

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

in the Matter of Harry D. Peterson,
Commissioner, Department of Labor
and Industry, State of Minnesota,

Complainant,

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

VS.

Standard Storage Battery Company,

Respondent.

The above-entitled matter came on for hearing before State Hearing Examiner George A. Beck at 9:30 a.m. on Wednesday, March 26, 1980, in Room 552 of the Space Center Building, 444 Lafayette Road, Saint Paul, Minnesota. The hearing continued to the following day. The transcript of this hearing was completed on April 15, 1980, and the record closed on that date.

Steven M. Gunn, Special Assistant Attorney General, Fifth Floor, Space Center Building, 444 Lafayette Road, Saint Paul, Minnesota 55101, appeared on behalf of the complainant. Thomas Walker, Plant Manager, Standard Storage Battery Company, 2286 Capp Road, Saint Paul, Minnesota 55114, appeared on behalf of the respondent.

The following witnesses appeared at the hearing: Timothy N. Tierney, Senior Occupational Safety and Health Investigator, Department of Labor and Industry; Thomas Walker, Plant Manager, Standard Storage Battery Company.

Notice is hereby given, pursuant to Minn. Stat. 182.664, subd. 5 (1978), that the Findings of Fact and Order of the Hearing Examiner may be appealed to the Minnesota Occupational Safety and Health Review Board by the employer, employee or their authorized representatives within 30 days following the publication of said Findings and order.

Based upon all of the files, records and proceedings herein, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. This matter arises pursuant to complainant's authority granted in Minn. Stat. 182.661, subd. 3 (1978).
2. Respondent is an employer as defined by Minn. Stat. 182.651, subd. 7 (1978), and, at the time of the violations alleged by the complainant, had a manufacturing plant at 2286 Capp Road in Saint Paul, Minnesota, where the respondent is engaged in the manufacture of wet and dry acid storage batteries.
3. On October 8, 1979, Senior Safety Investigator Tierney conducted an inspection of respondent's plant subsequent to a complaint by an employee of Standard Storage Battery. (Tr. pp. 9-10) The closing conference for this inspection occurred on October 11, 1979. (Tr. p. 12)
4. As a result of the above-described inspection, the complainant issued two citations on November 29, 1979, the first of which alleged 12 nonserious violations, and the second of which alleged four serious violations. (Ex. 3) On November 29, 1979, the complainant also issued a notification of proposed penalty to respondent proposing penalties for Items 3, 8 and 9 of Citation No. 1 and for items 1, 2, 3, and 4 of Citation No. 2 in the total amount of \$798.00.
5. Additionally, on November 29, 1979, the complainant issued two notifications of failure to correct alleged violations and of proposed additional penalty to the respondent. The first notification alleged that the complainant discovered on October 8, 1979, that the respondent had not yet corrected violations which were first cited on August 4, 1977, for which a total penalty of \$714.00 was proposed. The second notification alleged that the respondent had not yet corrected violations first cited as a result of an inspection on June 7, 1978, for which a penalty of \$882.00 was proposed. (Ex. 1)
6. By letter dated December 5, 1979, and received by the OSH Review Board on December 6, 1979, the respondent filed a notice of contestation of the citations and proposed penalties. The complainant served a summons and notice and a complaint upon the respondent on January 15, 1980. The respondent filed its answer by letter dated January 25, 1980. In its notice of contestation

and its answer, the respondent stated that it wished to contest all violations and failure to correct alleged violations for which penalties were proposed with the exception of Citation No. 1, Item 3.

ITEMS INCLUDED WITHIN THE TWO CITATIONS ISSUED NOVEMBER 29, 1979

Item No. 8 of Citation No. 1 Issued November 29, 1979

7. The complainant alleged a violation of 29 C.F.R. 1910.212(a)(1).

Its citation (Ex. 3, p. 2) described the violation as follows:

Failed to guard the:

- (A) Ingoing nip points on the:
 - (1) Conveyor chains and pulleys below the paste mixer oven.
 - (2) Infeed roll and conveyor belt on the past mixer.
 - (3) Tail pulley and idler pulley at the outfeed end of the battery washer.
- (B) Upper mechanisms and ram of the cardboard compactor at the South end of the plant.

8. 29 C.F.R. 1910.212(a)(1) reads as follows:

(a) machine guarding--(1) Types of guarding. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are--barrier guards, two-hand tripping devices, electronic safety devices, etc.

on October 8, 1979, Mr. Tierney observed that there were two ingoing nip

points that were not guarded on the conveyor chains and pulleys underneath the

paste mixer oven. (Tr. pp. 17-18; Ex. 10) An ingoing nip point is usually

created by two rollers which are moving together and which would tend to draw

hands or clothing into the rollers. (Tr. p. 31) A pinch point is created

where equipment joins together and creates a very narrow opening and which

could cause a crushing type of injury from being caught between two objects.

(Tr. p. 31) Mr. Tierney testified that these nip points could have been

guarded by an expanded metal barrier placed over the side of the machine which

would prevent access or by a barrier guard built up around the pulleys. (Tr.

P. 21)

10. In regard to the infeed end of the paste mixer oven, Mr. Tierney ob-

served that a nip point existed at the infeed roll and conveyor belt.
(Tr.

pp. 18-20; Ex. 8) MT. Tierney testified that a guard could be placed over the

top of the roll which would extend down to approximately 3/8th of an inch

above the belt. (Tr. p. 21)

11. In his inspection of the battery washer, Mr. Tierney observed that

there were unguarded nip points at the tail pulley and the idler pulley at the

outfeed end of the machine. (Tr. pp. 21-22; Ex. 11) Mr. Tierney testified that an expanded metal guard could be placed over the opening near the idler pulley, and that the tail pulley nip point could be guarded by a sheet of metal that is placed underneath the belt but in front of the pulley. (Tr. p. 23)

12. Mr. Tierney also inspected a cardboard compactor at the south end of the plant. The machine has pinch points near the side of the upper mechanism of the machine. A guard was missing from this machine, and Mr. Tierney observed the machine being used without the guard in place. Mr. Tierney asked respondent's representative if a guard was available for the machine; however, it could not be located during the inspection. (Tr. pp. 23-25; Ex. 12) Mr. Tierney testified that an expanded metal guard could be placed across the upper portion of the machine. (Tr. p. 26)

13. The Department calculated only one penalty for the four violations of 1910.212(a)(1) and stated the penalty was based primarily upon the failure to guard the ingoing feed roll and conveyor belt on the paste mixer. (Tr. p. 27) Mr. Tierney rated the severity of a potential injury from this violation to be a "B". On a scale of A to F, a "B" type of injury would involve medical treatment other than first aid, but not necessarily any lost time or hospitalization or disability. Mr. Tierney rated the probability of injury at a six out of a maximum of ten, since the operator would be close to the nip point and the machine was operated 16 hours per day for more than 50% of the time. (Tr. pp. 28-29) The B-6 rating provided an unadjusted penalty of \$180.00. The unadjusted penalty was then adjusted downward by 30% for a final penalty of \$126.00. The respondent was allowed a 20% credit for its size since it has less than 100 employees. The respondent was allowed only a 10% reduction out of a maximum of 30% for the factor of good faith. This was because Mr. Tierney believed there were problems with the safety responsibility of the company, the participation of employees in safety programs, training programs

for employees, use of protective equipment, and housekeeping and first aid facilities. The respondent received no credit out of a possible 10%, for the factor of past history due to the failure to abate discussed later in these Findings. (Tr. pp. 29-30)

14. Mr. Walker testified that subsequent to the inspection, the respondent placed a 1/4 inch steel plate over the nip point at the infeed roll and

conveyor belt on the paste mixer oven. (Tr. P. 36; Ex. A) He believes that the plate created a new nip point. In regard to the battery washer, Mr. Walker testified that the nip points are underneath the machine and that it is not a machine that normally requires an operator and that the machinery is in the condition which the manufacturer supplied it. (Tr. p. 38) The respondent did add guards to the machine subsequent to the inspection (Ex. C), and at a later date added even more extensive guarding to prevent splashing. (Ex. D) In regard to the cardboard compactor, Mr. Walker testified that the alleged pinch point on the machine is very high on the machine and would require a deliberate move for someone to get caught in it. The respondent provided a guard for the upper part of the machine subsequent to the inspection. (Ex. B; Tr. pp. 39-40)
Item No. 9 of Citation No. I Issued November 29, 1979

15. Item No. 9 of Citation NO. 1 alleges a violation of of the standard

published at 29 C.F.R. 1910.132(a) and described the alleged violation as

follows:

Failed to provide protective shield or barrier on the east side of the pasting machine oven where hot surfaces were exposed to accidental contact. (Ex. 3, p. 2)

16. 29 C.F.R. 1910.132(a) provides as follows:

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

17. During his inspection, Mr. Tierney observed that the side of the

pasting machine oven presented a hot surface and was located next to an aisle

thus exposing employees to accidental contact. (Ex. 10; Tr. pp. 56-57)

Mr. Tierney placed a plastic ballpoint pen against the side of the oven for

approximately five seconds which caused the side of the pen to melt.

(Tr. p.

57; Ex. 49) Mr. Tierney testified that the oven is hot to the touch and could

cause severe burns. (Tr. p. 60) Mr. Tierney testified that a guardrail could be placed along side the oven to prevent employee contact. (Tr. p. 60)

18. MT. Tierney rated the severity of the injury at "IC", which would indicate a minor type of burn. The probability of injury was rated at a 3, based on his observation that an employee might be relatively close to the hazard but for a very short time. This rating resulted in an unadjusted penalty of \$120.00 to which Mr. Tierney applied the 30% credit for good faith, size and history computed in the same manner as discussed in Finding of Fact No. 13, which resulted in a proposed penalty for this item of \$84.00.

19. Mr. Walker testified that subsequent to the inspection, the respondent did install a guardrail along the side of the oven. (Ex. E) Mr. Walker testified that he felt the guardrail introduced new hazards in that employees have to have access to a sump located underneath the oven and they have to lean over the rail or crawl in between the rail and the machine. (Tr. pp. 62-63) Mr. Walker suggested that the cost of remedying a safety violation ought to be compared against the actual gain in safety. (Tr. pp. 65-69) He stated that the cost of the guardrail was approximately \$100. (Tr. p. 69) Mr. Walker testified that he believed the hazard was grossly exaggerated in regard to this alleged violation. (Tr. p. 71)

Item No. 1 of Citation No. 2 Issued November 29, 1979

20. Item No. 1 of Citation No. 2 (Ex. 3, p. 4) alleged a serious violation of 29 C.F.R. 1910.23(a)(2) and alleged that the violation consisted of: Failed to guard the opening to the fixed ladder from the runway, from the roof to the outside acid storage tank, on the south side of the building where the railing was open and unguarded.

21. 29 C.F.R. 1910.23(a)(2) reads as follows:

(2) Every ladderway floor opening or platform shall be guarded by a standard railing with standard toeboard on all exposed sides (except at entrance to opening), with the passage through the railing either provided with a swinging gate or so offset that a person cannot walk directly into the opening.

22. On the date of inspection, Mr. Tierney observed a runway which ran from the roof of the plant to an outside acid storage tank. The runway led to a platform next to the storage tank which had a ladder proceeding down to a

lower platform. The upper platform at the runway level was approximately 25

feet above the ground. There was no railing or other guard around the ladder-way floor opening at the point of the upper platform. (Tr. pp. 91-92; Ewxs.

13, 14) Mr. Tierney testified that a fall from the upper platform would have resulted in serious injuries, requiring hospitalization and lost time. (Tr.

p. 98) Mr. Tierney testified that the remedy for this violation would be a gate that would swing in one direction only, and through which a person would proceed before stepping onto the the outside ladder. (Tr. p. 94)

23. Mr. Tierney determined that the severity of the injury should be rated at a "D" since a fall would result in a disabling injury and that the probability of an injury should be rated a 3, based upon one employee who would be out on the platform less than 10% of the time. This rating translates to a \$180 unadjusted penalty, which was then reduced 30% for the factors discussed above and resulted in a proposed penalty of \$126. (Tr. p. 95)

24. Subsequent to the inspection, the employer did install a gate. (Tr. p. 96; Ex. F) Mr. Walker testified that this walkway is used only about once a month in order to measure the quantity of acid in the tank. He also testified that the person coming up the ladder (instead of using the walkway) might find the gate to be an obstacle. (Tr. pp. 96-97) Mr. Walker believed that his company should not be responsible for the lack of a gate since they did not design or build the walkway. (Tr. p. 97)

Item No. 2 of Citation No. 2 Issued November 29, 1979

25. Item No. 2 of Citation No. 2 alleges a violation of 8 MCAR

1.7133(a) and describe the alleged violation as follows:

Allowed employees to maintain, clean, adjust or service the pasting machine without locking out the main electrical power disconnect means and affixing a "Do Not Start" tag as described in 29 C.F.R. 1910.145(f)(3) to any and all operating controls.

26. 8 MCAR 1.7133 A. states as follows:

1.7133 Lockout devices.

A. Any main electrical power disconnect means which controls a source of power or material flow shall be locked out with a lockout device whenever employees are maintaining,

cleaning, adjusting, or servicing machinery or equipment, if such disconnect is not in clear sight of the employee. A "Do Not Start" tag as described in 29 CFR 1910.145 (f)(3) shall be affixed to any and all operating controls.

27. At the time of Mr. Tierney's inspection, the paste mixing machine was partially torn down for maintenance. Two employees were working on the machine. (Ex. 15) Mr. Tierney observed that the main power disconnect switch to the machine was in the "on" position. He testified that the switch was not in the direct view of the employees at all times and that there was not a "Do Not Start" or warning tag on the switch. (Tr. pp. 99-102) The purpose of the lockout procedure and tag is to prevent injuries when the start switch is either intentionally or accidentally hit while the machine is being repaired.

(Tr. p. 103) Mr. Tierney testified that since one employee was working on large chains and sprockets on the machine, there was a potential for a severe injury involving amputation of fingers or a similar injury. (Tr. p. 104)

28. Mr. Tierney rated the severity of a potential injury at a "D" because of the possibility of amputation and the probability at a 3, since one employee would be relatively close should an accidental act expose him to a hazard. The D-3 rating yielded an unadjusted \$180 penalty which, when adjusted for the 30% credit for good faith size and history resulted in a proposed penalty of \$126. (Tr. p. 105)

29. Mr. Walker testified that an unusual situation existed at the time of inspection since the employer's chief mechanic, who uses lockout tags, was not available to work on the machine and a second mechanic was not in the plant. (Tr. p. 108) He testified that in their absence, two of the men who operate the machine elected to try and fix the machine themselves. (Tr. p. 109) Item No. 3 of Citation No. 2 Issued November 29, 1979

30. Item No. 3 of Citation No. 2 (Ex. 3, p. 4) alleged a violation of 29

C.F.R. 1910.219(f)(3) and described the violation as follows:

Failed to fully enclose all sprocket wheels and chains on the pasting machine.

31. 29 C.F.R. 1910.219(f)(3) reads as follows:

(f) Gears, sprockets, and chains. . .

(3) Sprockets and chains. All sprocket wheels and chains shall be enclosed unless they are more than seven (7) feet above the floor or platform. Where the drive extends over other machine or working areas, protection against falling shall be provided. This subparagraph does not apply to manually operated sprockets.

32. Mr. Tierney testified that his inspection of the pasting machine showed that, even with the guard in place, the ingoing nip points on the drive chain on the left side of the machine near the aisle were exposed. (Tr. pp. 113-114; Exs. 16, 17) Mr. Tierney testified that the person's finger or clothing could be drawn into the nip point if it were caught by the chain and the sprocket and that a relatively simple extension of the present guard that extended over the area in question would prevent access of the operator to the nip point. (Tr. p. 116)

33. Mr. Tierney rated the severity of the injury at I'D" since hands or fingers can be caught in the chain and sprocket and be severely maimed or amputated and he, therefore, also classified this a serious violation. He rated the probability at 3, since one employee would be relatively close, but only infrequently, approximately four to five times a day. This translated into an unadjusted penalty of \$180, which was then unadjusted downward by 30%, resulting in a total proposed penalty of \$126. (Tr. pp. 117-118)

34. Mr. Walker stated that the machine in question was guarded as it was provided by the manufacturer and that you would actually have to insert your hand into the machine in order to encounter the hazard. (Tr. p. 118) He testified that the frequency of an employee getting hurt on the exposed sprocket and chain would be extremely remote. (Tr. p. 119)

item No. 4 of Citation No. 2 Issued November 29, 1979

35. Item No. 4 of Citation No. 2 (Ex. 3, p. 4) alleged a violation of 29

C.F.R. 1910.219(d)(1) and (e)(3)(i) and described the alleged violation as

follows:

Failed to fully enclose belts and pulleys on the pasting machine.

36. 29 C.F.R. 1910.219(d)(1) provides as follows:

(d) Pulleys- (1) Guarding. Pulleys, any parts of which are seven (7) feet or less from the floor or working platform, shall be guarded in accordance with the standards specified in para-

graphs (m) and (o) of this section. Pulleys serving as balance wheels (e.g., punch presses) on which the point of contact between belt and pulley is more than six feet six inches (6 ft. 6 in.) from the floor or platform may be guarded with a disk covering the spokes.

29 C.F.R. 1910.219(e)(3)(i) provides as follows:

(e) Belt, rope, and chain drives. . .

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

37. In the course of his inspection, Mr. Tierney also observed that the

paste mixer belts and pulleys on the west side of the machine on the main

drive were exposed and unguarded. (Tr. p. 120; Ex. 18) The maintenance man advised Mr. Tierney that they did not have a guard for this part of the ma-

chine. (Tr. p. 121) Mr. Tierney testified that the machine could be guarded

by putting a barrier over the side of the machine or directly over the belts

or pulleys. (Tr. p. 123)

38. Mr. Tierney testified that he rated this a serious violation since

the injury would involve severe mangling of the fingers or possibly amputa-

tion. This violation was again rated at a "D" for severity and a 3 for proba-

bility. The unadjusted penalty was \$180 and a 30% percent reduction was again

allowed for a resulting total proposed penalty of \$126. (Tr. pp. 122-123)

39. The employer guarded the area in question subsequent to the inspec-

tion). (Ex. G) Mr. Walker testified that the belts are well within the ma-

chine and did not constitute a hazard. (Tr. p. 124)

ITEMS INCLUDED WITHIN THE NOTIFICATION OF FAILURE TO CORRECT ALLEGED VIOLATION

AND OF PROPOSED ADDITIONAL PENALTY

Item No. 8 of Citation No. 1 Issued August 4, 1977

40. Item to. 8 of Citation to. 1 issued August 4, 1977, (Ex. 4, p.

alleged a violation of 29 C.F.R. 1910.133(a)(1) and described the violation as follows:

Failed to require protective eye and/or face protection where there is reasonable probability of injury that can be prevented by such equipment at the:

(a) Receiving dock adjustments area where batteries are tested, repaired, drained, and/or filled with electrolyte.

(b) "First-fill" battery electrolyte filling area.

(c) "Second-fill" battery electrolyte drain and fill area.

41. 29 C.F.R. 1910.133(a)(1) reads as follows:

(a) General. (1) Protective eye and face equipment shall be required where there is a reasonable probability of injury that can be prevented by such equipment. In such cases, employers shall make conveniently available a type of protector suitable for the work to be performed, and employees shall use such protectors. No unprotected person shall knowingly be subjected to a hazardous environmental condition. Suitable eye protectors shall be provided where machines or operations present the hazard of flying objects, glare, liquids, injurious radiation, or a combination of these hazards.

42. Mr. Tierney stated that in 1977, there was no eye or face protection

provided or required for protection from the sulfuric acid in either the re-

ceiving dock adjustments area or the first or second fill battery electrolyte

filling areas. (Tr. p. 130)

43. The Department's issuance of this 1977 citation and its proposed \$100

penalty was contested by the respondent and was affirmed by the Minnesota Oc-

cupational Safety and Health Review Board in a decision dated June 7, 1979.

(Ex. 5) The decision was not appealed to District Court. (Tr. p. 131)

Item No. 1 of Citation No. 1 and Item No. 1 of Citation No. 2 Issued June 7, 1978

44. On May 18, 1978, Mr. Tierney inspected the respondent's plant as a

result of an employee complaint concerning eye protection. (Tr. p. 133) This

1978 inspection concerned the acid areas of the plant, while the 1977 inspec-

tion described above concerned the receiving dock area. (Tr. p. 134) During

his Nov 18, 1978 inspection, Mr. Tierney observed that in the first fill acid

area, an operator was wearing only prescription eyeglasses where chemical

splash-proof goggles or a face shield was required. In the second fill acid

area, an employee was wearing only safety glasses with perforated plastic side

shields. The employee advised Mr. Tierney that he had gotten acid in his eyes

on an average of one to two times per week. Mr. Tierney observed the same situation in regard to the battery charging area and at the acid tank area as was the case for the first fill acid area, namely employees wearing prescription eyewear only. (Tr. pp. 134-136)

45. As a result of the above inspection, two citations were issued on June 7, 1978, which alleged a violation of 29 C.F.R. 1910.133(a)(1) of both a

non-serious and serious nature. (Ex. 2) These citations were contested by the respondent, and on December 12, 1978, Hearing Examiner Russell L. Doty issued an Order affirming both citations. (Ex. 7) The Hearing Examiner's order was not appealed to the Minnesota Occupational Safety and Health Review Board.

46. Both the June 7, 1979 Review Board decision (Ex. 5) and Hearing Examiner Doty's December 12, 1978 decision (Ex. 7) concluded that the Standards required either safety goggles or a face shield in the areas of respondent's plant described above and that was the only proper protective eyewear. (See also, Ex. 6) Both of these decisions were issued to the respondent prior to the October 8, 1979 inspection.

Reinspection on October 8, 1979 Relating to the Above-Described Items

47. During his October 8, 1979 inspection, Mr. Tierney found an employee working in the receiving dock adjustments area wearing only safety glasses with a flat fold side shield. The employee told Mr. Tierney that he had had acid splashed in his eyes in the last 15 months, most recently, approximately two weeks before the inspection. (Tr. p. 140) In the first fill tank area, he observed three employees not wearing chemical splash-proof goggles or a face shield. One of the employees was wearing only prescription eyeglasses. (Tr. p. 140; Ex. 21) In the second fill acid area, Mr. Tierney observed an employee wearing only safety glasses with flat fold side shields which were loose fitting and therefore slid down the employee's nose. (Tr. pp. 142-142; Ex. 19)

48. During his October 8, 1979 inspection, Mr. Tierney also inspected the acid tank tower area. At the time of the inspection, an acetate face shield was located and available for use in the top level of the tower. The plastic face shield had been attacked by acid, however, and was therefore difficult to see through (Tr. p. 145; Ex. 20) An employee advised Mr. Tierney that the mask was worn only when acid was being mixed and not for other trips up to check the tanks. (Tr. p. 146) The method of mixing the acid in this area is

to drop an air hose into the acre concentrated sulfuric acid which then creates a bubbling action. (Tr. p. 149-150) Mr. Walker advised Mr. Tierney that he believed that use of the face shield was purely optional and that safety glasses were sufficient. (Tr. p. 151) Mr. Tierney testified that the

effect of strong acids upon an acetate face shield is decomposition whereas a rigid vinyl face shield would be only slightly affected. (Tr. p. 152; Ex.

37) The clear vinyl face shield costs approximately \$3.00 per shield in quantities of 50 or more. (Tr. p. 153; Ex. 38) Acetate face shields are intended for use with non-corrosive liquids. (Ex. 39)

49. Mr. Tierney stated that the advantage of the rubber safety goggles over prescription Eyewear or ordinary safety glasses with a side shield is that they completely surround the eyes to provide protection against splashing of liquids. (Tr. pp. 155-156; Ex. 40) Mr. Tierney testified that ordinary safety glasses with a side shield would be appropriate for situations where frontal protection only is required and where articles of a solid nature might

fly back at the employee. (Tr. pp. 157-159; Exs. 41; 42, p. 7; 43, p. 6)

50. A notification of failure to correct alleged violation and proposed additional penalty was issued only for Item No. 1 of Citation St. 2 issued on June 7, 1978, and not for Item No. I of Citation No. 1 (a non-serious violation) issued on the same date. A penalty of \$882 was proposed for this failure to abate. It was calculated by taking the original penalty assessed in 1978, namely \$240, and allowing a 25% discount for abatement of the item which reduced the penalty to \$180. That penalty was then multiplied by a factor of

seven which was arrived at because the abatement date was over 50 days earlier.

The multiplier used by the Department for failure to abate is the factor 1 equals one day over the abatement date, 2 equals two days, 3 equals three to five working days, 4 equals six to ten working days, 5 equals 11 to 30 working days, 6 equals 31 to 50 working days, and 7 equals over 50 days.

This calculation resulted in an unadjusted penalty of \$1,260, which was then

discounted by the 30% for the items of good faith, size and history and resulted in a proposed penalty of \$882. (Tr. pp. 164-165; Ex. 1, p. 2)

Mr. Tierney testified that he considered 25% of the hazard to be abated due to the presence of the face shield and the fact that covers were installed on the two acid hot tanks. (Tr. pp. 166-167)

51. Mr. Walker testified that the respondent's general plant safety rules provided that approved eye protection equipment must be worn in posted areas and/or then performing hazardous tasks and also provided that only qualified and certified employees may mix acid. (Tr. p. 169; Ex. id) A training sheet given to employees who work in the acid tower provides that they should always

wear their safety glasses and states that "Face shields may be worn in addi-

tion to your safety glasses for complete protection, particularly while mixing

acid". (Tr. p. 170; Ex. I) A January 3, 1979 notice to all employees by the

respondent also emphasized the necessity of wearing proper safety gear. (Ex.

J) Mr. Walker also testified at the hearing as follows:

I think when we begin to look at some of these suggestions for face shields, and goggles, and safety glasses, and special materials and all this, we find that a lot of this stuff looks really good on print and looks real good in a laboratory analysis of blowing up things in front of the faces of manikins and stuff, but when it comes right down to the everyday practice of some of this stuff it really doesn't work. And I think that of all the people in this room I think I'm probably more qualified to say what works in our particular company and what doesn't work. We're a little bit miffed at having somebody coming in from outside telling us how we're going to protect ourselves from ourselves. (Tr. p. 175)

Mr. Walker testified that the safety goggles were inadequate for his type of

operation. (Tr. p. 179) He also stated that the face shields create a

greater hazard than the hazard they prevent and are cumbersome. (Tr. p. 183)

Mr. Walker admitted that the face shield located in the acid tower was in bor-

derline condition and probably should have been replaced. (Tr. p. 186))

Item No. 9 of Citation No. 1 Issued August 4, 1977

52. During his inspection on July 21, 1977 of the respondent's plant,

Mr. Tierney observed that in the receiving dock adjustments area employees

were working in close proximity to open pails of acid and batteries with open

caps, however, there were no emergency eye washing or quick drenching facilities provided.

This alleged violation was contested by the respondent and

resulted in a final decision by the Minnesota Occupational Safety and Health

Review Board dated June 7, 1979, which affirmed the citation. The decision

concluded that facilities for quick drenching or flushing were required. (Ex.

5, pp. 6-7)

53. Item No. 9 of Citation No. 1 issued August 4, 1977, alleged a viola-

tion of 29 C.F.R. 1910.151(c) and described the alleged violation as follows:

Failed to provide suitable facilities for quick drenching or flushing of the eyes and body within the work area for immediate emergency use where there is exposure to injurious corrosive materials (electrolyte) in the receiving dock adjustments area. (Ex. 4, p. 3)

54. 29 C.F.R. 1910.151(c) reads as follows:

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

Reinspection on October 8, 1979 Relating to the Above-Described Item

55. On his October 8, 1979 inspection, Mr. Tierney again inspected the receiving dock adjustments area and found that employees were still exposed to the possibility of splashes from the acid material and that no adequate facilities for quick drenching or flushing of the eyes had been provided except for a 16 ounce bottle of neutralizing solution that was located on the wall.

(Tr. In II-6; Ex. 25) An employee advised Mr. Tierney that he occasionally had to saw open a battery to locate the problem that the batteries had open vent holes which permitted splashing, and that he had recently gotten acid in his eyes. (Tr. p. 18) The nearest sink was located approximately 150 feet from the area, but did not have a quick opening valve, was not limited to 25 pounds pressure and was not provided with a mixing valve. (Tr. p. 7; Ex. 26) Mr. Tierney testified that the sink was too far from the receiving dock adjustments area to help an employee exposed to acid. The eye wash bottle was half-full and was not therefore a sterile and sealed bottle. Mr. Tierney testified that eye wash bottles can contribute to a more severe injury and are, therefore, not recommended for use. (Tr. p. 10; Exs. 45; 44)

56. The complainant proposed a penalty of \$294 for the failure to abate this item. The original unadjusted 1977 penalty was \$80 and it was assumed that 25% of the item was abated which resulted in a \$60 pro rated unadjusted penalty which was then multiplied by a factor of 7 since it was over 50 days past the abatement period which then produced an unadjusted penalty of \$420. That figure was reduced by 30% for the factors of 'good faith, size and history, yielding a \$294 total proposed penalty. (Ex. 1, In 1; Tr. p. 15) The 25% abatement was in consideration of the installation of the neutralizing bottle by Mr. Walker. (Tr. p. 15)

57. Mr. Walker testified that he was unaware of any incidents where em-

ployees received acid in their eyes, that he believed that the receiving area in question was safer than it was in 1977, and that since he purchased the eye

wash bottle from a reputable safety company, he believed that he ought to be able to rely upon it as a safety device. (Tr. pp. 20-21) Mr. Walker testi-

fied that the respondent had, subsequent to the October of 1979 inspection, installed an eye wash sink and deluge shower in the area in question. (Tr. p.

24) Mr. Walker also testified that he believed the enforcement of OSHA regulations had contributed to a decrease in productivity in his plant. (Exs. L, M; Tr. pp. 30-31)

Item No. 12 of Citation No. 1 Issued August 4, 1977

58. Item No. 12 of Citation No. 1 issued August 4, 1977, alleged 2 viola-

tion of 29 C.F.R. 1910.212(a)(3)(ii) and described the alleged violation as

follows:

Failed to guard the point of operation on the six grid casting machines near the west side of the plant. The trimming die and

the mold exposed the operator to injury. (Ex. 4, p. 3)

59. 29 C.F.R. 1910.212(a)(3)(ii) states as follows:

(ii) - The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding

device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

60. In 1977, Mr. Tierney found no guards on any of the six grid casting

machines. (T. 37) Each of the machines had two unguarded pinch points at the

molding die operation and at the trimming operation. (T. 36) This violation

was contested by the respondent and was affirmed by the Review Board in its

decision dated June 7, 1979. (Ex. 5, pp. 7-10)

Reinspection of the Above-Described Item on October 8, 1979

61. Mr. Tierney again inspected the grid casting machines on October 8,

1979. He observed that no action had been taken in regard the pinch point at the mold die area. (Tr. pp. 39-40; Exs. 28, 29) In regard to the trimming die area of the machine, Mr. Tierney discovered that a guard had been in-stalled which was intended to protect the sides of the levers on the side of the power transmission equipment on the top of the die. (Tr. pn 47; Ex. 32) The guard did not cover the ingoing areas of the trimming die which were cited

in the 1977 inspection. (Tr. p. 47) Two of the six guards that did exist in this area of the machine had been removed. (Tr. p. 49) During his inspection, Mr. Tierney observed employees reaching into the mold die and trimming die areas of the machine. (Tr. pp. 73-74) Mr. Tierney testified that a proper way to guard the die trimming area would be to fasten a barrier guard to prevent access to the pinch point where the mold itself physically comes together. (Tr. p. 50)

62. A penalty of \$420 was proposed for this failure to abate. (Ex. 1, p. 1) This was calculated by taking the original \$150 unadjusted penalty and applying an 80% unabated factor which resulted in a pro rated unadjusted penalty of \$120. This was then multiplied by a factor of 5 since the abatement was ordered 11 to 30 days prior to reinspection and this resulted in a \$600 unadjusted penalty. This was then reduced by 30% for the items of good faith, size and history, which resulted in the \$420 penalty. (Tr. p. 51) The 20% abatement was allowed because of the installation of the guards even though they were not effective as to the pinch points, were not secured in position, and therefore two of them had been removed. (Tr. p. 51)

63. Mr. Walker testified that subsequent to the inspection, the respondent did install guards in the mold die area of the grid casting machines, (Tr. p. 55; Exs. N, O and P) but that the pinch point guards are more of a hazard than they are a help. Mr. Walker testified that his employees complained about hurting themselves on the guards. (Tr. p. 55) Mr. Walker testified that the mold guards are not an acceptable solution and that as an alternative he is attempting to reduce the pressure on the actuating cylinder for the machine in order to make it safer. (Tr. p. 65) He stated that the company had provided unjamming sticks for the operators to allow them to unjam the machine with a stick rather than their hands. (Tr. p. 66) He also testified that it would not be possible to install a device which would automatically shut down the machine since there is a 10 to 15-minute start up time to

get the machine back on line again. (Tr. p. 56) Mr. Walker testified that his company took no action in regard to the mold area of the machine prior to the October 1979 inspection because of the apparent impossibility of the task. (Tr. p. 67) Mr. Walker also testified that his company was incurring substantial additional operating costs due to government regulations including OSHA regulations. (Tr. pp. 77-78; Ex. Q) The respondent has recently laid off a number of employees due to slumping sales. (Tr. pp. 79-81; Exs. R, S)

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. That the Occupational Safety and Health Review Board and the Hearing Examiner have jurisdiction in this matter pursuant to Minn. Stat. 182.664 (1978) and Minn. Stat. 15.052 (1978).
2. That the complainant gave proper notice of the hearing in this matter and has fulfilled all relevant substantive and procedural requirements of law or rule.
3. That the respondent was in violation of the standard published at 29 C.F.R. 1910.212(a)(1) on October 8, 1979, and that the \$126.00 penalty proposed by the complainant is appropriate.
4. That the respondent es in violation of the standard published at 29 C.F.R. 1910.132(a) on October 8, 1979, and that the \$84.00 penalty proposed by the complainant is appropriate.
5. That the respondent was in violation of the standard published at 29 C.F.R. 1910.23(a)(2) on October 8, 1979, and that the \$126.00 penalty proposed by the complainant is appropriate.
6. That the respondent was in violation of 8 MCAR 1.7133 A. on October 8, 1979, and that the \$126.00 penalty proposed by the complainant is appropriate.
7. That the respondent was in violation of the standard published at 29 C.F.R. 1910.219(f)(3) on October 8, 1979, and that the \$126.00 penalty proposed by the complainant is appropriate.
8. That the respondent was in violation of the standard published at 29 C.F.R. 1910.219(d)(1) and (e)(3)(i) on October 8, 1979, and that the \$126.00 penalty proposed by the complainant is appropriate.
9. That the violations cited in Conclusions no. 5 through 8 above have been shown to be serious violations within the meaning of Minn. Stat. 182.651, subd. 12.
10. That cm the date of the October 8, 1979 inspection, the respondent had failed to correct the violation of 29 C.F.R. 1910.133(a)(1) which was the subject of a final order of the Minnesota Occupational Safety and Health Review Board (by the Hearing Examiner) dated December 12, 1978. The penalty

of \$882.00 proposed by the complainant for the failure to abate is appropriate.

11. That on the date of the October 8, 1979 inspection, the respondent had failed to correct the violation of 29 C.F.R. 1910.151(e) which was the subject of a final order of the Minnesota Occupational Safety and Health Review Board dated June 7, 1979. The penalty of \$294.00 proposed by the complainant was correctly calculated except that the record demonstrates that for the reasons set out in the Memorandum attached hereto, no portion of this violation was abated.

The proper penalty is, therefore, \$392.00.

12. That on the date of the October 8, 1979 inspection, the respondent had failed to correct the violation of 29 C.F.R. 1910.212(a)(3)(ii) which was the subject of a final order of the Minnesota Occupational Safety and Health Review Board dated June 7, 1979. The proposed penalty of \$420.00 is appropriate.

13. That the violations of standards cited above also constitute a violation of Minn. Stat. 182.653, subd. 3 by the respondent.

14. That the respondent failed to prove a "greater hazard" or an "impossibility" or Et "employee misconduct" -affirmative defense in regard to any violation.

Based upon the foregoing Conclusions of Law, the Hearing Examiner makes the following:

ORDER

It is hereby ordered that:

1. That each of the citations and determinations of a failure to correct

a violation cited in the above Conclusions of Law is hereby affirmed.

2. That the proper total penalty for the violations contested herein is \$2,408.00.

3. That Standard Storage Battery Company shall forthwith pay to the Department of Labor and Industry the sum of \$2,408.00, plus a further \$84.00 for the uncontested penalty in regard to Item No. 3 of Citation No. 1 if this penalty remains unpaid.

Dated: May 7, 1980.

GEORGE A. BECK
State Hearing Examiner

MEMORANDUM

The record in this matter demonstrates that the complainant has proved by a preponderance of the evidence the violations and the failure to correct violations as alleged. In regard to several violations, the respondent argued that the suggested correction of the violation constituted a hazard. In none of the instances did the employer demonstrate that the remedy was a greater hazard than non-compliance which is the initial element of proof necessary to sustain such a defense. National Steel & Shipbuilding Co., 1978 CCH OSHD paragraph 22,808; General Electric Co. v. Secretary of Labor, 576 F.2d 558 (3d. Cir. 1978). At most, the employer showed only that some hazard may have remained after the remedy, such as a guard, was installed.

Likewise, the respondent alleged that in a couple of instances compliance was impossible. In order to sustain such a defense, the employer must establish that compliance with the standard is functionally impossible and that alternative means of employee protection were unavailable. A showing of impracticability or inconvenience, which is the most that Standard Storage has shown in this case, is not enough. General Steel Fabricators, Inc., 1977-78 CCH OSHD paragraph 22,104. Most of the remedies suggested by the complainant were in fact installed by the respondent subsequent to the inspection in October of 1979.

The respondent objected to the penalties assessed herein as excessive. A review of the record, and of the inspector's reasons for calculating the penalties, demonstrates that, with one exception, the penalties were properly calculated. If any error can be said to have been made, it was made in favor of the respondent. Several of the penalties might be viewed as lenient considering the nature of the violations and the employer's apparent reluctance to comply with the Act. The Department's calculation of no credit for past history and only a 10% credit for good faith is justified based upon the evidence in this case which reflects the respondent's unfortunate attitude that safety requirements imposed upon it are unnecessary, unreasonable, and simply

one more cost factor reducing its profitability.

In regard to the penalty discussed in Conclusion No. 11, the Department calculated this penalty by assuming that the hazard, namely the failure to

provide quick drenching or flushing facilities in the receiving dock adjust-
ments area, was 25% abated. This partial abatement was allowed because the
employer provided a neutralizing bottle. The uncontradicted testimony in the
record, however, is that such a bottle is not an improvement and can, in fact,
contribute to a more severe injury. Mr. Walker testified that he did not pro-
vide this bottle in response to the Review Board's decision, but rather be-
cause he simply believed that something of the sort ought to be located in the
area. The employer also failed to replace the bottle after use so that a
sterile bottle was available. In light of the fact: that the sterilizing bot-
tle did not improve safety and since the Review Board decision cannot reason-
ably be interpreted to require only the purchase of a neutralizing bottle, the
25% credit for abatement is inappropriate. The penalty is properly calculated
reflecting no abatement by the employer.

G.A.B.