HEARING

Stayed

Criminal Charges

PENALTIES

Egregious Policy

SETTLEMENT

At Any Stage of the Proceeding

STATE PLAN

Egregious Penalty Policy

92-528 American Bumper & Manufacturing Company (1996)

This Department investigated Respondent's place of employment after the deaths of two employees in a press accident. The resulting inspections proposed penalties in excess of $1,000,000 and involved 27 serious, 96 willful, 9 repeat/serious, 72 other than serious, and 12 repeat/other violations. Both the Department and Respondent engaged in substantial discovery. There were also several prehearing conferences and motions. This file was placed in abeyance because of double jeopardy questions involving the circuit court criminal case against Respondent. After many conferences and discussions, the parties entered into a settlement agreement which covered not only this case, but seven other American Bumper appeals. See the Settlement Agreement on file. The Settlement Agreement called for payment of over $335,500 in penalties and employee training.

During the prehearing procedures, the ALJ issued three orders in response to motions. These were an Order Quashing Deposition of Lowell W. Perry, an Order Granting Motion To Terminate Discovery, and an Order Denying Motion For Partial Summary Disposition.

The first Order was issued because Lowell W. Perry was a political appointee of the Governor. The Motion To Quash was not granted for Douglas R. Earle, the Director of the Bureau of Safety and Regulation; Mark Smith, Chief of the GISD; and Eva Hatt, Assistant Chief.

The second Order was issued based on a finding that sufficient discovery had taken place for Respondent to prepare its defense for trial.

820 (Continued)

The third Order addressed Respondent's Motion that Complainant's "egregious penalty policy" was unconstitutionally vague. The ALJ denied the Motion finding that it is within the Department's discretion to cite an employer and fine using an instance-by-instance method. Using this method permitted Complainant to expand eight violations into 91 violations by issuing multiple citations, rather than grouping the violations. The Department adopted this policy based on the federal policy because of its obligations under the state plan requiring the state's enforcement efforts to be "at least as effective" as the federal OSHA program.

The ALJ found that this method does not impose a new liability. The employer's duty is to maintain a safe working environment regardless of the penalty assessed for noncompliance. The determination of penalty will be determined by the ALJ and the Board based on Section 36 which permits consideration of the size of the business, the seriousness of the violation, and the history of previous citations.

821 PETITION TO MODIFY ABATEMENT DATE

Exceptional Circumstances for Late Petition
Confusion

PMA 97-162 Fisher Corporation, Plants 1 and 2 (1996)

Both Items 10 and 11 addressed sensing devices, Petitioner requested a PMA on August 20, 1996, for Item 10 but forgot to include Item 11. An abatement extension was granted for Item 10 until October 1, 1996. On September 27, 1996, Petitioner filed an abatement extension request for both Items 10 and 11 believing that both had been extended to October 1, 1996. In actuality, however, the abatement period for Item 11 had expired on August 30, 1996.

Board Rule 441(3) requires the petitioner to establish exceptional circumstances to explain a PMA filed beyond the next working day following the date on which abatement was originally required. The test for determining exceptional circumstances is one of reasonableness. The ALJ found exceptional circumstances based on the confusion over the two items.

822 PETITION TO MODIFY ABATEMENT DATE

Exceptional Circumstances for Late Petition No
Objection from Department Prior Request
Small Company
Telephone Request

PMA 96-1459/96-209 Kysor Walker Industries (1996)

Board Rule 441(3) requires the petitioner to establish exceptional circumstances to explain a PMA filed beyond the next working day following the date on which abatement was originally required. The test for determining exceptional circumstances is one of reasonableness. The ALJ found exceptional circumstances based on the Petitioner starting the extension process by telephone before the end of the abatement period but not filing a written petition. Petitioner erroneously believed that since a prior extension had been approved, a phone call would be sufficient. Also, the Division of Occupational Health did not object to the late filing, and Petitioner is a small company attempting to abate.

823 PETITION TO MODIFY ABATEMENT DATE

Exceptional Circumstances for Late Petition
Vacation

PMA 95-1499 Hydraulic Tubes & Fittings, Inc. (1995)

Petitioner filed a late PMA due to a violation. Board Rule 441(3) requires the petitioner to establish exceptional circumstances to explain a PMA filed beyond the next working day following the date on which abatement was originally required. The test for determining exceptional circumstances is one of reasonableness. The ALJ found that a reasonable business person would either have sent the extension request before leaving or have directed another to file the request.

824 DISCRIMINATION

Hearing

Complainant's Failure to Appear

Failure to Appear

Proceeding in Absence of Party

Rehearing

MI-DI 96-868 J R Morton v Cascade Chrysler Dodge, Inc. (1996)

After Complainant filed an appeal from the Department's decision, he failed to attend the hearing. The appeal was dismissed. Complainant filed a request for rehearing claiming that he put the wrong date on his calendar and did not have an attorney to represent him. The request for rehearing was denied. The ALJ found the record pertaining to dismissal of the appeal adequate for purposes of judicial review as required by Section 87(2) of the APA. Complainant's explanation for missing the hearing did not establish good cause. Also, see paragraph 708.

825 EMPLOYER

Nonappearance at Scheduled Hearing

General Entry for Nonappearance Cases

HEARING

Failure to Appear

No Compliance with Board Rule R 408.21428(2)

JURISDICTION

Certified Mail Receipt

96-949 Assemblers Inc. (1997)

ER failed to appear at a scheduled hearing. The hearing proceeded pursuant to Section 72(1) of the APA. Testimony was taken from witnesses presented by MIOSHA and the evidence considered concerning the items appealed.

ER did not file a request for rehearing within ten days as permitted by Board Rule 428(2).

Prior to scheduling the hearing, an Order was issued finding good cause for a late petition for dismissal. ER did not sign the certified mail receipt for the citation packet.

826 JURISDICTION

Late Employer Petition/Appeal

Good Cause Found

Multiple Reasons for Late Filing

Multiple Reasons for Late Filing

96-954 Auto-Wares, Inc. (1997)

Good cause for filing a late petition was found where Respondent's general manager presented several reasons for the late filing.

1. The general manager believed the appeal period was 30 days not 15.
2. The general manager expected a final safety officer visit to finish the inspection.
3. The general manager had recently been appointed.
4. The general manager was preparing for an out-of-town marketing meeting which fell during the 15 working day period.
5. The general manager and his wife had their first child shortly before the citation was received.

Taken together, the ALJ found this explanation established good cause for the late petition for dismissal. After a prehearing conference was held, Respondent withdrew the appeal.

827 JURISDICTION

Late Employer Petition/Appeal

Good Cause Found

Post Office Error

Post Office Error

96-1083 Rubright, A Division of Newcor (1997)

Good cause was found where Respondent placed the petition for dismissal in the United States mail several days before the end of the 15 working day appeal period, but the petition did not receive a postmark until after the appeal period had expired. Delay by the postal service justifies a finding of good cause.

After a prehearing conference was held, Respondent withdrew the appeal.

828 JURISDICTION

Late Employer Petition/Appeal
Fifteen Working Days
Good Cause Found
State Legal Holidays
One Day Late
State Legal Holidays
One Day Late

96-682 3-S Construction (1997)

Good cause was found where the filing was one day late because Respondent miscounted the days over the Christmas and New Year's holidays. Section 6(9) defines a "working day" as "any day other than a Saturday, Sunday, or state legal holiday." Unfortunately, a state legal holiday is not the same as days state employees have off. MCL 435.101 lists recognized state holidays. The ALJ found this mistake to be reasonable and not based on carelessness, negligence, or a lack of reasonable diligence. The parties entered into a settlement agreement to close the file.

829 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Key Employee
Purposeful Conduct Against Employer's Interests Key Employee
Purposeful Conduct Against Employer's Interests

94-865 Patterson Laboratories, Inc. (1995)

Good cause was found where Respondent's on-site person responsible for MIOSHA purposely ignored the citations in a conscious effort to inflict economic harm and damage on the company. This individual was also discovered to have embezzled money and checks from Respondent. The ALJ held that it is reasonable to assign MIOSHA responsibilities to one person. Nothing in the record showed that Respondent erred in relying on this person during the appeal period. The parties entered into a settlement to close this file.

830 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Mailing
Affidavits
Nonreceipt by Department
Mailing
Affidavits
Nonreceipt by Department

96-475 Wolverine World Wide, Inc. (1997)

Good cause was found where Respondent presented affidavits showing the petition was mailed well within the 15 working day period but it was never received by the Department. Respondent exerted reasonable efforts to file a timely petition. After a prehearing conference, Respondent withdrew the appeal.

831 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Key Employee
Illness/Death/Resignation
Key Employee
Illness/Death/Resignation

96-630 Michigan Brush Manufacturing Company (1997)

Good cause for a late petition for dismissal was found where the person in charge of responding to the citations was ill due to the after effects of surgery and prescription drugs. These caused the employee to put the citations in his desk instead of responding to them immediately. After a prehearing conference, the parties entered into a settlement agreement to close the file.

832 JURISDICTION

Late Employer Petition/Appeal

Overlooking/Misinterpreting Appeal Rights

Posting Appeal Certification Form

96-1453 Alpha Bolt Company (1997)

Good cause was not found where Respondent misunderstood the appeal requirements. Respondent believed returning the certification of posting the appeal form was all that was required for an appeal. The ALJ pointed out that the appeal rights sheet, sent with the Department's decision, states how an appeal must be filed. Respondent did not act reasonably by ignoring these instructions.

833 JURISDICTION

Late Employer Petition/Appeal

After Receipt of the Citation/Decision

Written Petition/Appeal is Required

96-1553 Bortz Health Care of Ypsilanti (1997)

Respondent argued that a contact was made with the safety officer to secure help with abatement before the citation was issued. This contact could not have been Respondent's petition for dismissal because it was made before the citation was issued and it was not in writing. As noted on the material provided on the citation and as explained by the safety officer during the inspection closing conference, a petition for dismissal must be filed in writing within 15 working days after receipt of the citation. Good cause for the late petition for dismissal was not presented.

834 JURISDICTION

Late Employer Petition/Appeal

Misplaced

97-9 Frey Moss Structures, Inc. (1997)

Good cause was not found where Respondent asserted that a late petition was filed because the citation had been accidentally placed in the wrong file. Respondent argued that misfiling documents is part of the "human aspect of our lives." The ALJ concluded that misplacing a document is not "reasonable conduct." Thousands of citations are issued each year and they do not get misfiled.

835 JURISDICTION

Late Employer Petition/Appeal

Business Shutdown

Contacting a Third Party

Safety Consultant

96-1388 Tel-X Corporation (1997)

Good cause was not found where Respondent delayed filing a petition for dismissal to consult with a safety consultant. Delay was also caused because of a four day holiday shutdown. Prior cases have not found good cause where an employer delays to consult with a third party.

836 JURISDICTION

Late Employer Petition/Appeal

Fax Submission

Not Received

96-1555 Muskegon Community College (1997)

Respondent filed a late petition for dismissal but claimed that no appeal was intended. Respondent contended that a fax was sent requesting an informal settlement agreement. The Department did not receive this fax. The ALJ found that Respondent's failure to follow up on the fax transmission shows carelessness, negligence, and a lack of reasonable diligence. Good cause was not found.

837 JURISDICTION

Late Employer Petition/Appeal
Fifteen Working Days
Statutory
Cannot be Extended
Mail Handling
Delay in Forwarding to Proper Person

97-112 Shelby Precast Concrete Company (1997)

Respondent asserted that a late petition for dismissal was filed because the person in charge of responding did not receive the citations until after the appeal period had expired. Also, Respondent argued that a 15 day extension had been given by the Department's safety officer.

The ALJ held that it is Respondent's responsibility to train employees in proper mail handling procedures. The fact that the person in charge of responding did not promptly review the citations shows carelessness, negligence, and a lack of reasonable diligence. Also, the 15 working day appeal period is statutory. It cannot be extended by anyone. Moreover, the citation and the safety officer's closing conference instructions both refer to the 15 working day appeal period. Finally, the safety officer provided an affidavit denying that he gave Respondent a 15 day extension to file a petition. Good cause was not found.

838 JURISDICTION

Late Employer Petition/Appeal
Fifteen Working Days
Statutory
Cannot be Extended
Out of Town

96-1541 Oakwood Custom Coatings (1997)

Good cause was not found where Respondent believed the appeal period was 30 days and Respondent's corporate safety manager was out of town during the appeal period.

839 JURISDICTION

Late Employer Petition/Appeal
Business Distractions
Key Employee
Illness/Resignation
Employer Must Hire Staff

96-1537 Ray-Don Bindery Service, Inc. (1997)

Good cause was not found where Respondent's personnel director left. Her assistant was out caring for a sick husband. The owner was busy negotiating with the bank to take on new partners. The ALJ found that the safety officer gave the employer information on how to appeal at the inspection closing conference. This information is also contained in the citation packet. In the event a key person leaves, an employer must make other provisions to respond to mail with a due date. This includes hiring additional staff. Business distractions also do not present good cause. Responding to Department citations is part of doing business.

840 ADMINISTRATIVE LAW JUDGE

May Order Discovery Deposition

DISCOVERY

Depositions

94-1435 Superior Electric, Inc. (1996)

Respondent's motion to take the safety officer's deposition was denied although this was found to be within the authority of the Board's ALJs. See APA Section 80(1)(d) and Board Rule 431(2)(d). The motion was denied because the safety officer only makes recommendations for citation. His interpretation of standards is irrelevant. Respondent could obtain the Department's file which has all notes made by the safety officer. Respondent also observed the safety officer's deposition taken in a third-party lawsuit and could obtain a copy of this transcript. Complainant also responded to Respondent's interrogatories. There was also a prehearing conference where Respondent discussed the case with the safety officer.

The case was ultimately closed with a Settlement Agreement.

841 EMPLOYER DEFENSES

Greater Hazard

Lack of Injury

GUARDING

Removal

INJURY

Not Needed to Establish Violation

STANDARD

Effect of Law

VARIANCE

93-204 Magnecor Australia Limited (1996)

The ALJ affirmed eight serious violations. Respondent defended by arguing that there had been no injuries resulting from the alleged violations. Respondent also removed several guards but he argued that this made the machines more safe. Respondent asserted that compliance with several cited rules would create greater hazards for employees.

The ALJ found that Respondent did not establish a greater hazard defense. The hazards shown must be greater than those sought to be protected against. Respondent did not request any variances as allowed in Section 27 regarding the "improved" safety conditions created by removing guards. Without a variance, Respondent must protect employees as required by the rules which were all properly promulgated as required by the APA, 1969 PA 306. As such, they have the effect of law and are binding on all employers engaged in the occupations covered by each part. Finally, the ALJ found that the Department may cite an employer even where there are no injuries. The purpose of the Act is to prevent the first injury.

842 JURISDICTION

Late Employer Petition/Appeal

Good Cause Found

Department Communication

Penalty Only Appeal

97-690 A & E Heating & Cooling (1997)

Good cause was found where the Respondent called the Department after the 15 working day petition period and was told the penalties would be reduced. Respondent had completed abatement and desired only to have the proposed penalties examined.

Respondent had retained a certified asbestos contractor at a cost of $4,000. Respondent also paid the home owner $3,000 as compensation. Asbestos was unexpectedly discovered during work at a customer's home.

The parties ultimately entered into a settlement agreement to close the file.

843 EMPLOYER

Nonappearance at Scheduled Hearing

General Entry for Nonappearance Cases

HEARING

Failure to Appear

No Compliance with Board Rule R 408.21428(2)

JURISDICTION

Late Employer Petition/Appeal

Good Cause Found

Accident

95-618 Childress Construction Company (1997)

Good cause for a late petition was found where ER's wife and daughter were injured in an automobile accident, When ER called to discuss the citations, he was told an "appeal board" hearing would be needed. This information caused ER to seek an attorney to handle the case.

ER failed to appear at a scheduled hearing. The hearing proceeded pursuant to Section 72(1) of the APA. Testimony was taken from witnesses presented by MIOSHA and the evidence considered concerning the items appealed.

ER did not file a request for rehearing within ten days as permitted by Board Rule 428(2).

844 EMPLOYER

Nonappearance at Scheduled Hearing

General Entry for Nonappearance Cases

HEARING

Failure to Appear

No Compliance with Board Rule R 408.21428(2)

JURISDICTION

Late Employer Petition/Appeal

Good Cause Found

Forgetful Owner

97-491 Al's Tire and Glass, Inc. (1997)

Good cause was found where ER's owner in his late 70's had difficulty remembering and misplaced the citation packet. Even the best mail processing system breaks down when the company owner begins to forget. Since there was no showing that the company had ignored this problem, good cause was found.

ER failed to appear at a scheduled hearing. The hearing proceeded pursuant to Section 72(1) of the APA. Testimony was taken from witnesses presented by MIOSHA and the evidence considered concerning the items appealed.

ER did not file a request for rehearing within ten days as permitted by Board Rule 428(2).

845 JURISDICTION

Late Employer Petition/Appeal

Good Cause Found

Informal Settlement Agreement (ISA)

97-523 Manchester Stamping Corporation (1997)

Good cause was found where the Department did not consider the employer's statement an ISA request. The Department filed a statement not opposing the request. The employer's "petition" was timely - within 15 working days, but employer did not disagree with the citations to trigger a petition for dismissal and did not use the phrase "Informal Settlement Agreement." Since the goal of MIOSHA is to secure standard compliance and Respondent immediately sought to abate, it was reasonable to permit Respondent to seek a penalty reduction.

The parties ultimately entered into a settlement agreement to close the file.

846 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Accident
Informal Settlement Agreement (ISA)

97-342 C & G Excavating Company (1997)

Good cause was found when the sole operator and principal was killed in an accident.

The parties ultimately entered into a settlement agreement to close the file.

847 EMPLOYER

Nonappearance at Scheduled Hearing
General Entry for Nonappearance Cases

HEARING

Failure to Appear

JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
State Legal Holidays
One Day Late
Registered Mail
State Legal Holidays
One Day Late
Vacations
Attorney

96-1349 Allwaste Container Services, Inc. (1997)

Good cause for an appeal filed one day late was found based on the ER's reasonable conclusion that July 5, 1996, a day all state offices were closed, was also a state legal holiday. This is the kind of mistake even a reasonably prudent person could make.

The employer's argument that Section 41 requires MIOSHA to mail its decision by registered mail was rejected. MCR-2.106(K) states that the term "registered mail" includes certified mail.

Good cause was not found which explained the delay as caused by ER's attorney's vacation. A reasonably prudent ER makes provision for filing within statutory time limits even during vacations. ER did not appear for the scheduled hearing.

848 JURISDICTION

Late Employer Petition/Appeal

Key Employee

Purposeful Conduct Against Employer's Interests

97-256 Patterson Laboratories, Inc. (1997)
97-375

These cases concerned citations mishandled by the same vice president referred to in entry 829. However, the earlier case came about in 1994. The more recent cases were "discovered" in December 1996 when the Treasury Department levied an assessment for the unpaid citations at issue in these two cases, The ALJ found that a good cause finding made sense in 1994 when the vice president's misdeeds became known. A reasonable employer confronted with this issue would have made an effort in 1994 to find all outstanding citations before a further Treasury Department levy. Good cause was not found for the late filings.

849 JURISDICTION

Late Employer Petition/Appeal

Key Employee

Purposeful Conduct Against Employer's Interests

97-201 Bacon's Lawn & Landscaping, Inc. (1997)

Respondent argued that a late petition was filed because the office manager had been confiscating mail. Three months of mail and paperwork were delivered by the employee's mother at one time. Good cause was not found. A small business owner should have immediately noticed when mail stopped. This would have prompted immediate questions to the post office. Respondent's inaction demonstrated carelessness and negligence.

850 AMENDMENT

By Administrative Law Judge

DE MINIMIS VIOLATION

93-202 Wilson Stamping & Manufacturing Company (1997)

The Complainant filed a motion to amend items to De Minimis. Respondent agreed but desired three additional presses to be included in the description. Complainant did not object to his modification and the request was approved.

851 PETITION TO MODIFY ABATEMENT DATE

Dismissed

Failure to Supply Additional Information

General Entry for Dismissed PMA

Petitioner's request for abatement date extension was dismissed because the applicant failed to supply additional information required to process the application.

852 DISCRIMINATION

Evidence

Union Did Not File Grievance

Suspension

Job Refusal

MI-DI 97-108 Carbajo v Chrysler Corp, Sterling Heights Assembly (1997)

Complainant asserted that he was given a suspension when he refused to repair a robot without first shutting off the power as a precaution against power surges. The employer maintained that to eliminate causes for the robot crash, the simplest approach was taken first - that of changing a serial board. Complainant was ordered to change the serial board, but he refused to follow the instruction from his supervisor. Complainant's union refused to file a grievance on his behalf.

The ALJ found that the evidence did not support Complainant's claim that his failure to change the serial board was "protected activity." His suspension was the direct result of his refusal to follow a direct order from his supervisor.

853 DISCRIMINATION

Appeal

Good Cause Found

Right to Appeal Notice Not Provided

Remanded

For Investigation

MI-DI 97-507 Doublestein v Northern Michigan Hospitals (1997)

Good cause was found for Complainant's late appeal because the Department's letter finding no valid Section 65 claim did not contain an appeal rights statement.

The ALJ remanded this case for further investigation because it was concluded that the Department did not conduct an investigation of Complainant's complaint. The Complainant had appealed an informal Department decision made after only a cursory review of his claim performed without a full investigation.

854 DISCRIMINATION

Suspension

Falsification of Production Records

Union Representative

MI-DI 80-31 Plouski v Metro Machine Works, Inc. (1981)

The ALJ found no MIOSHA discrimination where the employee, a union steward, was given a disciplinary layoff for falsifying production records. The suspension was not related to a protected activity.

855 DISCRIMINATION

Employment

Industrial Waste Plant Operator

Safety Complaints to Employer

Sodium Metabisulfite

Suspension

Refusal to Perform Work Assignment

Whirlpool Decision Discussed

Unreasonable Work Refusal

MI-DI 80-41 Jaworski v Ford Motor Co (1982)

The ALJ found no MIOSHA discrimination where the Complainant refused to move bags of sodium metabisulfite into a room with acid leaking from pipes and a wet spot on the floor. This job assignment did not create an imminent safety hazard. The potential hazard of acid from tanks coming into contact with the sodium metabisulfite could have been addressed by filing a MIOSHA complaint.

856 DISCRIMINATION

Suspension
Refusal to Perform Work Assignment
Whirlpool Decision Discussed
Reasonable Work Refusal
Objective Test
Welding Bulging Furnace Walls

MI-DI 81-54 Mullins v Cast Forge Co (1982)

Complainant refused to weld metal strips over cracks in an overheated melting furnace. The furnace walls were bulging because of overheating. Although Respondent's management was informed by the manufacturer that the furnace was safe to operate as long as the wall temperatures did not exceed 500 degrees, this information was not given to Complainant.

A 1973 federal standard, 29 CFR 1977.12(b)(2) gave an employee the right to refuse work under certain circumstances, The condition must be such that a reasonable person would conclude that the condition presented a real danger of death or serious injury and that there was insufficient time to file a complaint with OSHA. This regulation was based on the United States Supreme Court decision in Whirlpool (see ¶ 668 for cite).

The ALJ found that Complainant had the right to refuse the welding assignment based on the federal rule and Whirlpool. It is not necessary that a hazardous condition actually exist if a reasonable person would conclude a real danger was present. Complainant's refusal was reasonable because to a reasonable person, the furnace appeared dangerous with its bulging walls and cracked framework. Moreover, the furnace was in operation with molten metal. Respondent did not give Complainant the information provided by the manufacturer.

857 DISCRIMINATION

Burden of Proof
    Complainant Must Meet
Safety Complaints to Employer
    Lack of Specificity
Suspension
    Refusal to Perform Work Assignment

MI-D1 97-328 Goslin v Route Steel Company (1997)

Complainant asserted that he was given a three-day suspension because he refused to load stone into an ore car. He denied being told to perform this task. Complainant argued that his suspension was due to the way he filled out the crane check-off list. His supervisors had told him to specifically list the problems he observed with the crane, but Complainant only stated in general fashion that the crane was unsafe.

The ALJ found that the evidence did not show a causal connection between any protected activity and the suspension. Complainant presented no specificity as to whether Respondent was unhappy with his crane complaints. The record did not establish the Complainant filed any health complaint or safety grievance against Respondent.

Also, Complainant had been previously disciplined for not following instructions. The record also did not establish why the Complainant was suspended, but the ALJ concluded that this was not required. Complainant had the burden to show a Section 65 violation. Respondent was not required to prove why Complainant was suspended.

858 DISCRIMINATION

Discharged
Refusal to Work
Demand for Blood Test
Refused to Work
Demand for Blood Test
Whirlpool Decision Discussed
Unreasonable Work Refusal
No Imminent Danger

MI-DI 95-151 Raymond Bujel & Ronald Bujel v (1995)
MI-DI 95-152 J S Alberici Construction Company, Inc

Respondent gave pre-job blood tests to approximately 1,800 employees, including the Complainants. The Complainants made several requests for these results, but the company responsible for taking the blood samples mislocated the files to St. Louis,

Missouri. A Department of Public Health inspection requested by one Complainant resulted in an order to provide the pre-employment blood tests to employees by May 31, 1994. The Department did not find any area to present an imminent danger to employees.

On April 19, 1994, the Complainants came to work but refused to work until they received their blood test results. Respondent directed them to leave. Both left because they were not provided a copy of the pre job blood tests.

The ALJ found no MIOSHA discrimination. The Complainants did not have the right to refuse work. There was no imminent danger at the work site.

859 BOARD REVIEW

Failure to Direct

Result

CIRCUIT COURT REVIEW

No Good Faith Reason for Hearing Absence/Default Judgment

EMPLOYER

Nonappearance at Scheduled Hearing

General Entry for Nonappearance Cases

HEARING

Failure to Appear

96-672 Truchan Tool & Machine (1997)

ER failed to appear at a scheduled hearing. The hearing proceeded pursuant to Section 72(1) of the APA. Testimony was taken from witnesses presented by MIOSHA and the evidence considered concerning the items appealed.

ER did not file a request for rehearing within ten days as permitted by Board Rule 428(2). Although ER filed exceptions, no Board member directed review. The ALJ's Report, therefore, became a Final Order of the Board.

ER filed an appeal to circuit court, but the court affirmed the Board's decision.

860 BOARD REVIEW

Affirmance
Late Employer Petition/Appeal
Failure to Direct
Result

JURISDICTION

Late Employer
Petition/Appeal Abatement
Concentration On
Business Trip
Contacting a Third Party
Employer Too Busy
First Inspection/Citation Good
Friday
Mail Handling
Researching the Issues Small
Employer
Vacations

General Entry for Late Petition/Appeal Cases

The employer filed a late petition for dismissal or appeal and in answer to the Order To Show Cause asserted any of the following:

1. The employer was too busy or the petition/appeal needed to be filed during a busy season;
2. The employer concentrated on abatement;
3. The company is a small employer;
4. This was the employer's first inspection/citation;
5. The employer has a part-time office staff;
6. The citation/decision was misplaced;
7. The person in charge of filing the petition/appeal was out of town on vacation or a business trip;
8. The employer delayed filing to research the issues or contact a third party; and,
9. The employer considered Good Friday to be a state legal holiday.

Being busy does not establish good cause for a late filing. Everyone is busy. If this were permitted to justify a late filing, employers would uniformly offer this as an explanation for a late filing.

860 (Continued)

The concepts of filing a petition for dismissal or an appeal and abating are different. Abatement means correcting the violations pointed out by the safety officer/hygienist within the period specified on the citation. Appealing is the act of protesting a part of the citation - type of violation, description, rule cited, abatement period, or proposed penalty. A petition/appeal may be as simple as "I appeal" but must be filed within the 15 working day period.

Section 41 of MIOSHA provides 15 working days for employers to file a petition for dismissal and an appeal. There are no exceptions for small businesses, those with a part-time office staff, or for a first inspection or citation. The reverse side of the citation and the material sent with the decision advise of the 15 working day period. This information is also provided during the closing conference by the safety officer/hygienist.

Employers are responsible for establishing a reliable mail-handling system. Employees must be trained so that mail is not misplaced and time limits missed even during holiday periods.

Being absent from work due to a vacation or business trip does not present good cause for a late filing. A reasonable employer will assign someone on site to open and answer important mail or call in periodically to direct the handling of important mail.

In the case of Algonac Cast Products, Inc, NOA. 97-58 (1997), a Board member directed review and the entire Board agreed to adopt the ALJ's Findings of Fact and Conclusions of Law regarding these issues.

In other cases concerning these reasons for late filing, the employer filed exceptions with the Board but no Board member directed review within the 30 day review period. Accordingly, the ALJ's decision became the Final Order of the Board by operation of law pursuant to Section 42 of MIOSHA.

A petition for dismissal or appeal need only express an intent to appeal. The 15 working day appeal period may not be extended for the employer to research the citation or contact third parties. See ¶573, delay to wait for air monitoring results; ¶631, delay to consult with an attorney; ¶811, delay to interview workers; and ¶835, delay to consult with a safety consultant.

Respondent argued that Good Friday should not be considered as a working day for purposes of counting the 15 working day appeal period (Section 41 of MIOSHA.) MCL 435.101 lists the legal holidays recognized in the State of Michigan. Good Friday is not included as a "state legal holiday." Section 6(8) of MIOSHA defines "working day" to be any day other than Saturday, Sunday, or state legal holiday. See ¶318.

861 EMPLOYER

Nonappearance at Scheduled Hearing

General Entry for Nonappearance Cases

No Good Cause

GOOD CAUSE – NON APPEARANCE AT HEARING

HEARING

Failure to Appear

Good Cause Not Presented

97-463 Bells Greek Pizza (1997)

ER failed to appear at a scheduled hearing. The hearing proceeded pursuant to Section 72(1) of the APA. Testimony was taken from witnesses presented by the MIOSHA and the evidence considered concerning the items appealed.

ER filed a request for rehearing within 10 days as permitted by Board Rule 428(2), but good cause for the nonappearance was not presented. ER argued that he had to deliver pizzas to the Senate on the day of hearing. The notice was mailed on March 27, 1997, for a July 17, 1997, hearing. The notice stated in bold - "the appeal will be dismissed if the Respondent fails to appear on the above date."

It was ER's responsibility to arrange his schedule to appear on July 17, 1997.

862 CIRCUIT COURT REVIEW
Preemption Interstate Commerce/Powered Industrial Trucks

EMPLOYER
Nonappearance at Scheduled Hearing
General Entry for Nonappearance Cases

HEARING
Failure to Appear

JURISDICTION
Highway Trucks, Loading or Unloading

POWERED INDUSTRIAL TRUCKS
Preemption

PREEMPTION - SECTION 4(b) (1) OF OSHA
Interstate Commerce/Powered Industrial Trucks

96-580 Yellow Freight Systems, Inc. (1996)

ER failed to appear at a scheduled hearing. The hearing proceeded pursuant to Section 72(1) of the APA. Testimony was taken from witnesses presented by MIOSHA and the evidence considered concerning the items appealed.

ER did not file a request for rehearing within ten days as permitted by Board Rule 428(2).

ER appealed to the Ingham County Circuit Court. Citation No. 1, Item 4, was dismissed. The Court concluded that Complainant is preempted by the Department of Transportation, Motor Carrier Safety Regulations, because ER is engaged in interstate commerce. Therefore, Item 4, Rule 2176(1) of the Powered Industrial Truck Standard, Part 21 of the General Industry Safety Standards was dismissed. The ALJ's decision was affirmed in all other respects. Also see ¶30.

863 JURISDICTION
Late Employer Petition/Appeal
Fifteen Working Days
Last Day

97-416 May & Scofield, Inc. (1997)

Good cause was not found where Respondent believed the day after Thanksgiving was a holiday. Respondent also waited until the last minute to file an appeal. Section 6(9) of MIOSHA defines a working day as a day other than Saturday, Sunday, or a state legal holiday. 1865 PA 124, as amended, MCL 435. 101, lists the state legal holidays. The day after Thanksgiving is not such a day. Also, waiting until the last minute to file does not constitute reasonable diligence.

864 EVIDENCE

Quashing

Post Hearing Submission

JURISDICTION

Late Employer Petition/Appeal

Abatement

Concentration On

Employer Too Busy

97-257 Lewis Metal Stamping & Manufacturing Company (1997)

Good cause was not found where Respondent's president was present at the inspection closing conference and knew citations with penalties would be issued. The president knew of appeal procedure because she had used it before. The president also opened the citation envelope and knew there were several willful allegations with penalties. Good cause was not presented by the employer's concentration on abatement and being too busy.

A Show Cause Hearing was held at Respondent's request. Respondent's post hearing evidence submission was quashed because it was found irrelevant to a good cause determination. Since the record was closed after the hearing concluded, the post hearing submission could not be considered.

865 JURISDICTION

Late Employer Petition/Appeal

Good Cause Found

Township Board

Township Board

96-1452 Athens Township Fire Department (1997)

Good cause was found where the Township delayed filing an appeal until after the Township Board met to decide whether to appeal. Since the Board was the Township's decision maker, no appeal could be filed until the Board met.

The parties ultimately entered into a settlement agreement to close the file.

866 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Illness/Death/Resignation
Key Employee
Illness/Death/Resignation
Key Employee
Illness/Death/Resignation

97-111 Chimes Restaurant (1997)

Good cause was found where the owner was ill and away from the business for two weeks.

The parties ultimately entered into a settlement agreement to close the file.

867 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Nonreceipt by Department
Mailing
Nonreceipt by Department

97-233 United Parcel Service (1997)

Good cause was found where the employer presented evidence that the appeal was mailed on time and received by the union and Respondent's attorney within the 15 working day period.

The parties ultimately entered into a settlement agreement to close the file.

868 BOARD REVIEW
Interlocutory Review

DISCOVERY
Document Production
Interrogatories

94-1043 Amoco Production Company (1997)

The ALJ issued an Order Directing Complainant To Respond To Respondent's Interrogatory And Document Production requests. Complainant filed an interlocutory appeal with the Board. The Board decided that it would not review an interlocutory appeal. Complainant's Motion To Review The Order Compelling Discovery was denied.

The parties ultimately entered into a Settlement Agreement to close the file.

869 LEAD EXPOSURE
Bridge Painting

PAINTING
Bridges

SERIOUS VIOLATION
Lead Exposure

97-475 Atsalis Brothers Painting (1998)

The Department's investigation of Respondent was part of the Division's lead exposure emphasis program for the construction industry. The inspection involved two bridge painting contracts Respondent had with the Michigan Department of Transportation (MDOT). Respondent removes old paint from the steel beams of highway bridges by use of an abrasive blasting material and then repaints the steel beams.

Based upon the hygienist's investigation, personal observations, interviews, test results, and records review, Respondent was issued a number of citations under the Lead Exposure in Construction Standard. Under Section 1926.62(d), citations were issued for lead exposure greater than fifty micrograms per cubic meter of air averaged over an eight hour period, failure to collect personal air samples in each work area, failure to notify each employee in writing within five days of their exposure assessment, failure to make certain medical procedures available to its employees at certain time frequencies, failure to establish and maintain an accurate exposure to lead, returning certain employees to their former positions too early after testing at or above 50 ug/dl, failure to properly post a lead warning sign in the work area, and failure of three employees to wash their hands and faces prior to eating, drinking, and smoking.

869 (Continued)

Respondent's argument that the company had a written lead safety program at the time of inspection and that the company had implemented adequate engineering and work practice controls was not accepted because the hygienist observed employees not washing their hands and faces prior to smoking, eating, and drinking while an officer of the company also observed this activity. Respondent failed to produce any documentation to support its claim that the exposure conditions for both contracts were the same. Respondent's argument that they gave oral notice for employees to get tested and that the department must produce these employees at the hearing was not accepted. The ALJ held that the purpose of MIOSHA regulations is for employers to keep credible records to substantiate their compliance with the Act. Enforcement would be impossible if the department had to interview every witness and produce them at trial after the investigation of business records showed a violation of the Act. Also, this information is more readily available to the employer. Respondent did not produce any records to show that their employees were properly notified and monitored.

The violations were found to be serious because the substance at issue was lead, a serious health hazard. A review of Respondent's medical records showed that over 30 employees worked on the MDOT contracts. Six of the employees had blood levels over 50 ug/dl, 10 had blood levels between 40 and 50 ug/dl, and 16 of 30 employees are over a 50 percent violation. The medical records of Respondent revealed that 3 of Respondent's employees were exposed to lead at concentrations 700 times the permissible exposure limit.

Although Respondent filed exceptions, no member of the Board directed review of the ALJ's proposed decision. Therefore, this proposed decision became a final order of the Board pursuant to Section 42 of MIOSHA.

870 BOARD REVIEW

Affirmance

Late Employer Petition/Appeal

JURISDICTION

Late Employer Petition/Appeal

Vacations

97-1011 Jackson Tumble Finish (1998)

Good cause was not found where the person in charge was gone on vacation and no one opened the citation packet in his absence. The ALJ found that a reasonable employer will make arrangements to have important mail answered or call in periodically to direct responses.

Although Respondent filed exceptions, no Board member directed review of the ALJ's Order Dismissing Appeal. Therefore, this Order became a final order of the Board pursuant to Section 42 of MIOSHA.

871 JURISDICTION

Late Employer Petition/Appeal

Confusion

Over Notice of Hearing for Prior Citation

97-1065 Meridian, Inc. (1997)

Respondent argued that they were confused because a Notice of Hearing for a citation issued for a prior inspection came during the appeal period for the more recent inspection and citation. Respondent had filed a timely petition for dismissal and the Department issued a decision received by Respondent June 30, 1997. The Notice of Hearing was issued June 24, 1997, setting a hearing for December 4, 1997, to address the prior inspection/citation. The ALJ found Respondent did not exercise reasonable diligence. While the Notice of Hearing did not specifically state the subject matter to be addressed at hearing, the notice did specify the items, citation number, and inspection number. It is reasonable to expect an employer to match up this information. Good cause was not found for the late filing.

872 DISCOVERY

Interview Statements
Questionnaires

GENERAL DUTY CLAUSE

Herpes B-virus
Knowledge
Actual or Industry Recognition

MOTION TO DISMISS

Interview Statements
Premature
Questionnaires

90-15 International Research and Development (1995)

Respondent is a contract research facility. It performs safety evaluation studies for government agencies such as the U.S. Food and Drug Administration and pharmaceutical, agricultural, chemical, and consumer industries. An employee failed to report a wound from a laboratory primate and later died from a herpes B-virus infection. As a result of its investigation, the Department's Occupational Health Division issued two citations containing six items. Five of these alleged violations were of the MIOSHA GDC. Four were issued as willful and one as serious.

The GDC violations were based on an article published in a pamphlet Morbidity and Mortality Weekly Report, Volume 36, No. 41, October 23, 1987, issued by the Centers for Disease Control entitled, "Guidelines for Prevention of Herpesvirus Simiae ('B-virus') in Monkey Handlers."

Respondent filed a Motion To Dismiss before trial and presented oral argument. The ALJ issued an Order in two parts. Part 1 denied the Motion To Dismiss as premature since no evidence had yet been presented. The Respondent's Motion to prevent the Department from using guidelines issued by the Centers for Disease Control to prove GDC violations was denied. The Department argued that Respondent's failure to follow these guidelines was evidence of willfulness. The ALJ relied on Brennan v OSHRC and Vy Lactos Laboratories, Inc, 494 F2d 460 (CA 8, 1974), and concluded that the Department may attempt to prove a GDC violation either by showing actual knowledge or industry recognition.

872 (Continued)

Part 2 concerned Respondent's concern over the Department's use of questionnaires distributed to Respondent's employees and ex-employees. Respondent's attempt to learn the identity of those who completed the questionnaires was denied by Complainant. Respondent also wanted the names of employees who gave interview statements to the Department. These were supplied but the names were deleted. The ALJ excluded survey results obtained by the Department as not being the type of evidence relied on by reasonable people. He noted that the questionnaires and results were not mentioned on the citations. Also, interview statements obtained during the investigation would not be accepted at trial unless Complainant followed Section 74(2) of the APA by providing Respondent with employee identities for statements offered.

The case was ultimately settled by the parties. The Department dismissed all willful violations and two items entirely. Respondent accepted serious violations for three items remaining and agreed to pay a $3,000 penalty.

873 DISCOVERY

Interrogatories
Request for Information

MOTION TO DISMISS

Information Not Provided

95-873 Brillcast. Inc. (1998)

The ALJ ordered Complainant to provide information to Respondent:

1. The hazards resulting in issuance of the citation. The type of work being performed by employees while exposed to the claimed hazards;
2. The names, job titles or "any other available means of identification" for employees that the Complainant claims were exposed to the hazards resulting in the citation; and,
3. The meaning of "head protection" and an explanation for how this protection would protect against the hazards described in No. 1 above.

After Complainant failed to provide this information, Respondent filed a Motion To Dismiss the citation. Before the ALJ ruled on this Motion, Complainant filed a Motion To Dismiss the citation. The Complainant's Motion was approved by the AU and the case was closed.

The Order requiring Complainant to provide information to Respondent was reissued to allow Board review. No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

874 HEARING

Failure to Appear
Board Review

96-1142/98-104 GMC, Powertrain Willow Run Plant (1998)

Respondent failed to appear for a prehearing and hearing. Since Respondent did not appear at the scheduled prehearing conference, the hearing convened and testimony was taken from Complainant's witnesses. A decision was issued affirming the citations on appeal.

Respondent filed exceptions with the Board. Review was directed. The Board remanded the case for further proceedings. The Board found Respondent's affidavits to be persuasive proof that Respondent did not receive the Notice of Prehearing Conference and Hearing. After a prehearing conference, the parties entered into a Settlement Agreement which closed the file.

875 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Department Communication

97-565 Rhe-Tech, Inc. (1998)

Good cause for a late appeal was found where the employer made several telephone calls to the Department during the 15 working day appeal period attempting to find out why the petition for dismissal had been denied and also the days considered "working days" in December for purposes of filing a timely appeal. Respondent did not receive an adequate timely response during the appeal period. The parties entered into a Settlement Agreement and the case was closed.

The Order Finding Good Cause For Late Appeal was reissued to allow Board review. No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

876 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Citation Not Sent to Proper Employer Representative

97-729 Fasco DC Motors Division (1998)

Good cause for a late petition for dismissal was found where the citation was not sent to the employer representative who attended the opening conference, walk-around inspection, and closing conference. Instead, the citations were sent to Respondent's Operations Manager who denied ever seeing them. The ALJ found that the citations should have been sent to the person who represented the company during all phases of the inspection. The parties entered into a Settlement Agreement and the case was closed.

The Order Finding Good Cause For Late Petition was reissued to allow Board review. No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

877 APPEAL

Timely Filed

JURISDICTION

Late Employer Petition/Appeal
Timely Filed

97-871 Precision Plastic & **Die Company (1998)**

An Order To Show Cause was issued because the file showed a late appeal faxed June 1, 1997, from a May 5, 1997, Department decision received on May 6, 1997. However, during the response period, the Department sent a copy of the envelope in which the May 5, 1997, decision was sent. The envelope had a May 7, 1997, postmark. This meant that the employer could not have received the decision on May 6, 1997, as stamped on the postal receipt. The decision was also initially mailed to the wrong address and then remailed to the correct address on May 10, 1997. Accordingly, an Order Finding Timely Appeal was issued. The parties entered into a Settlement Agreement and the case was closed.

The Order Finding Timely Appeal was reissued to allow Board review. No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

878 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Key Employee
Turnover
Key Employee
Replacement

97-963 Manchester Plastics, Inc - Homer Division (1998)

Good cause for a late petition for dismissal was found where the employer suffered a turnover of key people. It was found reasonable for the employer to assign MIOSHA responsibility to one person. When this person leaves, paperwork duties can be missed. The parties entered into a Settlement Agreement and the case was closed.

The Order Finding Good Cause For Late Petition was reissued to allow Board review. No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

879 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Combination of Factors

97-367 Detroit Edison Company, Trenton Channel Power Plant (1998)

Good cause for a late appeal was found where the appeal was one day late and the appeal period coincided with the end-of-the-year holidays. Respondent was closed during this time but had met with Department representatives to narrow issues. The ALJ found that the combination of the holidays, employee time off, and the unexpectedly prompt mail delivery of the Department's decision all contributed to a one day late filing. The evidence did not establish carelessness, negligence, or a lack of reasonable diligence. The parties entered into a Settlement Agreement and the case was closed.

The Order Finding Good Cause For Late Appeal was reissued to allow Board review. No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

880 AMENDMENT

Employer Identity
Freely Given – Prejudice

97-929 Harthun Construction (formerly R M I Construction Inc.) (1998)

Complainant's Motions To Amend the identity of the employer and the cited rule were approved by the ALJ As noted in the Order, amendment of citations should be freely granted unless prejudice can be shown by the employer. The employer filed a statement accepting responsibility for the citation and the case was closed.

The Order Approving Motion To Amend was reissued to allow Board review. No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

881 JURISDICTION

Late Employer Petition/Appeal
Informal Settlement Process
Assumptions Based on Department Communication
Oral Filing
Written Petition/Appeal is Required

98-437 Granola Kitchens, Inc. (1998)

During the first 15 working day appeal period, the employer contacted the Department to enter into an informal settlement agreement. All items were resolved but one. The agreement contained the language: "firm retains appeal rights on cit #1 item #14." However, the employer did not file an appeal for Item 14 within the 15 working day appeal period. Respondent argued that he assumed by signing the agreement, it was understood he was also appealing Item 14. The ALJ found that good cause is not presented when an employer makes an unjustified assumption that his oral discussion with the Department constituted an appeal.

882 BURDEN OF PROOF

Established by Safety Officer Testimony
Photographic Evidence Not Required

CRANES

Competent Person
Guarding Radius of Superstructure
Hydraulic Leaks
Weld Cracks
Worn Sheaves

ELECTRICAL

Ground Fault Interrupter
Grinder
Tunnels

EMPLOYER DEFENSES

Greater Hazard
Ground Fault Interrupter
Tools
Double Insulation

GENERAL vs SPECIFIC

Ground Fault Interrupters v Assured Grounding Program

HELMETS

Lifting Operations

TUNNELS

Emergency Crew
Ground Fault Interrupters
Rescue Equipment

95-847 Jay Dee Contractors, Inc. (1998)

Complainant cited Respondent for the following violations observed by the safety officer during an inspection of Respondent's tunneling activity in East Lansing, Michigan. Part 6, Rule 622(1), Lifting and Digging Equipment; Part 10, Rule 1926.550(a)(5); Rule 550(a)(9), Tunnels, Shafts, Caissons, and Cofferdams; Part 14, Rule 1463(11), Rule 1466(4), and Rule 468(1); and Electrical Installations, Part 17, Rule 1725(11).

The safety officer observed Respondent's employees engaged in a welding/rigging/lifting operation. During the lifting operation, the welder/rigger was standing in direct proximity as the loads were being lifted and lowered. A citation was issued for an employee's failure to wear a helmet. The citation was affirmed by the ALJ based upon the testimony of the safety officer.

882 (Continued)

A violation of Part 10 of the Lifting and Digging Equipment was affirmed because the safety officer testified that cracks in the welds, hydraulic leaks, and worn sheaves affected the integrity of the crane and its ability to perform in a safe manner. Respondent's argument that the citation should be dismissed because they designated a competent person who decided that the crane was only lifting a couple of 100-pound steel members was rejected. The "competent person" admitted to the safety officer that he was aware of the defects but was trying to keep the machine running. The ALJ found that there was a duty to take the crane out of use until the defects were corrected.

The ALJ affirmed the citation for a violation of the swing radius of the rear of a rotating crane. Respondent's argument that the citation should be dismissed because there was no photographic evidence was rejected. The ALJ determined it to be unreasonable to expect a safety officer to have a complete video or photographs of every citation issued. A safety officer can testify from his observations and notes made during the inspection.

A citation for violation of Part 14, Rule 1463(11), was affirmed by the ALJ because Respondent did not have a specific 10-ton jack near the tunnel opening. Respondent's argument that the citation should be dismissed because they hired and trained a fire department as a rescue crew was rejected because Respondent cannot delegate its responsibility. The rule does not define "top of the shaft," but the rule does distinguish between the term "crew" and "team." The intent of the rule is to ensure that the emergency crew provides immediate first aid and that a "rescue team" be provided to come to their assistance. Respondent's contract with the East Lansing Fire Department relates to the "rescue team." Respondent still had a duty to provide a "crew" and rescue equipment at the top of the shaft for full and instant use.

A violation of Tunnels, Shafts, Caissons, and Cofferdams, Part 14, Rule 1466(4), requiring ground fault interrupters was affirmed by the ALJ finding that the specific rule must be cited over the general rule. Part 14 specifically applies to the facts presented. Respondent's argument that Part 17 applies was rejected. Although Respondent could have provided safety with an assured equipment grounding system as provided in Part 17, this program was not sufficient. The citation did not apply to portable lighting as Respondent argued. The ALJ found that neither Part 14 nor Part 17 allowed an employer to use an unguarded lighting system. The ungrounded system utilized by Respondent was not as effective as compliance with Part 14. Respondent failed to show that compliance with the cited rule would require a "greater" hazard. Also, double insulation of tools is not a substitute for a ground fault circuit interrupter.

882 (Continued)

The ALJ affirmed a violation of electrical installations, Part 17, Rule 1725(11), because a grinder in use was not provided with a ground fault circuit interrupter. Respondent's argument that a ground fault circuit interrupter was not required because the tool was "double insulated" was rejected. Although Respondent could provide safety with the assured equipment grounding system, the proofs did not establish that this program was sufficient because Respondent did not check all the cords every day, but only at the expiration of a three-month period. See Rule 1722(2)(c).

Respondent filed exceptions with the Board but no Board member directed review within the 30 day review period. Accordingly, the ALJ's decision became the final order of the Board by operation of law pursuant to Section 42 of MIOSHA.

Respondent appealed the decision to the Circuit Court. The Court issued an oral opinion on October 7, 1999, and a final order reversing Item 5 of Citation No. 1 on January 4, 2000. This item addressed Rule R 1466(4) which requires ground fault interrupters. The Court affirmed all other issues decided by the ALJ. The Department moved for a rehearing on the grounds that the ALJ's decision on Item 5 (which became a final order of the Board) meets the requirements of the Administrative Procedures Act and that it is supported by competent, material, and substantial evidence on the whole record. This motion is pending.

883 BOARD REVIEW
Failure to Direct Result

JURISDICTION
Late Employer Petition/Appeal
Attorney Failure to File
Mail Handling
Delay in Forwarding to Proper Person
Mailing
Presumption of Receipt
Presumption of Receipt

98-669 Builders Square #1490 (1998)

Respondent's attorney filed a timely petition for dismissal. The Department issued a timely decision and sent the decision to Respondent's store and Respondent's attorney. The attorney denied receipt of the decision. The mailing to the store was unopened because the manager was no longer employed. The ALJ found that there is a rebuttable presumption that mail that is properly addressed and stamped is received by the addressee. Respondent presented no evidence to rebut the presumption that the Department's decision was received by Respondent's attorney. It was also found to be unreasonable for Respondent to leave the Department's decision sent to the store unopened.

Respondent filed exceptions but no Board member directed review within the 30 day review period. Accordingly, the ALJ's decision became the final order of the Board by operation of law pursuant to Section 42 of MIOSHA.

884 JURISDICTION

No Explanation for Late Filing

MOTION IN LTMINE

98-633 Concord Precision, Inc. (1998)

Respondent did not file a petition for dismissal within the 15 working day period. However, because Respondent found the behavior of the safety officer objectionable during the follow-up inspection, five months after the first, Respondent filed an untimely petition for dismissal. After a Motion in Limine was argued, the ALJ granted Complainant's Motion to restrict Respondent's evidence to events that transpired in proximity to the 15 working day period. The events surrounding the follow-up inspection were found to be immaterial and irrelevant to the issue of whether good cause exists for Respondent's late petition for dismissal. With this restriction, Respondent had no explanation for the late petition for dismissal.

885 JURISDICTION

Late Employer Petition/Appeal

Business Move

Good Cause Found

Business Move

93-1566 Western Waterproofing, Inc. (1994)

Good cause for a late petition for dismissal was found where the employer was in the process of moving to a new location after more than 80 years at the former address. The citation was issued during the move and lost after receipt. The ALJ found that even with reasonable preparation and care, mistakes can occur. The parties settled the items on appeal after a prehearing conference.

The Order Finding Good Cause For Late Petition was reissued to allow Board review. No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

886 JURISDICTION

Late Employer Petition/Appeal

Good Cause Found

Key Employee

Family Illness

98-40 Pleasant Ridge Investors, LLC (1998)

Good cause for a late petition for dismissal was found where the employer representative was out of town attending to his mother suffering from pneumonia. The parties settled the items on appeal after a prehearing conference.

The Order Finding Good Cause For Late Petition was reissued to allow Board review.

No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

887 JURISDICTION

Late Employer Petition/Appeal

Good Cause Found

Department Communication

98-82 Lockwood Manufacturing Company (1998)

Good cause for a late petition for dismissal was found based on Respondent's assertion that he called the Department hygienist early in the appeal period. The letter sent with the citations invited a call if there were any questions. The hygienist did not return the call. The petition was late because the employer was waiting for a return call**.** The

Department did not respond to Respondent's assertion. The ALJ found that the employer reasonably relied on receiving a return call before filing the petition. The parties settled the items on appeal after a prehearing conference.

The Order Finding Good Cause For Late Petition was reissued to allow Board review.

No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

888 BOARD REVIEW

Remand

For Prehearing Conference

DISCOVERY

Depositions

Interrogatories

Request for Information

EMPLOYER

Nonappearance at Scheduled Hearing

Notice Improperly Sent

HEARING

Failure to Appear

Board Review

97-2018 New Center Stamping, Inc. (1998)

ER failed to attend a scheduled hearing. Notice for the hearing was sent to local counsel and not the out-of-state attorney. The local attorney assumed the out-of-state attorney would attend and the out-of-state attorney did not know of the hearing. The hearing proceeded pursuant to Section 72(1) of the APA. Testimony was taken from witnesses presented by MIOSHA and the citations were affirmed. The Order also reissued for Board review an earlier Order Allowing Interrogatories. Request For Production Of Documents And Deposition.

ER filed exceptions and the Board remanded the matter for a prehearing conference. The parties ultimately settled the case in a Settlement Agreement approved September 10, 1999.

889 BOARD REVIEW

Remand

For Good Cause Consideration

98-312 Nakota Industries, Inc. (1998)

Good cause for a late petition for dismissal was not found because Respondent had made only a general assertion of illness. The ALJ provided an opportunity for more detail but nothing was filed.

In the exceptions filed with the Board, Respondent asserted that a further explanation had been filed but that it was sent to the Occupational Health Division and not the Office of Hearings. The Board voted to remand for the ALJ to consider this explanation.

890 JURISDICTION

Late Employer Petition/Appeal
Contacting a Third Party
Attorney from Industry Group
Fifteen Working Days
Statutory
Cannot Be Extended

98-200 Allied Systems, Ltd (1998)

Good cause for a late petition was not found where the delay was caused because the employer attempted to find an attorney from the industry group. The citations were sent to the manager who took part in the inspection and the Vice President of Maintenance. The manager was instructed to find an attorney from the industry group, but the manager misunderstood the instruction and instead found an attorney only to research the issues. After an attorney was found to file an appeal, another employer official determined that the attorney had a conflict of interest. The employer also delayed the filing due to a mistaken belief that a Department employee bad granted a time extension to file the petition. The Department provided an affidavit from the employee that made it clear he only extended the abatement period, not the statutory time for filing the petition for dismissal.

The ALJ found that prior Board decisions did not find good cause where the late filing was caused by contacting a third party. Also, no Department employee has the authority to extend a statutory filing period. The information provided the employer with the citation clearly stated how a timely petition could be filed. The employer chose to make the process much harder than necessary. A one sentence letter saying "I appeal" is all that the Act requires.

The Board reviewed the ALJ's decision and voted to affirm.

The Wayne County Circuit Court affirmed holding that the decision of the ALJ "finding that petitioner had not shown good cause is supported by competent, material and substantial evidence on the whole record and this court finds no reason to reverse or modify the decision and it is affirmed."

The Court of Appeals denied leave to appeal.

The Supreme Court denied leave to appeal from the decision of the Court of Appeals.

891 JURISDICTION

Late Employer Petition/Appeal
Business Move

98-998 Western Waterproofing (1998)

In an earlier Western Waterproofing case, NOA 93-1566 (1994), digested at ¶885, good cause for a late petition for dismissal was found where the employer was in the process of moving to a new location after more than 80 years at the former address. The citation was issued during the move and lost after receipt. The ALJ found that even with reasonable preparation and care, mistakes can occur. In the case NOA 98-998, the employer filed an appeal six years after an additional citation was lost because of the move. The ALJ referred to a similar issue in Patterson Laboratories, Inc, NOA 97-256 and 97-375 (1997), digested at ¶848, and concluded that while the employer's explanation was acceptable in the prior Western case, it was unreasonable for Respondent to sit back and do nothing after being put on notice that other Department citations may have been lost in the move. A reasonable employer, after having been alerted to this issue, would have contacted the Department for other possible mailings that had not been received. Good cause was not found for the late petition in the second Western case.

892 APPEAL

Dismissed
Settlement Agreement Not Submitted

BOARD REVIEW

Remand for Settlement

96-116 Detroit Edison Company, Trenton Channel Power Plant (1998)

Respondent requested a hearing adjournment asserting that the case would be "settled or otherwise dismissed within 30 days." After 60 days passed without submission of a Settlement Agreement, the ALJ dismissed Respondent's appeal,

A Board member directed review based on Respondent's exceptions. The Board voted to remand for processing of the Settlement Agreement.

893 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Key Employee
Newly Hired
Penalty Only Appeal

98-791 Robinson Industries, Inc. (1998)

Good cause for a late petition for dismissal was found where Respondent hired a new personnel director who attended to the citation as soon as he discovered the package. The ALJ observed that "Having key people leave an organization is disruptive. New people, even if trying their best, often make mistakes during training." Good cause was also found because Respondent did not desire to contest the citation but only to review the proposed penalty amounts. The parties settled the case as a result of the prehearing conference.

The Order Finding Good Cause For Late Petition was reissued to allow Board review. No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

894 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Department Communication
Penalty Only Appeal

98-381 Cedar Fire Department (1998)

Good cause for a late petition for dismissal was found where the employer contacted the Department for clarification as to when the petition needed to be filed. Respondent misunderstood the information provided and filed a late petition. The ALJ found that the employer relied on what he believed he was told. Respondent acted reasonably by calling the Department for guidance. Also, Respondent did not desire to contest the citation but only to review the proposed penalty amounts. The parties settled the case as a result of the prehearing conference.

The Order Finding Good Cause For Late Petition was reissued to allow Board review. No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

895 JURISDICTION

Late Employer Petition/Appeal

Good Cause Found

Informal Settlement Agreements (ISA)

98-772 S **K Y (Sakaiva) Corporation** **(1998)**

Good cause for a late petition for dismissal was found because the employer did not intend to appeal the citation. Respondent intended to sign an ISA and thus obtain a 50 percent penalty reduction but misunderstood the time period for making this request. The parties settled the case as a result of the prehearing conference.

The Order Finding Good Cause For Late Petition was reissued to allow Board review. No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

896 JURISDICTION

Late Employer Petition/Appeal

Good Cause Found

Citation Amendment

94-1307 McElroy Metal, Inc. **(1998)**

Good cause for a late appeal was found where the Department's decision in response to the petition amended the cited machine's description and extended the abatement date but did not address the employer's argument that the machine was a powered bending machine and not a press brake. The ALJ found that the employer reasonably concluded that no further appeal was necessary since the Department had not decided the "powered bending machine v press brake" issue. The parties settled the case as a result of the prehearing conference.

The Order Finding Good Cause For Late Appeal was reissued to allow Board review. No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

897 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Confusion
Multiple Inspections

97-708 Fitzgerald Finishing Company (1998)

Good cause for a late petition and appeal was found where citations from two inspections were erroneously combined by the employer causing late filings. Both inspections took place in early October 1996 and all citations were issued in November 1996. The ALJ found good cause based on reasonable confusion over two sets of citations issued days apart and relating to the same pieces of equipment. The parties settled the case as a result of the prehearing conference.

The Order Finding Good Cause For Late Petition and Appeal was reissued to allow Board review. No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

898 AMENDMENT

At Hearing
Notice to Respondent

EMPLOYER DEFENSES

Greater Hazard
New Hazard Not Enough

INJURY

Not Needed to Establish Violation

STANDARD

Amendment
Interpretation
Remote

WITNESSES

Impeachment

92-1169 A **P Parts Manufacturing Company Northern Tube Division (1997)**

The citations litigated by the parties concerned point of operation (POP) guarding. The rules at issue concerned Part 26 of the GISS, Rule 2642(1) and Rule 2646, which require a barrier or guard to protect the operator from the POP pinch points. The machines at issue were powered clamping devices where the employee holds the part with one (or both) hand(s) while activating the machine by pushing a button with the other hand or a foot.

898 (Continued)

Both rules direct that the operator be "remote" from the POP. The definition of the term "remote" was changed with a December 5, 1991, amendment to mean situations where the operator cannot, because of distance or location, place any part of the body within the POP. Prior to the amendment, "remote" meant the operator would not be required or expected to place any part of the body within the POP.

The ALJ affirmed serious and other than serious violations as written. A Department Motion To Amend during the hearing was denied. The Department wanted to change other than serious violations to serious. The Motion was denied because Respondent did not have any opportunity to respond.

Respondent alleged a greater hazard but only presented additional hazards, not proof of a greater hazard. Respondent also defended by pointing out a complete absence of injuries over an extended time period. The ALJ pointed out that proof of injuries is not required to prove a violation.

The Board directed review and voted to affirm the ALJ's proposed decision.

Respondent appealed the Board's decision to the Bay County Circuit Court. The Court acknowledged its decision is governed by all sections of MCL 24.306 and found that the Board's decision was supported by competent, material, and substantial evidence on the whole record, that the plain meaning of the word "remote" was used in interpreting the statute, and that no proof was needed that employees were actually exposed to a health or safety hazard before a violation could be found. The Court also found that the safety standards were not unconstitutionally vague, that the Board's decision was not affected by other substantial and material error of law, and that Northern Tube's reading of Rule R 2642(1) was without merit. The safety standards cited by the Department were not void for vagueness.

However, the Court remanded the case to the Board for further proceedings concerning the following issues:

1. Whether application of Rule 2642 and Rule 2646 of the metal working machinery rules (R 408.12642 and R 408.12646) to the cited machines may violate substantive due process and, if so, whether these rules may be interpreted and applied to these machines in such a way as to avoid a due process violation.
2. Whether enforcement of the standards is precluded because a "greater hazard would result from compliance."

898 (Continued)

The Board voted to remand the case to the Office of Hearings to monitor settlement discussions and set for further hearing, if necessary.

899 JURISDICTION

Late Employer Petition/Appeal
Key Employee
Illness/Death/Resignation
Employer Must Hire Staff

99-22/99-935 Industrial Fabricating Systems, Inc. (1999)

Good cause for a late petition for dismissal was not found where the key employee relied on by the employer died a month and a half before the citation was received. Sufficient time had elapsed after the death of the key employee for the employer to assign a replacement employee. Also, the paperwork sent with the citation provided sufficient information for one not familiar with the process to know a petition for dismissal had to be filed within 15 working days. Also, see ¶523, ¶608, and General Entry ¶860.

The Board voted to remand for a prehearing conference. The Board found the individual responsible for perfecting Respondent's appeal to have been incapacitated.

After a prehearing conference, the parties settled in an agreement approved January 14, 2000.

900 JURISDICTION

Late Employer Petition/Appeal

Good Cause Found

Department Communication

98-715 Melema Electric Company (1999)

Good cause for a late petition for dismissal was found where the employer called the Department and was told to talk to a specific individual. The employer made several calls to this individual but by the time the two actually spoke, the appeal period had expired. The ALJ found good cause because the employer made a reasonable attempt to discuss the citation with the Department. The failure to file a timely petition was not due to carelessness, negligence, or a lack of reasonable diligence. After a prehearing conference, the parties entered into a Settlement Agreement to close the case.

The Order Finding Good Cause For Late Petition was reissued to allow Board review. No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

901 BOARD REVIEW

Direction for Review

Withdrawal

MOTION TO DISMISS National

Electrical Code

NATIONAL ELECTRICAL CODE

Electric Utility Exemption

95-1384 Consumers Power Company (1999)

Respondent installed a temporary wiring system to transmit electric power to a high school. This wiring system was owned, installed, maintained by, and under the exclusive control of Respondent. Complainant cited Respondent because the wire supplying energy caught fire. Respondent argued that the National Electrical Code contains an exemption in the Scope section, 90-2(5), for installations under the exclusive control of an electric utility. After the parties filed briefs on the issues, the ALJ approved Respondent's Motion To Dismiss finding that the wiring in question was owned by and under the exclusive control of Respondent, an electric utility. Also, the system was installed out-of-doors for the distribution of energy. The fact that the same facts would allow an electrical contractor to be properly cited does not require a different conclusion because Respondent, a utility, clearly fell within the exemption provided by the National Electrical Code.

Complainant filed exceptions and a Board member directed review. The Board voted to withdraw the direction for review. Based on Section 42, the ALJ's Order became a final order of the Board.

902 BOARD REVIEW
Affirmance

DISCOVERY
Document
Production Enforcement
Informer's Privilege
Subpoenas

DUE PROCESS
Subpoenas
Unredacted Department Records

HEARING
Orders of ALJ
Failure to Follow

MOTION TO DISMISS
Trial Preparation

PRECEDENT
Section 46(6)

PRE HEARING PROCEDURES
Motion to Dismiss

SUBPOENAS
Enforcement
Unredacted Department Records

98-407 Kurdziel Iron of Rothbury, Inc. (1999)

The ALJ approved Respondent's Motion To Dismiss because Complainant refused to comply with a subpoena and two additional directions to provide Respondent with records of what prospective witnesses told Complainant's safety officer during the investigation and which witnesses Complainant planned to call at trial.

Complainant's Motion to recognize an informer's privilege based on Section 46(6) was rejected. This privilege is not a standard promulgated by OSHA or MIOSHA and, therefore, need not be followed based on Section 46(6) of MIOSHA. It is also not a concept such as "due process" which should be followed by the Board and its ALJ's as was decided in William Ferrel, Inc., NOA 76-347 (1977), ¶202. Complainant argued that even though the informer's privilege is not a standard, it is followed by the Federal Review Commission and should, based on Section 46(6) and the rationale expressed in

902 (Continued)

the Ferrel case, be followed by the ALJ. In Ferrel, the employer was not placed on notice that its basket lifting device was unlawful. Federal decisions were examined to support vacating the citation based on the Complainant's failure to put the employer on notice as to what conduct was prohibited. The similar concept applied based on Section 46(6) was "due process." In Kurdziel, the ALJ rejected this argument finding that the informer's privilege is not a concept such as "due process" which is a fundamental part of both OSHA and MIOSHA which should be followed by the Board based on Section 46(6).

Complainant's citation was dismissed based on Complainant's lack of compliance with ALJ orders. The ALJ has the power to enforce an order of discovery. Such an action was affirmed by the Circuit Court in Chrysler Corp, Warren Stamping, NOA 79-1392 (1981), aff'd, Ingham County Circuit Court No. 81-27784AA (1983), ¶205.

The Complainant filed exceptions and a Board member directed review. The Board voted to uphold the AL's Order Dismissing Citation.

903 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Penalty Only Appeal

98-256 National Bulk Equipment, Inc. (1998)

Good cause was found where the employer believed the employer was to immediately send the penalty after deducting 70 percent. All citations were immediately corrected. The employer did not want to contest the citations but only consideration over the proposed penalty amounts.

The employer misunderstood the safety officer's instructions and sent in a reduced penalty amount. The goal of MIOSHA is to secure compliance with safety standards. Since abatement was achieved, it was found reasonable to permit Respondent an opportunity to seek penalty reductions.

Respondent ultimately withdrew the appeal and the citation, including the original penalties, was affirmed.

The Order Finding Good Cause For Late Petition was reissued to allow Board review. No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

904 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Penalty Only Appeal

98-195 Orion House, Inc. (1998)

Good cause was found where the employer mistakenly believed all violations had to be corrected before a petition for dismissal could be filed. The employer did not want to contest the violations but only consideration over the penalty amounts. The goal of MIOSHA is to secure compliance with safety standards. Since Respondent immediately abated, it was found reasonable to permit the Respondent an opportunity to seek penalty reductions.

Respondent ultimately withdrew the appeal and the citation, including the original penalties, was affirmed.

The Order Finding Good Cause For Late Petition was reissued to allow Board review. No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

905 DISCRIMINATION

Evidence
Relative in Charge of Equipment
Probation Period
Union Employees Called First
Refused to Work
Water Blasting

MI-DI 98-8 Flathers v Power Vac Service, Inc. (1997)

On November 29, 1996, Complainant, a probationary employee, refused to do a water blasting job without a face shield. His brother-in-law was the crew chief in charge of safety equipment. The safety department at Ford Motor Company, where the work was being performed, decided that the work not be done because of poor air circulation. After this incident, Complainant worked one more day on December 4, 1996, but was not called back thereafter.

The ALJ found that Complainant was not called back because he was a probationary employee. The union contract required that union employees be called before those on probation. Due to a slow period, from December 1996 through March 1997, even union employees were not called back to work. The ALJ found it unlikely that Respondent would take action against Complainant when it was the crew leader, Complainant's brother-in-law, who decided whether the work should be performed.

906 DISCOVERY

Document Production

Privileged

Hearing

Order Required

BEARING

Discovery

90-1771 E & L Transport Company (1992)

The ALJ issued an Order Dismissing Citation because Complainant and the employee group failed to respond to Respondent's Motion To Dismiss or in the alternative to Compel Discovery. Complainant and the employee group had been given 30 days to respond to these Motions.

The Board remanded the case to the ALJ finding:

> * * *The Board directs that a formal discovery hearing be conducted on the record to ensure that the documents sought by Respondent are provided by Complainant, unless they are privileged or otherwise exempt from disclosure.
>
> If further discovery is necessary it shall be incorporated into an order setting forth the material sought by the parties. A hearing on the merits shall then be held if the parties are unable to resolve their dispute.
>
> The Board suggests that the discovery procedures and process be reviewed to prevent further occurrences such as this incident. The Board also urges that when directives are issued, that they be in writing, noting that no formal order compelling discovery was actually issued in this case. Instead, the parties had to respond to motions.

The case was closed with a Settlement Agreement in which Complainant amended Item 1, a willful serious alleged violation with a proposed penalty of $8,000, to a serious violation with $800 proposed penalty. Respondent withdrew its appeal to the item, as amended.

907 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Not Established
No Protected Activity
Discharged
Failure to Clean Tank
Evidence
Inspection Did Not Support Complaint
No Retaliation for Prior Work Refusal
Refused to Work
Tank Cleaning

MI-DI 97-304 Strobel v Hi Tech Surfacing, Ltd (1997)

In the fall of 1995, Complainant experienced choking, throat pain, and a runny nose while mixing chemicals. She had shortly before been transferred to this operation. Upon being notified of this problem, Respondent transferred Complainant to the job of "tool picking." On May 22, 1996, Complainant was told to perform the "clean-up/alloy tank" job. She had previously performed this job with no complaint. On May 22, 1996, however, she refused, expressing concern over her health from the lead alloys in the tank. A Department hygienist inspected the operation and testified that the temperature for the alloy was too low to create metal fumes and, in the manner used, would not generate airborne particles. Air monitoring found no need for masks or respirators.

The ALJ found no violation of Section 65. The burden of proof is on Complainant who must show that the job refusal was a substantial reason for the discharge. Here, there was no protected activity. Complainant had previously performed the tank cleaning operation with no complaint. Also, when she previously had a physical problem supported by her physician, she was moved to a different assignment with no retaliation.

908 DISCRIMINATION

Settlement
On the Record

MI-DI 98-385 Colby v Challenge Manufacturing (1998)

The parties entered into a settlement on the record but thereafter Complainant expressed a desire to back out of the agreement. The ALJ issued an Order approving the settlement entered into on the record and attached a copy of the transcript.

909 DISCRIMINATION

Dismissed
- Lack of Prosecution

Hearing
- Notice of
  - Presumption of Receipt

Mailings
- Presumption of Receipt

Rehearing Request

MI-DI 98-390 Lawrence v City of Detroit, Public Vehicle Maintenance Division (1998)

The Complainant's appeal was dismissed because he did not come to the hearing. The Department and Respondent appeared. Complainant's request for rehearing was denied based on the presumption that mail properly sent is received. The Notice of Hearing was not returned by the postal authorities as undeliverable. Complainant did not change his address with the Office of Hearings. Complainant's coworkers appeared for the hearing which indicated the employer properly posted the notice.

910 DISCRIMINATION

Burden of Proof
"But For" Test
Not Established
Employee Misconduct
Swearing
Motivating or Substantial Factor
Not Established
Employee Misconduct
Swearing
Discharged
Confrontation
Uncooperative Behavior
Abusive Language
Swearing
Protected Activity
Safety Complaints to MIOSHA
After Discharge

MI-DI 98-639 Gonzalez v K & K Manufacturing (1998)

The Complainant has the burden of proof to show that the discharge was the result of his exercise of rights provided by Section 65. Please see ¶675 of this Digest. In this case, the evidence did not support the Complainant's argument that "protected activity" caused his discharge. The Complainant argued that he was discharged for filing a safety complaint with MIOSHA over fumes generated from Respondent's welding operation. The ALJ found that the MIOSHA complaint was filed after the discharge. Complainant was discharged for swearing at the owner and ordering him into the owner's office for a meeting. Section 65 does not give employees an excuse to behave unreasonably. It is not reasonable for an employee to swear at the owner or order him into a meeting.

911 DISCRIMINATION

Burden of Proof
"But For" Test
Not Established
Employee Misconduct
Leaving Without Permission
Motivating or Substantial Factor
Not Established
Employee Misconduct
Job Refusal
Suspension
Refusal to Perform Work Assignment
Whirlpool Decision Discussed
Unreasonable Work Refusal
No Imminent Danger

MI-DI 98-297 Holbrook v Marine Pollution Control (1998)

On January 22, 1997, Complainant participated in a gasoline and water cleanup at a high school. The cleanup truck could not leave until receiving permission to transport the material over the public roads. Complainant was assigned to stay with the truck overnight. At the hearing, Complainant testified that he refused to stay with the truck because his clothes and feet were wet with gas and water. He was concerned over his health sitting in an unheated truck in wet clothes during a cold winter night. The Respondent's witness testified that Complainant made no mention of his clothes or the weather but said he would not stay because he had car problems and had a ride home. Respondent's witnesses, including the Complainant's supervisor and Operations Manager, testified that if Complainant had mentioned the above safety concerns, arrangements could have been made for Complainant to wash up in the school and that a change of clothes and shoes could have been provided. Based on this incident, Complainant was given a three-day suspension and placed on probation for 90 days. Within the 90 day period, Complainant was observed wrestling with another employee and discharged. "Horseplay" is specifically prohibited in Respondent's Employee Handbook.

The ALJ held that the Complainant failed in his burden to show that his protected activity, a health or safety complaint, was a "substantial reason" for Respondent's alleged discriminatory action. The Complainant failed to show that the employer's action would not have occurred "but for" the employee's safety complaint. The ALJ found that the Complainant's failure to stay overnight as directed by his supervisor was not a protected activity because he would not have been in imminent danger of a life and death situation as were the employees in Whirlpool.

912 DISCRIMINATION

Burden of Proof

"But For" Test

Not Established

Employee Misconduct

Complainant Must Meet

Suspension

Conduct

MI-DI 98-637 Abdo v Romulus Community Schools (1998)

Complainant filed an appeal from an adverse Department determination claiming that he had been discriminated against by his employer for complaining about asbestos exposure. Complainant had been suspended and denied a transfer request.

The ALJ referred to ¶675 of this Digest and pointed out that the Complainant has the burden of proof to show that the action taken by Respondent would not have occurred "but for" the employee's safety complaints. The ALJ found-that Complainant's suspension was due to his conduct at a meeting with the employer and not because of his safety complaints. The record established many prior safety complaints by Complainant but no adverse action was taken against him until the conduct issue. The ALJ found that the employer did not know the Department's test for asbestos on September 30, 1998, was prompted by a safety complaint from Complainant.

913 DISCRIMINATION

Complaint Must Be Filed Within 30 Days

MI-DT 98-924 Verbeke v Tift Construction (1998)

Respondent was a residential housing contractor. Complainant's crew was advised in March 1998 that there would be a one-month layoff. Respondent attempted to call Complainant back in April but his phone was out of order. A visit to Complainant's home found the house deserted with a "for sale" sign. A message was also left with Complainant's roommate that Respondent was hiring. When Respondent did not hear from Complainant, another carpenter was hired. Complainant's girlfriend contacted the MIOSHA Discrimination Division on May 29, 1998, to file a complaint because Respondent had filled Complainant's position on April 27, 1998. The girlfriend was advised that the complaint was untimely. The ALJ found that Section 65 requires a MIOSHA Discrimination Complaint to be filed within 30 days of the alleged act of discrimination. Complainant's complaint was untimely. Complainant was told his crew would be on layoff for one month, but he did not leave a forwarding address or phone number where he could be reached. Respondent made reasonable efforts to find the Complainant.

914 DISCRIMINATION

Complaint Must Be Filed Within 30 Days
By Employee
Jurisdiction
Complaint Must Be Filed By Employee

MI-DI 95-26 All Employees of Balsa USA v Balsa USA (1995)

The employer appealed a Department determination finding a violation of Section 65(1) of MIOSHA. The employer was ordered to post the MIOSHA Employee Discrimination Poster. The ALJ dismissed the Department's determination finding that no employee had filed a complaint as required by Section 65(2). The ALJ found no jurisdiction for the Department's discrimination investigation or order. The Act permits an investigation or possible discrimination only after an employee files a complaint.

915 DISCRIMINATION

Appeal
Good Cause Not Found
Too Busy

MI-DI 98-1203 Walker v Career Girl Hair Stylists (1998)

Good cause for a late appeal was not found where the appellant argued that she was too busy to file an appeal within the 15 working day appeal period. This explanation does not satisfy the good cause test applied to MIOSHA Discrimination cases. "Tile kind of cause that would prevent a reasonably prudent person from the performance of an important obligation."

916 DISCRIMINATION

Burden of Proof
Complainant Must Meet
Discharged
Probation Period
Performance Problems

MI-DI 98-1118 Malek v Perfection Bakery (1998)

Complainant was discharged during the 90 day probationary period for slow work, talking too much, wasting time, and disrupting coworkers. Two jobs had to be redone by others. One involved significant damage to a truck. Complainant did not file a MIOSHA complaint until after his discharge. He also did not make any safety complaints to company management or his union representative. The ALJ found no violation of Section 65. Complainant did not meet his burden of proof to show a causal connection between any protected activity and his termination.

917 DISCRIMINATION

Burden of Proof
Motivating or Substantial Factor
Not Established
Employee Misconduct
Job Refusal
Quit
Refusal to Work
Whirlpool Decision Discussed
Unreasonable Work Refusal
Standard for Minor

MI-DI 99-87 Sheehan v White Pine School District (1999)

The Complainant, a minor, left her summer job with the Michigan Works youth program. Complainant felt Respondent's employees were giving her the "cold shoulder" because her mother had filed a complaint regarding asbestos in the school buildings. The ALJ found that Complainant's burden of proof did not change because she was a minor. The Complainant still had to show that the asbestos complaint was a substantial reason for the employer's alleged discriminatory action - the "forcing" of the Complainant to quit her job. The Complainant was not faced with a life-endangering situation as the employees in the Whirlpool case. The Complainant's feelings that she was shunned or given the cold shoulder by Respondent's employees, even if true, did not justify the Complainant's quitting work.

918 JURISDICTION

Late Employer Petition/Appeal

Good Cause Found

Penalty Only Appeal

General Entry for Untimely Cases - Where Good Cause is Found

Good cause was found where the employer abated all cited items and desired only to review the proposed penalty amounts. The goal of MIOSHA is to secure compliance with safety standards. Since this goal was achieved, it was reasonable to permit the employer an opportunity to seek penalty reductions.

919 JURISDICTION

Late Employer Petition/Appeal

Good Cause Found

Department Mailing Error

78-774 Bechtel Corporation (1980)

Good cause for a late appeal was found where the Department did not mail its decision to Respondent's attorney but only to Respondent's job site. The Respondent later withdrew its appeal.

A Board member directed review and the Board voted to affirm the ALJ's proposed Order.

920 JURISDICTION

Late Employer Petition/Appeal
Attorney Failure to File
Good Cause Test
Definition
Temporary Secretary
Vacations
Attorney

79-1588 Stroh Brewery Company (1980)
79-1589

Good cause for a late appeal was not found where Respondent's attorney left on vacation and entrusted the filing of the appeal with a temporary secretary who failed to file the appeal. The ALJ found that a reasonably prudent person would not have placed reliance on one who may not have understood the assignment. The ALJ adopted, as the good cause test, the approach followed by the Michigan Employment Security Commission in Charles Merck. Jr v Chrysler Corp, Appeal Docket B-2486-37657, as follows:

> "Good cause" means the kind of cause that would prevent a reasonably prudent person from the performance of an important obligation. It does not include conduct that shows carelessness, negligence, or a lack of reasonable diligence.

Although Respondent filed exceptions, no Board member directed review. Accordingly, pursuant to Section 42, the ALJ's proposed decision became the final order of the Board.

921 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Confusion
Criminal Complaint
Good Cause Test
Definition

80-2056 Lanzo Construction Company (1981)

This is the case that resulted in the current procedure of issuing an Order To Show Cause whenever the respondent files a late petition for dismissal or appeal or when the Department issues a late decision. The 15 working day appeal and decision periods are set forth in Section 41.

As a result of Respondent's appeal, the Court of Appeals issued their decision on October 17, 1978, which remanded the case to the Board for a determination of good cause and meritorious defense. On January 11, 1980, the Supreme Court denied the Department's request for reconsideration. Lanzo Construction Co v Michigan Department of Labor, 86 Mich App 408; 272 NW2d 662 (1978), app lv den, January 11, 1980.

On October 16, 1980, the Board remanded to the ALJ to compile a record and issue a decision as to whether Respondent had good cause for filing an untimely petition for dismissal.

On January 30, 1981, the ALJ issued an Order Finding Good Cause. The term "good cause" was found to be the kind of cause that would prevent a reasonably prudent person from the performance of an important obligation. It does not include conduct that shows carelessness, negligence, or a lack of reasonable diligence.

The ALJ found that the similarity between the Department's citations and the criminal complaint issued to Respondent, together with the confusion caused by investigators and media, could cause even a reasonably prudent person to miss a filing deadline. Also, based on the decision by the Circuit Court on the criminal allegation of willful violation of the Act, the ALJ found that Respondent had a meritorious defense to the Department's civil allegations of willful violation.

The parties ultimately settled the case in a Settlement Agreement approved July 17, 1981.

922 JURISDICTION

Late Employer Petition/Appeal
Attorney Failure to File
Good Cause Test
Definition
More Strict Good Cause Test Needed

80-2161 Tezak Company (1981)

Good cause for a late appeal was not found where Respondent sent the Department's decision to its law firm and the firm neglected to file a timely appeal for reasons which were not explained on the record, but which appear to be simply that the document remained on an attorney's desk for too long.

The ALJ held that Respondent's attorney did not exercise reasonable diligence in reviewing the appeal rights stated in the Department's decision in Section 41 of MIOSHA and in Administrative Rule 1351. The Act does not give attorneys or Pro se employers more than 15 working days to file an appeal.

The ALJ found that a more strict standard for "good cause" must be utilized in MIOSHA cases than in the ordinary civil suit. For MIOSHA Section 41 cases, good cause means the kind of cause that would prevent a reasonably prudent person from the performance of an important obligation. It does not include conduct that shows carelessness, negligence, or a lack of reasonable diligence.

923 CITATION

History of Injuries Not Needed

DUE PROCESS

Interpretation of Enforcing Agency
Rule Vague

ELECTRICAL

Energized Circuits
Open Electrical Boxes
Safety Equipment for Employees

EMPLOYER DEFENSES

Employee's Experience and Training
Exposure
Greater Hazard
New Hazard Not Enough
Industry Standards
Unforeseeable Occurrence
Vague Rule

STANDARD

Compliance Required
Effect of Law
Interpretation of Enforcing Agency

95-614 Reliance Electric, Inc. (1999)

Respondent's employee opened an electrical cabinet door and turned on a 480 volt switch without taking protective measures required by R 408.41724 contained in Part 17 of the CSS. This rule requires the employee to de-energize the circuit by locking out and tagging unless the employee is protected by insulation, insulated tools, matting or blankets sufficient to protect against the voltage involved.

The Department's safety officer described the hazard to be not reinstalling the cover guard over the fuses before energizing the circuit and turning on the 480 volt switch with an unprotected hand. The concern was electrical shock from inadvertent or accidental contact caused by a trip or fall into the energized panel.

923 (Continued)

The Respondent defended by asserted the following defenses:

1. No duty to protect against an unforeseen occurrence;
2. Compliance with "Industry Standards;"
3. The employee's experience and training;
4. Lack of exposure potential;
5. Compliance would create a greater hazard;
6. The cited rule was vague;
7. No prior injuries had occurred; and,
8. The Safety Officer misinterpreted the rule.

The ALJ affirmed the citation and rejected Respondent's defenses. The cited rule was properly promulgated and, as such, has the effect of law. The "Greater Hazard" presented - long sleeves - is not a greater hazard but only another possible hazard. Respondent did not prevail in the "Greater Hazard" defense. It was unnecessary for the Department to present a history of past injuries. The standard assumes the existence of a hazard. Following "Industry Standards" did not preclude compliance with the cited rule, a properly promulgated standard.

Although Respondent filed exceptions, no member of the Board directed review of the ALJ's proposed decision. Therefore, the proposed decision became the final order of the Board pursuant to Section 42 of MIOSHA.

924 DISCOVERY

Document Production
Informer's Privilege
Subpoenas

DUE PROCESS

Subpoenas
Unredacted Department Records

STANDARD

Interpretation
Federal Review Commission Decisions

STATE PLAN

As Effective As
Informer's Privilege

SUBPOENAS

Enforcement
Unredacted Department Records

93-1303 Cellasto Plastics Industries, Inc. (1999)

At Respondent's request, the ALJ issued a subpoena duces tecum for unredacted records from the Department concerning its inspection. Complainant filed a Motion For Protective Order asserting an "informer's privilege." Complainant argued that release of names of current or former Respondent employees could have a chilling effect upon the regulatory mission of the Department.

The ALJ issued two orders in response. In the first order, the ALJ found that an informer's privilege is not required in order for Michigan to have a state plan "as effective as" the federal OSHA program. The ALJ held that Section 46(6) does not require Michigan ALJs or the Board to follow the decisions of the Federal Review Commission regarding the informer's privilege because this privilege is not a "standard" promulgated by OSHA. The ALJ also held that the informer's privilege does not apply to contested cases before the ALJs and the Board. See American Bumper & Mfg Co, NOA 93-289, 93-324, 93-391, 93-755 (1994),¶604. The Ingham County Circuit Court ordered compliance with the investigatory subpoena.

924 (Continued)

In the second order, the ALJ expressed an intent to apply the balancing test set forth in Stephenson Enterprises, Inc v Marshall, 578 F2d 1021, 1025 (CA 5, 1978), and directed Complainant to submit a statement indicating whether Complainant intended to rely at trial on information provided by Respondent's employees and to file an unredacted record with the ALJ. The ALJ intended to review the record and decide based on Stephenson, supra, whether employee names should be released to Respondent.

The parties entered into a Settlement Agreement for all appealed items. The ALJ issued an order approving the Settlement Agreement. The two orders addressing the informer's privilege were also reissued to permit Board review. No Board member directed review and these orders became final orders of the Board pursuant to Section 42 of MIOSHA.

925 EMPLOYER DEFENSES

Employee's Experience and Training
Personal Protective Equipment

METAL WORKING

Hobb Machines

PERSONAL PROTECTIVE EQUIPMENT

Gloves

POINT-OF-OPERATION

Area Covered

TRAINING

Hazards and Safeguards

95-1367 Wohlert Corporation (1999)

Employee was injured after having worked less than five months. The employee was to attend two rows of 12 Hobb machines and keep the coolant reservoir full. He was injured when he reached up with his right gloved hand over the containment curtain guard to adjust the coolant. His hand slipped and the machine caught the employee's glove pulling the hand into the machine. The Department issued a citation with three items:

1. Failure to provide training as to potential hazards and safe operation of the assigned job, Part 26, Rule 2611(a);

2. Failure to prohibit loose clothing, encircling neckwear, and jewelry, Part 26, Rule 2612(d); and,

3. Prohibit point-of-operation manual adjustments or measurements until after the toot and work piece have stopped, Part 26, Rule 2640(a).

Complainant asserted that Respondent did not train the employee to turn off the Hobb machine or use a tool to reach the coolant flow lever when adjusting the coolant flow.

Using a hand to do this job without turning off the machine requires placing the hand near the point-of-operation. It is 11 inches from the coolant lever to the machine cutter.

Respondent argued that new employees are trained regarding hazards of the job. Specifically, employees are told that they are not to put a hand in, over, under, or through the Hobb guard curtains. Employees were also told not to use gloved hands around the Hobb machine or inside the curtain area at any time while the machine is running. The injured employee was given a memo regarding glove use around this machine. This employee was also shown photos of a glove mangled in a 1992 Hobb machine accident. A witness testified that he specifically trained the injured employee to use a tool when adjusting coolant flow.

The ALJ dismissed all three items:

1. Regarding Item 1 alleging a lack of training, the ALJ found the injured employee was given repeated training regarding the dangers and hazards of the Hobb machine;

2. Regarding the wearing of loose clothing, the ALJ rejected Complainant's argument that the glove worn by the injured employee was an article of clothing. The gloves were appropriate personal protective equipment, Rule 2612(d), due to the nature and hazards of the Hobb cleaning job. This work included cleaning up metal shavings.

3. Regarding manual adjustments at the point-of-operation, the ALJ found that the cited rule covers adjustments at the point-of-operation and not near or in proximity to the point-of-operation. The coolant valve was not at the point-of-operation.

Although Complainant filed exceptions, no member of the Board directed review of the ALJ's proposed decision. Therefore, the proposed decision became the final order of the Board pursuant to Section 42 of MIOSHA.

926 JURISDICTION

Late Employer Petition/Appeal

Business Move

Good Cause Found

Business Move

96-1486 Maxcess Technologies, Inc. (1999)

Good cause for a late petition for dismissal was found where Respondent moved its entire operation after the inspection and before receipt of the citations. The citation packet was received by a skeleton staff and forwarded to where it was believed the company president was located. By the time the president received the citations, the 15 working day petition period had expired. The ALJ found good cause because the facts did not establish a normal operation. No matter how much care is attempted, glitches will occur. After a prehearing conference, the parties entered into a Settlement Agreement to close the case.

The Order Finding Good Cause For Late Petition was reissued to allow Board review. No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

927 STANDARD

Conflict Between Standards
General vs Specific
Promulgating Commissions
Separate Authority Raising
Promulgation Defects

98-708	**Kilgour and Company, Inc.**	**(1999)**
98-716	**Dan's Excavating, Inc.**	**(1999)**

Respondent filed a preliminary Motion To Dismiss in each case arguing a conflict in standards. Part 14 of the Construction Safety Standards, Rules 1454(2) and (3), exempts auger work; but, Occupational Health Standard Rule R 325.62991, addressing underground construction in general terms, has no reference to boring or auguring operations. Respondent also argued that the rule cited by Complainant was not properly promulgated in accordance with the Administrative Procedures Act.

In each case, the ALJ issued an Order Denying Motion To Dismiss finding that while the "general vs specific" argument has been recognized with respect to rules promulgated by the same Standards Commission, it is irrelevant to rules promulgated by separate Commissions. The fact that the Construction Safety Standards Commission chose to exempt auger work cannot bind a separate Commission with independent authority. Citing 1126 of this Digest, the ALJ also found that the rule cited by Complainant was properly promulgated as required by the Administrative Procedures Act.

After a prehearing conference, the parties entered into Settlement Agreements to close each case. The Orders Denying Motions To Dismiss were reissued to allow Board review, No Board member directed review and the Orders became final orders of the-Board pursuant to Section 42 of MIOSHA.

928 JURISDICTION

Late Employer Petition/Appeal

Business Move

No Explanation For Late Filing

99-437 Trov Metal Concepts, Inc. (1999)

Good cause for a late appeal was not found where the employer argued the business moved and the citations were not received in time to file a timely response. The issue concerned a late appeal not a late petition for dismissal. Respondent did not explain why a late appeal was filed even after asking and receiving additional time to respond. Respondent did not provide the dates for the business move and the ALJ assumed that the move had been completed by the time the Department's decision was issued.

929 JURISDICTION

Late Employer Petition/Appeal

Key Employee

Identity

Illness/Death/Resignation

Employer Must Hire Staff

Strike

99-490 Bent Tube, Inc. (1999)
99-491
99-492

Good cause for a late petition for dismissal and a late appeal was not found where the employer argued the late filings occurred because of the hospitalization and nursing home placement of the owner, as well as the lengthy General Motors strike.

The ALJ found that the owner was not a key employee. Respondent's vice president was the contact person for all three inspections and appeals. The vice president had represented the employer in two prior cases and entered into Settlement Agreements. Also, prior cases found that the employer has an obligation to assign replacement employees in the absence of a key employee. See ¶s 523 and 608. Finally, a strike is not a justification for filing a late appeal. As noted in ¶633, hiring replacement workers has nothing to do with filing a timely appeal which can be as short as "I appeal." The company vice president could have filed such a statement even during the GM strike and the illness of the owner.

930 EMPLOYEE
Leased

EMPLOYER
Control Over Employees

EMPLOYER DEFENSES
Lease Agreement

STIPULATION OF FACTS

95-349 Genesys Group (1999)

The parties submitted a Stipulation of Facts and Briefs on the subject of whether Respondent is covered by MIOSHA. Respondent leased its employees to Usztan Construction Company. Both companies were cited for violation of Construction Safety Standards based on a fatality caused when a crane cable broke causing a steel column to fall and strike one of Respondent's employees. Respondent leased a manager and four employees to Usztan for the project. One of the employees was a foreman.

The ALJ found Respondent was covered by MIOSHA. The leasing agreement gave Respondent the right to inspect the worksite and to control employees leased to Usztan. Respondent had the responsibility to inspect the worksite and cure defects. A private agreement between parties cannot avoid MIOSHA coverage. Respondent was properly cited, along with Usztan, because Respondent exercised rights over its employees on the site and provided a manager and four employees, one of whom was a foreman.

931 JURISDICTION

Late Employer Petition/Appeal

Good Cause Found

Citation Not Received

Mailing

Nonreceipt by Employer

99-493 Highland Park Department of Public Safety (1999)

The Department's citations were signed by someone who was not an employee. The citation package was not received by the employer. Also, the employer had no intent to appeal the alleged violations but only desired to have the proposed penalty amounts reviewed. Good cause was found because without the signature of one of the employer's employees, there was no way to determine when to start counting the employer's 15 working day petition period. In addition, the ALJ observed that since the employer did not desire to contest the citations but simply to have the penalty amounts reviewed, the goal of MIOSHA - to secure compliance with safety standards - had been achieved. Under these circumstances, it was reasonable to permit the employer an opportunity to seek penalty reductions. Also, see General Entry ¶918 of this Digest.

After a prehearing conference, the parties entered into a Settlement Agreement to close the case.

The Order Finding Good Cause For Late Petition was reissued to allow Board review. No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

932 JURISDICTION

Late Employer Petition/Appeal
Business Move
Good Cause Found
Business Move

99-257 Creative Controls, Inc. (1999)

Good cause for a late petition was found where the citation was lost during a company move. The ALJ found that even with the best intentions, preparation, and care, mistakes can happen. Identical conclusions were reached in ¶580 and ¶885.

After a prehearing conference, the parties entered into a Settlement Agreement to close the case.

The Order Finding Good Cause For Late Petition was reissued to allow Board review. No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

933 EMPLOYER DEFENSES
Department Dismissal in Prior Case

JURISDICTION
Highway Trucks, Loading or Unloading

POWERED INDUSTRIAL TRUCKS
Preemption

PREEMPTION - SECTION 4(b)(1) OF OSHA

STIPULATION
Not Binding on Later Case

98-252 Yellow Freight System, Inc. (1999)

The employer filed a Motion For Summary Disposition arguing that citations alleging violation of Part 21 of the GISS, "Powered Industrial Trucks," Rule 2176(1) and 2176(5) should be dismissed.

The Motion was dismissed. This issue was previously examined in ¶30 of this Digest.

MIOSHA is not preempted by federal OSHA from enforcement of Part 21. Federal preemption takes place when compliance with both federal and state regulation is not possible, where the subject matter requires federal supremacy, or where Congress intended to displace state regulation. Where federal law does not show a clear intent to preempt state activity, state regulation is considered complimentary not contradictory. These elements were not present because Section 18 of OSHA allows states to develop their own enforcement programs. OSHA does not require a provision comparable to 4(b)(1). There is no conflict between state and federal law.

The employer also referred to a stipulation in another Yellow Freight case where the Department agreed to dismiss a citation to Rule 2176(1). The ALJ found that the stipulation bound the parties only for that case.

After a prehearing conference, the parties entered into a Settlement Agreement to close the case.

The Order Denying Motion For Summary Disposition was reissued to allow Board review. No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

934 AMENDMENT

By Motion

No Objection

97-910 Wells Aluminum Corporation, Kalamazoo Division (1999)

The Department filed a Motion To Amend an item of a citation from Part 26, Rule 2612(d) to Part 33, Rule 3392(2). The description was also changed. The employer did not file any objection to the Motion and it was approved.

After a prehearing conference, the parties entered into a Settlement Agreement to close the case.

The Order Approving Motion To Amend was reissued to allow Board review. No Board member directed review and the Order became a final order of the Board pursuant to Section 42 of MIOSHA.

935 DISCOVERY

Document Production
Informer's Privilege
Subpoenas

DUE PROCESS

Subpoenas
Unredacted Department Records

STATE PLAN

As Effective As
Informer's Privilege

SUBPOENAS

Enforcement
Unredacted Department Records

96-171 West Michigan Tree Services, Inc (1999)

At Respondent's request, the ALJ issued a subpoena duces tecum for unredacted records from the Department concerning its inspection. Complainant filed a Motion For Protective Order asserting that release of names of current or former Respondent employees could have a chilling effect upon the regulatory mission of the Department.

The ALJ issued two orders in response.

In the first order, the ALJ directed submission by Complainant of a statement indicating whether Complainant intended to rely at trial on information provided by Respondent's employees and to file an unredacted record with the ALJ. The ALJ intended to review the record and decide, based on Stephenson Enterprises. Inc v Marshall, 578 F2d 1021, 1025 (CA 5, 1978), whether employee names should be released to Respondent.

Complainant provided the unredacted record to the ALJ and asserted its intent to rely on all information provided by Respondent's employees.

After a conference attended by all ALJs and counsel for Complainant and Respondent, the Complainant was directed to provide the names of Respondent's employees intended to be used at trial to prove Complainant's case. Instead of providing this information, Complainant filed a Renewed Motion For Protective Order. The ALJ denied the Motion in a second order finding that the informer's privilege does not apply to contested cases before the ALJs and the Board. Also, see American Bumper & Mfg Co, NOA 93-289, 93-324, 93-391, 93-755 (1994), ¶604. The Ingham County Circuit Court ordered compliance with the investigatory subpoena.

935 (Continued)

Complainant filed a Motion To Dismiss the single item at issue and the ALJ issued an order dismissing the citation. The two orders addressing the informer's privilege were also reissued to permit Board review. No Board member directed review and these orders became final orders of the Board pursuant to Section 42 of MIOSHA.

936 PETITION TO MODIFY ABATEMENT DATE

Exceptional Circumstances for Late Petition
Certification of Abatement

PMA 99-677 Caro Carbide Corporation (1999)

Exceptional circumstances for a late petition were found where the Petitioner certified abatement within the abatement period but was then advised by the Department that the item in question was not abated. By then, it was too late to request more time to abate. Petitioner reasonably believed that abatement had been achieved and that no further time was needed. The test for determining exceptional circumstances is one of reasonableness. See Lite Mfg Co, PMA 86-1562 (1986),¶379.

937 DISCRIMINATION

Burden of Proof
"But For" Test
Not Established
Employee Misconduct
Reprimand Issued Before. MIOSHA Complaint
Employment
Junior College Faculty
Reprimand
Safety Complaints to MIOSHA
After Reprimand

MI-DI 99-511 Bowers v Schoolcraft College (1999)

The ALJ affirmed a Department Determination finding no employer violation of Section 65. Complainant alleged she had been reprimanded because she filed a complaint with MIOSHA over Respondent's spraying of a pesticide spray. The ALJ found that the written reprimand was issued before Complainant made a telephone call to MIOSHA. Accordingly, Complainant did not satisfy the burden to establish that the reprimand was the result of her complaint. See ¶675 of this Digest where it was found that Complainant has the burden to present competent, material, and substantive evidence showing that the action taken by the employer would not have occurred "but for" the employee's safety complaint.

938 BOARD REVIEW

Failure to Direct

Remand by Majority Vote

Remand

Mail Delay

PETITION TO MODIFY ABATEMENT DATE

Exceptional Circumstances for Late Petition

Increased Inspections

PMA 99-204/99-380 ACC (Automotive Composite Co) (1999)

Petitioner's request for abatement date extension was dismissed because the Petitioner failed to supply additional information required to process the application.

Subsequently, Petitioner filed exceptions, but no Board member directed review within the 30 day review period.

After the 30 day period had expired, Petitioner's statement providing the requested information was received by the Office of Hearings. The envelope had a notation from the post office that it had been damaged in transit.

After receiving this information, the Board, by majority vote, (within the 60 day circuit court review period), remanded the case to the Office of Hearings for consideration of Petitioner's statement.

After review, an order was issued finding exceptional circumstances and extending the abatement period. The order found exceptional circumstances based on an increased workload brought about by increased inspections.

939 PETITION TO MODIFY ABATEMENT DATE

Exceptional Circumstances for Late Petition

Confusion

Increased Inspections

Small Company

PMA 99-585 City of South Haven DPW Street Barn (1999)

Exceptional circumstances were presented with Petitioner's assertions:

1. The city received 18 violations on three separate notices;
2. Confusion over perceived differences between the rule and the citation language;
3. Indecision over proper resolution;
4. Temporary abatement attempt; and,
5. Small city with limited tax base.

940 PETITION TO MODIFY ABATEMENT DATE

Exceptional Circumstances for Late Petition

Department Discussions

Settlement Agreement

PMA 97-161 Michigan Wire Processing Company, Inc. (1996)

Exceptional circumstances were-presented based on Petitioner's reasonable belief that the abatement date had been extended because of an informal settlement agreement and conversations with a Department representative.

941 PETITION TO MODIFY ABATEMENT DATE

Exceptional Circumstances for Late Petition

Lack of Reasonable Explanation

Settlement Agreement

PMA 99-584 Draw-Titer Inc. (1999)

Exceptional circumstances were not found where Petitioner relied on a Memorandum of Transmittal sent with a Settlement Agreement for a completely different case. Also, the Department's earlier decision extending the abatement date stated, "Near the end of that period, if you require more time, you must submit an updated request...." The ALJ found that a reasonable understanding of the phrase "near the end of that period" would not cause one to file a petition after the period had expired.

942 JURISDICTION

Late Employer Petition/Appeal

Good Cause Found

Weather Damages/Disruptions

98-1091/1999-4469 City of Muskegon Heights Fire Dept. (1999)

Good cause for a late petition was found where weather conditions caused "extreme damage" to Respondent which caused the late filing. Respondent later filed a motion to withdraw the appeal.

943 PETITION TO MODIFY ABATEMENT DATE

Exceptional Circumstances for Late Petition

Vacation

Citation Received During

PMA 1999-5333 P & G Metal Finishing (1999)

Petitioner filed a PMA on December 9, 1999. The abatement period expired November 24, 1999. Petitioner's explanation for the late petition was that he went hunting in the Upper Peninsula November 11, 1999, and returned November 26, 1999. The Department's citation package was received November 12, 1999, while Petitioner was hunting.

The ALJ found Petitioner presented exceptional circumstances for the late filing because he did not know of the November 24, 1999, abatement date until he returned November 26, 1999. The abatement date was extended as requested.

944 PETITION TO MODIFY ABATEMENT DATE

Exceptional Circumstances for Late Petition

Abatement

PMA 1999-4941 Federal Screw Works (1999)

Exceptional circumstances were found where the filing deadline was allowed to expire because the employer believed abatement had been achieved. A late PMA was filed after the Department notified the employer that abatement had not been accomplished. After the ALJ found exceptional circumstances, the Department agreed to an extended abatement date.

945 DISCRIMINATION

Costs
Hearing
Rehearing
Respondent's Failure to Appear
Relief Under Section 65
Costs

MI-DI 99-551 Verrett v Applewood Manor Nursing Home (2000)

After investigation of employee's complaint, the Department found a violation of Section 65. Respondent appealed but did not attend the hearing scheduled to hear the appeal. The Complainant and Department both attended.

Respondent's appeal was dismissed and the Department's order finding a Section 65 violation was affirmed. The ALJ also ordered Respondent to pay travel costs based on the "all appropriate relief" provision of Section 65.

Respondent filed a Motion for Rehearing which was denied by the ALJ. Respondent argued he was confused by a notice from the Department of Civil Rights and believed in error that the Section 65 hearing had been cancelled. The ALJ found it unreasonable for Respondent to conclude the MIOSHA Section 65 hearing had been cancelled.

946 APPEAL

Abandonment

97-911 Environmental Waste Control, Inc. (1999)

Respondent's appeal was dismissed as abandoned after Respondent did not appear for the prehearing conference, Respondent's Attorney withdrew and advised that Respondent had ceased operation, and the Notice of Hearing sent to Respondent was returned as undeliverable.

947 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Key Employee
Illness/Death/Resignation
Penalty Only Appeal
Strike
Key Employee
Replacement
Strike

98-971 Wilkie Metal Products, Inc. (1999)

Good cause for a late petition was found due to departure of a key employee during a strike. Also, Respondent had abated and desired only to address the proposed penalty amounts.

The parties ultimately entered into a Settlement Agreement to close the file.

948 JURISDICTION

Late Employer Petition/Appeal
Good Cause Found
Interoffice Mail System
Interoffice Mail System
Mailing
Affidavits

98-934 Meijer #33 (1999)

Good cause for a late petition was found where the Department's citations were lost in Respondent's mail system. The late filing was not caused by carelessness, negligence, or a lack of reasonable diligence. Respondent's interoffice mail system processes over a thousand pieces of mail each day. Respondent provided affidavits from three employees showing the citations were received and sent to the legal department but not received by that department. Also, see ¶486.

949 JURISDICTION

Late Employer Petition/Appeal

Confusion

Appeal of Citation and/or Proposed Penalty

Small Employer

PENALTIES

Not Excessive

1999-4862 Interstate Tool & Die Company (2000)

Respondent filed a late appeal claiming the wording "and/or" in Section II of the paperwork sent with the citation was confusing. Respondent believed this language barred an appeal of the penalties. Respondent also contested the amount of the proposed penalties, arguing Respondent is a small business with no history of previous citations and that the violations were not serious.

The ALJ found Respondent's explanation did not establish good cause for the late filing. Respondent's letters suggested Respondent's mind-set at the time of the writing was of a corrective nature and not the state of confusion and misunderstanding Respondent claimed was the basis for his late appeal. Respondent is a business savvy individual who made no attempt to clarify any confusion from the citation packet. See ¶39 and ¶366. Additionally, no other employer misunderstood the language on page 2 of the citation regarding the first appeal. It is axiomatic that "the most commonly accepted definition of the expression 'and/or' is that it means either 'and' or 'or', 3A CJS, AND, p. 457."

Also, good cause has not been found in prior cases where the employer was a small business with no prior citation history. See, ¶338, ¶788, and ¶860. Respondent's belief that the citations were not "serious" requires proof that the items do not meet the; "death or serious harm" definition set forth in Section 6(4). However, this would require a finding of good cause and scheduling the matter for a hearing on the merits. Since good cause was not established and Respondent failed to present a meritorious defense, Respondent's appeal was dismissed. Penalties assessed Respondent were found to be either 6.4 percent or 8.5 percent of the penalty allowed and, therefore, not excessive.

950 PETITION TO MODIFY ABATEMENT DATE

Exceptional Circumstances for Late Petition
Lack of Reasonable Explanation
Misplaced Paperwork

PMA 1999-5165 Coloma Frozen Foods, Inc. (2000)

Exceptional circumstances for filing a late petition were not found where the filing delay was caused by misplacing paperwork.

951 JURISDICTION

Late Employer Petition/Appeal
Abatement
Concentration On
First Inspection/Citation
Human Error
Key Employee
Newly Hired
No Knowledge of the 15 Working Day Period

1999-4898 Harding's Market #373 (2000)

Respondent filed a late appeal arguing this was the first time through a MIOSHA inspection and Respondent was not aware of the 15 working day appeal period. Respondent also claimed that the deadline was missed due to the transfer of a new manager to the store.

The ALJ found Respondent's explanation did not establish good cause for the late filing. Concentration on abatement does not nullify abatement. See ¶860 and ¶864. Additionally, simply claiming no knowledge of the 15 working day appeal period also did not establish good cause. See ¶456. The new manager was informed of his appeal rights at the time of the opening and closing conferences; and, since notice of the 15 working day appeal period was listed on the citation, his failure to act timely was human error. Human error, however, does not establish good cause. See ¶256. Respondent also failed to establish a meritorious defense. The appeal was dismissed.

952 JURISDICTION

Late Employer Petition/Appeal
Abatement
Concentration On
Employer Too Busy
Human Error
Overlooking/Misinterpreting Appeal Rights
Small Employer

1999-5017 American Standard Windows (2000)

Respondent filed a late appeal claiming failure to understand the appeal process, failure to follow-up by staff, and failure to understand penalties would become fixed if an appeal was not filed. Respondent concentrated on abatement. It was held that Respondent's explanation did not establish good cause for the late filing. Abatement does not nullify a citation. See ¶516. Ignoring the information on the citation concerning how an employer can appeal shows lack of reasonable diligence. See ¶39. Human error also does not establish good cause. See ¶265. There are also many cases in the MIOSHA Digest which holds that simply claiming oversight because Respondent is a small or busy employer does not constitute good cause. See ¶860. The appeal was dismissed.

Although Respondent filed exceptions, no Board member directed review of the ALJ's Order Dismissing Appeal.

953 EMPLOYER
Control Over Work Area
Joint Employer

EMPLOYER DEFENSES
Subcontractors

SLOPING

SUBCONTRACTORS
Joint Employer

TRENCH
Sloping
Supervisor Instructions

95-51 B & B Concrete Placement (1999)

The Department's citation alleged four serious violations and proposed penalties of $8,000. Respondent argued that the facts did not establish employer liability because Respondent only rented the backhoe and operator to M. J. Perry, a plumbing subcontractor.

Home Depot hired Parliament Construction as the general contractor to perform construction work at the Home Depot work site. M. J. Perry Company was a subcontractor for Parliament Construction.

Respondent leased a backhoe and operator Charles Johnson to M. J. Perry Company. The job site was supervised by Supervisor William Roberts, a plumbing contractor and employee of M. J. Perry Company. Roberts instructed Johnson to dig straight down with the backhoe into the trench in order to locate an existing storm drain pipe for a roof drain tie-in. The banks of the trench were cut at a 90 degree angle in violation of CSS Part 9, Rule R 408.40941(1). The spoils were stored at the edge of the excavation in violation of Rule R 408.40933(2). When the pipe was located, Supervisor Roberts jumped into the trench to uncover the pipe. Roberts told Johnson, the backhoe operator, to remove another bucket of dirt from under the pipe. When Roberts stepped backward into a deeper part of the trench, a wall caved in, fatally crushing him.

953 (Continued)

The ALJ held that when employees have a relationship with more than one employer, each may be considered "joint employer." The ALJ considered the following decisions relating to the concepts of joint employer, lease agreements, and subcontractors: Joseph Bucheit & Sons, OSHRC Docket Nos. 2684 and 2716, 1973 - 1974 OSHD 117.946 (1974), and Clarkston Construction Co v OSHD, 531 F2d 451 (CA 10, 1976). Respondent's supervision, direction, and control were reviewed to determine liability. Johnson knew he was digging the trench in violation of MIOSHA standards and continued to do so, although following Supervisor Robert's directions.

The ALJ found Respondent to be an employer subject to the MIOSHA standards. Respondent had the right to be present or at least oversee its employee at the worksite. Also, Respondent could have entered and inspected the worksite for compliance with MIOSHA standards. The ALJ also found that two or more employers may be liable for the same violative conduct and, therefore, the Department could have determined Respondent, as well as M. J. Perry Company, to have violated MIOSHA standards.

Respondent filed exceptions objecting to the ALJ's report. A member of the Board directed review of the report. This case is pending review by the Board.

954 DISCRIMINATION

Burden of Proof
"But For" Test
Not Established
Employee Misconduct Confrontation Insubordination
Discharged
Confrontation
Insubordination
Uncooperative Behavior Abusive
Language

MI-DI 99-369 Michael Segers v Plascore, Inc. (1999)

The Complainant has the burden of proof to show that the discharge was the result of his exercise of rights provided by Section 65. See ¶675. In this case, the evidence did not support the Complainant's argument that "protected activity" caused his discharge. None of Respondent's disciplinary actions against Complainant bore any causal relationship to his safety complaints or the processing of those complaints. Complainant's argument that his performance appraisal showed a retaliatory motive was without merit. Complainant was discharged due to repeated insubordination, disruptive behavior, a threatening statement, and for refusal to divulge a witness's name critical for Respondent's investigation of Complainant's complaint of assault. Respondent did not violate the Act. See also ¶910.

956 FIRE-FIGHTING REGULATIONS

Written Procedures
Fire-fighting Classes as Exception

2005-843 Brighton Area Fire Department (2005)

Employer fire department was required to have written procedures for responding to downed power lines and vehicle fires in an emergency operation [R 408.17451, Rule 7451(1)]. It is not enough that the employees have had classes pertaining to these operations because the written procedure requirement supplements and is more specific than training taught in firefighting classes. Moreover, the written procedure is a promulgated rule that has the effect of law. This rule provides no exception for prior training or classes.

Although Respondent filed exceptions, no member of the Board directed review of the ALJ's proposed decision. Therefore, this proposed decision became a final order of the Board pursuant to Section 42 of MIOSHA.

957 BURDEN OF PROOF

Citations Dismissed

Conflicting Hearsay Evidence

Lack of Showing Feasible Compliance Hearsay

Alone Insufficient to Establish EVIDENCE

Hearsay

Hearsay Alone Insufficient to Establish Burden of Proof

EXPOSED TO CONTACT

Operator Exposure

High Pressure Water Hose

FALL PROTECTION

Meat Mixer Cleaning

GENERAL DUTY CLAUSE

Elements

High-Pressure Water Hose Safety

Knowledge

Actual Industry Recognition Meat

Mixer Cleaning

MEAT INDUSTRY SAFETY

Cleaning Equipment Fall Protection

SANITATION

High Pressure Water Cleaning

2002-654 Bill Mar Foods (2006)

MIOSHA alleged that employer violated the general duty clause (GDC) by allowing employees, lacking fall protection, to climb over a barrier to clean mixing units, and by allowing the use of high pressure hoses. The GDC [R 408.1011 Sec. 11] is used where there is no specific standard covering the conduct at issue. A violation of the GDC requires MIOSHA to prove that (1) the employer failed to keep the workplace free of a

957 (Continued)

hazard to which its employees were exposed; (2) the hazard was recognized; (3) the hazard was causing or was likely to cause death or serious physical harm; and (4) feasible methods exist to correct the hazard.

Item 1 was dismissed. MIOSHA failed to meet its burden of proof. Employee statements obtained by the safety officer were contradicted by later statements by the same employees and these employees were not called as witnesses. All of MIOSHA's evidence was also hearsay. While Section 75 of the APA, MCL 24.275 allows the ALJ to accept hearsay "of a type commonly relied upon by reasonably prudent men in the conduct of their affairs," a citation cannot stand solely on hearsay evidence.

Item 2 was dismissed. The use of high-pressure hoses for cleaning presented a serious hazard to employees based on its high (900-psi) emission, and the history of employee injuries. Employer had knowledge of the fact that high-pressure water cleaning is dangerous shown by its record of injuries, its training program, and its emphasis on personal protective equipment; this knowledge is enough to make the hazard recognized. These facts, and especially the history of employee injuries, also show that an accident would likely cause death or serious physical harm. However, MIOSHA failed to meet its burden of showing an alternative feasible method to correct this hazard; the facts show that the employer tested other nozzles and they lacked flexibility and pressure control to properly do the cleaning job. An order denying the employer's motion for a directed verdict at the close of MIOSHA's evidence was also issued.

958 DE MINIMIS VIOLATION

Improper Lanyard Attachment of Fall Protection

FALL PROTECTION

Aerial Work Platforms
Building Corner
Controlled Decking Zones
Perimeter Protection

PENALTIES

Affirmed

Section 36 Followed: Size, History, and Seriousness

Dismissed

De Minimis violations

SERIOUS VIOLATION

Employer Knowledge Established

Owner Observed

2006-468 Capital Steel & Builder's Supply, Inc. (2007)

At issue are two allegations for violation of Construction Safety Standards (CSS) and the corresponding penalty amounts. The first item alleged a violation of R 408.42645(1) by having an unprotected fall over 15 feet;

here it was 50 feet. The second item was an alleged improper attachment for a lanyard not conforming to R 408.42651(1).

For a MIOSHA citation to be upheld it must establish four elements: the applicability of the cited standard, the employer's noncompliance with the standard's terms, employee access to the violative condition, and the employer's actual or constructive knowledge of the violation.

Item 1 was affirmed as a serious violation. The employer asserted that the area was a controlled decking zone (CDZ), which does not require fall protection for up to 30 feet. This defense failed because the possible fall was more than 30 feet. The first and second elements were established because employees were exposed to the fall, and employer failed to comply with the rule's requirements. The third element was established because workers were placing decking within 1 foot of the edge of the fall. A worker is exposed to a fall if he is within 3-4 feet of the edge, and a serious violation does not require evidence of a possible accident, but only that if an accident occurs it will result in serious physical injury or death. The fourth element was established because the safety officer observed employer owner working on the decking operation with his employees.

Item 2 was held to be a *de minimis* violation. The employee was not exposed to a fall of more than 15 feet, and so was not required to have fall protection. It was thus a *de minimis* violation because the improper tie off did not have a direct relationship to safety and health. The penalty for Item 1 was considered by Section 36(1) standards of MIOSHA and was determined to be $750 considering the company's size and favorable history. The penalty for Item 2 was dismissed because a *de minimis* violation carries no penalty.

The employer filed exceptions but no board member directed review of the ALJ's proposed decision. Accordingly the ALJ's decision became the final order of the board. See Section 42 of MIOSHA.

959 OTHER THAN SERIOUS VIOLATIONS

Noise

Grain Elevator

Noise Monitoring Program

2005-561 Peavey Company (2005)

An employer who operated a grain elevator was required to implement a noise-monitoring program because it was aware of information indicating noise above the minimum levels (85 dBA) [R 325.601081, Rule 8(1)]. This information included difficulty in normal conversations, employee complaints, and signs posted by the previous employer. The violation was affirmed as Other than Serious.

960 SERIOUS VIOLATION

Employer Knowledge Established

TRENCH

Employee Exposure

Trench Shield

Unstable or Soft Material

1999-4485 Rainbow Construction (1999)

Accumulated water at the excavation site created a serious cave-in danger to employees because the trenchbox shield system provided was not enough to cover the entire excavation site. A serious violation of R 408.40932, Rule 923(3) was found. There was evidence that employees, including the foreman, were working outside of the trenchbox and that minor cave-ins had already occurred; the employer used a dewatering system, but conditions still required an adequate shield system. An appeal was filed with the Board but no Board member directed review and the decision became a final order.

961 EXPOSED TO CONTACT
Hazardous Waste Operations

FIRE-FIGHTING REGULATIONS
Hazardous Waste Operations
Protective Equipment
Training

GENERAL DUTY CLAUSE
Specific Standard

MOTION TO DISMISS
General Duty Clause
Specific Standard Available
OSHA -- Section 4(b)(1)

PERSONAL PROTECTIVE EQUIPMENT
Immediate Danger to Life or Health Atmosphere

2005-374 Raytheon Technical Services (2006)

MIOSHA alleged a violation of the General Duty Clause (GDC) by employer for failing to ensure equipment used in firefighting was approved for the conditions or locations, and by allowing employees to engage in firefighting operations without proper training or a lack of personal protective equipment.

The employer filed a motion to dismiss asserting that Part 432 titled "Hazardous Waste Operations and Emergency Response" applied. Because there were specific standards that applied to the conditions at issue, MIOSHA should not have used the GDC. Employer also argued that the conditions presented are preempted by 29 USC Section 653(b)(1) Section 4(b)(1) of OSHA.

Items 1 and 2 were dismissed. Part 432, contains several rules that could have been cited in place of the GDC. The GDC can only be used when there is no specific rule that applies to the hazardous condition at issue. The ALJ also found that the Section 4(b)(1) exclusion only applies to OSHA. Michigan operates under its own approved plan pursuant to Section 18(b). Accordingly, this portion of the employer's motion was denied.

MIOSHA sought Board review and the Board reversed the ALJ's order granting the employer's Motion to Dismiss. The matter was remanded for a hearing on the merits of the employers appeal.

After several days of hearing, the parties settled.

962 BURDEN OF PROOF

Citations Dismissed

Conflicting Hearsay Evidence

Department Required to Prove Violation

Employee Exposure Required

EVIDENCE

Admission by a Party Opponent — Not Hearsay

Credibility

Failure to Produce

Hearsay

Admissibility

Decision cannot be Based Solely on Hearsay

EXPOSED TO CONTACT

Employee Exposure Required to Sustain Violation

PRESSES

Employee Exposure Required to Sustain Violation

2004-1044 Thyssen Krupp Budd (2005)

MIOSHA alleged multiple violations by employer of a mechanical power press plant. Among these violations were problems with press safety, training and instruction of operators and maintenance, and damaged equipment.

All items and citations in dispute dismissed. All of the disputed Items were dismissed for lack of evidence establishing MIOSHA's burden of proof. The safety officer failed to gather evidence to support the citations. What evidence was presented was contradicted by employer's more persuasive evidence. MIOSHA did not establish employee exposure.

One item concerned a damaged hi-lo truck tire was questionable as hearsay, but was found to be an admission and allowable evidence under Rule 801 (d)(2)(D) of the Michigan Rules of Evidence (MRE). Here the evidence was weak in the face of direct testimony from another employee that the alleged violating employee never had occasion to use the truck.

963 EMPLOYER DEFENSES

Lack of Injury

INJURY

Not Needed to Establish Violation

LOCKOUT PROCEDURE

Trenching Machine

Unexpected Motion

TRENCH

Trenching Machine

Unexpected Motion

97-86 J F Jacobs Construction Company (2000)

Employer was cited for allowing employees to adjust the rollers on the trenching equipment while the machine was running, at idle speed, with the controls unattended. Employer stated there had never been a problem with unexpected or unintentional machine motion. Also, if the machine had been activated, employees could get out of danger.

The ALJ found it unnecessary for MIOSHA to establish a history of past injuries in order to find an employer in violation of properly promulgated standard. See paragraphs 48, 101, and 841. The purpose of the Act is to prevent the first accident. Also see paragraphs 134 and 261.

On review, the Board found that there was no violation and reversed the ALJ's decision. The agency appealed to the Circuit Court. The court reinstated the ALJ's finding that the board's decision was unauthorized and unsupported by 'competent, material and substantial evidence on the whole record.

964 ADMINISTRATIVE LAW JUDGE
Authority to Dismiss for Failure to Comply with Subpoenas

DISCOVERY
Enforcement
Dismissal for Failure to Comply
Subpoenas
Order for Witness Statements

SUBPOENAS
Enforcement
Dismissal for Failure to Comply

2000-537 South Hill Construction (2004)

The ALJ may dismiss citation appeals when MIOSHA refuses to comply with a subpoena. MIOSHA was ordered by subpoena to provide unredacted witness statements for employer inspection. Because of noncompliance with the subpoena the ALJ ruled that the employer could not have a fair trial and dismissed the citations.
The employer may not request costs until the decision is final. See Section 123(2)(e) of the APA.
The Board affirmed the ALJ's decision on appeal.

965 ADMINISTRATIVE LAW JUDGE
Authority to Dismiss for Failure to Comply with Subpoena

DISCOVERY
Enforcement
Subpoenas
Records and Interview Statements

SUBPOENAS
Enforcement
Dismissal for Failure to Comply

2000-504 L & L Construction (2002)

The ALJ may dismiss citations when MIOSHA refuses to comply with a subpoena. MIOSHA was ordered by subpoena to provide unredacted records and interview statements for inspection. Because of noncompliance with the subpoena the ALJ ruled that employer could not have a fair trial and dismissed the citations. The employer may not request costs and fees until the decision is final. See Section 123(2)(e) of the APA, MCL 24.323.
The Board affirmed the ALJ's decision on appeal.

966 AMENDMENT

By Motion

Prejudice

Denied

Due Process

Employer Identity

DUE PROCESS

Violation

MIOSHA sought to substitute a different Employer

2000-773 Zion Church Builders (2001)

It would be a violation of due process to allow MIOSHA to amend its pleading by citing a different employer after the 90 day period provided in MCL 408.1033(1) for issuing the citation had expired. The original employer had repeatedly informed MIOSHA that they had the wrong party; however, MIOSHA waited until after the 90 day period had run to substitute a different employer during the administrative review process. As a result the new employer did not receive the citation, have a chance to file a petition seeking review, and did not appeal to the Board.

Accordingly due process was denied to the uncited employer.

967 NOISE

Hearing Conservation Program

PROCESS SPACE

Evaluation

RESPIRATORY PROTECTION

Respirators

Respiratory Protection Program

SERIOUS VIOLATION

Reduced to Other Than Serious

Substantial Probability of Death or Serious Physical Harm

2005-305 Precision Standard Inc. (2007)

Employer appealed citations for Occupational Noise Exposure [R 325.60107(1)], lack of a Respiratory Protection Program [R 325.60052], and lack of a determination and notification of a Permit Required Confined Space [R 325.63002].

967 (Continued)

Employer's noise level required hearing conservation program and its program did not fulfill the requirements of R 325.60108-60127. However, this violation was found to be other than serious because MIOSHA did not establish substantial probability of death or serious physical harm. No penalty was proposed.

A written respiratory protection program is only required if one of two conditions is met: either respirators are necessary to protect the health of the employee, or respirators are required by the employer. MIOSHA did not prove either condition. This item was dismissed.

MIOSHA failed to show that employer performed the required evaluation for confined spaces. This item was dismissed

MIOSHA failed show that the confined space was a Permit Required Confined Space.

Accordingly, the employer was not required to give notice of confined space dangers. This item was dismissed.

No Board member directed review and the decision became a final order.

968 ADMINISTRATIVE LAW JUDGE

Lack the Authority to Determine Constitutional Questions

CONSTITUTION

Supremacy Clause

CONSTITUTIONAL ISSUES

2006-216 EES Coke Battery, LLC (2006)

ALJs lack the authority to make determinations of whether MIOSHA is preempted by the Federal Railroad Administration (FRA) under the Supremacy Clause of the U.S. Constitution. Administrative agencies exercising quasi-judicial powers lack the authority to determine constitutional questions or hold statutes unconstitutional.

The parties stipulated to removal of the case to litigate the jurisdictional issue in the federal district court. The matter was dismissed from SOAHRs docket without prejudice and was remanded to MIOSHA. The matter may be reinstated on SOAHRs docket at request of either party after conclusion of the federal court proceeding.

969 EVIDENCE

Admissibility by Party Opponent — Not Hearsay
Credibility

GENERAL DUTY CLAUSE

Employee Exposure Not Established
Sufficient Lighting

OIL AND GAS DRILLING AND SERVICING OPERATIONS

New Equipment Training
Sufficient Lighting
Vehicle Distance from Well-Bore

TRAINING

New Equipment Training
Oil and Gas Drilling and Servicing Operations
New Equipment Training
Vehicle Distance from Well-bore

2004-1266 Key Energy Services, Inc (2005)

Employer, an oil or gas driller, appealed citations for violation of the General Duty Clause (GDC) and Repeat Serious Violations (RSV) of the Oil and Gas Drilling and Servicing Operations (OGDSO) standard, Part 57, Rule 5711(1) (a) & (d).

Statements from two on-site employees contradicted the employer's in-court witness. While these statements were admissible because they were made by the agent of a party opponent, they were not written down or signed and so were afforded little weight. See MRE Rule 801(d)(2)(d). Moreover, neither employee was called as a witness.

Item 1, Citation 1 alleged a violation of the GDC for a lack of lighting hazard because employer was only using vehicle lights at the rig site. This citation was dismissed because the witness testified that the employees were not exposed to inadequate vehicle lighting because employer had no employees on the site. Logging operations were being handled by a different company

Item 1, Citation 2 alleged a RSV of the OGDSO because there was a lack of proper training for new equipment and for the new drilling rig. This citation was dismissed because the witness testified that the employees were properly trained with the equipment and no training was needed for the new rig because it only had new engine parts and was repainted.

Item 2 alleged a RSV of the OGDSO by having vehicles, which could spark fuel ignition, parked within 100ft of the wellbore. This citation was dismissed because the witness testified that the vehicles were parked outside the 100ft perimeter guide wire.

970 AMENDMENT
Freely Given — Prejudice

FIRE HAZARD
Accumulation of Oil Fumes

GENERAL DUTY CLAUSE
Employee Exposure Not Established
Hydrogen Sulfide Gas

OIL AND GAS DRILLING AND SERVICING OPERATIONS
Rules Only Apply to Drilling and Servicing

SERIOUS VIOLATION
Written Certification of Hazard Assessment, Lack of

TRAINING

2004-983 Key Energy Services (2005)

Employer was removing water from oil storage tanks through a process of heating and separating water from the oil. As a result, fumes accumulated, were ignited, and burned employee who died from his injuries. Employer was investigated and given ten citations.

Item I was dismissed. Item 1 alleging a violation of the General Duty Clause (GDC) by not monitoring for hydrogen sulfide gas was dismissed due to lack of employee exposure. No evidence was presented that hydrogen sulfide gas was on the site.

Items 2-9 were dismissed. These items alleged a lack of employee training. These items were dismissed because the operation did not involve drilling or servicing of drilling equipment and accordingly did not fall under Part 57 Oil and Gas Drilling and Servicing Operations. Furthermore, the only exposed employee had been trained and had 14 years of experience.

Item 10 affirmed. Employer did not have a written certification of hazard assessment as required by Rule 3308(2). Employer objected to amending 3308(2) to replace 3308(1), which was originally issued. However, amendments of citations in an administrative setting are freely granted unless prejudice can be shown by the employer. Furthermore, this violation is serious because the lack of proper personal protective equipment could result in death or serious physical injury. Employer knowledge was established because the employer could reasonably be expected to know there was no written hazard assessment on the site.

971 CITATION

Timeliness of Issuance — 90 days

1999-4617 National Steel (2000)

MIOSHA's citations against employer were dismissed because they were not issued within the 90 day period after completion of the physical inspection or investigation [R 408.22344(1), Section 33(1)]. The ALJ found the first closing conference to designate the completion of the inspection or investigation,

The Board of Health and Safety Compliance and Appeals reversed the ruling, but it was later affirmed by the Circuit Court.

972 AISLES

Does Not Include Outdoor Areas

BURDEN OF PROOF

Department Required to Prove Violation

Citations Dismissed

Witness Credibility

EVIDENCE

Hearsay

Insufficient alone to Establish Burden of Proof

FLOOR MAINTENANCE

Work Area or Aisle

Does Not Include Outdoor Areas

POWERED INDUSTRIAL TRUCKS

Must Be Able to Carry Load

1999-4685 Milford Fabricating Co. (2000)

MIOSHA issued citations after an inspection of an employee accident involving a hi-lo truck dropping a car.

Employer was alleged to have a floor of a work area, passageway or aisle with hazardous accumulations [R 408.10015, Rule 15]. However, since the area was an unenclosed outdoor surface and not within a structure it does not fit within the meaning of "floor or work area." Also, there was a citation for a trip hazard, yet there was no measurement as to how uneven the surface was or that employees had tripped. These citations were dismissed.

972 (Continued)

MIOSHA alleged a violation of R 408.12193, Rule 2193, because employee was allowed to lift a load (car) that could fall off the truck during normal movement. This citation was not proved by preponderance of the evidence. The employer's manager testified that the load was lost when employee ran into a truck. This was contradicted by employee hearsay evidence. No other incidents of this type of accident occurred, and the hi-lo trucks were capable of carrying the weight of the cars. This citation was dismissed.

The parties eventually settled the matter.

973 EMPLOYER DEFENSES

Vague Rule

Statutory Interpretation

HEARING

Stipulation of Facts

REPORTING OF FATALITY

Definition of Employee

Statutory Interpretation

STIPULATION OF FACTS

1999-4540 Grede Foundries, Inc (2001)

The parties agreed to submit case with a statement of facts and a written argument. No hearing was held.

Employee died of a heart attack on the job. Employer failed to notify MIOSHA within 8 hours of the fatality associated with employment. MIOSHA alleged that this was a violation of Section 61(1) of MCL 408.1061(1). Employer argues that the phrase from statute, "associated with their employment," applies disjunctively to injuries and illnesses but not fatalities.

The ALJ determined that the lack of a comma before "or" demonstrates the intent of the drafters that fatalities be conjunctively included. Furthermore, an employee is defined as a person permitted to work by an employer. Employee was working when he died even though he was not expending effort.

The employer's time for reporting should only run from when the employer knows or should know of the fatality or injury. The ALJ suggested 408.22117, Rule 1117(1) be reworded to make clear that all fatalities and injuries for all workplace incidents regardless of employee activity must be reported.

974 ADMINISTRATIVE LAW JUDGE
Authority to Dismiss for Failure to Comply with Subpoena

BOARD REVIEW
Failure to Direct
Result

BORING OPERATION
Gas Main Rupture

DISCOVERY
Enforcement
Subpoenas
Confidential Employee Statements

CIRCUIT COURT REVIEW
ALJ Discretion Standard
Must Exhaust Administrative Remedies

PRIVILEGES
Informer's Privilege
Work Product Privilege

SUBPEONAS
Enforcement

1999-5313 Roese Contracting (2001)

Employer's boring drill ruptured a gas main and destroyed 4 buildings. MIOSHA took confidential statements from employees. The employer was granted a subpoena to access these statements.

MIOSHA sought a protective order for the records, but was denied because neither the informers' privilege nor the work product privilege were strong enough to overcome the employer's need for the documents. MIOSHA refused to comply with the subpoena and the ALJ granted a motion to dismiss, but did not impose costs. Without access to the employee statements the employer could not have a fair trial.

MIOSHA filed an appeal to the Board, but no Board member directed review and the decision became a final order. On Petition for Review with the Circuit Court MIOSHA sought reversal of the final Board order, reversal of the denial of the protective order, reversal of the order granting the employer's motion to dismiss, and reinstatement of the citation against the employer.

974 (Continued)

The Circuit Court gives great deference to administrative decisions, and the Circuit Court cannot substitute its discretion for that of the ALJ when there was no abuse of discretion on the ALJ's part. The ALJ was within his discretion in determining that the employee statements would be essential to a fair determination of the cause, and that the statements were not work products of MIOSHA.

Employer sought on Petition for Review court and attorney fees. However, employer failed to exhaust all administrative remedies because they did not appeal to the Board the AL's decision not to award costs.

975 SERIOUS VIOLATION

Employer Knowledge Established

TRENCH

Employee Exposure
Sloping
Granulated Clay Soil
Unstable or Soft Material

WILFUL VIOLATION

Definition
Indifference to Requirements
Intentional Disregard
Prior Citations

1999-5226 Bailey Excavation (2003)

Employer was cited for improper trench sloping, resulting in danger of serious physical injury or death from a cave-in. The 90 degree angle of the granular clay mixed soil should have been 45 degrees [R 408.40941(1), Rule 941(1)]. The support system used by employer was insufficient to derogate this requirement [Rule 942(1)].

A failure to act is willful if it is done knowingly and purposely [R 408.1006(8)]. The employer's violation of Rule 941(1) was willful based on employer's repeat citation history of six prior violations of this rule, one occurring the month before with the same employees, foreman, and citation.

No Board member directed review of the matter, and so the decision became a final order of the Board pursuant to Section 42 of MIOSHA.

976 BURDEN OF PROOF
Employee Exposure

EMPLOYER DEFENSES
No Employee Exposure

EXPOSED TO CONTACT
Exposure Not Established
Open Electrical Boxes
Shafting

PREHEARING PROCEDURES
Motion for Partial Summary Judgment

1999-5210 Interstate Brands Corporation (2001)

The ALJ considered the employer's motion for partial summary judgment. Those items with a genuine issue of fact were set for trial. Others were dismissed. After the order was issued and before the hearing, the parties settled all remaining issues.

MIOSHA alleged a variety of citations including a violation of exposed shafting 7 feet or less above a floor or platform, and lack of covers for pull boxes, junction boxes, or fittings [R 408.10751-54, R 1910.305(b)(2)].

While the shaft was 7 feet or less above the floor, MIOSHA failed to demonstrate the danger of an employee coming into contact with the shaft, and the actual hazard of the shaft. This item was dismissed while an electrical box was uncovered, there was no assertion of employee exposure in the deposition; other writings provided were in conflict. Accordingly, there was no issue of fact requiring a hearing on this issue.

This case was subsequently settled by the parties.

977 BURDEN OF PROOF

Department Required to Prove Violation

Citation Remanded

Department Must Prove Guardrails Inadequate Employee Exposure Required

COURT REVIEW

Dismissal Standard

Decision Not Supported By Substantial Evidence

Remanding to Different ALJ

ELEVATORS

Clip Requirement for Hoist Rope

FALL PROTECTION

Continuous Fall Protection

Elevator Shaft

GENERAL DUTY CLAUSE

Elevator

Wooden Struts Unnecessary / Hoist Anchored by Metal Bolts

1999-4576 Otis Elevator Company (2002)

Employer was cited for a serious violation of the General Duty Clause (GDC) for having improperly secured wooden struts as secondary safety precautions for an elevator fall. However, these wooden struts were not necessary because the drum hoist was adequately anchored by metal bolts, and so did not create a hazard. This citation was dismissed MIOSHA alleged a violation of R 408.44502, Part 45 by lack of continuous fall protection. An employee was disengaging fall protection when repeatedly opening an elevator door for another employee and subjecting himself to a dangerous and potentially deadly fall. This serious violation was affirmed.

There was an alleged violation of R 408.40834(4), Part 8 for having only two wire rope clips where three were required for the specific diameter of rope being used on the elevator hoist. This citation was affirmed.

Employer was also cited for a 408.41077(a)(4), Part 10 violation by not having a capacity rating indicated on the drum hoist itself. Even though the workers were aware of its capacity, this citation was affirmed.

The Circuit Court remanded the ALJ's determination on the 408.44502 violation for lack of continuous fall protection to a different ALJ. MIOSHA appealed and the Court of Appeals affirmed the Circuit Court's ruling. The ALJ had impermissibly shifted the

977 (Continued)

burden of proving the absence of personal fall protection and the absence of a guard rail to the employer when it should have been on MIOSHA.

Furthermore, the Circuit Court had the right to remand the case to a different ALJ because the original judge's jurisdiction ends upon rendition of the ALJ's decision.

On cross-appeal, employer asserted that the circuit court should have dismissed the citation. However, the Court of Appeals held a circuit court may only set aside a decision of an administrative agency if the decision is not supported by substantial evidence, which may be substantially less than preponderance of the evidence. The court found more than a scintilla of evidence before the ALJ to support a finding that the employee was exposed to a fall without the protection of a personal safety or guardrail system.

Upon remand to a different ALJ the parties settled and the case was closed.

978 FALL PROTECTION

Roof Work

HEAD PROTECTION

Overhead Lifting Operations

HELMETS

Lifting Operations

OTHER THAN SERIOUS

New Equipment, No Inspection Report

PENALTIES

Reduced

Section 36 Not Followed: Size, History, and Seriousness

PERSONAL PROTECTIVE EQUIPMENT

Hard Hats

Overhead Lifting Operations

SERIOUS VIOLATION

Fall Over 18 Feet

Overhead Lifting Operations

1999-4539 T.H. Eifert, Inc. (2001)

Employer was operating lifting equipment to transport cooling devices to the roof of a structure over 18 feet above ground. Lack of safety precautions led to 3 citations.

Helmets were required due to the risk of cooling units falling from the lift [R 408.40622(1)). None of the employees were wearing helmets. Anyone within distance of the boom on the ground or on the roof was required to wear a helmet.

978 (Continued)

This was a serious violation. Employees were walking near an unprotected surface subject to a fall of over 6 feet without fall protection [R 408,44502]. There was evidence from a photograph that at least one employee was near the building edge. The fall was over 18 feet and a serious violation.

The employer failed to have a copy of an inspection report for the boom truck available on site [R 408.41012a (1)]. This violation was "other than serious" because the truck had been inspected and was fairly new.

The proposed penalty amounts assigned did not comport with the standard of Section 36 considering the size of the business, the seriousness of the violation, the good faith efforts of the employer, and the history of pervious citations. MIOSHA did not inquire into all of the factors. The penalty amounts were reassessed by the ALJ.

979 ASBESTOS

Employer Identity

EMPLOYER

Control Over Employees
Entity in the Best Position to Prevent Hazards

EXPOSED TO CONTACT

Asbestos (see ASBESTOS)

1999-4474 A.J. Etkin Construction Co. (2001)

Employee was subjected to asbestos when removing floor tiles. Employee complained to both the contractor, who was directing his work, and the church who was paying his salary. Employee was fired for refusal to work on the tiles and filed a MIOSHA complaint; the church paid the fines but the contractor appealed the citations. The issue was whether the contractor was subject to citations as an employer.

The contractor and the church both fell under the broad definition of an employer [MCL 408.1005]. When there is a choice of employers, liability falls on the employer in the best position to identify and control workplace safety hazards. Here the contractor had the best position of information about the problems and how to solve them, and thus had a duty to protect the employee from asbestos hazards.

980 OTHER-THAN-SERIOUS VIOLATIONS
Found to be Serious on Board Review

PERSONAL PROTECTIVE EQUIPMENT
Traffic Signal Regulator
Head, Eye, and Foot Protection When Subject to Hazards

SERIOUS VIOLATION
Substantial Probability of Death or Serious Physical Harm if Accident Occurs

SIGNAGE
Road Construction
Properly Installed Traffic Control Signals

TRENCH
Employee Exposure
Heavy Loader with Open Hooks
Sloping
Six to Seven Feet Deep/ 69 Degree Sides
Storage of Spoil

1999-4529 Kamphuis Pipeline (2001)

Employer was lowering pipe in a trench by using a heavy loader with open hooks.

Employer was alleged to have caused a serious violation by using open swivel hooks instead of closed hooks. However, the definition of serious injury hinges on whether there was a substantial probability that death or serious injury would result. MIOSHA failed to show a substantial probability; employer stated the pipes have never fallen before using this method.

An excavation an employee must enter shall not have excavated or other material less than 2 feet from the edge [R 408.40933 (2)]. Employer had some topsoil located near the edge, and had some pipes stacked near the edge. The soil or pipes could cause cave-ins or the pipes could roll in and cause serious injury or death.

An excavation more than 5 feet deep is required to be sloped properly [R 408.4094 1(1)]. Employer's trench was 6-7 feet deep and 69 degrees. This was a violation of the rule. However, this was not considered a serious violation by the ALJ considering the slope, depth, and trench consistency.

Where traffic creates a hazard to construction employees, traffic control devices shall be properly installed [R 408.42223(1) Part 22]. Employer had traffic control devices, but they were not sufficiently placed, and the sign-holders had left their places. However, reduced traffic speed, light

980 (Continued)

traffic, and substantial compliance reduced this violation from serious to "other than serious."

When subjected to possible hazards, a traffic signal regulator shall wear head, eye, and foot protection [R 408.42223(9)]. Employees were subject to possible hazards while moving barrels, and could be injured for failure to comply with this statute. This violation was serious in nature.

On appeal to the Board the "other than serious" trench violation was reinstated as serious. The Board held that a 6 to 7 foot trench with a 69 degree slope is likely to result in serious injury or death.

981 SERIOUS VIOLATION

Employer Knowledge Established Supervisor
Observed Operation

TRENCH

Calculation of Trench Depth
Earth Ramp
- Angle of Sides
- Unstable Material

Employee Exposure
Sloping
- Clay Soil
- Machine Vibrations

Unstable or Soft Material

2001-982 Conex, Inc. (2002)

Employer was placing pipe in a trench that did not meet the standards for a trench deeper than 5 feet. The angle of repose for the trench walls was greater than the maximum angle of 63 degrees allowed for clay soil types, especially considering machine vibrations [R 408.409401(1)]. The ramp used for exiting the trench did not comply because it was made of unstable soil and its sides were too steep [R 408.40933(5-6)].

There was an issue of fact concerning the depth of the trench due to contradictory witness testimony. However, the great weight of the evidence by analysis of the blueprints and different soil removal techniques place the trench depth at greater than 5 feet.

These alleged violations were serious because substantial probability existed that death or serious physical harm could have resulted from a cave-in. The employer knew of these

981 (Continued)

conditions because a foreman was standing at the trench supervising. A penalty for $1,200 was affirmed for both violations.

982 CONSTITUTION
Supremacy Clause

CONSTITUTIONAL ISSUES

EXPOSED TO CONTACT
Fireworks-Explosives

PREEMPTION
Complimentary Jurisdiction
Federal Bureau of Alcohol, Tobacco, and Firearms

2001-1373 Wolverine Fireworks Display, Inc (2002)

Employer was cited for improper storage of class B and C explosives (fireworks). Employer used flashlights in magazines of explosives, piled explosives against walls, failed to ensure that packages of explosives were not unpacked or repacked in a magazine close to other explosives, and allowed employees to smoke within 25 feet of explosives.

The ALJ determined that Class B explosives were not preempted by regulations of the Federal Bureau of Alcohol, Tobacco, and Firearms (BATF). The nature of the subject matter does not require federal supremacy and uniformity and Congress did not intend to displace state legislation; neither was there a conflict between state and federal such that they could not coexist.

The ALJ held that MIOSHA was not required by OSHA to cite only NFPA consensus standards on storage of Class C explosives. There was no indication of this in the OSHA rules.

Employer appealed to circuit court, which ruled that where federal law does not slow clear intent that a state activity be preempted, state regulation is considered complimentary, not contradictory. The court held that the differences between the BATF and MIOSHA regulations were complimentary.

983 ADMINISTRATIVE LAW JUDGE
Disqualification for Prejudice

EMPLOYEE
Definition
Person Permitted to Work

EMPLOYER
Control Over Employees
Nonappearance at Scheduled Hearing
Good Cause

2000-852 Hughes Design & Build (2004)

Employer was not present at the scheduled hearing and a default ruling was issued. The decision was appealed and the Board reinstated the action. The Board found that employer had good cause for not attending because the Assistant Attorney General said the hearing would be adjourned. The employer thought the Assistant Attorney General had the authority to adjourn the hearing, even though he did not.

On remand, the ALJ found Mr. Reilly an employee because he was a person permitted to work by the employer. Therefore, employer's motion to dismiss was denied.

Employer's motion to disqualify the ALJ was dismissed. There was confusion over the position of the ALJ; he had never served as a prosecutor for MIOSHA.

This case was subsequently settled by the parties.

984 ADMINISTRATIVE LAW JUDGE
Authority to Dismiss for Failure to Comply with Subpoena

DISCOVERY
Enforcement
Subpoenas
Records and Interview Statements

SUBPOENAS
Enforcement
Citation Dismissal for Failure to Comply

2000-476 Barnhart & Son Construction (2002)

The ALJ may dismiss citations when MIOSHA refuses to comply with a subpoena. MIOSHA was ordered by subpoena to provide unredacted records and interview statements for inspection by the employer. Because of non-compliance with the subpoena the ALJ ruled that employer could not have a fair trial and dismissed the citations. The employer may not request costs and fees until the decision is final. See Section 123(2)(e) of the APA, MCL 24.323. The Board affirmed the ALJ's order to dismiss.

985 BURDEN OF PROOF
Department Required to Prove Violation
Citations Dismissed
Failed to Prove Employer Involvement

TRENCH
Sloping

2002-1611 L. D`Agostini & Sons, Inc. **(2004)**

Employer allegedly violated Rule 941 (1) for digging a trench with an improper angle of repose. The trench was 9 feet deep and connected the home's sewer line to the city's main line. A person was observed working in the trench but it was not proved that this person was an employee of the employer at that time. The trench was deeper than 5 feet with a slope too steep for the soil type.

MIOSHA failed to prove by a preponderance of the evidence that the employer was the one who dug the trench. The homeowner and the employer both stated that it was the homeowner who dug the trench with the employer's equipment. The citations were dismissed. No Board member directed review.

986 SERIOUS VIOLATION

Employer Knowledge Established

Employer Agent Present

TRENCH

Heavy Loader with Open Hooks

Ladder in Trench

No Ladder or Ramp

WILFUL VIOLATION

Actions of Foreman Imputed to Employer

Indifference to Requirements

History of Violations

Prior Citations

2002-806 L. D'Agostini & Sons (2003)

Employer was installing a water main in an 8 foot deep trench with 90 degree vertical sides without a support system. Employer's foreman was present at the site, and employer had been cited 39 previous times for trench violations. Open hooks were being used to raise and lower materials into the trench.

A serious and willful violation was appropriate because the employer's history of 39 violations shows a plain indifference to compliance with a safety rule.

Failing to use an closed hook was a violation of Rule 408.41032a(2). Furthermore, lack of a ladder or exit ramp was a violation of Rule 408.40933(5).

On appeal to the Board, the decision of the ALJ became the final order. On appeal to circuit court the decision was also affirmed. The Court of Appeals and the Supreme Court each denied leave to appeal.

987 BOARD REVIEW
Citation Dismissal
Unpreventable Employee Misconduct

ELECTRICAL
Grounding

EMPLOYER DEFENSES
Isolated Incident
Unpreventable Employee Misconduct

2002-1513 Detroit Edison Co. St. Clair Power Plant (2004)

Employee failed to ground a 345,000 volt power line when connecting a generator. No employees were injured, although serious injury or death could have resulted. Employer was cited for not inspecting the work area before restoring energy to the line [Electric Power Generation Part 86 Section 1910.269(d)(7)(i)], and for not conducting a job safety briefing before starting the job [Part 86 Section 1910.269(c)].

Employer asserted the defense of unpreventable employee misconduct. This defense has 4 elements: employer must have established work rules designed to prevent the violation, have adequate communication of those rules to its employees, have taken steps to discover violations, and have effectively enforced the rules when violations have been discovered.

Employer had work rules relating to both citations and had communicated them through training. Employer took steps to discover the violations by requiring records and pre-job briefings. Employer effectively enforced the rule to inspect the work area by severely disciplining employee. However, employer did not mention the failure of the pre-job briefing in its disciplinary letter to employee.

The citation for not inspecting the work area was dismissed because all the elements of unpreventable employee misconduct were met. The citation for lack of a pre-job briefing was affirmed because it failed the fourth part of the test.

On appeal the Board dismissed the citation for lack of a pre-job briefing because the employer does not need to directly mention the violation to fulfill the fourth part of the test.

988 FLOOR MAINTENANCE
Water/Oil

HAZARD ASSESSMENT
Rule
Triggered by Lack of Assessment not Improper Assessment

MOTION TO DISMISS
Directed Verdict

POINT-OF-OPERATION
Concurrent Machine Control

PREHEARING PROCEDURES
Motion for Directed Verdict

STOCK STACKING
Billet Placement

2002-1545 CSM Industries (2004)

Employer was cited for hazardous placement of materials, lack of concurrent machine control, not assessing the workplace for hazards, and for slip hazards. Employer moved for a directed verdict.

The employer was cited for hazardous placement of materials by having billets stored "loose" on pallets [Rule 15(1) Part 1]. This citation was dismissed because MIOSHA did not establish that placement of the billets created a hazard, and the billets' weight kept them stable.

Concurrent machine control is required for each employee exposed to the point of operation [Rule 33(4) Part 1]. There was evidence that the employee was exposed to the point of operation, and employer did not sufficiently contradict this evidence. The motion for directed verdict on this issue was denied, but MIOSHA dismissed this allegation before trial.

Employer is required to assess the workplace for hazards [Rule 3308(1) part 33]. MIOSHA attempted to show improper assessment. However, Rule 3308(1) is not violated for improper assessment, but for lack of assessment. Citation dismissed, MIOSHA should have charged the employer with violation of specific standards — hard hats and eye protection.

A directed verdict was denied for the slip hazard citation, but dismissed after trial. The floor of a work area must be maintained free of hazardous accumulations of water, oil, grease, and other slip hazards [GISS Rule 15(3)]. A worker was washing equipment on a cardboard sheet; the water from the cleaning likely contained oil and created a fall hazard.

988 (Continued)

The employer's proof established that all employees wore slip resistant boots, and there was a floor drain to prevent accumulation of water and oil. The record did not show the cardboard created a slippery surface.

989 BOARD REVIEW

Affirmance

Demolition Area Inspection

DEMOLITION

Inspection of Entire Demolition Area is Required

INSPECTION

Demolition Areas

Inspection of Entire Demolition Area is Required

2004-1212 Pitsch Companies (2006)

Employer was cited for not performing sufficient inspections of a demolition area before performing the demolition [R 408.42031]. Employees of a different contractor working in the area were put in danger and one was injured from demolition debris.

The ALJ determined that employer conducted sufficient inspections of the area. Employer had checked all but the locked area, and informed the other contractors that it would be working on the area where the accident occurred.

The Board reversed. The Board determined that a reasonable employer should have inspected the entire demolition area. Employer should have obtained the keys to the locked area to ensure "all employees" were safe from hazards.

990 BOARD REVIEW

Affirmance

No Evidence Linking Employer to Violation

BURDEN OF PROOF

Department Required to Prove Violation

Citations Dismissed

No Evidence Linking Employer to Violation

CONSTITUTION

Fourth Amendment

Employer Accompaniment During Inspection

INSPECTION

Accompaniment by Employer Representative

Required if Absence will Prejudice Employer

MOTION TO DISMISS

Employer Accompaniment During Inspection

2003-1476 Thomarios (2005)

Employer was absent when a MIOSHA inspection occurred, but MIOSHA had received permission from the general contractor to view the worksite. There were violations for improper fall protection, but employer argued that it had a right of accompaniment under MCL 408.1029(4) and R 408.22326(1), that had been violated.

The ALJ initially determined that the general contractor's consent fulfilled the Fourth Amendment requirements and that even if there was an illegal inspection the employer was not prejudiced in any manner. The employer's motion for summary disposition was denied.

Post-hearing, the ALJ concluded there was no evidence establishing that the fall protection lifelines belonged to the employer. The worksite was being used by at least 2 different companies. Employer's right to accompaniment was violated because they did not have an opportunity to refute or explain the allegations against them.

MIOSHA failed to establish by preponderance of the evidence the critical connection that employer was the one who had the improperly installed lifelines. MIOSHA appealed, but the Board affirmed the ALJ's decision.

991 HEARING

Record

Motions for Summary Disposition

INSPECTION

Site Specific Workplace Inspection

MOTION TO DISMISS

Summary Disposition

PERSONAL PROTECTIVE EQUIPMENT

Site Specific Workplace Inspection

2002-1050; 2002-1051 United Parcel Service (2004)

Two separate employer divisions received serious citations for inadequate assessment of workplace hazards that may necessitate the use of personal protective equipment.

Employers' inspectors did not do a walk-through survey of either workplace as is required by Part 33, R 3308(1). The parties stipulated that the citation should be other-than-serious, and no penalties were assessed.

The parties waived an evidentiary hearing and agreed to submit the case to the ALJ on cross motions for summary disposition. The ALJ found the employer's inspections at other sites did not satisfy the rule that inspections be site specific.

No Board member directed review of this matter. The Ingham County Circuit Court affirmed. UPS appealed to the Michigan Court of Appeals and the court found that UPS did not violate R 3308(1) and reversed and vacated the Circuit Court's decision.

992 FALL PROTECTION

Aerial Work Platforms

Bungee Jumping Operation Bungee

Jumping Operation

Mid rail

Strictly Prohibited to Stand On

GENERAL DUTY CLAUSE

Lift Basket Anchorage Points/Handrails

LIFTING EQUIPMENT

Lifting Basket

Anchorage Point/Handrail Requirement Bungee

Jumping Operation

Proof Testing of Hoist

Records of Periodic Inspections

2003-1015 St. Louis Bungy Jump, Inc. (2004)

Employer was operating a bungee jumping business and was cited for MIOSHA violations because it allowed its employees to bungee jump, had employees standing on the elevated midrail section while lubricating, allowed employees to work on the basket without anchorage points/handrails, lacked fall protection, had an unstable crane, did not have proof testing, and did not keep appropriate inspection records.

Allowing the employees to bungee jump does not violate MCL 408.1011(a), because this standard applies to personnel lift baskets. If a hazard exists to employees, then it would also exist for customers and bungee jumping would be outlawed. Citation reversed.

Employees standing on the elevated midrail while lubricating is a violation of ASME B30.23-3.2.4(a)(6) because the standard strictly prohibits working on a midrail. Even if employees were harnessed to the bungee cables the standard was violated.

Rule ASME B30.23-1.1.1(b)(3) and (4) requires generally that all lift baskets have either anchorage points or handrails to prevent the chance of accidents. Because this provision applies generally and is required for overall safety, and because employer chose to ignore a hazardous situation, there was a violation of the General Duty Clause and the standard.

ASME B30.23-3.2.4(a)(3) requires employees working in platforms to wear personal fall protection. Employees were using bungee rope for fall protection. This rule does not specify exactly what type of lanyard and harness is to be used, thus there was no violation. Citation reversed.

992 (Continued)

Stabilization of hoisting equipment in accordance with manufacturers' specifications is required by ASME B30.23-3.2.2(a)(3). However, MIOSHA presented no evidence regarding manufacturer's specifications concerning the type of hoisting equipment being used by employer. Citation reversed.

Proof testing is required before hoisting people on a platform [ASME B30.23-2.2.1(b)(1)]. Employer performed its own testing not in accordance with the testing procedures of the standard. Citation affirmed.

Records of periodic inspections shall be made and kept at the platform for review [ASME B23-2.1.1(b)(2)(c)(2)]. Employer did not keep the records available for review at the site. **Citation affirmed.**

No Board member directed review of the case.

993 BURDEN OF PROOF

DISCOVERY
- Interview Statements
- Safety Officer Observations Before Opening Conference Safety Officer Notes before Citation Issuance
- Employer Defenses
- Inspection Before Safety Officer Introduction
- Witness Statements as Hearsay

EVIDENCE
- Hearsay
  - Decision Cannot be Based Solely on Hearsay Prior Citations

MOTION IN LIMINE

PHOTOGRAPHSNIDEOTAPES
- Evidence in Plain Sight
- Improper Search

WITNESSES
- English Competence
- Right to Confront

2005-344 Lawrence M. Clarke, Inc. (2006)

Employer argued that the admission of certain documents into evidence would deny the right to confront accusers. The employer filed a Motion in Limine asking the ALJ to exclude exhibits before trial as hearsay based on the Michigan Rules of Evidence. The employer also argued that the evidence would not be the type a reasonably prudent

person would rely upon under Section 75 of the APA. The ALJ did not exclude an inspection report argued to contain hearsay. Hearsay evidence may be presented under Section 75 of the APA, but hearsay evidence alone will not satisfy MIOSHA's burden. It is the safety officer's job to prepare the report, but the parties can still present evidence in opposition.

The ALJ refused to exclude documented evidence of prior citations, but pointed out that those documents alone would not be enough to satisfy MIOSHA's burden.

Where employer's employees signed statements written by the safety officer, the ALJ found that the statements alone do not prove the assertions set forth. Additionally, MIOSHA has the burden to show that an employee "knowingly" made the admissions for the purposes of MRE 801(d)(2)(D), where an employee's ability or command of the English language are at issue.

Employer sought to dismiss citations in advance of hearing arguing that MIOSHA conducted an improper search and notes used to prepare the citation were destroyed. While a safety officer was driving by he pulled over to assess a work site. The officer immediately began to take pictures of the site, but did not introduce himself to the jobsite foreman until after he had already taken the photographs.

MIOSHA requires an "inspection or investigation ... be conducted without unreasonably disrupting the employer's operations," *MCL 408.1029 Section 29(1)* and requires the employer and employee (or a representative thereof) be "given the opportunity to accompany the department representative during the inspection or investigation." MCL *408.1029 Section 29(4).* However, in *Accu-Namics v Occupational Safety and Health Review (515 F2d 828,823 (CA 5, 1975)* and *C&H Landscaping Co., NOA 94-754 (1996),* evidence in plain sight observed before the inspection began was permitted at trial. The ALJ denied the employer's motion, explaining that the work site was in plain sight.

The employer also sought to dismiss the citations because original notes the safety officer used in issuing the citation were destroyed. MIOSHA argued that there was no formal requirement that MIOSHA keep the notes after the final report was prepared. The ALJ concluded destruction of notes did not require the citation to be dismissed. The ALJ also pointed out the burden remains on MIOSHA to demonstrate the validity of the citation. The absence of the notes could make MIOSHA's burden harder to satisfy.

This case was subsequently settled by **the parties.**

994 ASBESTOS

Buildings Constructed before 1981

Presumption of Asbestos Contamination

Employer Responsibilities

Removal

Floor Tile

2006-584 Blue Star, Inc. (2006)

The ALJ affirmed citations regarding asbestos contaminated floor tile. Petitioner was hired to remove flooring in a school. Before Petitioner began work, the building owner had prepared a survey which failed to analyze the flooring materials. Nevertheless, because the building was constructed before 1981, Petitioner was required to gather additional data to determine whether Petitioner's employees would be working with asbestos. In the absence of rebuttal sampling data, Petitioner was obligated to assume that the flooring contained asbestos.

For a citation to be upheld, the agency must establish four elements:

1) Applicability of the cited standard

2) The employer's noncompliance with the standard

3) Employee access to the violative condition, and

4) Employer's actual or constructive knowledge of the violation.

MIOSHA satisfied the first element because Petitioner's employee was working with double layered vinyl coated tile containing asbestos. MIOSHA met the second element because Petitioner did not monitor exposure, work within a regulated area, ensure supervision by a competent person, or use barriers or isolation methods to prevent airborne asbestos from spreading. Also, Petitioner did not provide respirators, protective clothing, an area for decontamination, or a training course. Because an employee was working with the material, employees had access to the violative conditions. MIOSHA met the fourth prong because Petitioner had worked with asbestos containing materials such as floor tiles before. The ALJ explained that the responsibility to determine if the flooring contained asbestos belonged to Petitioner, regardless of the terms of Petitioner's contract.

All Citations were affirmed.

995 ADMINISTRATIVE LAW JUDGE

Reassignment

ALJ Unable to Issue Decision

CONSTRUCTION

Activities/Operations

Roofing

2006-1151 North Coast Commercial Roofing Systems (2006)

Petitioner was a wholesale distributor of commercial roofing materials. Generally, Petitioner employees did not go on roofs when they delivered material to worksites. In this case, the employee went on the roof and fell through a skylight, resulting in his death. In deciding the citation's validity, the case turned on whether petitioner was involved in 'construction activities."

Under MCL 408.1004(4), which focuses on a business' general classification, the term "Construction Operations" is limited to work activities that fall within major groups 15, 16, and 17, of the standard industrial classification manual (SIC code). The parties agreed that the Petitioner did not fall within the scope of this definition. Instead, the parties directed the ALJ's attention to *Great Lakes Steel Division v Department of Labor, 191* Mich App 323, 477 NW2d 124(1991), where the Court of Appeals focused on the employee's activities. The court allowed MIOSHA to cite an employer engaged in construction activities even though the employer did not fall under SIC codes 15, 16, or 17. Here, the ALJ concluded the employee was engaged in construction activities, under *Great Lakes Steel*, focusing on what the employee was doing when he died.

Citations were affirmed in part, dismissed in part, and amended according to the parties' stipulation of facts.

996 EXCAVATION

Utility Line Installation

Pipe Rupture

Reasonable Care Standard

Strict Liability Standard

2007-296 Mid State Utilities (2007)

Because the ALJ found Petitioner responsible under a strict liability standard and a reasonable care standard, the citation was affirmed. Petitioner asked the public utility company to mark the utility lines so that Petitioner could install telecommunication cables. The public utility failed to properly mark the lines. While Petitioner's employee was digging, a gas line broke and exposed him to natural gas. ALJ explained that under MCL 408.40931, Petitioner was responsible for "ascertaining the location of all underground facilities" before excavating. Moreover, the ALJ found that under MCL 460.708, the excavator is strictly liable for determining the "precise location" of the utilities. The ALJ held petitioner liable under both the reasonable care tests set forth in MCL 408.40931(2) and MCL 460.711. Under these rules, the excavator is responsible for exercising reasonable care even when the excavator has obtained information from the public utility. Petitioner asserted MCL 460.708 as a defense, pointing out that the utility company failed to properly mark the site. The ALJ did not find that argument convincing.

Citation Affirmed

This decision was appealed to the circuit court but settled.

997 DISCRIMINATION

Discharged
Complaints about Working Conditions
Water on Floor
Insubordination
Walking out of Performance Evaluation
Safety Complaints to Employer
Water of Floor
Uncooperative Behavior
Intimidation
Threatening Tone of Voice
Employment
Laundry Worker
Evidence
No Employer Knowledge of Complaint
Decision to discharge before complaint

2000-724 Anderson v Memorial Medical Center (2000)

Employee complained to her supervisor of conditions in her work area. The next month, employee had her annual evaluation and was told she would not be receiving a raise at which point she walked out of the evaluation before it was finished. Employee filed a MIOSHA complaint three days after the evaluation was conducted. Employer met with employee the following day and informed employee that she was fired for her insubordination. Employee alleges that employer discriminated against her after she filed her complaint with MIOSHA.

Employer presented the following evidence:

1) Three months prior to employee's evaluation and termination, employer noted employee's argumentative conduct.

2) Employee's evaluation could have been completed if employee did not walk out.

3) Neither the employee's supervisors nor the employer was aware of the discrimination complaint at the time employee was fired.

The ALJ affirmed MIOSHA's decision concluding that employer did not discriminate against employee under section 65 of MIOSHA.

998 DISCRIMINATION

- Administrative Law Judge
  - Decision Assigned to Another
- Burden of Proof
  - "But For" Test
    - Established
    - Complaints
      - Laser Aimed at Eye
- Shifts to Employer
- Discharged
  - Threat against Co-Worker
- Hearing
  - Circuit Court Remand
- Protected Activity
  - Laser Use Complaint
- Relief under Section 65
  - Attorney Fees
- Back Pay
  - Deductions for Earned Wages

2000-998 Carpenter v Spartan Motors (2003)

A co-worker struck employee in the eye with a laser beam while at work. After employee discussed the incident with a supervisor, the supervisor brought employee and the co-worker together to talk about what had taken place. Employee claimed that the co-worker intentionally aimed the laser at him, and the co-worker claimed it was an accident. Employee also expressed his concern about the safety of lasers in the workplace. While employer asserted that it would take ten minutes to do any damage, the ALJ found that the sincerity of the employee's belief outweighs the reality of the danger perceived.

During the confrontation, the co-worker slapped employee's hands when employee had pointed at him. The supervisor stated that during the argument employee threatened the co-worker's life. However, nobody other than the supervisor claimed to have heard the threat. Employer indefinitely suspended employee while investigating the matter. Even though the management was aware of the physical contact and safety issue which arose out of these events, the focus of their investigation was on employee's threat to kill the co-worker.

Employee informed employer during the investigatory process that he intended to file a complaint with MIOSHA to address the safety risks of lasers. Employer terminated employee without further investigation and employee filed a discrimination claim.

998 (Continued)

The petitioner has the initial burden to show by a preponderance of the evidence that the termination of his employment was in retaliation of employee's participation in a protected activity, and therefore in violation of the Act,

In addition to showing the employee was engaged in protected activities, there must also be a nexus between the termination and the protected activity. Section 65 of MIOSHA protects an employee's right to file a complaint. Therefore, employee's action here is considered a "protected activity." Because employee expressed his concerns and demanded that employer take corrective action, and because the employer ignored these concerns, the required nexus was satisfied to bring this case within the scope of section 65 of MIOSHA.

The employer was unable to demonstrate a legitimate reason for firing employee. Accordingly, the termination was a violation of section 65.

The ALJ awarded lost wages, benefits, attorney fees, and court costs. The ALJ also directed that unemployment benefits, other wages, and additional offsets should not be deducted from the lost wages calculation. Lastly, the decision stated that "respondent is further ordered to pay any costs associated with the prosecution of this case."

The circuit court issued an order remanding back to the AU to explain what was meant by "costs associated with the prosecution of this case." The court specifically asked if the decision awarded attorney fees, and other costs incurred *after* the ALJ decision was filed.

After being sent back, the ALJ's replacement identified two issues which needed to be addressed. The first issue dealt with fees and costs incurred after the decision. The second issue addressed whether money earned by employee after the first decision should be applied against the back wages due. The ALJ found that employer should pay for all of employee's attorney fees while the case was litigated in the courts and back to the agency. The ALJ also directed that wages earned during the litigation should be deducted from the lost wages the employee would have earned from working at his original job.

999 DISCRIMINATION

Burden of Proof
"But For" Test
Not Established
Employee Misconduct
Leaving without Permission
Discharged
Leaving Job
Employment
Temporary Employment Agency
Evidence
No Employer Knowledge of Complaint
Decision to Discharge before Complaint
Protected Activity
Employee did not Raise Safety Issues
Employee Walked off Job assignment from Temporary Employment Agency.
Quit
Refusal to Work
Whirlpool Decision Discussed
Unreasonable Work Refusal
No Imminent Danger

2001-1368 Lawrence v Charity Motors & Adecco (2002)

Employment agency placed Petitioner with employer on a 90 day temporary assignment as an administrative assistant. Petitioner abruptly left employer without notifying the agency beforehand. When Petitioner did notify the agency of his action he was told that the agency would no longer make any more placements because of the way he left employer. Petitioner filed a complaint and at a subsequent hearing, stated that employer constructively discharged him because of a safety complaint he allegedly made. In his alleged complaint, Petitioner stated that he felt he was in "imminent danger."

"Imminent Danger" is defined as "a situation which could reasonably be expected to cause death or serious physical harm either immediately or before the imminence of the danger could be eliminated through enforcement procedures." Petitioner claimed that there was imminent danger because there had been numerous robberies, inadequate security, exposed telephone and electrical wiring, poor lighting, and unsafe salvage lots. All of the alleged threats were found to be false.

999 (Continued)

The issue in this case was whether Petitioner was discharged in violation of section 65. In order to establish that there was a violation of section 65, the *employee* must show that he was "engaged in protected activities," "suffered an adverse personnel action," and that there was a "causal connection between the protected activity and the adverse action." Petitioner left a voicemail for the employer stating that the parties had not yet "signed off on [him] becoming a Charity Motors employee." Accordingly, the ALJ concluded that Petitioner was not an employee for the purpose of a MIOSHA claim. The ALJ explained that even if Petitioner was an employee, there was no violation of MIOSHA. The ALJ found that refusal to work by walking off the job is not a protected right afforded under MIOSHA, and Petitioner didn't file any safety complaints. Therefore, the ALJ concluded that there was no evidence of discrimination or retaliation as the result of any complaints of safety nor was there any evidence of imminent danger.

ALJ concluded no violation of MIOSHA and dismissed Petitioner's complaints.

1000 DISCRIMINATION

Safety Complaints to Employer
Defective Equipment
Employment
Fire Fighter
Protected Activity
Presenting Equipment Issues at Township Meeting
Safety Complaints to Fire Department
Defective Equipment

2001 -1578 Holke v Blue Lake Township Fire Dept. (2001)

Employee was a captain for the Blue Lake fire department and was in charge of the department's training. The Township fired Employee. At a township meeting he stated that the department needed to hire a certified teacher to renew paramedics' licenses. He indicated that it would cost the township roughly $300. However, a member in the audience claimed that it would be possible to obtain the same services for only $100. The final decision was put off until the following meeting where Employee defended his proposal. During this meeting, some records claimed that Employee seemed angry, but there was no evidence of rude behavior such as profanity or personal insults.

1000 (Continued)

At a staff meeting attended by Employee, the fire commissioner, the fire chief, and the township clerk, Employee expressed all of his safety concerns regarding the department. After Employee articulated these concerns, the fire chief shouted profanities, resigned, and walked out of the meeting. There were no reports that Employee cursed or insulted anyone at this meeting. The township subsequently fired Employee.

The township alleged that Employee was fired because he by-passed the chain of command because he expressed his concerns at the meeting before discussing them with the fire chief. However, section 65 protects employees who express their concerns on matters of workplace safety. Additionally, the township clerk opened the meeting stating "we are here to hear complaints without fear of retribution." After the township meetings and the staff meeting were held, the township fire commissioner fired Employee explaining that he had openly criticized the fire chief and "caused indecision, confusion, loss of morale, and resignations."

The ALJ found 1) Employee did *not* openly criticize the fire chief, 2) there was no evidence Employee caused "indecision, confusion, or loss of morale", 3) there was no evidence Employee's comments caused anyone to resign.

The ALJ explained that Employee did not make any personal comments and that even if he had, those types of comments would be protected under section 65. Second, the ALJ pointed out that the fire commissioner was unable to point to any specific examples of indecision, confusion, or loss of morale. Furthermore, the ALJ held that the township's inability to cope with the number of the Employee's criticisms was not a valid reason to punish him. Finally, the ALJ found that the comments did not cause any resignations. The only person to resign was the fire chief, but he ultimately withdrew his resignation.

Employer ordered to reinstate Employee with back pay.

1001 DISCRIMINATION

Discharged
- Disobeying Order
- Uncooperative Behavior Abusive Language Fighting
- Reinstatement
  - Mental Illness

Employment
- Press Operator

Suspension
- Violation of Plant Rules

2001-1611 Furby v Daimler-Chrysler (2001)

Employee alleged Employer discriminated against him because he complained to his supervisor about unsafe work conditions. Employee's job was to move panels from one conveyor belt to another. Employer had informed Employee that should the belt move too fast, Employee was to stop the conveyor instead of placing anything on the floor. While Employee was working, he began throwing panels on the ground, complaining that the belt was moving too quickly. Employee's supervisor ordered Employee to turn off the conveyor and cease placing the panels on the floor. After Employee refused to comply with supervisor's request, supervisor sent Employee home.

Another incident occurred where Employee was working with a coworker and because the belt was again moving too fast, Employee pressed the "emergency stop button." When the co-worker objected to Employee's use of the button, Employee threatened him with violence and started a physical confrontation. Employer indefinitely suspended Employee, and eventually discharged employee for violating company policy. The company policy explicitly prohibited "threatening, intimidating, coercing, harassing, retaliating, or [use of] abusive language to others."

Shortly after Employee's discharge, Employer discovered that Employee suffered from an emotional condition. Employer subsequently reinstated Employee and placed him on medical leave of absence.

1001 (Continued)

The ALJ concluded that Employee's suspension, discharge, and placement on medical leave, were not consequences of any MIOSHA complaint. The suspension and discharge were both in response to Employee's violation of company policy. Additionally, Employer placed Employee on medical leave because he became erratic and irrational.

The ALJ affirmed the department's determination finding that Employer did not discriminate against Employee.

1002 DISCRIMINATION

Burden of Proof
"But For" Test
Established
Discharged/Suspended
Pretext
Illness
Discharged
Failure to Perform Assigned Task
Illness
Leaving Job without Permission
Refusal to Perform Assigned Job
Confined Space
Refused to Work
Confined Space/Silo
Relief under Section 65
Medical Expenses
401k contributions
Safety Complaints to Employer
Confined Space

2003-364 Bruce J. Groeneveld v Cemex (2003)

Employer directed Employee to clean the inside of a cement storage silo. Employee entered the silo through a 2'x2' hatch. After working inside the silo, he became disoriented and felt very unsafe. He exited the silo and went home. Employee read a safety handbook Employer had provided, which discussed the requirements for working in a confined space. The next day, Employee informed Employer that he had not completed his assigned task because of safety concerns.

1002 (Continued)

Employer became upset and told Employee that if he did not complete his assignments he would be fired. Employee complained that he did not feel well and planned on going home. Employer was aware that Employee had filed safety complaints in the past. Nevertheless, Employer told Employee that if he "punched out" he would be fired. As soon as Employee "punched out", Employer fired him. The next day, Employee sent a safety complaint to OSHA.

ALJ concluded that Employer fired Employee because Employee exercised his protected rights, therefore violating section 65 of MIOSHA

ALJ ordered reinstatement to former position as well as back wages, medical expenses, and 401 contributions.

1003 DISCRIMINATION

Burden of Proof
"But For" Test
Valid Nondiscriminatory Reason
Employment
Cleaning Supervisor
Evidence
No Employer Knowledge of Complaint
Decision to Discharge before Complaint
Safety Complaints to Employer
Fear of Assault
Safety Complaints to MIOSHA
Complaint Filed After Discharge

2003-1245 Coleman-Wahls v SSC Service Solutions (2004)

Employer was a cleaning business that provided services to shopping malls. Employee was a supervisor at one of the malls Employer serviced. Employer instructed Employee to fire a subordinate. When the subordinate heard that he was going to be fired, the subordinate threatened to hurt Employee. On another occasion, the subordinate was talking to a coworker on -the phone about a delay in pay, and again expressed his desire to injure Employee. Employee was not a party to the conversation and did not hear about it until after the alleged threat had been made. Employee met with Employer and complained about the threats the subordinate

1003 (Continued)

had made, and Employer's failure to resolve Employee's concern. Employer fired Employee the same day. Employer noted that Employee arrived to work late, sat in the lounge all day, and did not do any cleaning or supervisory work.

At the hearing, testimony established Employee was confrontational and tended to "alienate her crewmembers with her salty language." Employer had previously issued several written reprimands for leaving work without `punching out', failure to keep a clean area, and violating procedures in the course of firing an employee. Two of the three reprimands were issued before the subordinate made threats to Employee. Finally, Employee's own supervisor testified that Employee's crew did not do an effective job cleaning, and failed to follow orders.

The ALJ held that "it is essential that the retaliation follow the complaint." In this case, Employee did not file her complaint until after Employer fired her. The ALJ concluded that the Employer had an independent and legitimate reason for firing Employee. Neither of the statements the subordinate made posed any immediate threat of violence. Additionally, in their respective contexts, the subordinate was expressing a legitimate grievance.

Referencing MCL 408.1011(a), the ALJ explained that Employers are required to maintain a work environment that is free from "recognized hazards that . . . cause or are likely to cause, death or serious physical harm to the employee." Concluding that the subordinate was not a "recognized hazard likely to cause serious physical harm," and because Employee did not file her complaint prior to her termination, the ALJ found that Employer did not retaliate against Employee.

Complaint was Dismissed.

1004 DISCRIMINATION

Burden of Proof
"But For" Test
Not Established
Employee Misconduct
Leaving without Permission
Discharged
Leaving Job without Permission
Employment
Casino worker
Evidence
No Employer Knowledge of Complaint
Safety Complaints to Employer
Doctor's Note
Safety Complaints to MIOSHA
No Employer Knowledge of Complaint

2004-189 Hankins v Motor City Casino (2004)

Employee brought Employer a doctor's note stating that Employee should wear a long sleeve shirt at all times. Employer ordered Employee to go home without pay because she was not wearing her proper uniform. Minutes later, Employer granted Employee's request for accommodation and directed Employee to clock back in. Employer informed Employee that she would receive pay for the entire shift. Employee informed Employer that Employee was going home. Employer fired Employee for job abandonment and for walking off the job. Employee had filed a MIOSHA complaint nine months before she was terminated. Employer had no knowledge of that complaint at the time of the termination. Employee filed multiple complaints upon her termination, none of which mentioned a MIOSHA grievance. Employee filed this MIOSHA discrimination claim, seeking back pay and reinstatement.

1004 (Continued)

The ALJ stated that in order to establish a discrimination claim, Employee must demonstrate that "Employee's protected activity was a 'substantial reason' for the Employer's alleged discriminatory action, and the discriminatory action would not have occurred `but for' the protected activity." The ALJ denied the discrimination claim, concluding that Employee was fired for her refusal to follow a direct order, and return to work. The ALJ also found no retaliation because Employer was not aware that Employee had filed a MIOSHA complaint at the time Employer fired Employee.

Complaint was Dismissed.

1005 DISCRIMINATION

- Burden of Proof
  - "But For Test"
- Discharged
  - Disruptive Effect of Workforce
  - Economic Reasons
  - Probation Period
    - Timeliness
  - Tardiness
- Probation Period
  - Absence/Tardiness
- Safety Complaints to Employer
  - Fumes
  - Heat
  - Ventilation
  - Working Conditions
- Safety Complaints to MIOSHA
  - Complaint Filed After Termination

2004-321 Clarke v Detroit Coil Company (2004)

Employee spoke with Employer and expressed her concerns about heat coming from her machine, and fumes in her workspace. Employee filed a complaint with MIOSHA and MIOSHA conducted an inspection. Employer received a letter from MIOSHA stating that Employee had filed a complaint. Employer received a second letter from MIOSHA indicating that the complaint had been dismissed.

1005 (Continued)

Employer had begun to terminate Employee on a number of occasions because of tardiness and excessive absences. However, Employee's union intervened and reduced her terminations to suspensions or probations. Employer placed Employee on probation and they signed an agreement. If Employee failed to satisfy the terms of the agreement, it would be considered 'just cause' for termination. Employee began to arrive to work late or not at all. Employer fired Employee because Employee violated the terms of their agreement. Employee filed a second MIOSHA complaint. Employee asserted Employer's receipt of MIOSHA's dismissal of the complaint was the reason Employer fired Employee.

The ALJ concluded that Employer did not fire Employee because of her MIOSHA complaint but because of her tardiness and excessive absences. Additionally, the ALJ found that Employer fired Employee because of the negative impact Employee's absences had on her fellow workers and economic loss to the company. Also of concern was the decision to fire Employee was made before Employee's first MIOSHA complaint.

Complaint Was Dismissed.

1006 DISCRIMINATION

Burden of Proof

"But For Test"

Not Established

Job/Position Eliminated

EMPLOYMENT

Assembly Line Worker

EVIDENCE

Inspection Did Not Support Complaint

PROTECTED ACTIVITY

Causal Connection

2004-604 Seegars v Daimler-Chrysler (2004)

Employee worked on a machine at an assembly plant. Employee filed a MIOSHA complaint, stating that transporting parts to her machine was causing her pain. MIOSHA dismissed the claim. Employer had informed Employee that her job assignment was subject to change before she filed the first safety complaint.

1006 (Continued)

Whenever the machine was not in use, Employee was placed on a "floating" job assignment. Employer informed Employee that the machine was going to be eliminated. Employee filed this retaliation complaint with MIOSHA.

Employee raised an issue before the ALJ that was not included in Employee's original complaint. Employee testified that Employer failed to accommodate her asthma. Employee did not exhibit any symptoms, and MIOSHA found that Employee's workspace was properly ventilated. The ALJ concluded that there was no causal connection between Employer's alleged failure to accommodate and Employee's MIOSHA complaint.

The ALJ found that Employee failed to show that her first MIOSHA complaint was the reason Employer assigned her to floating jobs. Employee had been moved off her normal job before and after her MIOSHA safety complaint. Employee failed to establish retaliation because Employee did not show how "floating assignments" constituted an adverse action. Moreover, Employee did not demonstrate any causal connection between her assignments and her MIOSHA complaint.

Complaint was Dismissed.

1007 DISCRIMINATION

Burden Of Proof
    Proximity Of Employer Action And Safety Complaint
Discharged
    Probation Period Performance
Employment
    Firefighter
Inspection
    Employee Disobeyed Order During An Inspection
Probation Period
    Right to Terminate Without Cause

2004-730 Herczeg v Macomb Township Fire Department (2004)

During a MIOSHA investigation, Employer ordered probationary Employee to put away unmarked chemicals and air valves/bottles. Employee refused to obey. Eight months later, MIOSHA issued Employer a citation which did not mention the chemicals or air

1007 (Continued)

valves/bottles. Three months after MIOSHA issued the citation, Employer terminated Employee because Employee was an `unsatisfactory probationary employee.'

A collective bargaining agreement allowed Employer to terminate probationary employees without cause. The ALJ concluded the time period from the MIOSHA inspection to discharge-eleven months-to be too long to show retaliation under section 65.

The ALJ found that Employer exercised the right to terminate without cause as provided in the agreement. Employee did not participate in a protected activity and the time between the events was too distant to establish any nexus.

Complaint was Dismissed

1008 DISCRIMINATION

Complaint Must be Filed Within 30 Days
By Employee

2004-842 Michaels v Gibraltor Sprocket Company (2004)

Employees must file a section 65 complaint within 30 days of when the discrimination occurred. Employee filed a MIOSHA complaint on 11/17/2003. Employee was either fired or quit on 12/10/2003. Employee attempted to return to work on 1/26/2004 but was turned away. Employee filed his discrimination claim on 2/19/2004. The ALJ concluded that 12/10/03, the date Employee was fired or quit is the date the alleged discriminatory act took place. It is from this date that the 30 day statutory complaint period began.

Complaint was Dismissed.

1009 DISCRIMINATION

Burden of Proof
"But For" Test
Established
Discharged/Suspended Pretext
Absenteeism
Not Established
Employee Misconduct
Absenteeism
No Protected Activity
Valid Nondiscriminatory Reason

DISCHARGED

Absenteeism

EVIDENCE

No Employer Knowledge of Complaint
Other Employees Discharged for Absenteeism Safety

COMPLAINTS TO EMPLOYER

Fumes

SAFETY COMPLAINTS TO MIOSHA

No Employer Knowledge of Complaint

2004-936 Carter v Meridian Automotive Systems (2004)

Employee was concerned about fumes in the workplace. Employer had an attendance policy which stated absenteeism would lead to the accumulation of points. If an employee received nine points within a twelve month period, the employee would be terminated. Employer has terminated other employees for accumulating more than nine points in a twelve month period. Employee was absent several times before and after the fumes became an issue. Of the 9.5 points she accumulated, only 3.5 were allegedly related to the fumes.

Employee filed a written complaint with MIOSHA and Employer. Although Employee told several coworkers about the MIOSHA complaint, there was no evidence that Employer was aware of the complaint at the time of the discharge. After Employee complained to Employer, Employer ordered Employee to see a specialist. The specialist placed no restrictions on Employee but provided her with medicine to help with her symptoms. Employee continued to come in late or not at all and Employer terminated Employee. Employer stated that Employee's discharge was not a result of the MIOSHA complaint, but because of her point accumulation. The ALJ found Employer had valid reasons for discharging Employee. Additionally, the ALJ considered whether the reason for discharge was a mere pretext. The ALJ found Employee's absences were a legitimate reason to fire Employee. **Complaint was Dismissed.**

1010 DISCRIMINATION

Burden of Proof
"But For" Test
Established
Complaints
Chemicals
Discharged/Suspended
Pretext
Layoff
Lack of Work

DISCHARGED

Reduction in Force

EMPLOYMENT

Painter

EVIDENCE

Other Complaining Employee Recalled

LAYOFF

Lack of Work

SAFETY COMPLAINTS TO EMPLOYER

Chemical Inhalation
Lack of Ventilation

2004-1046 Pugh v The Austin Company (2005)

Employee painted with Hi-Solids Polyurethane Paint (HSPP) on a work site. The site was not ventilated. Employee's co-worker notified Employer of risks involved with working with HSPP, and asked Employer to provide "supplied air." Employer provided respirators and protective suits. However, the respirators were either defective or malfunctioned, and many of the employees suffered adverse reactions. Employee complained to Employer several times. After a few meetings, Employer fired Employee. Employee filed a section 65 complaint a few days later.

Before the project, Employer had informed Employee there would be layoffs because of declining work volume. Employer began to fire employees. The ALJ pointed out Employer had employees working overtime in the month following Employee's termination.

The only evidence supporting the alleged decrease in work was Employer's own testimony. Employer stated Employee was lowest in seniority and did not have the same abilities as other employees.

The ALJ found extensive evidence of Employer's animosity towards Employee. Employer threatened to fire Employee when Employee failed to follow the proper procedures for expressing complaints. Finally, the Vice President of the company told a supervisor that he believed Employee should be fired. The same day the Vice President voiced his position, Employer fired Employee. Employer also reinstated a co-worker who was fired the same day as the Employee. The ALJ concluded Employer's reasons for terminating Employee were a mere pretext.

1011 DISCRIMINATION

Appeal
Scope of Review
Burden of Proof
"But For" Test
Established
Complaints
Respirators
Discharged/Suspended Pretext
Insubordination
Proximity of Employer Action and Safety Complaint
Discharged
Insubordination
Swearing
Nature of the Workplace
Employment
Asbestos Remover
Protected Activity
Manner Complaint Presented
Relief Under Section 65
Attorney Fees
Back Pay
Deductions For Earned Wages
Claims Not Allowed
Emotional Damages
Fringe Benefits Hearing Costs
Medical Expenses
Reinstatement
Safety Complaints To Employer
Asbestos
Defective Equipment

2004-1131 Stearns v Pro-Tech Inc. (2005)

Employee's job involved asbestos removal. Employer provided respirators to employees, but many of them had defective batteries. Employee attempted to obtain additional respirators and found white powder on them. Employee voiced his concerns to Employer several times about the respirators believing that the

1011 (Continued)

powder was asbestos. One of the conversations between Employee and Employer was heated and other employees overheard Employee use vulgar language. Employer discharged Employee a few days later.

Employer changed the reasons supporting the discharge several times during the hearings. The ALJ found this "shifting" cast doubt on the sincerity of Employer's assertions.

Employer explained that the decision to discharge was due to Employee's insubordination, the damaging effect of Employee's complaint to Employer's relationship with the contractor, and Employee's physical encounter with a co-worker. Employer encouraged employees to openly and directly voice their concerns.

The ALJ considered the 'nature of the workplace,' and concluded Employee's vulgar language was not a legitimate and substantial reason for Employee's discharge. Vulgar language and yelling often occurred in Employee's work environment. Moreover, the ALJ found Employee still exercised a protected right regardless of the manner Employee expressed his concern. The ALJ concluded insubordination was a mere pretext to Employer's decision to discharge Employee. Employee's complaint did not interfere with the contractor and Employer's relationship because the contractor had the right to know the condition of health and safety equipment used on its property. Lastly, there was no substantial evidence Employer was aware of Employee's physical confrontation at the time of Employee's discharge.

The ALJ found Employee exercised a protected right; Employee suffered an adverse action, termination, shortly after a safety complaint. This was evidence of causation. Employer did not have a legitimate and substantial reason for terminating Employee. ALJ awarded back wages plus interest deducting earned wages during layoff period, medical expenses, and ordered reinstatement.

On appeal, the Circuit Court reversed the ALJ's decision and dismissed the complaint stating that the ALJ's fact finding was not supported by the whole record. Employee appealed, and the Appellate Court reversed the Circuit Court's decision. The Appellate Court stated that fact finding is the ALJ's task, not the Circuit Court Judge's. The Appellate Court concluded that the Circuit Court exceeded its scope of review. The ALJ's decision was supported by competent, material, and substantial evidence. Accordingly, the Appellate Court reversed the Circuit Court's decision and affirmed the ALJ.

1012 DISCRIMINATION

Burden of Proof
"But For" Test
Valid Nondiscriminatory Reason
Discharged
Damage to Employer's Equipment
Employment
Garbage Truck Driver
Safety Complaints to Employer
Defective Equipment
Truck

2004-1166 Wheeler v Waste Management (2005)

Employee was a garbage truck driver. Employee filed a report before and after each shift detailing the condition of the truck. Employee noted on six reports that one of the truck's systems was malfunctioning. The truck was damaged as a result of a malfunction.

Employer held weekly safety meetings and Employee received a written warning for showing up late. Employer provided Employee with a safety rule book which required employees to get help lifting heavy loads. Employee picked up a large television and was injured. Employer gave Employee a written warning for lifting the television without help. Employer provided Employee with another written warning for failure to report property damage to mailboxes with Employee's truck. Employee reported problems with the truck's brakes in reports filed with Employer.

Employee drove down a wet dirt road trying to steer right in order to avoid potholes. Employee collided with a tree. A police officer cited Employee for a traffic violation. Employer concluded that as a result of Employee driving off-road, Employee damaged the truck, and caused the accident. Employer also observed Employee did not secure the 'catch can' in the proper position at the time of the accident.

Employer terminated Employee, citing the failure to get assistance lifting the television, damage to the truck resulting from the malfunctioning automatic system, the mailbox incident, the tree accident, the traffic violations, and Employee's failure to properly secure the "catch can."

The ALJ found Employer had legitimate reasons for terminating Employee, and Employee had failed to establish the reasons were a mere pretext.

Complaint was Dismissed.

1013 DISCRIMINATION

Employment

Health and Safety Representative

Evidence

No Employer Knowledge of Union Decision

Hearing

Consolidation of Claims Union

Representative

Removal by Union

2004-1194 Marshall v Daimler-Chrysler (2005)

Employee filed MIOSHA discrimination claims against Union and Employer. The ALJ consolidated the claims, The Vice-President of the Union was responsible for appointing and removing employees. The Vice-President appointed Employee as a Health and Safety Representative. Employee participated in MIOSHA inspections and discussions related to lockouts. Union and Employer conducted an audit in 2001 and indicated some health and safety issues. In 2004, another audit showed that the issues had not been resolved. The Vice-President telephoned Employee and a co-worker and told them they were no longer Health and Safety Representatives. Employee was returned to the assembly line at the same rate of pay Employee earned as the Representative. Employer was not aware of Union's decision until Employee was removed. The ALJ concluded Employee did not present any evidence to show that his removal was due to filing a safety complaint.

Complaint Dismissed.

1014 DISCRIMINATION

Discharged
- Failure to Perform Assigned Task

Employment
- Janitor

Evidence
- Video Recording

Protected Activity
- Employee Did Not Raise Safety Issues

Safety Complaints to Employer
- MRSA Exposure

2008-5 Browne v Mt. Pleasant Public Schools (2008)

Employee worked for Employer as a school janitor. Employer confirmed that a child in a daycare classroom was infected by the Methicillin-Resistant Staphylococcus Aureus (MRSA) virus. Employer instructed Employee to clean a classroom and provided a solution formulated to kill the MRSA virus. Employer instructed Employee to sanitize all hard surfaces and take extra care to clean any common surfaces; including tables, chairs, light switches, counters, door knobs, and other surfaces a child would touch. Employer gave Employee a face mask, goggles, a MSDS sheet for the solution, and latex gloves. Employee expressed his concern with cleaning the room and asked Employer for personal protective equipment. Employer provided Employee with the equipment Employee requested.

Employee only testified to cleaning the bathroom and mopping the floor. Employer recorded all of Employee's actions while cleaning on video. Employer watched the video and observed that Employee only mopped the floor, vacuumed, and moved tables. Employer also mentioned that Employee only spent about twelve minutes cleaning the entire room, and about a minute cleaning the bathroom. The video also showed that Employee did not use the protective equipment provided and did not use the solution provided to wipe light switches, door knobs, and the bathroom.

The ALJ found that an employee must make a safety complaint in order to establish a discrimination case. Employee called the health department for information and raised his concern with Employer. However, Employer addressed Employee's concern and provided the appropriate equipment. Employee's call to the health department did not constitute a safety complaint to Employer because Employee only asked for information, The ALJ concluded Employee's expressed concern was not a "substantial reason" for Employer's decision to

1014 (Continued)

discharge Employee. Employee was discharged because he did not follow Employer's cleaning directions. Employer did not discriminate against Employee.

Complaint was Dismissed.

1015 DISCRIMINATION

Burden of Proof
"But For" Test
Not Established
Employee Misconduct
Job Refusal
Discharged
Failure to Report to Work
Employment
Corrosion Lab Technician
Evidence
No Employer Knowledge of Complaint Job
Reinstatement Refusal
Refused to Work
Dust Exposure
Safety Complaints to MIOSHA
No Employer Knowledge of Complaint

2005-69 Rytel v Daimler-Chrysler (2005)

Employee expressed concern over dust in the work place. Employer and Employee's union assured Employee that the workplace was safe. Employee refused to work because Employee considered the lab an unsafe environment. Employer explained that the lab complied with MIOSHA requirements. Employee filed a MIOSHA complaint, but did not tell Employer. When Employee refused to work, Employer discharged Employee.

Employer discovered that a MIOSHA investigation unconnected to Employee's complaint was being conducted. As a result of a union grievance on Employee's behalf, Employer offered Employee the opportunity to return to work with back pay, and a respirator. Employee rejected the offer. When Employee did not show up, the

1015 (Continued)

MIOSHA Discrimination Division informed Employee that the Division would not pursue Employee's MIOSHA discrimination complaint because of Employee's failure to cooperate.

The ALJ found that Employer was not aware of Employee's MIOSHA complaint at the time Employer terminated Employee. Additionally, Employee refused Employer's offer of reinstatement. The ALJ concluded that Employee's discharge was caused by his refusal to work.

Complaint was Dismissed.

1016 DISCRIMINATION

Complaint Must be Filed Within 30 Days
Discharged
    Disruptive Effect of Work Force
    Sexual Harassment
Employee or Independent Contractor
Employment
    Contractual Agreement
Evidence
    Termination of Employment Contract

2005-133 Hendy v National Environmental Services, Corp. (2005)

Petitioner and Respondent entered into a contractual agreement for Petitioner to provide a health and safety officer for Respondent's work site. Petitioner and Respondent's contract allowed either party to terminate the contract by written notification at any time. Respondent began receiving complaints about the safety officer. Respondent conducted an investigation which revealed the safety officer:

1) Behaved in an inappropriate manner toward female employees.

2) Failed to properly carry out the role of a health and safety officer because of his failure to conduct daily safety talks and meetings.

3) Failed to actually inspect the site.

Respondent subsequently terminated the contract. A few weeks later, Petitioner filed a MIOSHA safety complaint alleging multiple

1016 (Continued)

safety violations. More than thirty days after the termination of the contract, Petitioner filed a MIOSHA discrimination complaint. Respondent was unaware of Petitioner's intent to file a safety complaint at the time the contract was terminated. The ALJ concluded Respondent's decision to terminate the contract was not due to the safety officer's exercise of any rights protected by MIOSHA.

The ALJ also addressed the issue of standing. The ALJ stated that MIOSHA should be construed liberally when determining whether a party is classified as an "employee." The ALJ determined that the safety officer was an "employee." Lastly, the ALJ found the discrimination claim untimely because Petitioner did not file it until almost a month after the contract was terminated.

Complaint Dismissed.

1017 DISCRIMINATION

Discharged
- Failure to Perform Assigned Task
  - Emptying Cooking Oil
- Failure to Report to Work

Employment
- Kitchen Worker

Evidence
- Reasonable Belief of Termination

Protected Activity
- Subjective Belief

Safety Complaints to Employer
- Oil Burns

Whirlpool Decision Discussed
- Reasonable Work Refusal
  - Handling Hot Oil

2005-223 Miller v Taher, Inc. (2005)

Employee was responsible for emptying and cleaning deep fryers. Employee used buckets to empty old oil. Employee was concerned that the oil might spill. Employee used hot water and chemicals to clean the fryers. Employee used a cart to take old oil and the mixture out to the trash. Employee refused to perform the task, because she was afraid of burning herself or others. Employer informed Employee that she would be disciplined if she refused to perform the assignment. Employee was injured when a dishwasher door fell on her hand. Employee did not show up to work for a few days after the accident. Employer sent Employee a letter, which Employee believed indicated her termination. Employee did not return to work. Employee believed Employer terminated her because she would not empty the fryers. The ALJ found Employee reasonably believed she could be burned or cause injury to others, and reasonably believed Employer had terminated her after reading the letter. The ALJ concluded that Employer discharged Employee for past and future refusal to empty the fryers.

ALJ ordered Employee be Reinstated with Back Pay

1018 DISCRIMINATION

Complaint Must be Filed Within 30 Days
Employment
    Teacher
Employment Contract not Renewed
Protected Activity
    Complaining on Behalf of Student Safety
Complaints to Employer
    Restroom Access
    Students' Health and Safety

2008-680 Schied v Brighton Area Schools (2008)

Employee was a special education teacher. Employee asked Employer to obtain adult assistants to help special education teachers. During the discussions regarding Employee's request, Employee accused Employer of violating students' rights and endangering the health and safety of special education students. Employer instructed Employee to remain with a single student. Employee left the student during a class in order to use the restroom. Employer met with Employee and warned that Employee must have another adult cover the room in Employee's absence. Employee responded to Employer's warning, and sent Employer a memo. Employee's memo stated that Employee felt that he was prevented from using the restroom. Employer placed Employee on administrative leave. Employer did not renew Employee's contract.

Employee claimed Employer discriminated against Employee because he complained about the treatment of students; complained about denial of restroom breaks; and complained about Employer's actions that caused Employee stress and anxiety.

The ALJ found MIOSHA does not protect the health and safety of students. The ALJ stated MIOSHA provides employees access to a restroom. Employee must show a reasonable belief Employer was restricting Employee's access to the restroom. The ALJ did not find any evidence which supported Employee's belief. The ALJ also found Employer expressed their concern with students being left alone, and had not referred to the fact Employee was using the restroom. Additionally, the ALJ pointed out Employee did not provide any section of MIOSHA that protects employees from employers who harass an employee, or cause them undue anxiety or stress. Accordingly, the ALJ concluded Employee did not exercise a protected right afforded under MIOSHA.

The ALJ found the day Employer placed Employee on administrative leave, even if it was paid leave, qualified as the day of the violation. The ALJ pointed out MIOSHA requires Employees to file complaints within 30 days after the violation. Employee failed to file the discrimination complaint within the 30 day period. The ALJ concluded Employee had not exercised a protected right, and failed to file a timely complaint.

Complaint was Dismissed.

1019 DISCRIMINATION

Burden of Proof
"But For" Test
Established
Complaints
Electrical Boxes
Fire Alarms
Mold
Refrigerator
Roof Leaks
Employment
Hotel Front Desk Manager Relief
Under Section 65
Attorney Fees
Costs
Medical Expenses
Emotional Illness Testimony
Emotional Distress
Safety Complaints to Employer
Electrical Boxes
Fire Alarms
Mold
Refrigerator
Roof Leaks
Safety Complaints to MIOSHA
Proper Paperwork

2005-495 Days Inn v McCurdie (2006)
2005-519 McCurdie v Days Inn (2008)

Employee worked as a front desk manager. Employee was responsible for scheduling guests, billing, and handling customer complaints. Employer's motel had a leaky roof, falling ceilings, mold in rooms, and bursting pipes. Moreover, the refrigerator was broken, the fire alarm routinely malfunctioned, and electrical boxes were not always covered. Employee regularly discussed these concerns with her supervisors.

1019 (Continued)

Employer told Employee that hours were being cut to save money. Employee called MIOSHA and asked for the papers to file a safety complaint. Employer terminated Employee two weeks later. Employer attempted to fix some of the problems, but a majority of them were unresolved when Employer fired Employee. The ALJ concluded Employer violated section 65 of MIOSHA.

Employee subsequently requested a hearing for damages. A different ALJ considered the damages issue. The ALJ cited section 65(5) which allows an ALJ to order employers pay attorney fees, hearing costs, and transcript costs. The ALJ also referred to section 65(2), which requires ALJs to order "all appropriate relief' where a section 65 violation has been found. The ALJ stated that section 65's goal is to make the complaining employee whole. The ALJ awarded Employee wages and back pay, medical expenses due to her emotional problems, attorney fees, and transcript costs. The ALJ also ordered Employer pay MIOSHA's costs. Employee presented depositions from psychologist to support medical expense claim.

ALJ ordered medical expenses caused by emotional distress, back pay, and costs of litigation.

1020 DISCRIMINATIION

Burden of Proof
"But For" Test
Not Established
Employee Misconduct
Insubordination
Employee Production Below Standards
Discharged
Insubordination
Production Below Standards
Refusal of Reassignment
Employment
Truck Driver
Evidence
Rumors
Safety Complaints to Employer
Truck

2005-617 Saxton v City of Warren-Sanitation Dept. (2006)

Employee was a temporary truck driver for Employer. Employer placed Employee on a leave of absence because of a work-related injury. Employee returned but the quality of his work decreased. Employer sent a warning letter to Employee. Employee filed a MIOSHA safety complaint, claiming Employer's trucks were unsafe. Employer attempted to help and reassign Employee, but Employee refused to cooperate. Employer terminated Employee. Employee's main argument was that there was a "rumor" that Employer terminated Employee because of a MIOSHA complaint. The ALJ found the "rumor" alone insufficient for Employee to meet his burden of proof. The ALJ concluded Employer terminated Employee because of his poor work performance, insubordination, and failure to cooperate with Employer.

Complaint was Dismissed.

1021 DISCRIMINATION

Burden of Proof
- Not Established
  - Insubordination
    - Abrasive Language Job
  - Refusal

Discharged
- Bathroom Facilities Complaint
- Insubordination
  - Abrasive Language

Employment
- Security Guard

2005-674 White v Crime Prevention Security (2005)

EE worked as a security guard assigned to protect golf course carts. EE later complained that she was not allowed to leave the work site and had soiled herself while attempting to relieve herself in the weeds. ER stated that he pointed out a nearby "porta-john" to EE. Later, at a meeting with the owner, EE yelled and used abrasive language towards the owner and another employee. EE claimed she was discriminated against because she was not provided with bathroom facilities and was discharged because of her complaint,

The ALJ found that the EE's complaint failed to meet the burden of proof. See *Stark v Wayne State Univ*, Appeal Docket MI-DI 80-26 Digest ¶ 675 (1982) and other cases regarding this issue. EE's description of the events conflicted with witnesses. EE agreed she was allowed to leave other assignments to use the restroom. ER attempted to assign EE elsewhere; EE refused all other job assignments.

ER's actions are sufficient to allow for termination based on EE's refusal to accept assignments and because of the EE's insubordination during the meeting.

Previous decision affirmed. ER did not violate MIOSHA.

1022 DISCRIMINATION

Back Pay Award
MESC Benefits
Burden of Proof
"But For" Test Established
Complaints
Trench
Court Review
Standards
Discharged
Complaints About Working Conditions
Refusal to Work
Trench
Employment
Trench Worker
Protected Activity
Trench Work
Refused to Work
No Trench Box/ Improper Shoring
Relief Under Section 65
Back Pay
Costs
Expungement of Personnel File
Reinstatement
Safety Complaints to Employer
Trench
Whirlpool Decision Discussed
Reasonable Work Refusal
No Trench Box/ Improper Shoring

2006-317 Brzezinski v Leoni Township (2006)

EE was a Township laborer assigned to work in a trench. EE refused to enter the because the 8' deep trench did not have proper shoring or a trench box. EE was then assigned to another job back at the shop. After lunch, EE reported to a supervisor two miles from the shop. During this meeting, EE discussed aspects of the job he was unhappy with and this displeasure grew into a heated argument. In response to this argument, ER fired EE. ER denies that EE was fired because of EE's refusal to enter the trench.

In *Whirlpool Comp v Marshall 445 US 1; 100 S CT 883 (1980),* the court concluded work may be refused if there is a reasonable fear of death or serious injury

where there was an insufficient time to file a complaint through the standard procedure. In the present case, EE had previous experience regarding "cave-ins". Therefore, EE had a reasonable fear of a "cave-in" in this incident. There was not sufficient time to file a complaint with MIOSHA before EE was required to enter the trench.

The burden of proof was met in this case. EE's job refusal was protected activity. ER issued an adverse personnel action; EE was discharged. There was a causal connection between these two events. If EE had not refused to enter the trench, he would not have been fired. EE had reason to believe that the trench was unsafe.

The ALJ ordered ER to pay EE back pay (not to be reduced by unemployment compensation), 7% interest until the amount due is paid, and reinstatement. ER also ordered to clear EE's personnel file of any written material regarding the termination of EE. ER ordered to pay transcript and witness fees.

An appeal was filed with the Jackson County Circuit Court. The Court chose to believe ER witnesses while the ALJ found the EE more credible. The Circuit Court reversed the decision of the ALJ and dismissed the EE's claim.

The Circuit Court's decision was appealed to the Court of Appeals. The Court of Appeals reversed the Circuit Court's decision. The Court of Appeals affirmed the ALJ's decision.

As stated in the decision of the Court of Appeals, it is the ALJ's task and right to listen to the evidence and determine the credibility of the witnesses; this is not the job of the Circuit Court.

1023 DISCRIMINATION BURDEN OF PROOF

"But For" Test

Not Established

No ER Knowledge Of Complaint

DISCHARGED

Possible EE suicide

EMPLOYMENT

Roofer

EVIDENCE

No ER Knowledge of Complaint
Record does not establish Layoff
Concern Over Possible EE suicide

2006-1048 Vick v Royal Roofing (2007)

EE worked for ER as a roofer. EE was working by a dumpster when another employee threw materials from the roof. These materials landed on EE's back while bent forward. EE worked the rest of the day. Two days later, EE went to the clinic for back problems. EE's doctor informed EE's safety officer of EE's suicidal thoughts. The doctor stated EE could not safely return to work. EE called ER to see about working the following the day; ER told EE that EE had been laid off.

Several days later, EE was discharged from medical treatment and was allowed to return to work. EE stated that he had been joking about jumping off a building and had no suicidal thoughts. EE had previously been fired before and allowed to return. EE has not worked since the incident. EE also has been experiencing pain in his back and neck.

EE complained about safety on the job site, but it was not clear when the complaint was made with respect to EE's layoff/discharge.

EE unable to prove that ER knew of the safety complaint before ER discharged EE. The ALJ found EE was not discharged because of a safety complaint.

Previous decision affirmed. ER did not discriminate against EE.

1024 DISCRIMINATION

Circuit Court Review
Collateral Estoppel Whistle Blower Action
Discharged
MIOSHA Complaint
Hearing
Motion To Dismiss
Res Judicata
Whistle Blower Action

2006-654 Sutcliffe v Ironwood Plastic (2007)
2006-729

EE Heidi Sutcliffe filed a MIOSHA discrimination complaint that alleged she was discharged for reporting a chemical placed in her coffee. EE Douglas Sutcliffe also filed a MIOSHA discrimination complaint that alleged he was discharged as a result of his wife filing a MIOSHA complaint.

The Employee Discrimination Division issued separate determinations that found that in both cases ER did not violate MIOSHA. Both EEs Heidi and Douglas appealed.

In addition to filing MIOSHA discrimination complaints, EEs also filed a complaint with Circuit Court. This complaint had two counts. Count one was an assertion that EE Heidi Sutcliffe's discharge was in violation of the Michigan Whistle Blower Protection Act (WPA). Count two was an assertion that EE Douglas Sutcliffe's discharge was also in violation of WPA based on his wife's complaint to MIOSHA. Circuit Court dismissed the WPA complaints and granted summary judgment to ER.

ER filed a motion to dismiss EEs' MIOSHA discrimination appeals based on *res judicata.* ER stated that since the Circuit Court found no genuine issue of material fact, it was decided on the merits, a final determination was made, and it concerned the same parties. However, a more accurate claim would have been collateral estoppel. Collateral estoppel bars the relitigation of issues while *res judicata* bars claims that should have been raised in previous litigation.

EE may file a WPA action and a MIOSHA discrimination complaint, but must exhaust administrative remedies with regard to the MIOSHA discrimination complaint.

Although the Court dismissed EEs WPA claims, the MIOSHA discrimination complaints could not be dismissed because they had not yet finished the administrative process. Also, collateral estoppel did not apply because the issues in a WPA action are not the same as in the MIOSHA discrimination complaint. The parties are not the same in each action because the MIOSHA Discrimination Section is a party to the MIOSHA case but not the Whistle Blower Protection action.

1024 (Continued)

A settlement agreement was later reached by EEs and ER.

EEs agree to dismiss their complaints and release ER from any further liability for the sum of $2,750.00 each. EEs also waived any claim to re-employment attorney fees, and costs.

1025 DISCRIMINATION

Burden of Proof
"But For" Test
Not Established
Replaced Prior to Complaint
Valid Nondiscriminatory Reason
Failure to Complete Assigned Tasks
Discharged
Failure to Perform Assigned Tasks
Employment
Grounds Technician

2006-1049 Cluckey v Huntington Management (2006)

EE was employed as a grounds technician. The complaint stated that a co-EE had thrown broken screens at EE in anger. EE interrupted ER in a meeting. EE advised ER of the situation and made ER aware of EE's fear of escalation. The following Friday both EE and EE's direct supervisor were fired.

EE alleges EE's complaint involved a safety issue. ER stated EE was discharged for failure to complete assigned tasks. ER stated that the decision to replace EE was already made and someone to replace EE had already been hired.

The ALJ relied on *Mount Healthy City School District v Doyle, 429 US 294* (1977), EE cannot use EE's protected conduct to improve EE's situation. EE's protected activity must have been a substantial reason for the ER's alleged discriminatory action. Here the EE was to be terminated for failure to perform assigned tasks.

EE did not meet the burden of proof. ER not in violation of MIOSHA.

1026 DISCRIMINATION

Burden of Proof
"But For" Test
Established
Complaints
Safety and Health Concerns
Circuit Court Review
Motion for Taking Additional Evidence
Employment
Radiological Control Technician
Evidence
Other Complaining Employees Not Discharged
Other Complaining Employees Recalled
Timing of Protected Activity and Adverse Action
Failure to Recall
Layoff
Not Recalled
Safety Complaints
Safety Complaints to Employer
Chemical Inhalation
Lack of Ventilation
Requests for Safety Gloves

2007-69 Venson v Philo Technics (2008)

EE worked as a Radiological Control Technician handling and disposing of radioactive waste. EE was hired for each job assignment and then laid off until the next; EE's position with ER operated similar to that of a contractor. EE was a great employee and had never before been terminated from an assignment early. EE had been provided with environmental safety and health training and later made complaints concerning health and safety concerns. EE claimed EE was laid off in the middle of an assignment and not rehired for raising health and safety concerns or because of racial discrimination.

EE's health and safety concerns included: cutting fume hoods into pieces, not using filter vacuums when operating saws, gloves not changed often enough, and lack of ventilation. These actions of EE's co-workers were against ER policy and could release radioactive materials into the air.

ALJ found EE's complaints were protected activity. ER had knowledge of EE's complaint. ER laid off EE; this was an adverse action against EE. Close timing alone is not enough to show a causal link. EE displayed a causal connection between the protected activity and adverse action. ER laid off EE because of the health and safety complaints EE had made. EE satisfied the "but for" test.

1026 (continued)

ER asserted EE was laid off because the project was overstaffed. The ALJ found this reason to be a pretext. EE was laid off because ER blamed EE for the project being behind schedule based on EE's safety complaints. ER added 2 EEs after EE's layoff.

ER violated MIOSHA. ALJ ordered EEs rehire, reinstatement, and back wages.

EE filed a motion for attorney's fees and costs after the original hearing.

ALJ ordered EE's attorney fees and costs be paid by ER except for a slight reduction based on ALJ's calculations.

ER appealed the ALJ's decision to Circuit Court. EE cross-appealed stating that the damages awarded to EE by the AU were underestimated.

Circuit Court affirmed ALJ's decision and denied ER's request to take additional evidence.

1027 DISCRIMINATION

Discharged
- Production Below Standards Violation of No-Smoking Policy

Employment
- Maintenance Mechanic

Safety Complaints to Employer
- Boxes Stacked Too High
  - Safety Boots
  - Working Conditions

2007-986 Trower v Otsego Memorial Hospital (2007)

EE was a maintenance mechanic. EE frequently made complaints regarding safety issues to ER. EE had once complained to management about having to lift boxes, which were up very high and were also heavy. EE had suffered a hernia due to this situation. EE stated that ER had previously been cited by MIOSHA for stacking boxes too high after another EE complained to MIOSHA and an inspection was completed. EE also raised safety concerns at staff meetings. EE alleges that he was discharged for complaining to management regarding safety concerns and for mistakenly being involved in the complaint to MIOSHA which resulted in a citation.

1027 (continued)

ER stated that EE was not fired for safety complaints. According to ER, EE was fired because EE admitted to violating the no-smoking policy multiple times on the premises and also because EE had not completed his tasks in a timely manner. EE was placed on probation. EE had received low scores on ERs evaluations.

EE filed a complaint with MIOSHA after EE was discharged. MIOSHA Discrimination Division found no violation of Section 65. The ALJ agreed.

EE had many opportunities and years to file a MIOSHA complaint prior to being discharged. Also, several of EE's complaints had been corrected by management and EE had been warned about the no-smoking policy.

ER did not violate MIOSHA.

1028 DISCRIMINATION

Burden of Proof
"But For" Test
Not Established
Employee Misconduct
Insubordination
Leaving Without Permission
Discharged
Insubordination
Leaving Job Without Permission
Questions About Chemical Use
Employment Janitor
Evidence
No Employer Knowledge of Complaint Decision to Discharge before Complaint Safety Complaints to Employer
Requests for Safety Gloves

2007-1447 Hunter v CSM Services (2008)

EE worked for ER on a cleaning crew for several local schools. EE was a new employee and was subject to a 90 day probationary period. EE received one day of training. EE worked 5 full days. On EE's 5th day of work, a co-EE mixed a cleaning solution with the wrong chemical. EE used the cleaning solution without gloves, even though they were provided. EE's hands hurt after use. EE made no complaint at this time.

1028 (continued)

EE was required to clock out by calling a designated telephone number on a landline telephone. However, a landline could not be found at the school when it was time to clock out. After a brief search, EE gave up and left without informing the ER on site or by the use of EE's cell phone. Other EEs eventually found a landline at the school and clocked out.

EE returned to work the next day. EE requested gloves. A lower level supervisor went to get the gloves while a higher level supervisor asked to speak with EE. The higher level supervisor told EE to clock out and go home. The next day ER told EE that EE was discharged.

EE filed a complaint with MIOSHA several days later. EE claimed EE was fired for raising health and safety concerns. ER maintains EE was fired for walking off the job without clocking out and for insubordination. ER had previously fired another EE for the same reason even though that other EE had been at the company past the 90 day probationary period.

MIOSHA Discrimination Division found no violation of Section 65. The ALJ agreed. EE failed to show a casual connection. EE was fired for failure to follow time clock procedures not for requesting safety gloves. Safety gloves had always been provided and ER went to get a pair for EE when requested.

ER did not violate MIOSHA.

1029 DISCRIMINATION

Burden of Proof
"But For" Test
Not Established
Sleeping on Duty
Discharged
Sleeping on Duty
Employment
Asbestos Remover
Evidence
Complaint Not MIOSHA Concern

2008-321 Thomas v Northern Industrial Services (2008)

EE worked for ER performing asbestos removal on a boiler. EE worked for ER for four days. EE's assignment was for 15 days. EE was observed sleeping on the job on his 4th day of work. ER discharged EE for this behavior. EE can be discharged at any time due to EE's at-will status.

EE did not make a health or safety complaint to ER or to MIOSHA while employed with ER. EE's complaints were regarding union representation and leaving the work site for lunch. MIOSHA Discrimination Division found no violation of Section 65. The ALJ agreed.

ER did not violate MIOSHA.

1030 DISCRIMINATION

Burden of Proof
"But For" Test
Not Established
No Protected Activity
Discharged
Uncooperative Behavior
Fighting
Employment
Nurse Assistant
Safety Complaints to Employer
Validity of No Consequence to a Section 65 Action
Safety Complaints to MIOSHA
Validity of No Consequence to a Section 65 Action

2008-384 Varner v Henry Ford Village (2008)

EE was a Certified Nurse's Assistant. EE argued with a co-EE which resulted in co-EE slamming a door on EE's foot. EE complained to ER verbally and later in a written statement. EE took the complaint to MIOSHA because EE felt ER was not investigating EE's complaint. EE was first suspended then fired. This type of complaint is not covered under MIOSHA. EE also took the complaint to the Unemployment Insurance Agency. The ALJ in the unemployment hearing, found for EE.

The unemployment decision in EE's favor does not assist EE in determining whether EE was engaged in protected activity.

EE's complaint did not involve a threat of serious physical harm or death. This complaint only rose to the level of "interpersonal dealings" and is not recognized under MIOSHA's General Duty Clause Section 11(a).

EE's complaint did not complain of protected activity. Motion to dismiss was granted.

1031 DISCRIMINATION

Employment

Welder

Evidence

No Employer Knowledge of Complaint

Decision to Discharge before Complaint

Formal Complaint Never Made

Probation Period

Absence/Tardiness

2008-474 Anderson v Demmer Corporation (2008)

EE worked as a manufacturing representative and welder. EE's duty was to find ways to streamline work while working on the line. EE was placed with ER through an employment staffing company with hopes of becoming a permanent EE. EE's employment status with ER was probationary for 90 days.

EE often reported on safety matters to EE's supervisor. EE was asked to find a new assignment through EE's employment staffing company since EE would not be extended an offer for a permanent position. ER gave several reasons why EE was not given a permanent position: EE's absences, EE's tardiness, EE's negativity, and EE's inability to accept direction. ER also stated that the position was to be made companywide instead of focused on EE's department.

EE's safety concerns and activities never rose to the level of a complaint. A complaint is needed to set in motion a Section 65 violation. EE was not retained as a permanent EE for valid non-discriminatory reasons.

ER did not violate MIOSHA.

1032 EXCAVATION

Utility Water Line Installation

TRENCH

Calculation of Trench Depth

Road as Tie Back

Shoring

Sloping

Storage of Spoil

Protection from rainwater

Unstable or Soft Material

2007-593 Lawrence M. Clarke, Inc. (2009)

The ALJ affirmed citations regarding water utility replacement.

Petitioner was responsible for replacing water main pipes. MIOSHA's S.O. inspected the petitioner's excavation site after receiving a complaint. The S.O. took photographs of the site, and found it in violation of Rule 941. The excavated trench was deeper than five feet. Also, the site had a sand and gravel soil mix with cracks in the soil. There was no shoring system or an angle of at least 45 degrees. The S.O. also alleged a Rule 933(2) violation due to a spoil pile within 2 feet of the trench. Finally, the S.O. found a Rule 932(5) violation, because photographs showed EEs working in the trench with no shoring or sloping.

Petitioner's witness testified the crew was soon going to cut an angle of repose into the trench, but the S.O. left before that happened. He claimed EEs in the photographs were not standing in areas deeper than 4 feet. Petitioner's witness stated that EEs were in a stronger trench area due to concrete in the road next to them. He then claimed the spoil pile protected the trench from rainwater.

A witness to the site testified he witnessed 2 incidents at this site regarding the lack of sloping or shoring.

The ALJ found there was a spoil pile on site within 2 feet of the trench edge. Also, the trench was over 5 feet deep. The ALJ also found that the employee representative allowed EEs to be in the trench exceeding a depth of 5 feet without proper safety precautions. Finally, the ALJ found petitioner failed to cut an angle of repose to compensate for the cracked soil. The ALJ did not find the road acted to suppress the trench sides. The ALJ affirmed violations of Part 9 R 408.40933(2), R 408.40941(1).

1033 ASBESTOS

Building Constructed Before 1981

Presumption of Asbestos Contamination

Demolition

Employer Responsibilities

ASBESTOS ABATEMENT CONTRACTORS LICENSING ACT

CADMIUM EXPOSURE

Demolition

EMPLOYEE

Definition

Person Permitted to Work

EMPLOYER

Co-owners

EMPLOYER DEFENSES

Impossibility of Performance

Intentional Acts of Employee

No Employee Exposure

EVIDENCE

Photographs

LEAD EXPOSURE

Demolition

SERIOUS VIOLATION

Knowledge

Imputed to Employer

Lead Exposure

Substantial Probability

Written Certification of Hazard Assessment, Lack of

2008-194 Press's L.L.C. (2009)

The ALJ affirmed citations regarding the failure to monitor and warn EEs of airborne asbestos, lead, and cadmium.

Petitioner contracted with the city of Muskegon to demolish a residence. MIOSHA's hygienist inspected the demolition site following a complaint. Hygienist took

photographs and samples and analyzed them to find Petitioner failed to monitor airborne asbestos and other contaminants. The residence had a history of poor maintenance. Prior to demolition, Petitioner did not perform an inspection.

Petitioner was required to use licensed persons to identify, remove, and dispose of any asbestos or other contaminants. The residence was built before 1980, and Hygienist found asbestos in the thermal system insulation and the plaster surfacing. Lead and

Cadmium were also found in the house. One co-owner of Petitioner testified to knowing asbestos was likely present in the home.

Petitioner argued the hygienist had no right to inspect without a warrant. Petitioner also claimed the residence owner would not allow a pre-demolition inspection. Petitioner argued it also could not inspect the house due to furniture in the house. Petitioner claimed the City ordered Petitioner to violate MIOSHA requirements.

The ALJ found:

1. An inspection could have taken place after the owner was removed from residence.
2. At least one co-owner knew asbestos was likely present.
3. No competent person supervised contaminant work on the house
4. Petitioner did not control asbestos exposure by disposing of contaminated materials post-demolition
5. Proper equipment was not used to handle contaminated materials.
6. The City had no authority to order Petitioner to violate MIOSHA requirements.
7. The demolition site would not have been a danger to the public if Petitioner had installed a fence around the site, as required by the City.
8. MCL 408.1029 allows for inspections without an EE complaint and without a warrant.

The ALJ rejected Petitioner's claim that no EE covered by MIOSHA worked on the site. The ALJ affirmed serious violations of Part 602, asbestos exposure; Part 603, lead exposure; and Part 309, cadmium exposure. Petitioner also violated the Asbestos Abatement Contractors Licensing Act (AACLA) and MCL 338.3207 because Petitioner's work was performed without a license.

1034 DEMOLITION

Accident Prevention Program

EMPLOYER DEFENSES

Employee's Experience and Training
Employer Good Faith

SERIOUS VIOLATION – TWO-PRONG TEST OF SECTION 6(4)

Accident Prevention Program
Reduced to Other Than Serious
Reasonable Diligence
Oral Training Program
Substantial Probability of Death or Serious Physical Harm
Oral Training Program

TRAINING

Accident Prevention Program
Hazards and Safeguards

2008-440 Pitsch Companies (2008)

The ALJ addressed an alleged serious violation that Petitioner's accident prevention program did not contain required instructions on the hazards of packing debris. The ALJ found this violation other than serious.

Petitioner was contracted for demolition. Petitioner used trucks to carry debris from site. The truck drivers walked on top of debris when packing trucks. The S.O. found Petitioner's Health and Safety Plan (Plan) did not contain instructions on recognizing and avoiding hazards for packing debris.

Petitioner argued it had a general plan at its office containing the required instructions, but did not provide the plan prior to the hearing. Petitioner also claimed it provided oral instructions to its drivers concerning the hazards.

The ALJ found Petitioner's Plan provided to the S.O. during inspection did not contain instructions for packing debris. The ALJ determined Petitioner's oral instructions were insufficient. Petitioner is required to provide a written accident prevention program to EEs. The ALJ also found Petitioner's testimony that a general plan containing the required instructions existed insufficient.

Respondent alleged Petitioner's violation was serious and proposed a $435.50 penalty. The ALJ found the violation to be other than serious because Petitioner reduced the probability of death or harm by providing EEs with an oral training program.

The ALJ affirmed a violation of Rule 114(2)(d), but reversed respondent's proposed penalty, finding the violation to be other than serious.

1035 DEMOLITION
Basement

EMPLOYER DEFENSES
Favorable Prior Record

EVIDENCE
Photographs

PENALTIES
Affirmed
Section 36 Followed: Size, History, and Seriousness

SERIOUS VIOLATION – TWO-PRONG TEST OF SECTION 6(4)
Substantial Probability of Death or Serious Physical Harm

2008-1428 Demolition Contractors, Inc. (2008)

The ALJ addressed an alleged serious violation that Petitioner failed to positively attach wrecking balls to excavation equipment as required. The ALJ affirmed that the violation was serious.

Petitioner was contracted to demolish former hospital buildings. The S.O. and Hygienist found, based on photographs taken during inspection, that the CAT excavating machine cabs on site were in the path of wrecking balls. These wrecking balls were not positively attached to the excavation equipment. The inspectors recommended issuance of a serious violation of Rule 2045(7) with a $625 penalty. The initial penalty was $2,500, but was reduced in consideration of Petitioner's size, good faith efforts to protect employees, and the high severity, but low probability of the wrecking ball becoming dislodged.

Petitioner claimed the wrecking balls would fall straight to the ground if disconnected and would not hit the cabs. Petitioner also claimed it always conducted work this way without incident in the past. Petitioner then argued Rule 2045(7) did not apply because it only applied when using a crane.

The ALJ found Rule 2045(7) did not apply only to cranes. The ALJ also affirmed that Petitioner committed a serious violation of Rule 2045(7) due to the possibility of death or serious physical injury resulting from the wrecking balls' positions. The ALJ also affirmed the $625 penalty amount.

1036 ASBESTOS

Building Constructed Before 1981

Presumption of Asbestos Contamination

Competent Person

Employer Responsibilities

Respirators

Storing Contaminated Material

CADMIUM EXPOSURE

Demolition

School Heating System

CONSTRUCTION

Activities/Operations

School Heating System

EMPLOYER DEFENSES

Employee's Experience and Training

Lack of Knowledge

LEAD EXPOSURE

Demolition

School Heating System

SERIOUS VIOLATION

Knowledge

Imputed to Employer

Lead Exposure

SERIOUS VIOLATION – TWO-PRONG TEST OF SECTION 6(4)

Employer Knowledge

Reasonable Diligence

Oral Training Program

Substantial Probability of Death or Serious Physical Harm

2009-1288 Johnson Controls, Inc. (2010)

The ALJ addressed alleged serious violations that Petitioner failed to monitor asbestos, lead, and cadmium contamination in a construction area resulting in exposure. The ALJ affirmed the violations and found them to be serious.

Petitioner was contracted to update a school heating system. Much of the debris from the operation contained asbestos, lead, and cadmium. Petitioner did not check debris for contaminants. Petitioner did not ensure asbestos work was supervised by a "competent

person." Petitioner also did not store or dispose of asbestos materials using impenetrable containers.

Petitioner claimed it trained EEs on asbestos on a regular basis every 12-18 months. Petitioner also claimed the school assured Petitioner the area was safe. The school gave Petitioner an asbestos study conducted before work began. This study was incomplete.

Petitioner also claimed it hired Upper Peninsula Engineers and Architects (U.P.E.A.) to serve as a "competent person" on the job. Petitioner alleged it used respirators during work, but U.P.E.A. recommended that higher efficiency respirators be used. Petitioner also argued its lead exposure was limited, but this was contradicted by the evidence.

The ALJ ruled that Petitioner should have known about the violations with reasonable diligence. The ALJ also noted that U.P.E.A. did not do the actual labor. Petitioner's EEs did the work and Petitioner's respirators and clothing were not in compliance with the rules. Petitioner's EE training was ineffective. Petitioner also did not have EE decontamination procedures on-site.

The ALJ found that a substantial probability existed for death or serious harm from Petitioner's violations. The ALJ affirmed serious violations of Part 309, Cadmium; Part 602, Asbestos Standards for Construction; and Part 603, Lead Exposure in Construction.

1037 CONSTRUCTION
Activities/Operations
Truss Erection

EMPLOYER DEFENSES
No Truss Installation Rule

EVIDENCE
Photographs
Insufficient Alone to Establish Burden of Proof

FALL PROTECTION
Truss Erection

GENERAL DUTY CLAUSE
Truss Installation

SERIOUS VIOLATION
Truss Installation

SETTLEMENT
At Any Stage of the Proceeding

2009-1542 Sarniak Construction (2010)

The ALJ addressed an alleged serious violation that Petitioner did not adequately protect EEs from construction site hazards. All but one of the alleged violations were settled before hearing. The ALJ reversed the remaining violation.

The S.O. inspected a home construction site and took photographs of the site. The S.O. saw EEs installing wood trusses on top of the perimeter walls, 20 feet from the ground without temporary bracing. EEs were at risk of serious injury or death if EEs fell from the walls.

Petitioner did have lateral support across trusses, but no diagonal braces going from one truss to the next. Petitioner asserted the company installed supports below the trusses, which made the diagonal supports unnecessary. Petitioner also placed plywood sheeting beneath EEs to protect them as an alternative to lateral trusses. Petitioner also claimed there was no rule about truss installation.

The ALJ found Respondent failed to show Petitioner's EEs were at risk of serious harm due to Petitioner's actions, and agreed there was no rule concerning truss installation. Petitioner used another acceptable method to secure the trusses. The ALJ reversed the alleged violation of the MIOSHA General Duty Clause Section 11(a).

1038 CONSTRUCTION
Activities/Operations
Water Treatment Plant

EMPLOYER
Control over Employees
Entity in the Best Position to Prevent Hazards

EMPLOYER DEFENSES
Violation Not Serious

SERIOUS VIOLATION – TWO-PRONG TEST OF SECTION 6(4)
Substantial Probability of Death or Serious Harm

2009-1643 Allied Mechanical Services, Inc. (2010)

The ALJ addressed alleged serious water treatment plant hazards. Petitioner accepted that it violated Rules, but disputed Respondent's allegation that the violations were serious. The ALJ found the violations were serious.

Petitioner was responsible for upgrading and renovating a water treatment plant. The S.O. found an air compressor without safety fasteners or an over pressure relief device. The S.O. determined EEs were exposed to whipping line hazards because the compressor lacked connectors and over pressure relief devices.

Petitioner did not dispute the S.O.'s facts, but claimed the violations at issue were other than serious.

The ALJ found that the violations were serious. The compressor was in use the day of the inspection and the ALJ determined that EEs could have been badly hurt. The ALJ affirmed serious violations of 1995 AACS R 408.41935 (5) and (10).

1039 CONSTRUCTION
Activities/Operations
Roofing

EMPLOYER DEFENSES
Intentional Acts of Employee
Employer Remains Responsible
Isolated Incident
Unpreventable Employee Misconduct

EVIDENCE
Photographs
Roofing Work

FALL PROTECTION
Perimeter Protection
Roof

SERIOUS VIOLATION
Fall Over 18 Feet

SERIOUS VIOLATION – TWO-PRONG TEST OF SECTION 6(4)
Accident Prevention Program
Employer Knowledge Established
Supervisor Observed Operation
Reduced to Other than Serious
Some Fall Protection Provided
Substantial Probability of Death or Serious Physical Harm
Type of Injury if Accident Occurred

2010-101 Shambaugh and Son, L.P. (2010)

The ALJ addressed three alleged serious construction site violations of 29 CFR 1926.501. The ALJ found two violations serious and one other than serious.

A MIOSHA inspector took photographs during the inspection. The inspector found three instances where EEs lacked fall protection. In two cases EEs worked twenty-five to thirty feet above ground, within six feet of the roof edge. In one case EEs worked in an attic near an open doorway with a twenty-five foot drop.

The ER argued it had a fall protection plan, but EEs ignored it. ER claimed it should not be responsible for EEs' misbehavior. The ER also claimed the attic's screen door was shut, and EEs opened the attic doors for ventilation. The ER also used a guard rail to block the attic doorway.

1039 (Continued)

The ALJ found ER knowledge based on his finding that supervisors observed EEs at work on the roof. The ALJ cited a high risk of serious injury in two of the violations. The ALJ stated the attic doorway needed another guardrail, but found the third violation other than serious because the doorway had some fall protection.

1040 EVIDENCE

Photographs
Traffic Roundabout

FLAG PERSON
Traffic Roundabout

REPEAT VIOLATION
Traffic Roundabout

SERIOUS VIOLATION
Knowledge
Imputed to Employer
Substantial Probability

SERIOUS VIOLATION – TWO PRONG TEST OF SECTION 6(4)
Employer Knowledge Established
Supervisor Observed Operation
Substantial Probability of Death or Serious Physical Harm
Type of Injury if Accident Occurred

SIGNAGE
Road Construction
Traffic Roundabout

2010-130 Florence Cement Co. (2010)

The ALJ addressed an allegation of a repeat serious violation of a traffic control standard, Rule 2223(1). The ALJ found that ER violated the standard a second time and the violation was serious

The Senior SO cited ER for failing to provide more than one traffic regulator at a roundabout construction site. One of the roads leading to the roundabout did not have a traffic regulator. The safety supervisor deemed this a repeat violation due to a prior violation of the same Rule.

ER claimed there was a low traffic volume in the area because traffic was restricted to local traffic and school buses. ER also argued its contract did not list a specific way to

Utilize traffic regulators. ER claimed it reduced the speed limit and placed yield signs in the area.

The ALJ affirmed the violation and found it serious. ER's foreman witnessed the violation, and the foreman's knowledge was imputed to ER. The activity also had a substantial probability to cause serious physical harm. The ALJ found that signs and signals did not provide the necessary protection for EEs and the project required a second traffic regulator.

1041 CONSTRUCTION

Activities/Operations

Electrical lines

ELECTRICAL

Energized Lines

Transmission lines vs. Distribution lines

EMPLOYER DEFENSES

Vague Rule

Statutory Interpretation

PERSONAL PROTECTIVE EQUIPMENT

Gloves

Electrical Protection

SERIOUS VIOLATION – TWO-PRONG TEST OF SECTION 6(4)

Accident Prevention Program

Electrical Lines

Employer Knowledge

2010-150 NG Gilbert Corporation (2011)

The ALJ addressed alleged construction site violations of Part 16 of the Construction Safety Standards Rules 114(2)(b), 1647(2), and 1648(4). The ALJ affirmed all violations as serious. ER appealed to the Ingham County Circuit Court.

A 40,000 volt power line injured EE installing a new power line with non-grounded equipment. EE did not wear the protective gloves ER provided. ER did not include grounded equipment in its accident prevention program. The SO cited ER for not using grounding devices near the power line.

ER claimed the statute only required the use of grounding equipment with transmission lines. ER also claimed grounding equipment only needed to be a part of the accident prevention program when transmission lines are involved. ER stated the line at issue was a distribution line due to its lower voltage.

The ALJ found that the definitions of transmission lines and distribution lines were not fixed and ER misinterpreted the Rule. The ALJ found the violations serious due to a

substantial probability for death or serious physical harm and ER knowledge that EE was unprotected.

The Board of Health and Safety Compliance and Appeals did not direct review, and the decision became final pursuant to Rule 408.1042 of the Michigan Occupational Safety and Health Act.

The Ingham County Circuit Court reversed the decision following ER appeal. The court found that the electrical line's voltage matched a distribution line and not a transmission line. The court reversed because the applicable Rule only applies to transmission lines.

1042 CONSTRUCTION
Activities/Operations
Excavator Inspections

EMPLOYER DEFENSES
Favorable Prior Record
Prior Inspections

INSPECTION
Annual Equipment
Prior Inspections Produced no Citation

2010-260 Corby Energy Services, Inc. (2010)

The ALJ addressed an alleged construction site violation of Rule 408.41012a(1) of the Construction Safety Standards. The ALJ affirmed that ER violated the Rule.

The SO claimed ER did not keep a copy of the date and results of annual inspections for its excavators. ER did not have these records because ER did not perform an annual inspection of the items required in the Rule.

ER stated that the excavator operator performed daily inspections of the excavator, but these inspections did not include all items specified in the Rule. The SO made a statement that MIOSHA did not cite ER for this violation in the past, but the past inspection reports are not on record. Finally, ER claimed its excavator was not subject to inspection because it was a rubber tired "skid-steer", but this kind of excavator was not defined on the record

The ALJ found that ER's excavator was not rubber tired, but had crawler treads. Therefore the excavator is covered by the cited Rule. The excavator was subject to annual inspections that ER failed to perform. The ALJ also found that there was no proof that MIOSHA examined ER's excavators during past inspections.

1043 EMPLOYEE

Delegation to Employees of Safety Requirements

EMPLOYER

Experienced Employees

Training Needed

Required to train Employees

SERIOUS VIOLATION – TWO-PRONG TEST OF SECTION 6(4)

Employer Knowledge

Substantial Probability of Death or Serious Physical Harm

TRAINING

Accident Prevention Program

Hazards and Safeguards

New Operation

2010-318 EES Coke Battery, LLC (2011)

The ALJ addressed alleged serious violations of Part 1, 38, and 85 of the General Industry Safety Standards. The ALJ affirmed all violations as serious. ER appealed to the Ingham County Circuit Court.

An EE died replacing a piece of machinery without previous experience or a work procedure order. The work crew (two EEs) performed a job hazard analysis, but it contained errors that were not fixed before the operation. Respondent asserted EEs were not properly trained to do this job.

ER argued one EE stated he had done this job before, but the ALJ found otherwise considering the mistakes EE made while performing it. The ALJ found ER needed to verify EE's plan because no procedure existed for completing the task. The ALJ stated that ER should have known of the unsafe working conditions with reasonable diligence. ER also did not effectively train employees to perform this task. The ALJ found these violations serious considering that one EE died as a result.

The Ingham County Circuit Court affirmed this decision following ER appeal for the same reasons cited in the ALJ's opinion.

1044 ACCIDENT PREVENTION PROGRAM
Traffic Control

CONSTRUCTION
Activities/Operations
Traffic Control

PERSONAL PROTECTIVE EQUIPMENT
Hard Hats
Traffic Signal Regulator
Head, Eye, and Foot Protection When Subject to Hazards

SERIOUS VIOLATION – TWO-PRONG TEST OF SECTION 6(4)
Reduced to Other Than Serious
Short Exposure

SIGNAGE
Road Construction
Traffic Control

2010-1011 Give 'Em A Brake Safety, Inc. (2011)

The ALJ addressed alleged construction site violations of Part 22 Rule 408.42223(1) and (10) and Part 1 Rule 408.40114(1). The ALJ affirmed all violations.

ER was responsible for construction site traffic control. The SO cited EE for failing to wear a hardhat or use a sign to stop traffic while retrieving an obstacle from the road.

The ALJ found the EE failed to use a STOP/SLOW paddle to stop traffic as is required in the manual. The obstacle was a company truck that only served as a "Minor Traffic Incident". The EE had time to retrieve his hat and sign, and did not need to act so quickly. The obstacle was also visible from 1,000 feet away and the weather was clear. Most drivers would have been able to stop for this obstacle on their own.

The ALJ found that the traffic paddle was "readily available" and that EE should have retrieved it before closing the lane. ER also failed to have an accident prevention program on-site, which was a violation. The ALJ ruled the violations other than serious because the road was only blocked for three minutes and most drivers could easily see EE in the road.

1045 ASBESTOS

Demolition
Removal
Regulated Area
Showers

DEMOLITION

Asbestos Removal

EMPLOYER DEFENSES

Excessive Costs
Greater Hazard
Water in Basement
Impossibility of Performance
No Employee Exposure

EXPOSED TO CONTACT

Asbestos

2010-918 Brandenburg Industrial Service Co. (2012)

The ALJ addressed an alleged violation of 29 CFR 1926.1101(j)(1)(i), requiring hygiene facilities for EEs exposed to asbestos. The ALJ affirmed the violation.

MIOSHA cited ER for placing decontamination showers too far from the asbestos site. ER claimed it could not move showers closer due to lack of water or drainage in the basement. ER claimed it removed harmful paraphernalia from the worksite each day. ER argued there was no electricity in the basement that could support a closer decontamination area.

The ALJ found no evidence that ER removed harmful paraphernalia from the worksite. The ALJ also found ER could access utilities from other areas. The ALJ stated that creating a secure pathway to the shower facility would not require more utilities.

ER argued it could not create multiple shower stations for crews in different areas, but the ALJ found this feasible. ER also claimed there was no contamination in the basement, and it was not feasible to include showers on-site. Finally, ER argued showers on-site were a greater hazard that would create puddles and cause injuries. The ALJ rejected this and found the ER did not explore complying with the standard before making this conclusion.

1046 PERSONAL PROTECTIVE EQUIPMENT
Life Jackets

EVIDENCE
Photographs
Trench Depth

SERIOUS VIOLATION
Knowledge
Imputed to Employer
Substantial Probability

SERIOUS VIOLATION – TWO-PRONG TEST OF SECTION 6(4)
Employer Knowledge Established
Employer Agent Present
Substantial Probability of Death or Serious Physical Harm
Type of Injury if Accident Occurred

TRENCH
Calculation of Trench Depth

2010-1158 J E Kloote Contracting Inc. (2011)

The ALJ addressed an alleged serious violation of Part 6, R 408.40636(1). The ALJ affirmed the violation as serious.

ER allowed EEs to work on a trench over adjacent water without a life jacket or buoyant work vest. The SO did not see EEs wearing life jackets during inspection. No ring buoy was available for rescue operations. The SO photographed EEs who were calculating the trench depth close to the water without life jackets.

ER claimed that while EEs were in the boat they wore life jackets. ER claimed the rule should only apply to those within three feet of the water.

The ALJ found requiring life jackets within six feet of the water fulfilled the safety standard better than three feet. The ALJ also found EEs were within three feet of the water. The ALJ found a risk of EEs drowning. The ALJ found the violation serious due to ER knowledge and the substantial probability for death or serious physical harm if an EE fell in the water without a life jacket.

1047 BURDEN OF PROOF

Department Required to Prove Violation

Carbon Monoxide Testing

Citations Dismissed

Allegations Not Supported

EVIDENCE

Credibility

Carbon Monoxide Testing

EXPOSED TO CONTACT

Carbon Monoxide

RIGHT TO KNOW

Hazard Communication Program

Employee Information and Training

Training

SERIOUS VIOLATION – TWO-PRONG TEST OF SECTION 6(4)

Employer Knowledge Established

Reasonable Diligence

Oral Training Program

SETTLEMENT

At Any Stage of the Proceeding

TRAINING

Carbon Monoxide Training

2011-132 United Parcel Service, Inc. (2012)

Both parties agreed to a partial settlement. The ALJ addressed remaining alleged serious violations of Part 430, Hazard Communication, Part 470, Employee Medical Records and Trade Secrets, Part 301, Air Contaminants, and Part 520, Ventilation Control. The ALJ affirmed violations of Parts 430 and 470 as serious, but dismissed violations of Parts 301 and 520.

MIOSHA cited ER for exposing EEs to impermissible levels of carbon monoxide without proper ventilation. The hygienist found EEs had carbon monoxide training, but were unaware of its harmful health effects. ER claimed it held required annual EE training, but the hygienist could not find any record of it.

1047 (Continued)

The hygienist measured carbon monoxide at the site using a test not based on reliable scientific methods. Other tests of the facility showed readings that did not violate the MIOSHA standard.

The ALJ found ER did not provide EEs proper carbon monoxide information or hold required annual safety meetings. EEs were exposed to hazards and ER's knowledge of this was a serious violation. The ALJ also found the hygienist's carbon monoxide test was not based on sufficient facts or data to support alleged serious violations of Parts 301 and 520.

1048 CONSTRUCTION

Activities/Operations

Roofing

EMPLOYEE

Definition

Person Permitted to Work

Owner

FALL PROTECTION

Roof

Alternate Fall Protection Provided

LADDER

Construction Site

Roof

Portable

SERIOUS VIOLATION – TWO-PRONG TEST OF SECTION 6(4)

Employer Knowledge Established

Owner Observed

Substantial Probability of Death or Serious Physical Harm

Type of Injury if Accident Occurred

11-000866-MIOSHA Signature Homes Contracting LLC (2012)

The ALJ addressed an alleged violation of Part 45, Section 1926.501(13) and an alleged serious violation of Part 11, R 408.41124(5). The ALJ overturned the first violation and affirmed the second as serious.

The SO cited ER for not having a fall protection plan for EEs when working on a residential roof. ER provided a ladder, but it was not secured and lacked grasping

devices. ER also used an alternate method of fall protection consisting of 2x4 "slide boards" connected to trusses and a small platform called a "roof jack" that was installed near the dormer.

ER argued the person the SO saw on the roof was an owner, not an EE, and the applicable rule did not apply as a result.

The ALJ found the owner on the roof was an EE working for ER (*Barker Brothers Construction v. Bureau of Safety and Regulation*, 212 Mich App 132; 536 NW2d 845 (1995)). The ALJ found ER did have alternate fall protection and did not violate the Rule. Finally, the ALJ determined EE's ladder did not meet safety standards. This violation was serious because there was a substantial probability of death or serious physical harm.

1049 CONSTRUCTION
Activities/Operations
Sewer Installation

EVIDENCE
Photograph**s**
Trench Violations

REPEAT VIOLATION
Trench Slope

RIGHT TO KNOW
Hazard Communication Program
Employee Information and Training

SERIOUS VIOLATION – TWO-PRONG TEST OF SECTION 6(4)
Accident Protection Program
Employer Knowledge Established
Supervisor Observed Operation
Substantial Probability for Death or Serious Physical Harm
Type of Injury if Accident Occurred

TRENCH
Accident Prevention Program
Calculation of Trench Depth
Earth ramp
Unstable Material
Sloping
Granulated Clay Soil
Trench Box

11-000867-MIOSHA Bacco Construction (2012)

The ALJ addressed alleged serious violations of Part 1, General Rules, and Part 9, Excavation, Trenching, and Shoring, and one other-than-serious violation of Part 9. The ALJ affirmed all alleged serious violations as well as the other-than-serious violation.

The SO cited ER for failing to provide an accident prevention program. The SO photographed EEs entering and exiting the trench improperly. EEs did not have instructions for using the trench box to access the excavation. ER had knowledge that the trench ladder was inaccessible to EEs. When trench depth surpassed 5 feet, the excavation slope was in violation by exceeding a 45 degree angle.

1049 (Continued)

ER claimed appropriate measurements for a 45 degree angle were painted on the street. ER also made claims of excavation dimensions inconsistent with the SO's observations.

The ALJ found based on SO's photographs that ER painted the streets post-inspection. The ALJ found ER's slope angle created a substantial probability for death or serious physical harm and was a repeat violation. ER also knew the trench box was unstable and was in violation. ER was in serious violation of not giving instruction to EEs.

1050 BARRICADE
Cranes
To Keep Employees from Hazardous Area

CONSTRUCTION
Activities/Operations
Bridge Construction

CRANES
Blind Spot
Constantly Moving
Guarding Radius of Superstructure
Stationary

SERIOUS VIOLATION – TWO-PRONG TEST OF SECTION 6(4)
Employer Knowledge Established
Supervisor Observed Operation
Substantial Probability of Death or Serious Physical Harm
Type of Injury if Accident Occurred

STOCK STACKING
Pipe Casings

2011-1102 Walter Toebe Construction (2012)

The ALJ addressed alleged serious violations of Part 8, Handling and Storage of Materials, Part 10, Lifting and Digging Equipment, and Part 21, Guarding of Walking and Working Areas. The parties stipulated to violating Part 21. The ALJ affirmed all other violations but one as serious.

The SO cited ER for keeping stacked pipes with a high probability of collapsing near high traffic areas. Large cranes on-site lacked barricades between them and nearby EEs. One crane had a blind spot EEs walked through and a nearby concrete wall within its swing radius. There was also a broken handrail on the bridge that was splintered with nails protruding.

ER argued the stacked pipes were not dangerous because the SO parked near them. However, at that time the SO was unaware of the stack and moved after noticing it.
The ALJ found a high probability that the stacked pipes could collapse. This violation was serious due to substantial probability of death or serious physical harm and ER had knowledge. The ALJ found one crane needed to be barricaded to avoid substantial probability of death or serious physical harm. The violation was serious because ER was aware of it. The crane with the blind spot was not consistently stationary and was not in

violation of Rule 1024a(2), which only requires an extended barricade for completely stationary cranes.

1051 CONSTRUCTION

Activities/Operations
Employer Responsibility When Creating Hazard
Multi-Employer Worksite

EMPLOYER DEFENSES

Affirmative Defen**se**
No Control Over Project

GENERAL DUTY CLAUSE

Protection of Other Employees

SERIOUS VIOLATION

Knowledge
Imputed to Employer
Substantial Probability

TRENCH

Calculation of Trench Depth
Excavated Material
Shoring
No System Present
Sloping
Clay Soil
Required Even if Employer Believed Safe

2011-1021 Site Development Inc (2012)

The ALJ addressed alleged serious violations of 1979 AC R 408.40933(2) and 1979 AC R 408.40941(1). The ALJ affirmed the violations as serious.

The inspector cited ER for keeping excavated material within two feet of the excavation edge while EE was in the trench. The near vertical trench and the material increased the possibility of a cave-in. The inspector also cited ER for failing to slope the trench properly. The trench was eight feet deep.

ER argued the trench project was controlled by the City. The City ordered ER to dig the trench that way. ER claimed it worked in a narrow area with little space available to

place excavated material. ER also stated the General Duty Clause did not require ER to protect City EEs.

The ALJ found there was not enough evidence to show the City took control of the project away from ER. ER was responsible for all work and knew it was violating the Rules. An ER who creates hazards with multi-employer work sites is liable under OSHA standards.

1052 CONSTRUCTION
Activities/Operations
Competent Person
Scaffold System

EMPLOYER
Delegation to Employees of Safety Requirements

EMPLOYER DEFENSES
Intentional Acts of Employe**e**
Fall Protection Provided but Not Used

FALL PROTECTION
Competent Person Required
Scaffold System

SERIOUS VIOLATION – TWO-PRONG TEST OF SECTION 6(4)
Competent Person Required
Substantial Probability of Death or Serious Physical Harm

SUPERVISION
Competent Person Required

2011-1136 Leidal and Hart Mason Contractors (2012)

The ALJ addressed alleged serious violations of 1998-2000 AACS R 408.41210(2) and 1998-2000 AACS R 408.41213(6). The ALJ affirmed the first violation as serious and rescinded the second.

ER was cited for altering a scaffold system without a competent person's supervision. ER's EE moved scaffold planks and fell thirty-five feet. The planks needed to be moved to raise the scaffold, but were not secured properly. ER was also cited for lacking any

fall protection for the scaffold system. EE was seriously injured and was not wearing any fall protection gear.

ER stated EEs were told to wear fall protection gear. ER claimed it did supervise EE with a competent person during the operation. ER argued that 1998-2000 AACS R 408.41210(2) was inapplicable because the scaffold was not raised or altered at the time of the fall, a requirement of the Rule.

The ALJ found EE was likely attempting to raise the scaffold when he fell. EE's supervisor was not competent because he did not see EE lacked protection. The supervisor lacked the knowledge to take corrective measures because he entered his trailer and did not see EE fall. ER did not violate the fall protection rule because ER provided fall protection that EE did not use.

1054 CONSTRUCTION
Roofing

EVIDENCE
Photographs
Roofing Work

FALL PROTECTION
Roof

ROOFING WORK
Fall Protection

12-002126-MIOSHA East Muskegon Roofing (2013)

The ALJ addressed an alleged violation of 29 CFR 1926.501(b)(10). The ALJ found no violation.

MIOSHA cited ER for exposing EEs to fall hazards while performing roofing activities within six feet of a roof edge. The roof was approximately twenty-two feet high and EEs had no fall protection. EEs were assigned to fix a leak.

The inspector took photographs of EEs on the roof to indicate what was happening. None of the photographs clearly showed EEs working within six feet of the edge. MIOSHA claimed one EE was within six feet because he could use a leaf blower to reach snow on the roof edge. ER claimed this was not actual roofing work, but an inspection of the roof.

The ALJ noted that fall protection rules require roofing work to have already begun, and the inspector's photographs were not specific enough to show roofing work had begun.

1054 (Continued)

The inspector testified at the hearing, but the testimony lacked clarity and specificity. Also, only two EEs were on the roof and they were not using other roofing work tools. This supported the finding that this was an inspection and not roofing work.

1055 EMPLOYER

Control Over Work Area

EVIDENCE

Photographs

SERIOUS VIOLATION

Substantial Probability

TRENCH

Sloping

Angle of Repose

Granulated Clay Soil

13-010445-MIOSHA Universal Consolidated Enterprises, Inc. (2014)

The ALJ addressed an alleged serious violation of the MIOSHA Construction Safety Standards, Part 9, Excavation, Trenching and Shoring. The ALJ affirmed the violation.

MIOSHA cited ER for not sloping a trench to the required angle of repose when the trench was more than five feet deep. This is required when a trench has granulated soil, as was the case here. Without proper sloping there was a risk of cave-in.

ER was contracted to dig the trench in order to enter and tap the water main. The excavation was over thirteen feet wide, ten feet long and seven feet deep. A couple of the trench sides were vertical and not at the required angle. The inspector took photographs of the trench sides.

The ALJ found the excavation did not comply with the applicable Rule. The ER dug the trench, and the ER was responsible for the violation.

1056 EGRESS, MEANS OF
Welding Operations

EMPLOYER DEFENSES
Participation in MIOSHA Consultation Education and Training Program (CET)

EYE PROTECTION
Probability vs Possibility
Penalty Assessment

LEAD EXPOSURE
Welding Operations

PERSONAL PROTECTIVE EQUIPMENT
Respirator

RESPIRATORY PROTECTION
Medical Evaluations
Respirators
Respiratory Protection Program

SERIOUS VIOLATION
Written Certification of Hazard Assessment, Lack of

TRAINING
New Equipment Training

12-000229-MIOSHA Schmidt Industries (2013)

The ALJ addressed serious violations of multiple MIOSHA rules. ER stipulated to the violations, but contested the penalties and claimed immunity.

MIOSHA's hygienist cited ER for not providing a respiratory protection program for its plating, welding, and sandblasting operations. ER did not medically evaluate EEs to determine if they required respiratory protection. ER also did not fit the masks to EEs or store equipment properly. ER also did not train EEs for job requirements. ER did not provide proper eye or foot protection for welding operations.

MIOSHA also cited ER for not providing a written hazard communication program, or monitoring EE lead exposure. ER did not provide means of egress due to blocked exits. ER did not guard equipment, and untrained EEs operated a crane.

ER stipulated to the violations at a previous hearing, but claimed immunity and disputed penalties. ER claimed immunity based on its participation in MIOSHA's "Consultation

1056 (Continued)

Education and Training" (CET) program. ER also stated the penalties imposed were excessive and arbitrary.

The ALJ found MIOSHA used all proper procedures for ER's penalties. The ALJ found ER did not deserve a good faith reduction in penalties, as ER made it difficult for the hygienist to enter the premises. The ALJ stated there was not enough evidence to show the penalties were discriminatory compared to other companies.

ER was previously cited and given an extended date to resolve its issues due to ER's CET program association, but this ended in 2008. Therefore, the ALJ found the ER was no longer protected by CET and the violations were appropriate.

1057 ELECTRICAL

Energized Circuits
Standard for Electrical Safety (National Fire Protection Association)
Open Electrical Boxes
Safety Equipment for Employees

EMPLOYER DEFENSES

No Employee Exposure
Vague Rule
Statutory Interpretation

PERSONAL PROTECTIVE EQUIPMENT

Gloves
Electrical Protection

13-000266-MIOSHA Newkirk Electric Associates (2013)

The ALJ addressed an alleged serious violation of 1979 AC R 408.41724(3). The ALJ affirmed the violation as serious.

MIOSHA cited ER for allowing unprotected EEs to be too close to a volt panel while working with a drill motor. The energized panel supplied an electric current to the area where EEs were replacing circuit box conduits. EEs on site were aware of this, but tried to drill around the energized areas. The drill was insulated, but one EE did not wear gloves.

ER claimed the EE not wearing gloves did not operate the drill and no citation should result. ER claimed the statute only intended to include the drill in determining what is "exposed" to the electric shock hazard. ER also claimed the part of the statute at issue did not apply to this case.

The ALJ found that the rule should not be read as narrowly as ER claimed and stated the unprotected EE still assisted with drill operation. The ALJ confirmed that the rule applied. Using the *Standard for Electrical Safety in the Workplace* by the National Fire Protection Association as a guide, the ALJ determined that installing conduits in a circuit box required use of insulated gloves.

1058 ACCIDENT PREVENTION PROGRAM
Roofing Operations

CONSTRUCTION
Activities/Operations
Roofing

EMPLOYER
Control Over Employees
Nonappearance at Scheduled Hearing
Filed Answer with Appeal

EMPLOYER DEFENSES
Independent Contractors
Roofing Work
No Fall Protection
Subcontractors

FALL PROTECTION
Roof

SERIOUS VIOLATION – TWO-PRONG TEST OF SECTION 6(4)
Accident Prevention Program
Employer Knowledge Established
Employer Agent Present

TRAINING
Accident Prevention Program
Hazards and Safeguards

13-002387-MIOSHA Kingsmen Construction (2014)

The ALJ addressed alleged serious violations of MIOSHA rules. The ALJ affirmed the citations as serious.

MIOSHA's SO visited ER's site after one EE fell off of a roof. The SO claimed ER had no accident prevention program for its roofing operations. EEs were exposed to falling eight feet when using ER's extension ladders as well. Also, EEs had no fall protection and were not trained to identify fall hazards. EEs were also not trained to use their equipment properly.

ER did not appear at the hearing, but filed an answer with its appeal. The answer claimed that all of the EEs were independent contractors not controlled by ER. ER claimed the EEs worked under independent contractor agreements. ER alleged it provided EEs with

1058 (Continued)

fall protection equipment and its subcontractor agreement stated EEs were required to make use of it.

The ALJ found that no evidence supported ER's answer and that everyone at the worksite worked for ER. The citations themselves were not disputed and the ALJ found ER violated the MIOSHA rules.

1059 DISCRIMINATION

Burden of Proof
"But For" Test
Established
Discharged/Suspended
Pretext
Absenteeism
Discharged
Bathroom Facilities Complaint
Complaints about Working Conditions
Relief Under Section 65
Personal File
Transcript Payment
Safety Complaints to Employer
Restroom Access

MI-DI 2005-425 Menards, Inc. v Lishin (2006)

Employee was a full-time cashier for Employer from 1998 until January 30, 2005, when Employee was discharged after complaining about two new policies. First, the Water Policy restricted bottled water at registers. Second, the Bathroom Policy limited employees to one paid bathroom break per eight hour shift. Employee orally complained about these policies when they were announced January 5th. Additionally, Employee objected to these policies in a conversation with the head cashier on January 6th, and Employee discussed the policies with a customer, who initiated the conversation, on January 25th. Employer disciplined Employee for both of these conversations.

On January 25th, Employee filed a complaint with MIOSHA General Industry Safety and Health Division, but Employer was not aware of this complaint until after Employee was terminated. Employer terminated Employee on January 30th for unsatisfactory work habits and poor attendance.

On February 1st, Employee filed a MIOSHA Discrimination Complaint against Employer. On February 11th, Employer withdrew the water policy. On February 25th, Employer received a letter from a MIOSHA industrial hygienist, stating that employers must provide employees free access to bathrooms and drinking water.

Employer claimed that Employee's discharge was due to poor attendance, failure to work 40 hours per week, her conversations with the head cashier and customer, and her attitude/teamwork. The ALJ found the explanations given by Employer did not justify the termination. Employee's absences, under Employer's own policy, would not merit a discharge. Employee's conversation with the head cashier was required under Employer's policy requiring employees bring their concerns to their immediate supervisor. Employee's conversation with the customer did not violate any of Employer's

policies. The ALJ also dismissed the failure to work 40 hours explanation and the attitude/teamwork explanation. The ALJ found Employee's objections to the policies to be the only likely explanation for the termination. Employer knew or should have known the Bathroom and Water Policies were inappropriate.

The ALJ ordered Employee reinstated at her former pay rate, taking into account six month raises. Additionally, the Employer was ordered to pay back-wages with interest, taking into account six month raises. Employer was also ordered to reimburse Employee the $80 she paid for her personnel file, and the Department $2,309.62 for transcript costs.

1060 DISCRIMINATION

Burden of Proof
    Proximity of Employer Action and Safety Complaint
Employment
    Truck Driver
Evidence
    Inconsistent Employer Treatment
Relief Under Section 65
    Expungement of Personnel File
Safety Complaints to Employer
    Supervisor Failed to Use Safety Equipment

MI-DI 2007-619 Benn v Jackson County Road Commission (2007)

Employee is a truck driver for Employer. Employee filed a safety complaint related to conduct of Employee's Supervisor. Without wearing any safety gear, the Supervisor was lifted 10 to 12 feet in the air on a forklift driven by another employee. The Supervisor was not written up.

Eight days later, Employee was waiting for a co-worker at a garage, and had his eyes closed for less than 10 minutes. The Supervisor observed Employee, and twice called out to Employee. Employee responded on the second call. The next day, the Supervisor gave Employee a write-up for sleeping on the job. The Supervisor had previously caught two other employees sleeping for over 30 minutes while on the job. The Supervisor did not issue write ups to these employees. Those two employees had not filed a safety complaint.

After issuing the write up to the Employee, the Supervisor gave Employee less desirable assignments.

The ALJ found that the Supervisor discriminated against Employee, and that the discrimination was a result of Employee's safety complaint. The ALJ affirmed the Department's order to expunge all material in the Employee's personnel file related to the "sleeping" incident.

1061 DISCRIMINATION

Burden of Proof
"But For" Test
Not Established
Employee Misconduct
Insubordination
Job Refusal
No Protected Activity
Valid Nondiscriminatory Reason
Refused to Move Patient

Whirlpool Decision Discussed
Unreasonable Work Refusal
No Imminent Danger
Patient Movement

MI-DI 2009-1577 Nodurft v War Memorial Hospital (2010)

Employee worked as a registered nurse in Employer's Behavior Health Center from 2007 to 2009. In July 2008, Employee filed a MIOSHA complaint. In January 2009, Employer gave Employee a poor performance review, stating it was partly due to the MIOSHA complaint. In February 2009, Employee filed a MIOSHA discrimination complaint against Employer concerning the poor performance review. During the MIOSHA investigation of the February 2009 complaint, Employee filed a second discrimination complaint against Employer for Employee's discharge.

Employee was discharged after refusing to help the Nurse Manager restrain and seclude a patient. Employee claimed she did not hear the Nurse Manager ask for help restraining the patient. Employee refused to help move the patient claiming there were not enough staff members to safely accomplish the move to the seclusion room. Employee recommended the patient be moved to the patient's room instead of the seclusion room.

The Nurse Manager reprimanded Employee for Employee's refusal. After an investigation by the Director of the Behavior Health Center, Employee was suspended and subsequently discharged. Employer stated Employee was discharged for insubordination, incompetency, and dishonesty.

The MIOSHA Discrimination Division found (1) Employer violated Section 65 when it issued the poor performance review, and (2) there was insufficient evidence to show that Employer violated Section 65 when it discharged Employee. Employee appealed the second finding.

The ALJ found insufficient evidence to support a causal connection between the MIOSHA complaint and the Employee's discharge. Employee admitted to helping restrain and seclude patients in the past, and such assistance was a part of Employee's job duties.

The ALJ referred to the *Whirlpool* decision. The *Whirlpool* decision found that an employee can refuse work only if confronted with a reasonable fear of imminent death or serious bodily injury. Employee refused to help move the patient to the seclusion room, but was willing to help move the patient to the patient's room. Employee's refusal did not result from a reasonable fear of serious injury or death.

Employee's refusal to help her superior amounts to insubordination. Employer had a legitimate, nondiscriminatory basis for discharging Employee.

1062 DISCRIMINATION

Complaint Must be Filed Within 30 Days

By Employee

Employment

Welder

MI-DI 2010-321 Clark v H & H Metals (2010)

Employee worked as a torch man for Employer. Employee submitted to a blood test during a required physical. Employee was informed the blood test revealed high levels of lead. Employee's test results triggered a MIOSHA investigation, and Employee was interviewed.

Over the next three months, Employer terminated over 40 employees due to economic hardship. Employee was terminated in December 2008. In July 2009, Employee filed a MIOSHA General Industry Safety and Health Complaint, but the complaint was not investigated because Employee was no longer employed with Employer.

On October 2, 2009, Employee had a phone conversation with the Employer's Vice President of Operations. Employee claimed the Vice President stated Employer would not rehire Employee because Employer believed Employee initiated the MIOSHA investigation.

Employee filed a MIOSHA discrimination complaint on October 8, 2009. The MIOSHA Discrimination Division dismissed the complaint because it was not filed within the 30 day period required by Section 65. The MIOSHA Discrimination Division started the 30 day period on the day Employee filed the MIOSHA General Industry Safety and Health complaint. Employee appealed the dismissal of the complaint.

Employee argued the 30 day period should start on October 2, 2009 when he had the phone conversation with the Vice President. Employer and the Employee Discrimination Division representative both argued the latest the 30 day period should start was July 2009 when Employee filed the first complaint.

The ALJ found that the complaint was not timely filed. The ALJ relies on *Michaels v Gibraltar Sprocket Company* MI-DI 2004-842 (2004), which strictly interprets the 30 day period. See *MIOSHA Digest paragraph §* 1008. The ALJ in *Michaels* found that the

alleged discriminatory action was the termination of employment, and the 30 day period started on that day.

Employee's employment ended in December 2008. No exceptions (such as the Employee's temporary insanity) apply to this case. Employee's complaint was not timely filed.

1063 DISCRIMINATION

Burden of Proof

"But For" Test

Not Established

No Protected Activity

Complainant Must Meet

Employment

Firefighter

MI-DI 2010-563 Reiter & Reiter v Slagle-Harrietta Volunteer Fire Dept. (2010)

MI-DI 2010-574

Employees (Carl and Selma) worked for Employer Fire Department. A Fire Department Board managed Employer. Employees disagreed with the management practices of the Board.

A MIOSHA complaint initiated an inspection of Employer in 2009. Carl accompanied the MIOSHA inspector. The inspection and follow-up inspection resulted in several citations. Employees deny filing the MIOSHA complaint.

On January 14, 2010, Selma submitted a request for a leave of absence. The next day, Employer issued a memorandum stating no request for a leave of absence would be approved. On January 15, 2010, Carl submitted a request for a leave of absence. Employer told Carl that the submission of the request would be treated as a notice of resignation. Selma and Carl were subsequently discharged.

In February 2010, Employees filed MIOSHA Discrimination complaints against Employer. The MIOSHA Discrimination Division found that Employer did not discriminate against Employees. Employees appealed.

The ALJ found no evidence that Employees engaged in a protected activity. Employees did not file a MIOSHA complaint or raise health or safety concerns with Employer. The ALJ found that Employer did not have a reasonable basis for believing Employees filed the MIOSHA complaint. The ALJ found that the Employee's disagreements with Employer's management caused the discharge of Employees. The disagreements were not a result of a protected activity. Employees failed to establish a case of discrimination under Section 65.

1064 DISCRIMINATION

Complaint Must be Filed Within 30 Days
By Employee
Discharged
Economic Reasons
Remanded
For Investigation

MI-DI 2010-518 Leicht v Wayne State University (2010)

Employee was a Post-Doctoral Fellow for Employer's School of Medicine. On January 21, Employee complained to her supervisors about working conditions and filed a MIOSHA safety and health complaint. On January 28, Employee received a letter terminating her fellowship claiming a lack of funding. The termination was effective on February 8. Employee received a second letter postponing the termination until February 11. Employee's last day of work was February 5, and she was removed from payroll on February 11.

Employee filed a MIOSHA discrimination complaint on March 2. The MIOSHA Discrimination Division dismissed the complaint finding that it had not been filed within the 30 day period required under Section 65. Employee appealed.

The ALJ found that the start of the 30 day period is the last day Employee worked. The date of notice of termination is not the appropriate start date. The plain language of Section 65(1) gives employees the right to file a complaint when they have been discharged. Employee's discharge did not occur until February 5. The ALJ reversed the dismissal and remanded the case to the MIOSHA Discrimination Section.

1065 DISCRIMINATION

Burden of Proof
"But For" Test
Not Established
Employee Misconduct
Absenteeism
Fighting
Insubordination
Unauthorized Drafting of Notices
No Protected Activity
Valid Nondiscriminatory Reason
Failure to Attend Mandatory Meetings
Safety Complaints to MIOSHA
After Suspension
Suspension
Conduct

MI-DI 2011-110 Kloostra v Dwelling Place (2011)

Employee worked as a customer service associate at one of Employer's low-income housing branches. Employer holds monthly meetings that are mandatory for customer service associates. Employee missed several of these meetings.

In June and July, Employee made multiple complaints to Employer about residents and other employees. These complaints were not related to safety. In August, Employee drafted two notices without Employer permission. Employee did not post the notices, but left them on the desk for her manager.

Between August 26 and September 1, Employee called the police to the branch on three occasions. A resident threatened Employee with physical harm after the police were called the second time. Employee informed Employer, but did not state that she feared for her safety.

Employee was suspended on September 2. Employer indicated the suspension was in response to Employee arguing with the residents and various resident complaints. Employer mailed Employee three job performance memoranda listing the reasons for suspension as (1) excessive absenteeism, (2) violation of agency policies, (3) insubordination, (4) dishonesty, (5) fighting at work, and (6) poor resident relations.

On September 8, Employee filed a MIOSHA General Industry Safety and Health Division compliant. Employer was not aware of the complaint. Employer decided to let Employee return to work on October 3 and re-assigned Employee to a different location with different hours. Employee refused to accept the relocation. Employer terminated Employee.

On September 29, Employee filed a MIOSHA Discrimination complaint. MIOSHA dismissed Employee's General Industry Safety and Health complaint on October 6.

MIOSHA dismissed the discrimination complaint on December 15 because the General Industry Safety and Health complaint was filed after the suspension.

The ALJ found that Employee did not participate in a protected activity. Employee's complaints to her supervisor about the other residents and employees were not considered a protected activity. Employee did not tell Employer that she was afraid for her safety at any point. Employer had a valid reason to suspend Employee because her poor attendance at mandatory meetings, unauthorized drafting of notices, and problems with the residents. Employee's MIOSHA complaints did not cause the suspension. Employer did not violation Section 65.

1066 DISCRIMINATION

Burden of Proof
"But For" Test
Not Established
Employee Misconduct
Absenteeism
Valid Nondiscriminatory Reason
Unable to Perform Duties
Complainant Must Meet
Safety Complaints to MIOSHA
Not a Substantial Factor

MI-DI 2011-331 Harvard v American House Management Company (2011)

Employee worked as a housekeeper for Employer. Employee injured her knee in September 2010 and required surgery. Employee was unable to work for approximately 18 days after the surgery. Employee was also required to take a medical leave for 22 days in November.

In October 2010, Employee was accidently stuck with a resident's needle while cleaning a bathroom. Employer issued two Corrective Action Notices to Employee after the needle stick. The first notice concerned the Employee's request for the lab results of the resident whose needle stuck her, which violated privacy requirements. The second notice concerned Employee's tardiness and absences.

Employee filed a MIOSHA complaint about the needle incident on November 1. Employer terminated Employee on November 5 citing attendance issues and her inability to work due to the knee injury. Employee filed a MIOSHA Discrimination complaint. The MIOSHA Discrimination Division found no violation of Section 65.

The ALJ found Employee engaged in a protected activity by filing the MIOSHA complaint. However, the ALJ found Employee's protected activity was not the cause of the termination. The ALJ found Employer had the right to terminate Employee because her injury made her unable to perform her duties. Employee's absences and tardiness were also valid concerns for Employer. The Employee did not establish that the protected activity was a "but for" or "substantial reason" for the Employee's discharge. The ALJ affirmed the Agency's finding.

1067 DISCRIMINATION

Burden of Proof
"But For" Test
Established
Discharged/Suspended
Pretext
Theft
Evidence
Timing of Protected Activity and Adverse Action
Relief under Section 65
Back Pay
Deductions for Earned Wages
Mitigation of Damages
Unemployment Compensation – No Credit
Expungement of Personnel File
Reinstatement
Safety Complaints to MIOSHA
Substantial Factor

MI-DI 2011-1001 Mt. Clemens Quick Lube v Gordon (2011)

Employee was employed as a manager. In 2009, Employer fired another employee for theft and suspected Employee participated. Employee was not disciplined.

In August 2010, Employee filed an anonymous MIOSHA complaint. However, Employer knew Employee filed the complaint. In November 2010, Employer demoted and then terminated Employee, stating that he did not trust Employee because he believed Employee was a thief.

Employee filed a MIOSHA discrimination complaint. The MIOSHA Discrimination Division found that Employer violated Section 65 and ordered Employer to expunge Employee's personnel file, reinstate Employee, and pay Employee for his lost wages. Employer appealed.

The ALJ found (1) Employee engaged in a protected activity by filing the MIOSHA complaint, and (2) Employee suffered an adverse action when he was terminated. Relying on *Rice v Request Foods*, MI-DI 94-1484 (1995), the ALJ states that the timing between the MIOSHA complaint and the termination creates a rebuttable inference that the termination was caused by the complaint. See *MIOSHA Digest paragraph* § 768. The ALJ found that the theft explanation was a pretext, and the MIOSHA complaint was a "substantial reason" for the termination.

The ALJ affirmed the Agency's finding. The ALJ specified that Employee's earned wages from February 2011 through June 2011 were to be deducted from his back-pay, but Employee's unemployment compensation did not count as mitigation of damages.

1068 DISCRIMINATION

Burden of Proof
"But For" Test
Not Established
Valid Nondiscriminatory Reason
Medical Condition
Discharged
Illness
Employment
Drummer—Chemical Drum Filler
Evidence
No Employer Knowledge of Complaint
Safety Complaints to Employer
Chemical Inhalation
Lack of Ventilation

MI-DI 2011-1524 Vassallo v BASF Chemical Corporation (2011)

Employee worked as a drummer, filling 55 gallon drums with chemicals for storage and transportation. On August 30, Employee was exposed to a strong concentration of chemical vapors and became ill. Employee claimed the exposure was due to a defective vent hose.

On August 31, Employee still felt ill when he reported for his shift, and he informed his supervisor of the incident. The supervisor asked if Employee wanted to go the hospital, and Employee declined. Employee informed his supervisor that he had aerobic asthma, so the hospital would simply advise him to use an inhaler. Employee's supervisor reported Employee's medical condition to Employer.

On September 1, Employer terminated Employee. Employer stated that Employee's asthma disqualified Employee from working as a drummer. On September 2, Employee filed a MIOSHA discrimination complaint claiming he was terminated for complaining to his supervisor about the defective vent hose. The MIOSHA Discrimination Division found that Employer did not violate Section 65. Employee appealed.

The ALJ affirmed the Agency's finding. The ALJ found Employee engaged in a protected activity when he informed his supervisor of the defective vent hose, but Employee's complaints were not a "substantial factor" for Employee's termination. Employer actively and regularly solicited safety complaints from employees. Employer was not aware of Employee's safety complaint when terminating Employee. The ALJ accepted the explanation that Employee was terminated because of his asthma.

1069 DISCRIMINATION

Burden of Proof
"But For" Test
Not Established
Employee Misconduct
Attitude
Complainant Must Meet
Evidence
No Discipline For Prior Complaints
Safety Complaints to Employer
Restroom Access
Safety Complaints to MIOSHA
Announced Intention To File

MI-DI 2011-1595 Hickey v AW Transmission Engineering U.S.A., Inc. (2012)

Employee worked as an Equipment Investigator and participated in a safety committee. Employee made multiple complaints to the Director of Safety, including a complaint about the condition of one of the bathrooms.

The Director of Safety had another employee clean the bathroom, but Employee was not satisfied. Employee resigned from the safety committee and informed Employer that he was going to file an MIOSHA complaint. Employer asked Employee what the complaint would be concerning, but Employee refused to tell Employer.

Employer issued four warnings to Employee. Employee filed a MIOSHA discrimination complaint against Employer, alleging that the warnings were retaliation for the safety complaints. The MIOSHA Discrimination Division found Employer did not violate Section 65. Employee appealed.

The ALJ found Employee engaged in a protected activity by complaining to Employer and stating he intended to file a MIOSHA complaint. The ALJ also found Employee suffered an adverse employment action when the warnings were issued. However, Employee did not meet his burden to show that Employer's explanations for the warnings were a pretext. Employer had a safety committee and encouraged employees to report issues. Employee had previously made safety complaints without Employer discipline. The ALJ found that a poor relationship between the parties, and not the protected activity caused the warnings.

1070 DISCRIMINATION
Burden of Proof
"But For" Test
Not Established
Employee Misconduct
Absenteeism
Employment
Cashier
Evidence
No Employer Knowledge of Complaint
Attendance Violations
Safety Complaints to Employer
Chemical Inhalation
Safety Complaints to MIOSHA
Not a Substantial Factor

MI-DI 12-000012 Pachesney v Wal-Mart (2012)

Employee worked as a cashier. On January 9, 2010, Employee received a verbal warning related to six absences and five attendance violations. On April 17, 2010, Employee received a written warning related to two additional absences and one additional attendance violation. On July 20, 2010, Employee received a "decision-making day" after receiving three more attendance violations. The Employee's absences continued with four absences and three more attendance violations between February 2, 2011 and April 18, 2011.

On April 25, 2011, Employee claimed she had an asthma attack at work caused by the floor stripper and wax. Employee reported the asthma attack on April 28, 2011. Employee filed a MIOSHA complaint on May 26, 2011.

On June 21, 2011, Employee called in sick. The Assistant Store Manager informed Employee that another absence would result in her termination. Employee did not report to work and was terminated.

Employee filed a MIOSHA discrimination complaint alleging that her termination was a result of her MIOSHA compliant. The MIOSHA Discrimination Division found that Employer did not violate Section 65. Employee appealed.

The ALJ affirmed the Agency's decision. The ALJ found that Employer terminated Employee because of Employee's attendance violations and not because of the MIOSHA complaint. The Assistant Store Manager did not know Employee filed the MIOSHA complaint when he terminated Employee. Employer's policy stated that four attendance violations after a "decision-making day" would result in termination, and Employee's absence on June 21, 2011 resulted in her fourth attendance violation.

1071 DISCRIMINATION

Burden of Proof
"But For" Test
Established
Talking to Safety Officer
Evidence
Timing of Protected Activity and Adverse Action
Protected Activity
Answering MIOSHA Inspector's Questions
Relief Under Section 65
Back Pay
Unemployment Compensation—No Credit
Expungement of Personnel File
Reinstatement
Safety Complaints to Employer
Heat

MI-DI 2012-62 April Restaurants, LLC v Thomas (2012)

Employee was an assistant manager. In July 2008, the air conditioning unit at Employer's restaurant broke down. Employee complained to Employer about the lack of air conditioning.

On August 7, 2008, an employee called in a MIOSHA complaint concerning the broken air conditioner. A MIOSHA Supervisor called the Employer's restaurant and spoke with Employee, who confirmed that the air conditioner was broken. Employee gave the MIOSHA Supervisor the District Manager's phone number, and the MIOSHA Supervisor called the District Manager to discuss the broken air conditioner.

Employer terminated Employee one hour after the phone call with MIOSHA. On August 8, 2008, Employee filed for unemployment benefits and informed the MIOSHA Supervisor that he had been terminated. On August 12, 2008, Employee filed a MIOSHA discrimination complaint.

On November 13, 2008, the MIOSHA Discrimination Division found Employer violated Section 65, but the order was set aside during a circuit court proceeding. The investigation was reopened in August 2011. On November 9, 2011, the MIOSHA Discrimination Division found that Employer violated Section 65. Employer appealed.

The ALJ found Employee engaged in a protected activity when he spoke with the MIOSHA Supervisor, and Employee suffered an adverse action when he was terminated on August 7. The ALJ found the short time between the MIOSHA phone call and Employee's termination indicated a causal connection. Additionally, the ALJ found that the MIOSHA Supervisor's testimony stating the District Manager was "livid" during their phone call on August 7 supported a causal connection.

The ALJ affirmed the Agency's order requiring expungement of Employee's personnel file, reinstatement, and back-pay. Employee's unemployment compensation is not factored into the amount of back-pay due.

1072 DISCRIMINATION

Burden of Proof
"But For" Test
Not Established
Employee Misconduct
Swearing
Valid Nondiscriminatory Reason
Unprofessional Conduct
Employment
Firefighter
Evidence
No Employer Knowledge of Complaint
Decision to Discharge before Complaint
Safety Complaints to MIOSHA
Not a Substantial Factor

MI-DI 2011-478 North Berrien Fire Rescue v Schmidt (2012)

Employee was a firefighter and Employer Safety Officer, who shut off power and gas lines and evaluated building entrances at fire scenes. In November 2009, Employee informed Employer that he was considering retiring once he fulfilled ten years of service, which would be in April 2010. Employee did not provide a specific date, and Employer and Employee did not talk about retirement again.

On January 13, 2010, Employee filed a MIOSHA complaint concerning lack of proper certifications for the new Fire Chief. In late January 2010, Employee and Employer had a confrontation during a meeting, and Employee cursed at Employer. Employer did not discipline Employee because Employer believed Employee would be retiring in a few months. On February 1, 2010, Employee resigned from his position as an Employer Safety Officer. On February 25, 2010, MIOSHA informed Employee and Employer that no citations resulted from the Employee's MIOSHA complaint.

In March 2010, Employee and Employer had another confrontation. On March 29, 2010, Employer sent Employee a letter stating that Employer accepted Employee's resignation effective April 1, 2010.

Employee filed a MIOSHA discrimination compliant on April 6, 2010. The MIOSHA Discrimination Division found that Employer violated Section 65 by terminating Employee. Employer appealed.

The ALJ reversed the Agency's decision. The ALJ found Employee engaged in a protected activity when he filed the MIOSHA complaint, and Employee suffered an adverse action when he was in effect discharged with a forced resignation. However, the ALJ found that the discharge was not a result of the MIOSHA complaint. The ALJ found that Employer had a legitimate reason to discharge the Employee because of Employee's unprofessional conduct. Additionally, Employer decided to discharge Employee prior to the MIOSHA complaint. Employer did not violate Section 65.

1073 DISCRIMINATION

Burden of Proof

"But For" Test

Not Established

Employee Misconduct

Lying

Discharged

Disobeying Order

Evidence

No Employer Knowledge of Complaint

MI-DI 12-001709 Bradley v Dept. of Corr. Alger Correctional Facility (2012)

Employee worked as a corrections officer. On March 6, Employee filed a MIOSHA complaint concerning fit testing for gas masks. On March 9, Employer announced that all resident unit officers (RUOs) would be demoted to corrections officers. Employee began handing out pamphlets to the RUOs, encouraging them to take a lay-off instead of the demotion. At 1:00pm, Employer ordered Employee to stop handing out the pamphlets. At 2:00pm, Employee handed a pamphlet to RUO Miron.

Miron informed Employer that he had received a pamphlet from Employee, so Employer immediately suspended Employee. Employer informed Employee of the suspension, and Employee called Miron to ask that he not say from whom he got the pamphlet.

Employer had the internal affairs division investigate Employee. The investigation found seven rule violations, and Employee was terminated for insubordination, lying during the investigation, and asking Miron to lie.

On March 23, Employee filed a MIOSHA discrimination complaint alleging he was suspended for filing the MIOSHA safety complaint. The MIOSHA Discrimination Division found that Employer did not violate Section 65. Employee appealed.

The ALJ affirmed the Agency's decision. The ALJ found that Employer suspended/terminated Employee for handing out the pamphlets after he was ordered not to, for lying, and for asking Miron to lie. The internal affairs investigator and the individual who decided to terminate Employee did not know of the MIOSHA complaint. Employer did not discriminate against Employee for filing the MIOSHA complaint.

1074 DISCRIMINATION

Complaint Must be Filed Within 30 Days
By Employee
Employment
Firefighter
Union Steward

MI-DI 12-000563 Story v Flint Township Fire Dept. (2012)

Employee worked as a Sergeant and a Union Steward. As a Union Steward, Employee had been involved in various MIOSHA complaints. On January 5, Employee received a written reprimand for failure to wear a self-contained breathing apparatus during a fire rescue.

On February 14, Employee filed a MIOSHA discrimination complaint alleging the written reprimand was a result of having filed MIOSHA complaints. The MIOSHA Discrimination Division dismissed the complaint because it was not timely filed. Employee appealed.

The ALJ affirmed the Agency's dismissal. Section 65 requires complaints be filed within 30 days of the alleged discriminatory action. Employee did not file within 30 days, so it was not timely filed.

1075 DISCRIMINATION

Burden of Proof
"But For" Test
Not Established
Reprimand Issued Before MIOSHA Complaint
Evidence
Consistent Employer Treatment
Protected Activity
Report of Work Injury
Safety Complaints to MIOSHA
After Reprimand
Not a Substantial Factor

MI-DI 2010-1310 Canada v Chrysler Group, LLC (2012)

On June 22, Employee slipped on oil and injured his arm. Employee called his supervisor, who arrived at the scene and transported Employee to receive care.

The fall did not occur in Employee's department, so Employer disciplined Employee for leaving his work station without permission. Employee claimed he was on break when the fall occurred. Employer argued that Employee could not have left his workstation, arrived at the location, slipped and fell, regained his composure, and called his supervisor within the twelve minutes allowed for Employee's break.

On July 7, Employee filed a MIOSHA discrimination complaint, alleging that the discipline was caused by Employee's injury. On July 23, Employee filed a MIOSHA complaint with the General Industry Safety and Health Division. The MIOSHA Discrimination Division found that Employer did not violate Section 65. Employee appealed.

The ALJ affirmed the Agency's decision. Employee engaged in a protected activity when he reported his injury to his supervisor. Employee suffered an adverse action when he was disciplined. However, the ALJ found that there was not a causal connection between the injury report and the discipline. The ALJ found sufficient evidence to support Employer's argument that Employee was away from his workstation without permission at the time of the fall. The ALJ also found that Employee's discipline was consistent with the discipline received by other workers. Lastly, the ALJ found there was not a causal connection between the discipline and the MIOSHA safety complaint because the safety complaint was filed after the discipline. Employer did not violate Section 65.

1076 DISCRIMINATION

Burden of Proof
"But For" Test
Established
Discharged/Suspended
After Inspection
Pretext
Substandard Work
Lay Off
Economic Reasons
Evidence
Timing of Protected Activity and Adverse Action
Relief Under Section 65
Expungement of Personnel File
Reinstatement

MI-DI 12-001428 McCarthy Group Industries, Inc. v Hunter (2012)

Employee threw away what appeared to be a broken machine controller. Employee had asked his supervisor if the controller should be thrown away, and the supervisor had replied that it should. The controller should not have been thrown away, so Employer ordered Employee to retrieve the controller from the dumpster. Employee informed his supervisor that he intended to file a MIOSHA complaint.

On July 21, Employee filed a MIOSHA complaint with eight violations, including requiring an employee go in the dumpster. On July 27, Employer was inspected by MIOSHA. Employer knew Employee filed the complaint that triggered the inspection. The inspection was completed on August 2 and resulted in citations and penalties. On August 3, Employer told Employee that he was laid off.

On August 10, Employee filed a MIOSHA discrimination complaint. The MIOSHA Discrimination Division found that Employer violated Section 65, and Employer appealed.

The ALJ affirmed the Agency's decision. The ALJ found that Employee engaged in a protected activity when he filed the MIOSHA complaint, and he suffered an adverse action when he was discharged. Additionally, the ALJ found that the discharge would not have occurred "but for" the MIOSHA complaint. The alternative explanations given by Employer were pretexts. Employer stated that Employee was discharged for substandard work, economic reasons, and for throwing away the controller. However, (1) Employee had not received discipline for substandard work since he was promoted, (2) Employer hired a new employee shortly after Employee was discharged, and (3) Employee was not at fault in throwing away the controller.

The ALJ ordered that Employer reinstate Employee, expunge his personnel file, and pay back wages, including bonuses, benefits, and general wage increases.

1077 DISCRIMINATION

Burden of Proof

"But For" Test

Not Established

Employee Misconduct

Absenteeism

Attitude

Evidence

No Employer Knowledge of Complaint

Safety Complaints to MIOSHA

Not a Substantial Factor

MI-DI 2010-1147 Valdez v M & R Blueberry Growers (2012)

Employee worked installing drainage pipe and harvesting blueberries. Employee lived in a trailer next to Employer's trailer. Employee was not supposed to live in the trailer because it did not have running water or a bathroom. Employee filed a MIOSHA complaint about a gas leak at the trailer.

On July 28, Employee was terminated for poor work ethic and sleeping on the job. On July 29, a MIOSHA inspection was conducted in response to Employee's complaint. Employee was not present for the inspection because he was terminated the previous day.

On August 10, Employee filed a MIOSHA discrimination complaint alleging he was terminated because of his MIOSHA complaint. The MIOSHA Discrimination Division found that Employer did not violate Section 65. Employee appealed.

The ALJ affirmed the Agency's decision. The ALJ found that Employee engaged in a protected activity when he filed the MIOSHA complaint, but the complaint was not the cause of the termination. The ALJ found that Employee was terminated for his absences and poor work attitude. Employer was not aware of the MIOSHA complaint until after Employee was terminated. Employer did not violate Section 65.