

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

Steve Keefe, Commissioner, Department  
of Labor and Industry, State of Minnesota,

Complainant,  
FACT,  
V.

FINDINGS OF  
CONCLUSIONS AND  
ORDER

Marquette Elevator: ConAgra, Inc.,  
Respondent.

The above-entitled matter came on for hearing before Bruce D. Campbell, Administrative Law Judge, from the Minnesota Office of Administrative Hearings, on August 28-29, 1986, at 9:00 a.m., in Minneapolis, Minnesota.

Appearances: Louis Hoffman, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Complainant, Occupational Safety and Health Division, Minnesota Department of Labor and Industry (Complainant or Department); and Dean G. Kratz, McGrath, North, O'Malley & Kratz, Attorneys at Law, Suite 1101, Central Park Plaza, 222 South Fifteenth Street, Omaha, Nebraska 68102, appeared on behalf of Marquette Elevator, ConAgra, Inc. (Respondent or Employer).

The record herein closed on November 12, 1986, the date set by the Administrative Law Judge as the last date for the filing of a Reply Memorandum by the Complainant.

Notice is hereby given that, pursuant to Minn. Stat. 182.664, subd. 5 (1984), the Findings of Fact and Order of the Administrative Law Judge may be appealed to the Minnesota Occupational Safety and Health Review Board by the Employer, Employee or their authorized representatives within thirty (30) days following the publication of said Findings and Order. The procedures for appeal are contained in Minn. Rule 5205.5000.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are as follows-  
(1) Whether the Employer violated 29 C.F.R. 1910.303(b)(1) and, as a

consequence, Minn. Stat. 182.653, subd. 3 (1984), as a result of a broken cable and unfunctioning sensor on the hot bearing detector located on a tail pulley bearing in the west short gallery of the facility and, if a violation of 29 C.F.R. 1910.303(b)(1) and, as a consequence, Minn. Stat. 182.653, subd. 3 (1984), is found to have occurred, the appropriate penalty, if any, to

be assessed; (2) Whether the Employer violated 29 C.F.R. 1910.22(a)(1) and, as a consequence, Minn. Stat. 182.63, subd. 3 (1984), by failing to keep the place of employment in a clean, orderly and sanitary condition, as regards the tail pulley and adjacent aisles on the west long conveyor in the west gallery of the facility and the tail pulley and adjacent areas on the conveyor belt in the west short gallery, and, if a violation of 29 C.F.R. 1910.22(a)(1) and, as a consequence, Minn. Stat. 182.63, subd. 3 (1984), is found to have occurred, the appropriate monetary penalty, if any, to be assessed; (3) Whether the Employer violated 29 C.F.R. 1910.307(b) and, as a consequence, Minn. Stat. 182.63, subd. 3 (1984), by maintaining the open motors as hereinafter described in what is asserted to be a Class II, Div. 2 location: 30 h.p. GE motor for the longbelt at the west end of the tunnel; 10 h.p. GE drive motor to the short belt in the west gallery; the drive motor on the north belt in the new house tunnel; the 75 h.p. Fairbanks Morse new house leg drive motor in the headhouse; and the 30 h.p. Fairbanks Morse new house north belt drive motor in the new house tunnel; and, if a violation of 29 C.F.R. 1910.307(b), and, as a consequence, Minn. Stat. 182.63, subd. 3 (1984), is found to have occurred as a result of the use of such motors, the appropriate monetary sanction, if any, to be assessed; and (4) Whether the Employer violated 29 C.F.R. 1910.22(a)(1) and, as a consequence, Minn. Stat. 182.653, subd. 3 (1984), by failing to keep clean and orderly or in a sanitary condition the following portions of the facility: the area of the basement workhouse; the east end of the long belt located in the west gallery; and the aisle ways of the west gallery long belt conveyor system.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

1. On January 2, 1986, the Respondent maintained a worksite at 2300 Marshall Avenue Southeast, Minneapolis, Minnesota. The worksite consisted of a grain elevator for the storage of wheat and barley. The elevator had a capacity of 3.5 million bushels and, at the time of the inspection hereinafter discussed, had in storage 2.3 million bushels of wheat and .5 million bushels of barley.

2. On January 2, 1986, an occupational safety and health inspection was conducted by Steven Sobolewski, a senior safety investigator for the Occupational Safety and Health Division of the Department of Labor and Industry. Mr. Sobolewski has been employed by the Department for approximately two years and has partial responsibility for general industry

and feed and grain facility inspections in a ten-county area. He received a six-month training course with approximately two months of specialization in grain facility inspection. He has conducted some supervised inspections. Mr.

Sobolewski, prior to being employed by the Department, had approximately 15 years of underground mining experience. The inspection, conducted on January 2, 1986, was the result of a facility complaint received by the Department.

3. Mr. Sobolewski arrived at the worksite and met with Gary Anderson, the superintendent of the facility, Robert Szology, an official from the Shoreham Elevators, and Arnold Spenningson, the union representative. At the lengthy opening conference, the participants discussed, with a degree of particularity, the safety procedures that were in force at the facility.

4. After the opening conference, Mr. Sobolewski conducted an inspection of the elevator, accompanied by Mr. Anderson and the union representative. During the course of the inspection, Mr. Sobolewski went into the basement areas, the newhouse tunnel areas and into the galleries. A gallery is located along the tops of the storage bins and contains various entries for loading and unloading grain from one bin to another. It runs the length of the tops of the storage bins. Mr. Sobolewski also inspected the headhouse. The headhouse contains motors for driving the conveyor belts and is located at the very top of the facility.

5. In the west short gallery, Mr. Sobolewski detected a nonfunctioning cable and sensor on a hot bearing detector on the tail pulley. Although Comp. Ex. I shows the broken cable, the actual Babbitt bearing is located substantially below the area shown in the photograph.

6., Mr. Sobolewski felt the Babbitt bearing and testified that it was hot to the touch.

7. There is no OSHA or other occupational safety standard which requires an employer to use a hot bearing detector.

8. The area in proximity to the Babbitt bearing contained only traces of grain dust and there was no dust in suspension in the area of the cited bearing. The piles of material noted at Finding 15, supra, were raw grain which posed no fire or explosion hazard. See. Finding 19, supra.

9. There is no evidence in the record that even intentionally scooping the dust shown in Comp. Ex. 1 and placing it on the Babbitt bearing would cause a fire or explosion, given the conditions in the area surrounding the bearing.

10. A defective Babbitt bearing will appear worn as it malfunctions, make noise and result in a distinctive smell.

11. The employees at the facility routinely touch the exposed bearings to test their temperature and some employee is in the gallery where the cited bearing is located every day. It is impossible to go into the gallery without walking past the bearing. It is the duty of the employee who usually works in the gallery to regularly check all exposed bearings,

12. Mr. Sobolewski made no test to record the temperature of the Babbitt bearing.

13. On the day of the inspection, Mr. Anderson had touched the bearing and it felt warm.

14. Near the tail pulley in the west long conveyor in the west gallery, Mr. Sobolewski observed what he described as wheat and barley dust approximately 16 inches deep and four feet wide around the tail pulley. It was piled up to the level of the conveyor belt. Comp. Ex. 2, 3.

15. On the south side of the tail pulley in the west short gallery, Mr. Sobolewski observed what he believed to be a pile of wheat and barley dust three inches deep, 28 inches wide and seven feet long. Comp. Ex. 4; Comp. Ex. 5.

16. At the time of the inspection, there was no grain dust in suspension in the air in the locations indicated.

17. To cause an explosion from grain dust, there must be suspended in the air a sufficient amount of grain dust to significantly obscure vision, as resembling a dense fog, or resulting in the inability to see a distant wall. Brief of Respondent, October 13, 1986, pp. 25-26. The lower explosive limit for grain dust in suspension is 55 grams per cubic meter, resulting in the rough visual test previously stated.

18. Although Mr. Sobolewski took no tests to determine the amount of grain dust in suspension in the air in the two areas indicated, the photographs of the areas and his testimony establish that the requisite amount of dust, as measured against the visual indicia of an explosive level, was not in suspension.

19. The material described by Mr. Sobolewski accumulated in piles in the two areas was spilled raw grain, not grain dust. The grain shown in photographs 2, 3, 4, and 5 resulted from a grain spill which had occurred the working day previous to the date of the inspection. During Mr. Sobolewski's inspection, several employees were shoveling the grain from the areas indicated. Although they were wearing dust masks, such masks were not used during the shoveling of the material. Comp. Ex. 5.

20. Raw grain, as was spilled at the facility on the previous working day and shown in photographs 2, 3, 4 and 5, contains only approximately one-half of one percent of grain dust. The dust found in the grain spilled, as shown in the photographs, even if suspended, would not be sufficient to cause an explosion or fire, assuming an ignition source.

21. Although the facility had not been individually cleaned for approximately a week and a half, that period included a number of holidays and the period between regularly scheduled cleanups only amounted to several working days.

22. At the time of the inspection, four employees were cleaning the grain spill and it was completely removed on January 3, 1986.

23. There is no evidence in the record that ConAgra did not act diligently in cleaning the grain spill from the facility.

24. Mr. Sobolewski found a number of motors which were of an open type. He concluded that five such motors, as enumerated in the Statement of Issues, were not intrinsically safe, or approved for use in a Class II, Div. 2

location, since they were not "explosion proof".

25. In even the most well-maintained elevator, there will be some accumulations of grain dust at any given time. An elevator completely free of dust is impossible to maintain.

26. A grain elevator is, by definition, a Class II, Div. 2 location.

27. A Class II, Div. 2 location is one in which "combustible dust is not normally in the air in quantities sufficient to produce explosive or ignitable mixtures, and dust accumulations are normally insufficient to interfere with

the normal operation of electrical equipment or other apparatus, but combustible dust may be in suspension in the air as a result of infrequent malfunctioning of handling or processing equipment and where combustible dust accumulations on, in or in the vicinity of the electrical equipment may be sufficient to interfere with the safe dissipation of heat from electrical equipment or may be ignitable by abnormal operation or failure of electrical equipment." Resp. Ex. 2, p. 70-179.

28. At the time of the inspection herein, the outer portions of the motors and the immediately adjacent areas contained only traces of grain dust, appropriately described as moderate or less than moderate in amount.

29. Grain dust is nonconductive and nonabrasive.

30. The open motors can be reached for routine cleaning and maintenance.

31. The National Electric Code, Resp. Ex. 2, at p. 70-186, authorizes the use of standard open-type machines (motors) without sliding contacts, centrifugal or other types of switching mechanisms (including motor overcurrent, overloading and overtemperature devices), or integral resistance devices when accumulations of nonconductive, nonabrasive dust will be moderate and the motors can be easily reached for routine cleaning and maintenance.

32. The exception to the National Electric Code contained at Article 502-8(b)-Exception has been adopted by reference in Minnesota through the adoption of the federal OSHA standards. Reply Brief of Complainant, November 3, 1986, paragraph 2.

33. Mr. Sobolewski was unaware of the exception to the National Electric Code regarding the types of motors permissible for use in a Class II, Div. 2 location until it was brought to his attention at the hearing.

34. Although the area immediately adjacent to the motors contained only traces of grain dust and the exterior portions of the motors evidenced a similar amount of dust, Mr. Sobolewski assumed that the interior portions of the motors, which he erroneously described as fan-driven, would have unusual accumulations of grain dust.

35. There is no evidence in the record that the interior portions of the motors had any greater accumulations of dust than the slight or less than moderate amounts found on the exterior portions of the motors.

36. Mr. Sobolewski found piles of wheat and barley in the basement work house, the east end of the long belt in the west gallery, and near the aisle ways of the west gallery long belt. The product on the floor was the result of a grain spill that occurred the working day immediately preceding the inspection. It did not represent a typical condition of the worksite.

37. Grain spills are not uncommon in an elevator and, at the time of the inspection, at least four employees were engaged in cleanup activities. The spill was entirely removed by the next working day, January 3, 1986.

38. The spilled grain created no hazard of fire or explosion due to the low level of dust contained in raw grain. See, Finding 20, supra. Moreover, the spilled grain was not blocking any aisle way so as to create a hazard to the normal passage of employees during the course of their work.

39. The Facility is routinely cleaned according to a schedule established by the Employer. Resp. Ex. 1.

40. This routine maintenance schedule is customarily followed and there is no evidence in the record that the Employer had departed from the schedule immediately prior to the inspection. Any greater time period for elements of the cleanup was occasioned by the holidays immediately preceding the inspection.

41. After conducting the inspection, Mr. Sobolewski held a closing conference with Mr. Anderson and the union representative. At that time, he described his conclusions regarding the inspection and dates for abatement of what he considered to be the violations.

42. On January 10, 1986, two citations concerning the alleged violations were issued to the Employer. Comp. Ex. 16. The initial citation alleged three serious violations of OSHA standards. Item No. 1 alleged a serious violation of 29 C.F.R. 1910.303(b)(1). Mr. Sobolewski rated the asserted infraction as a E-2 violation. E is a violation where a person would receive a 60 percent permanent partial disability and miss more than ten days of work as a result of the severity of the hazard. The probability factor was arrived at by rating the "work conditions" and "employee control" factors at I each. The unadjusted penalty for the asserted violation was \$300.

43. Item No. 2 of Citation No. 1 asserted a serious violation of 29 C.F.R. 1910.22(a)(1). Mr. Sobolewski rated the infraction as a E-3 violation. The probability factor was arrived at by rating "work conditions" and "employee control" at I each plus a 1 for the one additional instance of the violation. The unadjusted penalty for the asserted infraction was \$350.

44. Citation 1, Item 3 asserted a serious violation of 29 C.F.R. 1910.307(b). Mr. Sobolewski rated the infraction as an E-6 violation. The probability factor was arrived at by rating "work conditions" and "employee control" at I each plus a 4 for the four additional instances of the asserted infraction. The unadjusted penalty was \$450.

45. The total unadjusted penalties, \$1,100, were reduced by a uniform credit factor of 55 percent. The good faith credit was 20 percent, the size credit was 30 percent, and the history credit was 5 percent.

46. As a result of the 55 percent credit, the proposed penalties for Citation No. 1 were as follows: Item 1 \$135; Item 2- \$157; Item 3--\$202.

47. The second citation asserted a nonserious violation of 29 C.F.R. 1910.22(a)(1) for which no monetary penalty was sought. The asserted infractions were termed nonserious because of the extremely low level of hazard to employees resulting from the occurrence.

48. By letter dated January 16, 1986, Respondent indicated an intention to contest the Citations, the type of alleged violations and the penalties proposed. The Occupational-Safety and Health Review Board, on March 4, 1986, erroneously dismissed the Respondent's Notice of Contest, which was reinstated by-the Board on May 20, 1986.

49. Complainant served a Summons, Notice and Complaint upon Respondent on June 4, 1986.

50. On June 6, 1986, the Respondent filed an Answer to the Complaint with the Occupational Safety and Health Review Board.

51. On July 25, 1986, the Board issued a Notice and Order for Hearing in the above-captioned matter which the Respondent received.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Minnesota Occupational Safety and Health Review Board and the Administrative Law Judge have jurisdiction herein and authority to take the action proposed pursuant to Minn. Stat. 182.661, subd. 3, 182.664 and 14.50 (1984).

2. The Board gave proper notice of this hearing and the Complainant and the Board have fulfilled all relevant substantive and procedural requirements of law and rule.

3. The Respondent is an employer as defined by Minn. Stat. 182.651, subd. 7 (1984).

4. The Complainant must establish the violations alleged and the appropriate monetary penalty for the serious violations by a preponderance of the evidence. Minn. Rules 1400.7300, subp. 5 (1985).

5. The Complainant has failed to establish a serious violation of 29 C.F.R. 1910.303(b)(1) and, as a consequence, Minn. Stat. 182.653, subd. 3 (1984), as regards the broken heat sensor on the hot bearing detector located on the tail pulley bearing in the west short gallery.

6. The Complainant has failed to establish a serious violation of 29 C.F.R. 1910.22(a)(1) and, as a consequence, Minn. Stat. 182.653, subd. 3 (1984), as regards a failure to keep clean and orderly the tail pulley and adjacent aisles on the west long conveyor in the west gallery and the tail

pulley and adjacent areas on the conveyor belt in the west short gallery.

7. The motors cited in Citation 1, Item 3, are within the exception for the maintenance of open motors in a Class II, Div. 2 location, as stated in Article 502-8(b), National Electrical Code, and that exception has been adopted in Minnesota as a consequence of the adoption of the OSHA standards by reference.

8. As a consequence of Conclusion 7, supra, the Complainant has failed to establish a serious violation of 29 C.F.R. 1910.307(b) and, as a consequence, Minn. Stat. 182.653, subd. 3 (1984), by the maintenance of the cited open motors in the grain elevator, a Class II, Div. 2 location.

9. The Complainant has failed to establish a non-serious violation of 29 C.F.R. 1910.22(a)(1) by the alleged failure to keep clean and orderly the area of the basement workhouse, the east end of the long belt located in the west gallery and the aisle ways of the west gallery long belt conveyor system.

10. Any Finding of Fact more properly termed a Conclusion, and any Conclusion more properly termed a Finding of Fact is hereby expressly adopted as such.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

Citation No. 1 is dismissed as to all of the three cited items.

Citation No. 2 is dismissed as to all instances of the one item cited.

Dated this 19th day of December, 1986.

BRUCE D. CAMPBELL  
Administrative Law Judge

Reported: Tape Recorded - Unauthorized, unofficial transcript prepared by Respondent.

MEMORANDUM

The Respondent is initially charged with a violation of 29 C.F.R. 1910.303(b)(1). The asserted violation is the broken heat sensor cable on the hot bearing detector located on the tail pulley bearing in the west short gallery. As indicated in the Findings, the employer is under no requirement to install such sensors. Moreover, the measures undertaken by the employer adequately guard against a defective Babbitt-type bearing, even if the absence of a hot bearing detector.

The Administrative Law Judge does not credit the testimony of the OSHA inspector regarding the asserted violation. Initially, he was not able to locate the bearing in the photograph that he took. He showed the bearing in some close proximity to the grain dust exhibited in Comp. Ex. 1. Further testimony indicated that the bearing was located several feet away from the area he indicated in the photograph. Moreover, when questioned about the hazard, he admitted that he had no opinion as to whether a fire or explosion could be caused by intentionally placing all of the grain dust in proximity to the bearing onto the bearing. His assertion of a hazard was apparently occasioned by his conclusion that a pile of material he thought proximate to the bearing was in fact grain dust. As Finding 19, supra, indicates, the material was grain.

Further, there is no definitive evidence in the record regarding the temperature of the bearing on the date of inspection. Mr. Sobolewski indicates that it was "hot"; Mr. Anderson indicates that it was "warm". The OSHA inspector has not borne the burden of proof of the existence of a

hazardous condition. Secretary of Labor v. Cargill, Inc., 7 OSHC 2114.

Given other conflicts in Mr. Sobolewski's testimony and his inability to locate the bearing in the photograph, the Administrative Law Judge concludes that Mr. Sobolewski assumed that the mere absence or malfunction of the sensor was sufficient to establish an OSHA violation. Needless to say, if the employer is not required to maintain the device, a malfunction of a voluntarily placed device gives rise to no greater duty. In summary, the Administrative Law Judge finds that the Babbitt bearing at the time of the inspection did not contain a recognized hazard likely to cause death or serious physical harm to the employees within the meaning of 29 C.F.R. 1910.303(b)(1).

The second asserted serious violation is the presence of what Mr. Sobolewski described as piles of grain dust located in two separate areas. A dispute arose in the record as to whether the material was grain or grain dust. Several witnesses testified that it was grain; Mr. Sobolewski felt that it was grain dust. An examination of the photographs and a comparison of the photographs which Mr. Sobolewski concedes contain grain rather than grain dust lead the Administrative Law Judge to the conclusion that the piles of materials shown in the photographs are grain, not grain dust. There is also strong circumstantial evidence that the material was raw grain. See, - Finding 19, supra.

The record shows that Mr. Sobolewski was entirely unfamiliar with the level of grain dust necessary to cause an explosion. As discussed on the record and stated in the Exhibits of the Respondent, a visual test for the lowest level of grain dust in suspension necessary to cause an explosion is that it would resemble a dense fog or render a person unable to see the opposite wall in a building. There is no suggestion in the record that the conditions at the elevator that day were sufficient to establish the lowest level of suspended grain dust necessary for an explosion.

The Complainant argues that, to establish the violation, they need only show the presence of the material, they need not show hazard. Brief of Complainant, October 10, 1986, p. 8-13. As stated by Respondent, however, there will always be some grain and grain dust in a grain elevator. It is impossible to keep the elevator entirely free of the material, even with the strictest standards of cleanliness. Under such circumstances, therefore, a violation of the standard is established when the amounts present give rise to the serious threat of a fire or explosion hazard. *Bunge Corp. v. Secretary of Labor*, 638 F.2d 831 (5th Cir. 1981) does not require a contrary conclusion. In that case the employer had stipulated to the presence of excessive amounts of grain dust.

In *Secretary of Labor v. Con Agra, Inc.*, Resp. Ex. 5, p. 14, the standard is stated as follows:

The word "clean", as used in this housekeeping standard, is

a relative, general term of no positive or precise meaning. But it may explain the standard's objective: to secure and preserve the health or well-being of employees by removing all ineffective or deleterious influences which would expose employees to health and safety hazards. Because it is a broad term, however, the meaning of "clean" in 1910.22(a)(1) will necessarily vary, depending upon the special circumstances of each case and upon the subject matter to which the term is applied.

The standard's imposed duty to keep "clean" work places has been applied to "significant" or excessive accumulations of grain dust. See *Con Agra, Inc. v. OSAHRC and Donovan*, 672 F.2d 699 (8th Cir. 1982); *Farmers Cooperative Grain and Supply Company*, 82 OSAHRC 59/C12, 10 BNA OSHC 2086, CCH OSHD 24,081, 26,301 (No. 79-1177, 1982). In the Commission's view, grain dust accumulations are "excessive" whenever they give rise to a fire or explosion hazard. See *Farmers Cooperative*, supra.

Adopting the testimony of ConAgra's witnesses that the material shown in the photographs is grain rather than grain dust, the facts in the instant case do not support an assertion that the amount of grain dust present was excessive so as to pose a threat of fire or explosion under any recognized test.

The Complainant asserts that even if the material was not grain dust posing an explosion hazard, a nonserious violation of the housekeeping standard has been established. However, the Administrative Law Judge finds that the material was present as a result of a grain spill, a not unusual occurrence in a grain elevator. The presence of the material did not represent the usual condition of the facility. The testimony supports the conclusion that the spill had occurred on the working day previous to the date of the inspection, and, at the time of the inspection, four employees were engaged in cleanup activities. The spill was completely removed on January 3, 1986. Further, there is no evidence in the record that the cleanup was not accomplished in a timely fashion. Under such circumstances, the Respondent has established that it acted appropriately to remove the grain spill in a timely fashion. Hence, no violation of the housekeeping standard, 29 C.F.R. 1910.22(a)(1), is found with respect to Citation 1, Item 2, serious or nonserious. *Con Agra, Inc.*, 1984 OSHD paragraph 27,061.

The third asserted serious violation arises from the maintenance of open motors in an area which, it is alleged, allow only for explosion-proof motors, rather than the open motors placed by the Employer. The Administrative Law Judge finds that a grain elevator, with normal cleaning schedules, is a Class II, Div. 2 location inherently. *Con Agra, Inc.*, OSHRC Docket No. 84-254, CCH paragraph 27,296 (April 19, 1985); *Con Agra, Inc. v. Swanson*, 356 NW.2d 825 (Minn. App. 1984).

As recognized by the Respondent, however, the National Electric Code contains an exception which allows the placement of open motors in certain Class II, Div. 2 locations under defined circumstances. Mr. Sobolewski was totally unaware of this exception at the time of the Citation and until it was brought to his attention at the hearing. The conditions for application of the exception are as stated at Finding 31, supra. The Administrative Law Judge finds that the conditions for the application of the exception to the instant fact situation were present. The Complainant argues that Minnesota has never specifically adopted that exception to the National Electric Code, and, hence, the exception should be ignored. The Administrative Law Judge agrees with the position of the Respondent that Minnesota has implicitly

adopted the exception to the National Electric Code contained in Article 502-8(b) by adopting the OSHA standards by reference. Reply Brief of Respondent, November 3, 1986, paragraph 2.

The Administrative Law Judge also finds that the Complainant has failed to establish the nonserious violations of the housekeeping standard asserted in Citation 2. There is no doubt that the material was present in the locations as alleged. However, there is no dispute in the record that the material was not dust but was, in fact, whole grain, posing no fire or explosion threat. Nor was the grain blocking passageways, posing a falling hazard. There is no evidence that it was unsafe to work around the spill. Myron Nickman Co., Inc., 1973-74 OSHD paragraph 16,694. Moreover, the grain was present as the result of a grain spill on the working day immediately preceding the inspection. At the time of the inspection, at least four employees were remedying the condition. It was completely corrected the following day. Under such circumstances, the Employer was proceeding with all appropriate alacrity to remedy the spill. There is no evidence in the record of any dilatory conduct in the cleanup. Hence, it is not appropriate to find a violation of the OSHA standard. Con Agra, Inc., 1984 OSHD paragraph 27,061.

Should the Board disagree with the Administrative Law Judge and reinstate any of the serious violations, the Administrative Law Judge finds that the characterization of the asserted violations according to severity and exposure, the unadjusted proposed penalties, and the credits given the Employer in the initial Citation would be appropriate.

B.D.C.

