ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 11, 2001

No. 00-1392

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KASPAR WIRE WORKS, INC.

RESPONDENT-PETITIONER

V.

ELAINE L. CHAO, UNITED STATES SECRETARY OF LABOR

COMPLAINANT-RESPONDENT

AND

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

NOMINAL RESPONDENT PURSUANT TO FED.R.APP.P. 15(a)

ON PETITION FOR REVIEW OF AN ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR THE SECRETARY OF LABOR

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JULY 2001

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(A) Parties and Amici

The parties in this proceeding are: (1) Kaspar Wire Works, Inc., of Shiner, Texas; and (2) the Hon. Elaine L. Chao, U.S. Secretary of Labor.

The Occupational Safety and Health Review Commission must be named as a Respondent pursuant to Fed.R.App.P. 15(a), but it is not an active party in these proceedings. *See Oil, Chemical & Atomic Workers Internat'l Union v. OSHRC*, 671 F.2d 643, 652 (D.C. Cir. 1982).

(B) Rulings Under Review

At issue is the Commission's final order holding Kaspar Wire Works accountable, *inter alia*, for hundreds of willful violations of OSHA requirements at its Texas worksite.

(C) Related Cases

We are not aware of any related cases pending before this Court or any other court, although similar issues may ultimately be raised in *Sec'y of Labor v. A.E. Staley Mfg., Co.*, D.C. Cir. Nos. 00-1530 & 01-1041 (briefing schedule issued May 22, 2001).

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* Authorities upon which we chiefly rely are marked with asterisks.

Statutes and regulations:

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GLOSSARY

BLS	the Bureau of Labor Statistics, one of the programmatic divisions of the U.S. Department of Labor
BLS 412	*What Every Employer Needs To Know About OSHA Recordkeeping*, a booklet of supplemental instructions on when and how to record occupational injury and illness cases on the recordkeeping forms, published by BLS in 1972 and updated in 1973, 1975, and 1978
the Commission	the three-member Occupational Safety and Health Review Commission, an *independent* adjudicative forum for employers who contest citations issued by the U.S. Secretary of Labor. *29 U.S.C. §§ 659, 661. See generally Martin v. OSHRC*, 499 U.S. 144 (1991)
Kaspar	Kaspar Wire Works, Inc., Shiner, Texas
Leg. Hist.	Committee Print, *Legislative History of the Occupational Safety and Health Act of 1970*, 91st Cong. 2d Sess. (1971)
OSHA	the Occupational Safety and Health Administration, one of the programmatic divisions of the U.S. Department of Labor
the OSH Act	the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678
the Secretary	the U.S. Secretary of Labor has delegated her responsibilities under the OSH Act to an Assistant Secretary, who heads OSHA (the terms "Secretary" and "OSHA" are used interchangeably herein)

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Kaspar Wire Works, Inc. ("Kaspar"), seeks review of a final decision of the Occupational Safety and Health Review Commission (R.40:73).[1] The Commission obtained jurisdiction when Kaspar contested a citation, issued by the U.S. Secretary of Labor, alleging violations of the Occupational Safety and Health Act of 1970, codified at 29 U.S.C. §§ 651-678 (1994 ed. and Supp. V (2000)). *29 U.S.C. § 659(c).* The Commission's order adjudicated all the claims, rights, and liabilities of the parties to the action.

This Court has jurisdiction because Kaspar is authorized to file its appeal in this Circuit, as well as in the Fifth Circuit, and because Kaspar timely filed a petition for review on Sept. 1, 2000, within sixty days of the issuance, on July 3, 2000, of the Commission's order disposing of all of the parties' claims. *29 U.S.C. § 660(a).*

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[1] Record references are to the Commission's Certified List (dated September 22, 2000). References are cited either by page number of the Joint Appendix ("JA _") prepared by Kaspar or by volume number, document number (where applicable) and/or page number of the original record. *See Fed.R.App.P. 28(a)(7), 30; Circuit Rule 30.*

STATEMENT OF ISSUES

1. Does substantial evidence support the Commission's conclusion that Kaspar willfully violated OSHA's recordkeeping rule when it failed to record 86% of its employees' recordable injuries?
2. Was each injury that Kaspar failed to record a separate violation of the recordkeeping rule?
3. Was the Secretary required to undertake notice-and-comment rulemaking before citing Kaspar for each violation committed?
4. Does substantial evidence support the machine-guarding and equipment-grounding violations challenged by Kaspar?

STATUTES AND REGULATIONS

The Addendum contains pertinent statutes and regulations.

STATEMENT OF THE CASE

Following an inspection of Kaspar's worksite in Shiner, Texas, the Secretary issued a citation charging Kaspar with failure to comply with certain rules established pursuant to the OSH Act (R.34:1).

Kaspar contested the citation and proposed penalties (R.34:2), thereby invoking the jurisdiction of the Commission. When an employer contests a citation issued by the Secretary, an administrative law judge of the Commission conducts a trial-type hearing and issues a decision. *29 U.S.C. §§ 659(c), 661(j).* In this case, following a 9-day hearing (R.25-33), a judge found that Kaspar had willfully violated OSHA's recordkeeping rule hundreds of times, had violated other safety requirements as well, and that substantial penalties were warranted (R.39:62).

Kaspar challenged the judge's decision by filing with the Commission a Petition for Discretionary Review (R.40:64). *29 U.S.C. § 661(j).* Following full briefing, the Commission largely affirmed the judge's decision (R.40:73). *29 U.S.C. § 661(j).*

Kaspar then petitioned this Court to review the Commission's disposition. *29 U.S.C. § 660(a).*

STATEMENT OF THE FACTS

A. Statutory background

Congress acted in 1970 "to reduce the number and severity of work-related injuries and illnesses which . . . are resulting in ever-increasing human misery and economic loss." *Leg. Hist.* at 141. *See Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1260-1261 (D.C. Cir. 1973) ("Though novel in approach and sweeping in coverage, the legislation is no more drastic than the problem it aims to meet [footnote omitted]."). *See also* Sidney A. Shapiro, *Substantive Reform, Judicial Review, and Agency Resources: OSHA as a Case Study*, 49 Admin.L.Rev. 645, 648 (1997) ("Congress established OSHA after it became apparent that market incentives, such as additional compensation for dangerous jobs, and state regulatory systems, primarily workers' compensation, were unable to prevent thousands of workplace fatalities and injuries."). Congress sought "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and preserve our human resources." *29 U.S.C. § 651(b).*

To achieve that objective, Congress mandated that "[e]ach employer shall make, keep and preserve, and make available to the Secretary . . . such records regarding his activities relating to this Act as the Secretary . . . may prescribe by regulation as necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses." *29 U.S.C. § 657(c)(1).* In so doing, Congress *explicitly* emphasized the importance of *accurate* recordkeeping. *29 U.S.C. §§ 651(b)(12), 657(c)(2), 673(a).* "Full and accurate information is a fundamental precondition for meaningful administration of an occupational safety and health program." *Leg. Hist.* at 156.

Employers who willfully violate OSHA regulations may be assessed a penalty "for each violation." *29 U.S.C. § 666(a).* *See also* Sidney A. Shapiro, *supra*, at 650 ("Cooperative enforcement policies work only as long as those regulated entities that voluntarily cooperate are assured that companies in bad faith are likely to be punished.").

B. Regulatory background

Recordkeeping Requirements. OSHA's injury recordkeeping regulations, at 29 C.F.R. Part 1904, have been in effect since 1971.

Employers must "enter each recordable injury and illness" on the OSHA No. 200 form or an equivalent. *29 C.F.R. § 1904.2(a).* An occupational injury is "recordable" if it results in a fatality, lost workdays, transfer to another job, termination of employment, medical treatment (other than first aid), loss of consciousness, restriction of work, or restriction of motion. *29 C.F.R. § 1904.12(c).* Instructions for accurately completing the OSHA recordkeeping form are on the back of the form itself (JA 304-308).

An employer must record and report occupational injuries "for enforcement of the [A]ct, for developing information regarding the causes and prevention of occupational accidents and illnesses, and for maintaining a program of collection, compilation, and analysis of occupational safety and health statistics." *29 C.F.R. § 1904.1.* These recordkeeping requirements "are a cornerstone of the Act and play a crucial role in providing the information necessary to

make workplaces safer and healthier." *Secretary of Labor v. General Motors Corp.*, 8 O.S.H. Cas. (BNA) 2036, 2041 (Rev. Comm'n 1980).

Accurate injury and illness records serve multiple purposes. *See Occupational Safety & Health: Assuring Accuracy in Employer Injury and Illness Records* (GAO/HRD-89-23, Dec. 30, 1988) ("*Assuring Accuracy*") at 2-3.

Raising employers' and employees' awareness of the kinds of injuries and illnesses occurring in their workplaces and the related hazards promotes the identification and voluntary correction of hazardous workplace conditions. *Id.* at 2. Accurate records are an alarm bell for effective administration of company safety programs.

Similarly, employees who are accurately informed about injuries and illnesses are more alert to hazards in the work environment, more likely to report them, and more inclined to utilize prescribed safety equipment and follow safe work practices.

Accurate worksite injury records also enhance OSHA's enforcement efforts: at the worksite, OSHA first reviews the injury

and illness data for the establishment and then focusses the ensuing inspection on the hazards revealed by the records. *Ibid.*

Accurate records also yield statistical data on the incidence of workplace injuries and illnesses, thereby affording a more complete measure of the nature and magnitude of the occupational safety and health problem across the country. The BLS and participating States make the data available to researchers and to the public.

Since 1972, the Secretary has provided supplemental instructions -- such as BLS 412, *What Every Employer Needs To Know About OSHA Recordkeeping* -- about how to record injuries on the recordkeeping forms, including lists of first aid and medical treatments, flow charts describing the recordkeeping decision-making process, and answers to frequently-asked questions.

In September 1986, after publication in the *Federal Register*, 50 Fed. Reg. 29102 (July 17, 1985), and after meetings with employers, trade associations, unions and others, 51 Fed. Reg. 8574 (Mar. 12, 1986), the Secretary also issued *Recordkeeping Guidelines for Occupational Injuries and Illnesses*, a compilation of

interpretations of the types of injuries to be recorded. *Empl. Safety & Health Guide* (CCH) ¶ 9090 (Nov. 11, 1986).

In October 1986, OSHA expanded its procedure for verifying the accuracy of employers' recordkeeping logs, *Empl. Safety & Health Guide* (CCH) ¶ 9102 at 9506 (Nov. 18, 1986):

> Compliance officers will check the logs against workers' compensation first reports of injury, OSHA 101s, and in-plant medical treatment records or first aid records to ensure that illnesses and injuries are being properly recorded. All first reports of injury, or, if all reports cannot be examined, a representative sample, will be examined to determine if anything has occurred to indicate that a recordable injury or illness has not been recorded. The company representative responsible for maintaining injury and illness records will be interviewed to determine what the company's recording policy is and records will be reviewed and verified with employee representatives and other informed employees.

Recordkeeping Enforcement. At this same time, though, OSHA discovered numerous instances of significant underreporting of injuries by employers: congressional oversight hearings explored the phenomenon, *Empl. Safety & Health Guide* (CCH) ¶ 9230 at p. 9861 (April 7, 1987) (subcommittee chairman "expressed concern about apparent widespread and deliberate underreporting of

injuries of a serious nature requiring medical care or surgery, with some companies keeping two sets of injury records, a complete and accurate internal version and a second, doctored version for submission to OSHA."); and the General Accounting Office attributed inaccurate recordkeeping to the lack of knowledge about the requirements, the existence of incentives to underreport, and the low priority given to recordkeeping, see *Assuring Accuracy* at 22-23:

> The low priority many employers attach to recordkeeping can lead to inaccurate entries on OSHA logs. Our review of inspection files and interviews with OSHA compliance officers revealed that recordkeeping responsibility is sometimes assigned to low-level, untrained employees. The recordkeeper may be unsupervised, and injury data may not be reviewed for accuracy and completeness. This inattention leads to errors, such as logs that are not kept up to date.

In response, OSHA increased enforcement of recordkeeping, to deter underreporting (JA 296-297). See O.S.H. Rep. (BNA) (Dec. 17, 1987) at 796 ("The agency began this year to emphasize the importance of keeping accurate injury and illness records, in response to concerns about its policy of exempting some

workplaces from comprehensive inspections based on the results of the firm's records."); JA 314-315.

OSHA also began to propose larger penalties for such "egregious" violations. *Assuring Accuracy* at 4 ("This change allowed for fines up to $10,000 for each instance of an egregious violation of OSHA standards, rather than a $10,000 maximum for each standard violated (regardless of the number of instances)." *See Caterpillar, Inc.*, 15 O.S.H. Cas. (BNA) 2153, 2170 (quoting the 1986 revision to OSHA's Field Operations Manual that permits an additional, numerical factor -- up to the number of violation instances -- to be applied when calculating a proposed penalty in certain "egregious" cases: "Penalties calculated with this additional factor shall not be proposed without the concurrence of the [OSHA Administrator].").

C. OSHA discovers numerous violations at Kaspar

"A Rash of Stupid Accidents." Working at Kaspar in 1988-89 was dangerous. See R.11:G-84 (on first day, press operator trips foot switch and injures finger); R.13:G-222 (on first day, punch

press cycles while operator removes part, injuring operator's finger); R.11:G-71 (operator trips press, tearing nails off two fingers); R.18:G-358 (operator cuts off finger while feeding metal into die). Some weeks, Kaspar might have 10-15 injuries (JA 369). During 1988-89, Kaspar employees suffered over 400 recordable injuries among a workforce of approximately 850 employees; nearly half of its employees were injured during the space of two years.

Although Kaspar experienced a "rash of stupid accidents" involving its press machinery in 1988 and 1989 (JA 369), Kaspar recorded less than 15% of its recordable injuries during this period (JA 125; JA 230-253, 254-255, 256-257, 258-259; JA 260-267; R.10 through R.20; R.21:G-388, G-389, G-390, G-391). In one month, for example, Kaspar failed to record eleven separate eye injuries involving chemicals, metal burrs, grit and other foreign objects in employees' eyes (R.11:G-56, G-61, G-62, G-64, G-67, G-68, G-70, G-73, G-74, G-87, G-92). In one two-week period, Kaspar failed to record 18 injuries (R.13:G-176; R.14:G-235, G-236, G-237, G-238, G-239, G-240, G-241, G-242, G-243,

G-244, G-245, G-246, G-247, G-248, G-250, G-251, G-252). Kaspar even omitted amputations (R.11:G-84; R.14:G-243; R.15:G-269; R.16:G-278, G-384). All of these injuries -- and over 300 more -- should have been recorded on the pertinent OSHA forms.

OSHA Inspects. OSHA inspected Kaspar's facility in 1990 and discovered hundreds of failures to record injuries (JA 265-267; R.10 through R.18). After extensive review within the agency -- at the local, regional, and national levels -- the Secretary determined to cite each of Kaspar's recordkeeping failures as "willful" and to propose a separate penalty for each such violation (JA 265-267, 268-273, 298-302, 303-304, 316-321; JA 33-87).

Kaspar Explains its Recordkeeping. Kaspar presented David Little, Dan Price and Jo Ann Knezek to explain "the policies and procedures for keeping records of occupational illnesses and injuries at [Kaspar] during all relevant times . . . " (R.36:42:5).

1. David Little (former Personnel Manager). From 1970 through 1988, Mr. Little had the duty to assure Kaspar's

compliance with recordkeeping requirements ("I would be the one responsible for it.") (JA 404). However, Little did not brief his successor, Dan Price, regarding injury and illness recordkeeping ("I don't remember") (JA 420). And he never discussed OSHA's recordkeeping guidelines either with his assistant, Jo Ann Knezek ("I don't remember") or with Price ("I don't recall") (JA 407-408). And Little never gave any instructions concerning how to record restricted work activity cases to Knezek ("I don't recall that.") or to Price ("I don't recall that either, sir.") (JA 410, 411).

Kaspar later admitted (R.38:51[*Kaspar's Post-Trial Brief*]:78):

> David Little's understanding of how to correctly record injuries and illnesses on the OSHA 200 was virtually non-existent. During his hearing testimony, Little demonstrated that he had no grasp of the proper way to record occupational injuries and illnesses.

2. Dan Price (successor Personnel Manager). Mr. Price was hired in September 1988 and, in January 1989, took over "overall responsibility for safety within the facility" -- including responsibility for OSHA recordkeeping (JA 346, 353). Yet Price never discussed this responsibility with his predecessor -- "I don't

recall any discussions about recordkeeping [with Mr. Little]" (JA 350) – or with his subordinate, Ms. Knezek -- "I don't recall any [conversations with her about recordkeeping]" (JA 351); "I assumed that that recordkeeping was all established at that time and didn't see the necessity of getting involved in it" (JA 354).

Price could not "recall" whether he had ever taken time to read an OSHA No. 200 Form (JA 352). He could not "recall" if he had checked the information reported on the 200 Form before he certified the accuracy of the OSHA No. 200-S Form (JA 355, 356). Reference materials for accurately completing the forms sat in a credenza behind his desk (JA 178-180, 225-226, 227-230, 348, 397-398, 409; R.38:51[*Kaspar Post-Trial Brief*]:77-78 ("The only OSHA information kept by Kaspar prior to the March 1990 inspection was a large bundle of OSHA folders located in David Little's credenza, in which were buried three OSHA recordkeeping pamphlets.").

3. Jo Ann Knezek (Kaspar manager). From 1970 on, Ms. Knezek was responsible for maintaining Kaspar's injury records

(JA 322-324). She testified that Mr. Little's only instruction to her was to put "the most serious injuries" on the OSHA forms (JA 335). Therefore, using her best judgment, she recorded injuries "that I felt or knew . . . would be missing work, restricted work, or could not work at all, one day or more, or if it was a serious injury, not just first-aid treatment" (JA 325-326).

On a separate, company first-aid log, Knezek recorded "minor cuts or abrasions or minor burns" (JA 326). If Knezek initially entered an injury on Kaspar's first-aid log, she would not add it to the OSHA form, even if she subsequently discovered that the injury had resulted in lost work days (JA 330-331). Yet Knezek understood that a purpose of the OSHA form is to enable OSHA to review an employer's recordable injuries (JA 343).

When Dan Price succeeded Mr. Little in January 1989, Price became Ms. Knezek's direct supervisor, but she stated that he did not give her any new instructions other than what Little had already told her (JA 336, 347). And, although Little reviewed her OSHA No. 200 Form at the end of 1988 and Price reviewed her

OSHA No. 200 Form at the end of 1989, neither ever questioned Ms. Knezek regarding the accuracy of her reports (JA 339).

At the hearing, Ms. Knezek initially professed that, for 20 years -- until it was called to her attention during OSHA's 1990 inspection, she remained unaware that instructions on how to accurately complete the OSHA form were on the back of the form itself (JA 326-329).

Later, Ms. Knezek explained (JA 329): "No. I could maybe know that there was writing [on the back of the form], but I never went by what was on the back, because I was going by what I was instructed to do."

Still later, Ms. Knezek amplified (JA 332): "I really wasn't aware of it until we had the inspection in March [1990] that the information was on the reverse side and [that] there was a booklet available that I could have looked things up to know where to put them in the proper place."

And still later, Ms. Knezek admitted that the instructions on the form are clear (JA 341) and that the OSHA recordkeeping book

clearly explains the types of injuries and illnesses that must be recorded (JA 341). But she reaffirmed that she had only started reading the instructions in the latter part of 1990, after OSHA's inspection was underway (JA 342).

Ms. Knezek did not record any lacerations, mashed fingers, punched hands, or amputations on the OSHA logs in 1988-1989; they were not serious enough, to her (JA 333). She recorded only 32 injuries in 1988 on the OSHA form (R.4:R-164) and only 40 in 1989 (R.4:R-162) -- almost exclusively muscle and back strains.

D. The judge concludes that Kaspar willfully violated OSHA requirements hundreds of times

The judge concluded, *inter alia*, that Kaspar willfully violated the recordkeeping requirements (R.39:62). He found "no reason to conclude that the various inspections of its facilities [by OSHA in the past] led the company to believe it was in compliance with OSHA's recordkeeping requirements . . . " (R.39:62:11). "[T]he company did nothing to ensure the standard was met" (R.39:62:13). He also affirmed violations for unsafe machinery (R.39:62:23-24) and unsafe electrical equipment (R.39:62:46).

E. The Commission affirms that Kaspar willfully violated OSHA requirements hundreds of times

"Obvious"; "Incredible"; "Overwhelming." In evaluating the "willful" allegation, the Commission focussed on Kaspar's recordkeeping procedures and history, and on the knowledge and training of its personnel regarding the recordkeeping requirements.

The Commission found 357 recordkeeping errors in 1988 and 1989 -- "the vast majority of which consisted of complete failures to record," an error rate of 86.5% (JA 129). The Commission found that, although the recordability of most of the cited items was "obvious" and "could be determined from the instructions on the OSHA 200 form itself," virtually all were noted on the company first-aid log, but were omitted from the OSHA forms (JA 131).

The Commission also emphasized that Kaspar's 86.5% error rate "alone is simply overwhelming" (JA 134-137):

> [T]he whole of [Kaspar]'s recording process was fatally flawed. As underscored by the lack of any follow-up tracking procedures, [Kaspar] made no effort to ensure that the regulation was followed and the OSHA 200 was correctly filled in [citation omitted]. The failures here, though involving large numbers of hand and finger injuries, included many other types of injuries and

> illnesses and resulted from an overall disregard of the regulation's requirements . . . [A] 1-in-8 recording rate during a period in which 412 items should have been recorded either defies consistency or effectively constitutes a consistent failure to record at all . . . [P]ervasive and blatant failures to comply with the statutory recordkeeping requirements in 1988 and 1989 were anything but mistaken or careless . . . [but] showed plain indifference to the requirements of the Act . . . .

It was "incredible" to the Commission that Kaspar officials could have believed that they were correctly recording injuries and illnesses in 1988 and 1989 (JA 131-132):

> Ms. Knezek, who was by then a managerial level employee and had principal, if not sole responsibility for [Kaspar]'s OSHA recordkeeping, knew what was required and simply failed to continue to properly maintain [Kaspar]'s OSHA 200s in 1988 and 1989. Knezek admitted knowing that . . . lacerations, mashed fingers, punched hands, and amputations are more than first aid, yet she listed instances of just such injuries on [Kaspar]'s 1988 and 1989 first-aid logs rather than its OSHA 200, explaining that they were "[i]n [her] judgment," not serious enough. Injuries not serious enough to be recorded included finger amputations suffered by five employees . . . Many items involving lost work days were also listed on the first-aid logs rather than the OSHA 200s despite Knezek's acknowledgment that she knew such items were recordable . . . .

The Commission, too, rejected Kaspar's tactic of blaming OSHA for failing to issue citations or to recommend changes following prior inspections (JA 132-133):

> Rather than showing good faith in 1988 and 1989, . . . [Kaspar]'s inspection history shows that [Kaspar] profoundly changed its recordkeeping practices sometime between 1985 and 1988 . . . [T]he evidence establishes that this change was knowingly made and thus reflects a willful state of mind [citation omitted].

For example, the Commission determined that Kaspar had "substantially complied with [OSHA recordkeeping requirements] for many prior years" (JA 135). However, it noted (JA 128-129, 133) that OSHA's 1985 review of Kaspar records for 1984 disclosed a rate of recorded injuries to total employees of approximately 40%, whereas Kaspar records for 1988 and 1989 showed only a rate of recorded injuries to total employees of 4.3%, when -- based on accurate reporting of injuries -- the rate was actually 24% for each of the two years. This 1985 inspection is the only prior inspection for which underlying recordkeeping statistics were in evidence (JA 128 n. 8). The Commission concluded (JA 133): "This marked

decrease in recorded items clearly constitutes a change from [Kaspar]'s earlier recordkeeping practices."

In addition, the Commission observed that OSHA's 1985 review discovered *no* injuries involving "restricted work days" in 1983 and 1984, yet OSHA found some 130 such injuries in 1988 and 1989. The Commission noted that, even though OSHA's 1985 review of Kaspar records did not result in any citations,"[i]n view of this data, it seems unlikely that there were no injuries resulting in restricted work days in 1983 and 1984" (JA 129 n.9).[2]

No mitigation of penalty for each willful violation. The Commission relied upon well-settled Commission precedent that the Secretary has discretion to cite each recordkeeping error as a separate violation, and that the Commission has discretion to assess penalties on a per-violation basis (JA 138).

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[2] The inspector, an industrial health specialist, who reviewed Kaspar's records in 1985 could not recall (in 1992) what records-review procedures were prescribed by the OSHA Field Operations Manual in effect in 1985 (JA 396). However, he discovered "an epidemic of hand and finger injuries" and informed Kaspar that he would recommend that OSHA assign a safety-specialist inspector to visit the worksite (JA 381, 388, 395-396, 401).

Finding "no basis" for affording Kaspar credit for good faith "where the bulk of the violations are affirmed as willful, and where the failures to record were largely so obvious," the Commission assessed the penalties as originally assessed by the judge (who calculated the penalties on a violation-by-violation basis in the amount of $250-$1000 per violation), yielding an aggregate penalty of $210,500 for the outstanding willful recordkeeping items (JA 137-138).[3]

Unsafe Machinery. The Commission concluded that Kaspar willfully failed to provide safety guarding on a punch press. The Commission cited employee testimony: that, when guards were installed on the machines, they were bolted in place and not easily removed; that the press' function changed frequently, sometimes within the course of a day; and that a supervisor would determine

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[3] At the time this case arose, Section 17(a) of the Act, 29 U.S.C. § 666(a), provided that a willful violation could be assessed a penalty of up to $10,000, whereas the maximum penalty under Section 17(b) for a serious violation was $1000. These amounts were subsequently raised to $70,000 and $7000, respectively, in the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (1990).

in what mode the punch press would operate (JA 145). Kaspar did not deny that the punch press was in use and unguarded (*ibid.*). Kaspar was aware of the hazard created by an unguarded punch press: it had been previously adjudicated in violation of the same safety requirement; its safety officer was aware that there had been a "rash" of serious punch press accidents; other punch press injuries had been known to management personnel; and its records for 1988 and 1989 revealed numerous hand or finger injuries from unguarded punch presses (JA 146-147).

The Commission concluded (JA 147): "[A]rmed with this information, [Kaspar]'s failure to install a point of operation guard on the punch press showed 'plain indifference' and constitutes a willful violation of the Act [citation omitted]." It assessed a $2,500 penalty (JA 148).

Unsafe Electrical Equipment. The Commission found that Kaspar failed to ground two lamps (JA 166-168). Without denying that the lamps were ungrounded, Kaspar argued that the safety requirement is inapplicable because the lamps were not portable.

The Commission reasoned that the portability element underlying the grounding requirement derives from the electrical shock hazard presented when such lamps are handled while plugged in but not grounded (JA 167). It noted that testimony describing the lamps as "portable" and "clamp-type" was unrebutted, that the lamps were located just five or six feet above the floor, and that employees were exposed (JA 167-168). It assessed a $200 penalty (JA 168).

SUMMARY OF ARGUMENT

Kaspar played ostrich through a two-year wave of amputations and other patently recordable employee injuries.

The Commission's conclusion that Kaspar just did not care whether its records of "overwhelming" numbers of "obvious" employee injuries were accurate -- and, therefore, was plainly indifferent to OSHA recordkeeping -- is supported by substantial evidence and amply justifies the "willful" characterization of these violations. Kaspar does not substantiate its claim that previous OSHA reviews of its records convinced it that all was well.

Holding Kaspar accountable for *hundreds* of willful failures to maintain accurate records of injuries is legally sound: per-instance penalties are a valid exercise of prosecutorial discretion and do not require notice-and-comment procedures; caselaw and common sense support multiple penalties for multiple violations.

Kaspar fails to demonstrate that the Commission's penalty assessments are inappropriate or that there is no substantial evidence supporting the machine- and electrical-safety violations.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S CONCLUSION THAT KASPAR WILLFULLY VIOLATED OSHA RECORDKEEPING REQUIREMENTS HUNDREDS OF TIMES

A. Standard of review

This Court will uphold a Commission finding of a willful violation if it is supported by substantial evidence. *Conie Construction, Inc. v. Reich,* 73 F.3d 382, 284 (D.C. Cir. 1995).

B. Substantial evidence supports the finding of willfulness

"Willful" is a word "of many meanings, its construction often being influenced by its context." *Spies v. United States*, 317 U.S. 492, 497 (1943). See, e.g., *Finer Foods Sales Co. v. Block*, 708 F.2d 774 (D.C. Cir. 1983) (failure to make full and prompt payment for green beans was willful, because it was done with careless disregard of statutory requirements). Although the term is not defined in the OSH Act, this Court has recognized that a willful violation of this statute is "an act done voluntarily with . . . plain indifference to . . . the Act's requirements." *Cedar Construction Co. v. OSHRC,* 587 F. 2d 1303, 1305 (D. C. Cir. 1978). See also *Brock*

v. Morello Bros. Const., Inc., 809 F.2d 161, 164 (1st Cir. 1987) (employer need not be consciously aware that conduct is forbidden at the time performed, but his state of mind must be such that, if he were informed of the rule, he would not care); *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 319 (5th Cir. 1979) (rejecting a showing of bad purpose as an element of willful under the OSH Act: "We do not feel that such a result would well serve the congressional purpose of creating a strong and effective federal job safety statute."); *Intercounty Const. Co. v. OSHRC*, 522 F.2d 777, 780 (4th Cir. 1975), *cert. denied*, 423 U.S. 1072 (1976) (Congress intended to punish the conduct of an employer who is plainly indifferent to OSHA requirements).

The Commission cited a two-year toll of broken bones and injured eyes, of lacerations and contusions, of welding-flash burns and second- and third-degree burns, of punctures and amputations (JA 132) -- all indisputably recordable injuries and all indisputably omitted by Kaspar from its OSHA records.

This was no mere inadvertence. This was no mere lack of diligence. Kaspar's responsible officials just did not care. Kaspar has conceded that "David Little's understanding of how to correctly record injuries and illnesses on the OSHA 200 was virtually non-existent" (R.38:51:78) and that "it is apparent that Mr. Little ["I would be the one responsible for it" (JA 404)] had no substantive knowledge of recordkeeping requirements while employed by Kaspar" (R.39:58:4). Little left it to Knezek's discretion to determine which injuries were "serious" enough to merit recording. Knezek merely used her "best judgment," never looking at the instructions on the forms or in the credenza. Price "didn't see the necessity of getting involved in it."

The Commission could reasonably infer from such "overwhelming" evidence of hundreds of "incredible" failures to record "obvious" employee injuries that Kaspar was plainly indifferent to its statutory obligation to record such injuries accurately. See *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 667 (D.C. Cir. 1996) ("[A] court may, when determining

whether a defendant acted in reckless disregard of consequences, consider a pattern of conduct even if no one action or omission by itself would meet that standard."); *Donovan v. Williams Enters., Inc.*, 744 F.2d 170, 180 (D.C. Cir. 1984) (finding plain indifference, noting employer's failure to train senior supervisor at the job-site concerning OSHA requirements and failure to discuss safety until OSHA inspections of the project began); *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 320 (5th Cir. 1979) ("It is precisely because the company made no effort whatsoever to make anyone with supervisory authority at the job site aware of the OSHA regulation that the Company can be said to have acted with plain indifference and thereby acted willfully."). *See also Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419, 1424 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 937 (1984) (Scalia, J., dissenting) ("[W]here a specific action has been mandated by law, the duty of observance is more prominent and categorical -- so the level of inattention necessary to establish 'indifference' is less.").

The Commission's "willful" determination is supported by substantial evidence and, thus, must be affirmed. See *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1263 n.24 (D.C. Cir. 1973) (court must uphold Commission finding supported by substantial evidence; Commission's view on preponderance of the evidence is otherwise final).[4]

C. Kaspar's excuses are without merit

Because Kaspar took no meaningful steps at its workplace to meet its statutory obligation to record employee injuries accurately, it can only plead that *OSHA*'s failures to discover *Kaspar*'s failures sooner should excuse Kaspar's indifference to compliance.[5] This contention is belied by the facts and is foreclosed by the law.

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[4] Kaspar is flatly wrong in suggesting (K.Br.7) that "[t]he only finding" by the Commission supporting willfulness is that Kaspar changed its recordkeeping practices between 1984 and 1988. *See* JA 131 & n.11, 132-135, 136 & n.15, 137.

[5] Although Kaspar trivializes these violations as "alleged occurrences" (K.Br.13), it only challenges the characterization of the violations as "willful" (K.Br.8-11); it nowhere contests the Commission's conclusion that it failed to comply.

Citing 15 lines of testimony by David Little, Kaspar's former Personnel Manager, Kaspar asserts (K.Br.3) that the company "maintained both an OSHA 200 and a first-aid log based on the instructions of an OSHA compliance officer who assisted Kaspar in setting up its recordkeeping system in 1970 or 1971." But Kaspar places more weight on these 15 lines than they can bear: Little made *no* reference to any specific instructions or particular OSHA forms supposedly discussed with the inspector; and no one testified that anyone from OSHA ever gave "instructions" to omit broken bones, or amputations or any of the other injuries Kaspar left out.

All of Kaspar's heavy-breathing (K.Br.1-11) about OSHA's reviews of Kaspar records over the years cannot negate Kaspar's failure to identify *any* Kaspar official who claimed to have deviated from OSHA regulations in reliance upon these OSHA reviews.[6] *See*

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[6] Kaspar similarly failed below to identify *any* Kaspar official who claimed to have deviated from the recordkeeping requirements in reliance upon OSHA's records reviews. *See* R.38:51[*Post-Hearing Brief*]:87-91; R.40:64 [*Petition for Discretionary Review*]:27-35; R.40:70[*Response Brief to Commission*]:4-14. It should also be noted that OSHA's records review procedure changed in 1986, see p.9, *supra.*

Cedar Constr. Co. v. OSHRC, 587 F.2d 1303, 1306 (D.C. Cir. 1978) (petitioner adduced no evidence that it relied upon previous OSHA inspection). In fact, without regard to OSHA instructions or prior record reviews by OSHA, Little directed Knezek to use her "best judgment," Knezek decided on her own what to record, and Price refused to get "involved in it." Although OSHA revised its recordkeeping instructions several times between 1970 and 1990 (JA 395), Kaspar never kept up; it never bothered to read the instructions on the form itself.

Kaspar repeatedly claims (K.Br.2,9,10) that the Secretary admitted that Kaspar's recordkeeping practices remained unchanged after Little spoke to an OSHA inspector in 1971. But Kaspar misrepresents -- and misquotes -- the Secretary's response to an interrogatory. The Secretary responded only that the same error-riddled practices that began under Mr. Little persisted under Mr. Price (R.1:27:9).

Similarly unfounded is Kaspar's contention (K.Br.7,9,10) that the Secretary never asserted below that Kaspar changed its

recordkeeping practice sometime after 1984. As the Secretary explained in her Post-Hearing Brief (R.37:50:38), if an employer's records reflect a lost workday injury ("LWDI") rate below the national average for that employer's particular industry, then "a comprehensive inspection is not conducted." Prior record reviews yielded LWDI rates that exempted Kaspar from comprehensive physical inspections of its premises in 1982 and 1983 (R.5:Tab 2 & Tab 3) and exempted Kaspar's much smaller associated enterprise, Kaspar Electroplating Corp., from such inspections in 1983 and 1984 (R.5:Tab 4 & Tab 5).[7] Thus, the Secretary argued below that Kaspar deliberately cheated on its 1988-1989 records for the purpose of diminishing the likelihood of a comprehensive inspection by OSHA. *See* R.37:50:39 ("Kaspar purposely omitted certain cases from its OSHA 200 form in order to exempt itself from inspections.") and R.1:27:7 (Kaspar's "action was taken for the sole purpose of keeping OSHA from conducting an inspection as Kaspar

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[7] Kaspar Electroplating Corp. employs only approximately 50 persons, while an even smaller associated enterprise in Shiner, Kaspar Die & Tool, employs only 15 (R.38:51:2).

had done in the past where inspections were conducted only when the [sic] Kaspar's records revealed a LWDI was [sic] less than the national average for manufacturing."). The Secretary also pointed out in her Reply Brief before the Commission (R.40:71:2) that, following the "epidemic of hand and finger injuries" in 1985, Kaspar virtually stopped recording this type of injury, "at the very least, demonstrat[ing] that Kaspar fundamentally changed its recordkeeping system." Although the Secretary fell short of establishing Kaspar's *motivation* for underreporting its injury status, she did convince the Commission, *inter alia*, that Kaspar had acted *intentionally* when it failed to record more than 86% of its recordable injuries.

Thus, Kaspar's 15 lines notwithstanding, the Commission had ample factual basis for rejecting Kaspar's groundless, blame-OSHA tactic and this Court should not disturb the Commission's evaluation of the evidence. *Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298, 1305 (D.C. Cir. 1995) ("[W]e do not feel free to choose

between competing inferences that can be drawn from essentially factual matters. It is up to the Commission, not us . . . .").

Even if Kaspar's OSHA-didn't-warn-us excuse were supported by the record, it would still fail on legal grounds. Receipt of prior warning from OSHA is not a necessary condition to finding willfulness. *National Steel & Shipbuilding Co. v. OSHRC*, 607 F.2d 311, 317 (9th Cir. 1979) (to hold otherwise would obliterate the distinction between "repeat" and "willful" violations). And an employer may not rely on OSHA's failure, during a previous inspection, to identify the same violations subsequently charged. *Cedar Constr. Co. v. OSHRC*, 587 F.2d 1303, 1306 (D.C. Cir. 1978) ("[R]ecognizing such a right would discourage self-enforcement of the Act by businessmen who have far greater knowledge about conditions at their workplaces than do OSHA inspectors.").

II. THE OSH ACT AND THE RECORDKEEPING RULE PERMIT THE SECRETARY TO CITE, AND THE COMMISSION TO SANCTION, "EACH [WILLFUL] VIOLATION" SEPARATELY

A. Standard of review

An agency's interpretation of a statute it administers is controlling if it is reasonable and consistent with the statutory language. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The same is true of the agency's interpretation of its own regulations. *Martin v. OSHRC*, 499 U.S. 144, 153-54 (1991).

B. The Secretary's interpretation that the OSH Act permits per-instance sanctions is consistent with the statutory language and purpose

1. The OSH Act permits employers to be cited and penalized separately for "each violation" they commit. For example, section 17(a), 29 U.S.C. § 666(a), which deals with willful and repeat violations, provides:

> *Any employer who* willfully or repeatedly *violates the requirements* of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter may be assessed a civil penalty of not more than $10,000 *for each violation* [emphasis added].

Thus, under the plain language of the Act, an employer may be liable for penalties appropriate for willfulness each time it "violates the requirements" of the Act or any rule promulgated thereunder.

The Commission has agreed with OSHA that per-instance citations and penalties are allowed when an employer commits multiple violations of a single rule. *E.g.*, *Pepperidge Farm, Inc.*, 17 O.S.H. Cas. (BNA) 1993, 2001 (Rev. Comm'n 1997); *Sanders Lead Co.*, 17 O.S.H. Cas. (BNA) 1197, 1204-05 (Rev. Comm'n 1995); *Hern Iron Works, Inc.*, 16 O.S.H. Cas. (BNA) 1619, 1621-23 (Rev. Comm'n 1994); *J.A. Jones Constr. Co.*, 15 O.S.H. Cas. (BNA) 2201, 2213-14 (Rev. Comm'n 1993); *Caterpillar, Inc.*, 15 O.S.H. Cas. (BNA) 2153, 2173 (Rev. Comm'n 1993); *Hoffman Constr. Co.*, 6 O.S.H. Cas. (BNA) 1274,1275 (Rev. Comm'n 1978).

The recordkeeping rule, 29 C.F.R. § 1904.2, requires an employer to "enter each recordable injury and illness on the log and summary as early as practicable . . . ." An employer violates this requirement each time it fails to enter a recordable injury or illness on the log. Thus, under the plain language of the Act and the rule,

an employer can be penalized separately for each injury or illness it fails to record. *Pepperidge Farm, Inc.*, 17 O.S.H. Cas. (BNA) at 2001; *Caterpillar, Inc.*, 15 O.S.H. Cas. at 2173. It is only common sense that multiple failures to comply may be sanctioned separately in appropriate circumstances, rather than inflexibly "bundled" together, regardless of the number of such failures and of the presence of a willful state of mind.

2. The availability of per-instance penalties under the OSH Act and the recordkeeping rule is consistent with the general principle that each violation of a statutory duty exposes the violator to a separate statutory penalty. For example, in *Missouri, K. & T. R. Co. v. United States*, 231 U.S. 112 (1913), the statute made it unlawful "for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours . . . " and provided for a civil penalty "not to exceed five hundred dollars for each and every violation." The Supreme Court concluded that the plain language of the statute authorized

separate penalties for each employee who exceeded the allowed hours of service when several employees worked too long as a result of the delay of a single train. "The statute makes the carrier who permits 'any employee' to remain on duty in violation of its terms liable to a penalty for 'each and every violation.' The implication of these words cannot be made much plainer by argument." Id. at 119.

Similarly, in *Used Equip. Sales, Inc. v. Department of Transp.*, 54 F.3d 862 (D.C. Cir. 1995), this Court held that a motor carrier could be penalized separately each time it dispatched the same disqualified driver to operate a motor vehicle. "[T]he provision of a separate penalty for 'each' offense suggests that 'multiple penalties are recoverable for a multiplicity of occurrences.'" Id. at 865.

In criminal cases as well, courts have upheld per-instance sanctions when the statute was worded to permit them. See *Ebeling v. Morgan*, 237 U.S. 625 (1915) (each mail bag robbed was a separate violation of a statute prohibiting cutting of "any mail bag"); *United States v. Davis*, 656 F.2d 153 (5th Cir. 1981), *cert. denied*,

456 U.S. 930 (1982) (statute that criminalized possession of "a controlled substance" was violated twice by simultaneous possession of two separate controlled substances); *United States v. Billingslea*, 603 F.2d 515, 520-21 (5th Cir. 1979) (each stolen check was separate offense even though all were deposited to defendant's account at the same time); *United States v. Nichols*, 731 F.2d 545 (8th Cir.), *cert. denied*, 469 U.S. 1085 (1984) (simultaneous possession of rifle and silencer was two separate violations of statute proscribing receipt or possession of an unregistered firearm); *Castaldi v. United States*, 783 F.2d 119 (8th Cir.), *cert. denied*, 476 U.S. 1172 (1986) (each denomination of postage stamp counterfeited was separate violation of statute that made it a crime to counterfeit "any postage stamp"). Although this is a civil penalty case, criminal cases are relevant because the rule of lenity requires that any ambiguity in a criminal statute be resolved in favor of the accused. *Crandon v. United States*, 494 U.S. 152, 158 (1990). Therefore, decisions upholding per-instance penalties in criminal cases show that no special "per-instance" language is needed in a

statute to read that statute as unambiguously providing for per-instance sanctions.[8]

3. Kaspar claims there is evidence that Congress intended to preclude per-instance penalties under the OSH Act. It points out (K.Br. at 14) that the Coal Mine Safety and Health Act of 1969 contained specific "separate offense" language, while the OSH Act does not. This is significant, Kaspar states, because it says that Congress patterned the OSH Act, which was enacted in 1970, after the Coal Mine Act and that each "provide for implementation by administrative agencies and independent review commissions."

Kaspar is wrong when it says that Congress patterned the OSH Act after the 1969 Coal Mine Act, *29 U.S.C. §§ 801 et seq. (1976).* The two statutes contain numerous differences, including

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[8] In some criminal cases, the Court has applied the rule of lenity to reject per-instance sanctions where it found sufficient evidence that Congress intended to preclude such sanctions. *Ladner v. United States*, 358 U.S. 169 (1958); *Bell v. United States*, 349 U.S. 81 (1955); *United States v. Universal C.I.T. Credit*, 344 U.S. 218 (1952). These cases illustrate that per-instance sanctions are the general rule and are only precluded where there is specific congressional intent to the contrary.

their administrative structure. The Coal Mine Act was administered by the Secretary of the Interior, who was both rulemaker, enforcer, and adjudicator. The Secretary of Labor possesses rulemaking and enforcement authority under the OSH Act, while the independent Occupational Safety and Health Review Commission acts as adjudicator. It was only in 1977, when Congress repealed the 1969 Coal Mine Act and adopted the Federal Mine Safety and Health Act of 1977, *30 U.S.C. §§ 801 et seq. (1996)*, that it gave both statutes the same administrative structure, with both being administered by the Secretary of Labor and with independent review commissions to adjudicate contested cases. Since it is clear that Congress did *not* use the 1969 Mine Act as a template for the OSH Act, no significance can be assigned to the absence of the Mine Act's "separate offense" language from the OSH Act. And, as the cases cited earlier show, Congress generally intends to allow for per-instance sanctions even when it does not include "separate offense" language in a statute.

4. If Congress has not spoken to a precise question in enacting a statute, the question for the Court is whether the interpretation by the agency authorized to administer the statute is a valid one. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."). Under the OSH Act, the Secretary is the policymaking agency, and it is therefore the Secretary's interpretations that are entitled to *Chevron* deference. *Anthony Crane Rental, Inc. v. Reich*, 70 F.3d at 1302. See also *In re Sealed Case*, 223 F.3d 775, 780 (D.C. Cir. 2000).

In *Used Equipment Sales*, this Court applied *Chevron* in accepting the FHWA's statutory interpretation that each dispatch of a disqualified driver was a separately penalizable violation. 54 F.3d at 865. The Court found the agency's interpretation reasonable in light of the statute's purpose of ensuring increased compliance with motor vehicle safety and health regulations. *Ibid.* The Court noted

that allowing only a single penalty for multiple occurrences would significantly reduce the employer's incentive to comply with the regulation once it had committed a single violation. The Secretary's interpretation in this case is similarly reasonable. Per-instance penalties promote the OSH Act's safety objectives by ensuring that the injury information employers make available to OSHA and to their own employees reflects the actual safety and health experience at the worksite. And, by allowing the assessment of penalties more severe than that appropriate for an employer who has failed to record only one recordable injury, the interpretation provides demonstrably needed incentive for employers less compliant with Congress' explicit directive, see *29 U.S.C. § 657 (c)(2)* ("regulations requiring employers to maintain *accurate* records of . . . work-related deaths, injuries and illnesses . . . " [emphasis added]).

In challenging the Secretary's interpretation that the Act allows per-instance citations, Kaspar objects (K.Br. at 12) that it "allows fines to increase exponentially" and (K.Br. at 16) that it

provides for "penalties that [a]re limited only by the imagination of the Secretary." To the contrary, the Secretary's interpretation permits penalties that are limited, not by the Secretary's imagination, but by the employer's conduct. It permits a higher potential penalty against an employer who violates a rule in 357 discrete instances than against an employer who does so only once. Moreover, an employer who believes that the Secretary's enforcement action is ill-founded or that her penalty proposal is overly harsh can obtain review of those matters by the independent Review Commission, as Kaspar did here. *29 U.S.C. § 666(j)* ("The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.").

5. Only one judicial decision has addressed the Secretary's authority to issue per-instance citations. In *Reich v. Arcadian*

Corp., 110 F.3d 1192 (5th Cir. 1997), the court held that the Secretary could not issue separate citations and proposed penalties under the OSH Act's "General Duty Clause," *29 U.S.C. § 654(a)(1)*, for each employee exposed to a hazardous condition. The court held that this result was compelled by the plain language of the General Duty Clause, which it read to "focus on an employer's duty to prevent hazardous conditions from developing in the employment itself or the physical workplace." *Id.* at 1196. In reaching that conclusion, the court said that per-employee violations *would* be permissible under OSH Act standards "if the regulated condition or practice is unique to the employee (i.e., failure to train or remove a worker)." *Id.* at 1199.

Arcadian does not undermine issuance of per-instance citations here. *Arcadian* presented the question of whether each employee in a group exposed to a single hazard can be a permissible unit of prosecution. Here, OSHA has not cited Kaspar for each of the 850 Kaspar employees who were potentially endangered by a general lack of accurate information about

workplace hazards. Instead, OSHA has cited Kaspar for failing to perform more than 300 unique tasks -- particularized as to date, injury and employee -- required by the recordkeeping rule.

III. OSHA DID NOT NEED TO UNDERTAKE RULEMAKING BEFORE IT COULD ISSUE PER-INSTANCE CITATIONS

A. Standard of review

Whether this case implicates notice-and-comment rulemaking requirements is a question of law that this Court decides *de novo*. See *Molycorp, Inc. v. EPA*, 197 F.3d 543 (D.C. Cir. 1999).

B. OSHA's policy of issuing per-instance citations in selected cases is an exercise of prosecutorial discretion, not a substantive rule that requires notice and comment

1. Typically, when OSHA finds that an employer has committed multiple violations of a single standard, it groups the violations into one citation and proposes a single, combined penalty. OSHA began to follow this practice in the OSH Act's early days, when employers were becoming familiar with the Act's requirements and OSHA was gaining experience in enforcing the statute. This was never a rigid practice, however, and in some cases the Secretary proposed separate penalties for multiple

violations of the same standard, discrete violations of related standards, or similar violations of the Act's General Duty Clause, 29 U.S.C. § 654(a)(1).[9]

By the mid-1980s, OSHA had gained considerable experience in enforcing the Act and determined that a small number of employers were ignoring the Act's requirements.[10] To encourage such employers to improve their level of compliance, OSHA began to issue per-instance citations to employers who committed multiple violations of the same provision. By issuing per-instance citations, OSHA proposed more severe penalties in order to deter

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[9] See, e.g., *RSR Corp.*, 11 O.S.H. Cas. (BNA) 1163, 1180-81 (Rev. Comm'n 1983) (separate penalties proposed for each employee terminated in violation of lead standard); *Wheeling-Pittsburgh Steel Corp.*, 10 O.S.H. Cas. (BNA) 1242 (Rev. Comm'n 1981) (separate violations of the General Duty Clause for each of two trains that lacked functioning brakes); *Morrison-Knudsen & Assoc.*, 8 O.S.H. Cas. (BNA) 2231, 2239 (Rev. Comm'n 1980) (separate penalties assessed for two nonconforming electrical cables); *Hoffman Constr. Co.*, 6 O.S.H. Cas. (BNA) 1274 (Rev. Comm'n 1978) (each of two nonconforming scaffolds was separate violation of scaffolding standard).

[10] See, e.g., *Reich v. Sea Sprite Boat Co.*, 50 F.3d 413 (7th Cir. 1995) (Court assessed $1.452 million penalty against employer who contemptuously violated court order requiring abatement of OSH Act violation).

more flagrant violators from continuing to violate the Act. See *Coal Employment Project v. Dole*, 889 F.2d 1127, 1132 (D.C. Cir. 1989) ("monetary penalties provide a 'deterrence' that necessarily infrequent inspections cannot generate."). The decision to issue such citations is made only after extensive review within the agency, see JA 265-267, 268-273, 298-300, and with the concurrence of the OSHA administrator, see p. 11, *supra*.

2. "The Secretary's prosecutorial power to enforce the Act is broad." *United Steelworkers of America v. Herman*, 216 F.3d 1095, 1097 (D.C. Cir. 2000). The practice of issuing per-instance citations is a classic exercise of prosecutorial discretion. See *United States v. Bonnet-Grullon*, 212 F.3d 692, 707 (2d Cir.), *cert. denied*, 121 S.Ct. 261 (2000). Such citations are only issued in a small number of cases, each of which has been intensively reviewed at the highest level of the agency.

Kaspar contends (K.Br. at 17) that the practice of issuing per-instance citations is a "rule" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 551(4). Kaspar is wrong.

A "rule" under the APA is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." OSHA's practice of issuing per-instance citations does not fit any part of this definition. The practice is neither law, policy, nor a rule of procedure or practice, but is an enforcement strategy designed to better deter violations while more efficiently using the agency's resources. That is an objective of every law enforcement agency, and an agency's use of enforcement tools that are within its statutory authority does not fit the definition of "rule." See *Dilley v. National Transp. Safety Bd.*, 49 F.3d 667, 669-70 (10th Cir. 1995) (FAA did not need to issue rule to exercise statutory authority to suspend pilot certificates for disciplinary reasons).

3. Even if OSHA's practice of issuing per-instance citations is a "rule," it is not a substantive rule and therefore did not require notice and comment before being put into effect. Substantive rules "grant rights, impose obligations, or produce other significant

effects on private interests." *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C.Cir. 1987); *Chamber of Commerce v. Department of Labor*, 174 F.3d 206, 212 (D.C. Cir. 1999).[11] OSHA's per-instance practice does none of these things. *See Capuano v. National Transp. Safety Bd.*, 843 F.2d 56, 58 (1st Cir. 1988) (FAA manual "that tells the staff when to seek sanctions or what sanctions to seek" does not affect "the rights, duties, obligations, or conduct of pilots or any other member of the public."). Nor does Kaspar suggest how it would have changed its conduct had it received the special notice it now demands.

Nor does the practice "impose new substantive burdens, in the sense that [it] either require[s] or prohibit[s] any particular actions on the part of [employers]." *Aulenback, Inc. v. Federal Highway Admin.*, 103 F.3d 156, 169 (D.C. Cir. 1997). Kaspar's substantive

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[11] Kaspar relies (K.Br. at 17) on the "substantial impact" test set forth by the Fifth Circuit in *Brown Express v. United States*, 607 F.2d 695, 702 (5th Cir. 1979). This Court, however, has rejected that test. *American Postal Workers Union v. United States Postal Serv.*, 707 F.2d 548, 560 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

obligations under the Act are established by duly promulgated standards and the Act's General Duty Clause, not from the Secretary's discretionary enforcement decisions. *See ibid.* ("Carriers are obliged to comply with all valid and applicable federal safety rules, regardless of whether the FHWA has authority to suspend their operations for non-compliance."). And Kaspar's potential liability for penalties flows from the Act's requirement that allows penalties for "each violation," *29 U.S.C. § 666(a)*, not from the agency's decision in particular cases to exercise its discretion to issue separate citations for each violation. The agency's practice does not "encode[] a substantive value judgment or put[] a stamp of approval or disapproval on a given type of behavior." *See Bowen*, 834 F.2d at 1047. The stamp of disapproval placed on employers who violate OSH Act rules is found in the Act itself. The practice of issuing per-instance citations is simply designed to effectuate Congress' intent to use the Act's penalty structure to deter violators.

4. Kaspar's argument (K.Br. at 18-19) that OSHA was required to publish advance notification of the per-instance practice in the Federal Register is without merit. The practice is not a "rule" that had to be published before it could be implemented. *See 5 U.S.C. § 552(a)(1).* OSHA may enforce the Act in a manner authorized by Congress without notifying the public how it will do so. *Dilley*, 49 F.3d at 669-70; *Capuano*, 843 F.2d at 58. Employers are not entitled to special notice in the Federal Register that multiple violations of OSH Act rules may lead the Secretary and the Commission to exact penalties proportional to their misdeeds.

The instructions from OSHA to its staff to follow the per-instance practice in selected cases is at most an "administrative staff manual" under the APA. *5 U.S.C. § 552(a)(2)(C).* Such manuals need not be published in the Federal Register. *Ibid.*; *Capuano*; *Donovan v. Wollaston Alloys*, 695 F.2d 1, 9 (1st Cir. 1982) (OSHA instructions for conducting inspections are the type of material published in agency staff manuals and need not be published in Federal Register).

IV. THE COMMISSION COMMITTED NO ABUSE OF DISCRETION IN HOLDING KASPAR ACCOUNTABLE FOR EACH OF ITS HUNDREDS OF WILLFUL VIOLATIONS AND IN ASSESSING SIGNIFICANT PENALTIES

A. Standard of review

Within the limits set out in the OSH Act, the amount of penalty assessed for any violation is a matter of discretion, and a court's review is limited to abuse of discretion. *Union Tank Car Company v. OSHA*, 192 F.3d 701, 707 (7th Cir. 1999).

B. The Commission assessed penalties "appropriate" for Kaspar's hundreds of willful violations

Deterrent objectives of OSH Act penalties. Civil penalties under the OSH Act are intended to provide a sufficient incentive for employers to comply with the statute's requirements even before an OSHA inspector visits the worksite. *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990, 1001 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977) (OSH Act penalties are meant to "inflict pocket-book deterrence" and to provide a significant weapon in the Secretary's arsenal of enforcement tools). As one of the OSH Act's principal sponsors explained, the "requirement to comply with these occupational

safety and health standards is not a game to be played only when the official is coming around to inspect." *Leg. Hist.* at 434. Penalties that may be absorbed casually, as just a cost of doing business, do not induce compliance. *See Leg. Hist.* at 853 ("even large [penalties] can become mere license fees."); *Zemon Concrete Corp. v. OSHRC*, 683 F.2d 176, 181 (7th Cir. 1982) (penalties cannot be so low as to frustrate the purposes of the OSH Act).

Penalties assessed under the OSH Act must take into account: the size of the employer's business; the gravity of the violation; the good faith of the employer; and the history of previous violations. *29 U.S.C. § 666(j).* The statute does not prescribe how to apply, or what weight to assign to, the penalty criteria. Although an agency's exercise of discretion must square with its responsibilities, only if the remedy chosen is unwarranted in law or without justification in fact should a court attempt to intervene. *American Power & Light Co. v. SEC*, 329 U.S. 90, 112-113 (1946). Here, the Commission's assessment of penalties is consistent with the statute,

commensurate with Kaspar's plain indifference, and within appropriate bounds of discretion.

Appropriate, not excessive, penalties. The penalties assessed here by the Commission were appropriate under the penalty factors prescribed by the statute and under principles previously applied by the Commission. The Commission noted that Kaspar is a large employer with a minimal history of violations and no history of recordkeeping violations. Gravity -- the number of employees exposed, the duration and degree of exposure, and the relative likelihood of an accident -- is generally the principal factor to be considered in penalty assessment and, here, the Commission observed that "the gravity of recordkeeping violations is generally considered low" (JA 138).

But the Commission reasonably found no basis for crediting Kaspar with good faith: its failures to record were clear violations of either the OSHA regulations or the instructions on the back of the OSHA reporting form; and it failed to provide training and reference materials to those it assigned to maintain the records.

In sum, Congress repeatedly and explicitly mandated that employers keep accurate records of workplace injuries. Kaspar is not a small, unsophisticated employer who might otherwise be deserving of special forbearance concerning penalties. Kaspar did not fall short in a good-faith effort to grasp the nuances of a regulatory regime; it just didn't try. Kaspar's indifference to recordkeeping requirements and inattention to accurate reporting produced a picture of working conditions that would mislead employees and OSHA concerning the true extent of the hazards at Kaspar. By obscuring these injuries, Kaspar effectively perpetuated the hazards to which its employees were exposed and it disabled an alarm mechanism which might have alerted employees and OSHA to problem areas within the workplace. For example, Kaspar had eleven incidents of eye injuries in May 1988 (R.11:G-56,G-61,G-62, G-64,G-67,G-68,G-70, G-73,G-74,G-87,G-92). But none were recorded, so no alarm sounded. The next month, Kaspar had five more such injuries (R.11:G-79,G-86,G-88,G-90,G-94).

Kaspar does not allege any failure by the Commission to give due consideration to the penalty criteria. Kaspar does not allege that the penalty amounts assessed by the Commission were excessive. Significant penalties were warranted by Kaspar's conduct, were assessed by the Commission, and should be affirmed here. See *American Power & Light Co.*, 329 U.S. at 115, 118 (agency's choice of sanction, legally and factually sustainable, not so lacking in reasonableness as to constitute an abuse of its discretion).

V. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S CONCLUSION THAT KASPAR VIOLATED REQUIREMENTS GOVERNING MACHINERY AND ELECTRICAL EQUIPMENT

A. Standard of review

This court must uphold a Commission finding supported by substantial evidence. *Anthony Crane Rental*, 70 F.3d at 1305.

B. Substantial evidence supports the Commission's conclusion that Kaspar willfully violated an OSHA machine safe-guarding requirement

The Commission concluded that Kaspar willfully failed to provide safety guarding on a punch press. Kaspar does not deny:

that it was aware of the hazard created by an unguarded punch press: that it had been previously adjudicated in violation of the same safety requirement; that its safety officer was aware that there had been a "rash" of serious punch press accidents; that other punch press injuries had been known to management personnel; and that its records for 1988 and 1989 revealed numerous hand or finger injuries from unguarded punch presses (JA 146-147). The Commission concluded that, "armed with this information," Kaspar's failure to guard the machine showed "plain indifference" and willfulness (JA 147).

Although the Commission reported (JA 146) that Kaspar did not deny that the punch press was in use and unguarded, Kaspar now intimates (K.Br.20) that there is insufficient evidence that the machine lacked safety-guarding. Kaspar did not forthrightly assert below that the cited machines were equipped with a guard. *See* R.38:51[*Kaspar's Post-Trial Brief*]:97-99; R.40:64[*Kaspar's Petition for Discretionary Review*]:58-60; R.40:70[*Kaspar's Response Brief to Commission*]:32-33.

Accordingly, Kaspar's insinuation on appeal that the machines were guarded cannot be considered. *Durez Div. of Occidental Chem. Group v. OSHA*, 906 F.2d 1, 5 (D.C. Cir. 1990) (employer's argument is not properly before the appellate court, because it was not effectively raised in the employer's petition for review to the Commission, as required by 29 U.S.C. § 660(a): "abbreviated mention" of contention is wholly inadequate to satisfy the requirement that an objection be urged before the Commission); *General Carbon Co. v. OSHRC*, 860 F.2d 479, 486 (D.C. Cir. 1988) (employer's argument on appeal is foreclosed by its failure to present it to the Commission: "The governing statute expressly forbids us to consider arguments not advanced to the Commission.").

Kaspar touts an apparent discrepancy among several OSHA officers' evaluation of the hazard here to support its claim that the "willful" finding is without justification. However, the Commission is not bound by the representations or interpretations of OSHA compliance officers. *L.R. Willson & Sons v. Donovan*, 685 F.2d 664,

676 (D.C. Cir. 1982). More important, Kaspar ignores the evidence, *supra*, upon which the Commission explicitly relied to find a willful violation. Thus, Kaspar fails to show that there is no substantial evidence supporting the Commission's conclusion.

C. Substantial evidence supports the Commission's conclusion that Kaspar violated an OSHA equipment-safety requirement

Kaspar seeks to overturn the Commission's conclusion that Kaspar failed to ground two lamps, arguing that there is no evidence supporting either that the lamps were portable or that employees were exposed to a hazard.

The Commission noted that testimony describing the lamps as "portable" and "clamp-type" was unrebutted, that the lamps were located just five or six feet above the floor, and that employees were exposed (JA 167-168). An inspector described the lamps as "portable" and stated that they were used at the loading dock "to provide light *in the trucks* when they are loading their product . . . " [emphasis added] and that they were subject to "rough handling" by employees (JA 176-177). He explained that they were "clamp-type lamps" and that, when he observed them, "they were attached

to the bracket on the wall to be used when they were loading or unloading a truck in that area" (JA 215). He contrasted them with a "somewhat more expensive but more permanent type lighting system that is designed to attach to the wall with an articulated arm [to] shine light in the back of the trucks, which is very common in many shipping departments" (JA 177).

Kaspar asserts that the lamps were not portable because they were attached to brackets. However, the Commission could reasonably infer from the testimony -- a "portable" and "clamp-type" lamp which is subject to "rough handling" by employees and which is used "to provide light in the trucks when they are loading" and which can be contrasted with a "more permanent type lighting system that is designed to attach to the wall with an articulated arm" in order to illuminate "in the back of the trucks" -- that the ungrounded lamps were readily removable and "portable" within the meaning of the cited safety requirement.

Kaspar further asserts that there was no proof of employee exposure. The test for employee exposure is whether it is

reasonably predictable that employees have been, or will be, in the zone of danger. See *Anthony Crane Rental, Inc. v. Reich*, 70 F.3d at 1303-05. The testimony regarding rough handling of the lamps by employees in order to provide light into the back of trucks during loading on the shipping dock surely permits a reasonable inference of exposure in this context. This Court has rejected Kaspar's related suggestion (K.Br.21) that the Secretary must show prior injuries in order to establish employee exposure. *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 588 (D.C. Cir. 1985) (the fact that the hazard which the regulation protects against has never occurred is no defense: "Many of the Secretary's regulations are preventive in nature, and enforcement would be meaningless if [this] argument were accepted."). Thus, Kaspar fails to show that there is no substantial evidence supporting the Commission's conclusion.

CONCLUSION

The Court should affirm the Commission's decision: (1) that Kaspar willfully violated its obligation to compile accurate records of employee injuries; and (2) that Kaspar may be held accountable, with significant deterrent penalties, for each of its violations.

The Court should also affirm the two other safety violations challenged by Kaspar.

Respectfully submitted.

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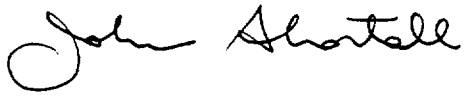

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CERTIFICATE OF COMPLIANCE WITH D.C. Cir.R. 32(a)(3)(C)

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CERTIFICATE OF SERVICE

I hereby certify that, on this 12TH day of July 2001, copies of the foregoing Brief for the Secretary of Labor were served by certified mail, postage prepaid, return receipt requested, on the following:

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ADDENDUM

Statutory & Regulatory Addendum

[OSH Act Excerpts]

§ 651 Congressional statement of findings and declaration of purpose and policy.

* * *

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources --

* * *

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition.

* * *

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this Act and accurately describe the nature of the occupational safety and health problem;

* * *

§ 657 Inspections, Investigations, and Recordkeeping.

* * *

(c) Maintenance, preservation, and availability of records; issuance of regulations; scope of records; periodic inspections by employer; posting of notices by employer; notification of employee of corrective action.

(c)(1) Each employer shall make, keep and preserve, and make available to the Secretary or the Secretary of Health and Human Services, such records regarding his activities relating to this Act as the Secretary, in cooperation with the Secretary of Health and Human Services, may prescribe by regulation as necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses. In order to carry out the provisions of this paragraph such regulations may include provisions requiring employers to conduct periodic inspections. The Secretary shall also issue regulations requiring that employers, through posting of notices or other appropriate means, keep their employees informed of their protections and obligations under this Act, including the provisions of applicable standards.

* * *

(c)(2) The Secretary, in cooperation with the Secretary of Health and Human Services, shall prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.

* * *

(d) Obtaining of information. Any information obtained by the Secretary, the Secretary of Health and Human Services, or a State agency under this Act shall be obtained with a minimum burden upon employers, especially those operating small businesses. Unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible.

(e) Employer and authorized employee representatives to accompany Secretary or his authorized representative on inspection of workplace; consultation with employees where no authorized employee representative is present. Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

* * *

(g) Compilation, analysis, and publication of reports and information; rules and regulations.

(g)(1) The Secretary and Secretary of Health and Human Services are authorized to compile, analyze, and publish, either in summary or detailed form, all reports or information obtained under this section.

* * *

§ 666 Civil and Criminal Penalties.

(a) Willful or repeated violation. Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter, may be assessed a civil penalty of not more than $10,000 for each violation.

* * *

(g) False statements, representations or certification. Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this Act shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

* * *

(j) Authority of Commission to assess civil penalties. The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

* * *

§ 673 Statistics.

(a) Development and maintenance of program of collection, compilation, and analysis; employments subject to coverage; scope.

In order to further the purposes of this Act, the Secretary, in consultation with the Secretary of Health and Human Services, shall develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics. Such program may cover all employments whether or not subject to any other provisions of this Act but shall not cover employments excluded by section 4 of the Act. The Secretary shall compile accurate statistics on work injuries and illnesses which shall include all disabling, serious, or significant injuries and illnesses, whether or not involving loss of time from work, other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.

* * *

(e) Reports by employers. On the basis of the records made and kept pursuant to section 8(c) of this Act, employers shall file such reports with the Secretary as he shall prescribe by regulation, as necessary to carry out his functions under this Act.

[OSHA Regulation Excerpts]

29 C.F.R. § 1904.2 Log and summary of occupational injuries and illnesses.

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

(b) Any employer may maintain the log of occupational injuries and illnesses at a place other than the establishment or by means of data-processing equipment, or both, under the following circumstances:

(b)(1) There is available at the place where the log is maintained sufficient information to complete the log to a date within 6 working days after receiving information that a recordable case has occurred, as required by paragraph (a) of this section.

(b)(2) At each of the employer's establishments, there is available a copy of the log which reflects separately the injury and illness experience of that establishment complete and current to a date within 45 calendar days.

* * *

29 C.F.R. § 1904.4 Supplementary record.

In addition to the log of occupational injuries and illnesses provided for under §1904.2, each employer shall have available for inspection at each establishment within 6 working days after receiving information that a recordable case has occurred, a supplementary record for each occupational injury or illness for that establishment. The record shall be completed in the detail prescribed in the instructions accompanying Occupational Safety and Health Administration Form OSHA No. 101. Workmen's compensation, insurance, or other reports are acceptable alternative records if they contain the information required by Form OSHA No. 101. If no acceptable alternative record is maintained for other purposes, Form OSHA No. 101 shall be used or the necessary information shall be otherwise maintained.

29 C.F.R. § 1904.5 Annual Summary.

(a) Each employer shall post an annual summary of occupational injuries and illnesses for each establishment. This summary shall consist of a copy of the year's totals from the form OSHA No. 200 and the following information from that form: Calendar year covered, company Name[,] establishment name, establishment address, certification signature, title, and date. A form OSHA No. 200 shall be used in presenting the summary. If no injuries or illnesses occurred in the year, zeros must be entered on the totals line, and the form must be posted.

* * *

(c) Each employer, or the officer or employee of the employer who supervises the preparation of the log and summary of occupational injuries and illnesses, shall certify that the annual summary of occupational injuries and illnesses is true and complete. The certification shall be accomplished by affixing the signature of the employer, or the officer or employer who supervises the preparation of the annual summary of occupational injuries and illnesses, at the bottom of the last page of the log and summary or by appending a separate statement to the log and summary certifying that the summary is true and complete.

* * *

29 C.F.R. § 1904.6 Records Retention.

Records provided for in §§1904.2, 1904.4, and 1904.5 (including form OSHA No. 200 and its predecessor forms OSHA No. 100 and OSHA No. 102) shall be retained in each establishment for 5 years following the end of the year to which they relate.

29 C.F.R. § 1904.7 Access to Records.

(a) Each employer shall provide, upon request, records provided for in §§1904.2, 1904.4, and 1904.5, for inspection and copying by any representative of the Secretary of Labor for the purpose of carrying out the provisions of the act, and by representatives of the Secretary of Health, Education, and Welfare during any investigation under section 20(b) of the act, or by any representative of a State accorded jurisdiction for occupational safety and health inspections or for statistical compilation under sections 18 and 24 of the act.

(b)(1) The log and summary of all recordable occupational injuries and illnesses (OSHA No. 200) (the log) provided for in §1904.2 shall, upon request, be made available by the employer to any employee, former employee, and to their representatives for examination and copying in a reasonable manner and at reasonable times. The employee, former employee, and their representatives shall have access to the log for any establishment in which the employee is or has been employed.

* * *

29 C.F.R. § 1904.12 Definitions.

* * *

(c) "Recordable occupational injuries or illnesses" are any occupational injuries or illnesses which result in:

(c)(1) Fatalities, regardless of the time between the injury and death, or the length of the illness; or

(c)(2) Lost workday cases, other than fatalities, that result in lost workdays; or

(c)(3) Nonfatal cases without lost workdays which result in transfer to another job or termination of employment, or require medical treatment (other than first aid) or involve: loss of consciousness or restriction of work or motion. This category also includes any diagnosed occupational illnesses which are reported to the employer but are not classified as fatalities or lost workday cases.

(d) "Medical treatment" includes treatment administered by a physician or by registered professional personnel under the standing orders of a physician. Medical treatment does not include first aid treatment even though provided by a physician or registered professional personnel.

(e) "First Aid" is any one-time treatment, and any followup visit for the purpose of observation, of minor scratches, cuts, burns, splinters, and so forth, which do not ordinarily require medical care. Such one-time treatment, and followup visit for the purpose of observation, is considered first aid even though provided by a physician or registered professional personnel.

(f) "Lost workdays": The number of days (consecutive or not) after, but not including, the day of injury or illness during which the employee would have worked but could not do so; that is, could not perform all or any part of his normal assignment during all or any part of the workday or shift, because of the occupational injury or illness.

* * *

29 C.F.R. § 1910.304 Wiring design and protection.

* * *

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

* * *

29 C.F.R. § 1910.217 Mechanical power presses.

* * *

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