

**FINAL ORDERS OF THE VIRGINIA COURTS**  
**IN**  
**CONTESTED CASES ARISING UNDER THE**  
**VIRGINIA OCCUPATIONAL SAFETY AND HEALTH ACT**

**VOLUME XIV**

**JULY 1, 1992 - JUNE 30, 1993**

**ISSUED BY**

**The Virginia Department of Labor and Industry**  
**Posers-Taylor Building**  
**13 South Thirteenth Street**  
**Richmond, Virginia 23219**

**Carol A. Amato, Commissioner**

## PREFACE

This publication contains the orders of the Virginia General District and Circuit Courts in contested cases from July 1, 1992 through June 30, 1993, arising under Title 40.1 of the Code of Virginia, 1950, as amended July 1, 1992. The Department of Labor and Industry is responsible for publishing the final orders by virtue of §40.1-49.7 which states, "The Commissioner of Labor shall be responsible for the printing, maintenance, publication and distribution of all final orders of the General District and Circuit Courts. Every Commonwealth's Attorney's office shall receive at least one copy of each such order (1979, C. 354)."

The Table of Contents provides an alphabetical listing of the reported cases for the fiscal year. The full texts of decisions are categorized as Health or Safety and are arranged and indexed in alphabetical order.

Reference is made to Title 29 of the Code of Federal Regulations, Parts 1910 and 1926. These regulations were adopted by the Virginia Safety and Health Codes Board pursuant to section 40.1-22 of the Code of Virginia, as amended. The Standard's Index provides a reference to cases which involved these regulations. The Subject Index provides an alphabetical listing of the hazard or regulation cited and contested for all cases.

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OCCUPATIONAL HEALTH

PART I

-----  
VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO

Carol A. Amato, Commissioner of Labor and Industry,	)	
	)	
Plaintiff,	)	
v.	)	Chancery No. CH93-000354
	)	
CATLETT-JOHNSON CORPORATION,	)	
	)	
Defendant.	)	

AGREED ORDER

Comes now the Commissioner of Labor and Industry (Plaintiff) by counsel, Susan F. Dobbs, Assistant Commonwealth's Attorney for Henrico County, and Catlett-Johnson Corporation (Defendant), in order to provide for the health, safety, and welfare of defendant's employees and to conclude this matter without the necessity for further litigation, do stipulate and agree as follows.

TERMS AND CONDITIONS OF AGREEMENT

1. The parties are before this Court pursuant to Virginia Code § 40.1-49.4.E (1992 Supp.), to be heard on Defendant's contest of certain Virginia Occupational Safety and Health (VOSH) Citations and Proposed Penalties, arising from inspection number 112374954, and issued to Defendant by Plaintiff on December 11, 1991, (copy of the citations attached). This case was brought

before this Court pursuant to recent amendments to Code § 40.1-49.4.E, establishing jurisdiction effective July 1, 1992. The citations alleged the following violations of VOSH Standards for General Industry:

**SERIOUS VIOLATIONS**

- a. **§ 1910.38(a)(1)** - Where employer has elected to partially evacuate the workplace in emergencies, employer had no written or oral emergency action plan. Penalty \$560.00.
- b. **§ 1910.101(b)** - In reference to Compressed Gas Association pamphlet, § 3.4.4 (1965); employer did not secure compressed gas cylinder against displacement while in use. Penalty \$560.00.
- c. **§ 1910.215(a)(4)** - Employer did not maintain a properly adjusted work rest on an electric bench grinder. Penalty \$560.00.

**OTHER THAN SERIOUS VIOLATIONS**

- d. **VOSH Administrative Regulation Manual § 11.3.A** - Employer did not have VOSH poster posted at the work place. Penalty \$80.00.
- e. **§ 1910.147(c)(4)(i)** - Employer did not provide formal employee training on using Lock-out Tag-out equipment. No penalty.
- f. **§ 1910.1200(h)(2)(ii)** - Employer did not provide formal employee training on hazards of handling chemicals in the workplace, specifically, duct adhesive. No penalty.

**TOTAL PROPOSED PENALTY \$1,760.00.**

2. In accordance with Title 40.1 of the Code of Virginia, and in consideration of the actions of the Commonwealth regarding the instant citations, Defendant agrees to pay a penalty of \$1,080.00 in lieu of the penalties originally proposed in the citations. The total penalty due is to be remitted to the Department of Labor and Industry within fifteen (15) days after the Defendant

has received a fully executed copy of the agreement.

3. The above violations and penalties are amended as follows:

a. Serious Citation 1, item 1 is affirmed with a penalty of \$420.000.

b. Serious Citation 1, item 2 is amended as follows:

2

**Title 40.1-51.1(a), Code of Virginia:** The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that:

(a) In the shop area a compressed gas cylinder containing 75% CO2 and 25% Argon was not supported or chained to prevent it from falling over.

One feasible and acceptable abatement method, among others, to correct this hazard is to secure the compressed gas cylinder against a wall, in an upright cart or dolly, or elsewhere by means of a chain or other securing device. This abatement method is outlined in the Compressed Gas Association Pamphlet P-1-1991, at § 3.7.4.1.

(b) In the shop area a compressed gas cylinder, while not in use did not have installed a valve cover protecting the exposed valves from accidental breakage. On the Commissioner's information and belief, manufacturers and distributors of compressed gas cylinders provide protective caps with the cylinders.

One feasible and acceptable abatement method, among others, to correct this hazard is to secure a protective metal cover over the exposed valves while the compressed gas cylinder is not in use. This abatement method is outlined in the Compressed Gas Association Pamphlet P-1-1991, at § 3.4.1.

This violation is affirmed with a penalty of \$420.00.

c. Serious Citation 1, item 3 is affirmed with a penalty of \$240.00.

- d. Other-than-serious Citation 2, item 1 is affirmed and the penalty is vacated.
- e. Other-than-serious Citation 2, item 2 is affirmed with no penalty.
- f. Other-than-serious Citation 2, item 3 is vacated.

TOTAL AMENDED PENALTY \$1,080.00.

4. As consideration for the modification of the terms of the original citations, the Defendant agrees to withdraw its original notice of contest filed with respect to the above-styled case and waives its right to contest the remaining terms contained in this agreement. The Defendant further agrees to comply with the terms in paragraphs 5 through 10.

5. The Defendant agrees to develop and implement a written emergency action plan within thirty days of the effective date of the Settlement Agreement. This must include, at a minimum, a written program which sets out the methods by which the requirements of §1910.38(a)(2) shall be met, an employee alarm system, the types of evacuations to be conducted, and training of employees in the procedures for safe and orderly emergency evacuation. The Defendant will provide to the Department for review, at the end of this 30 day period, a copy of the written program and records of the training conducted, including a summary of the content of the sessions, the date of each session, the names of all persons attending, the name of the person(s) conducting the training, and the instructors'

qualifications to conduct the training. This documentation shall be sent to:

Charles L. Stiff, Regional Supervisor  
Department of Labor and Industry  
Main Street Station, Suite 222  
1500 East Main Street  
Richmond, VA 23219

6. The Defendant agrees to periodically and regularly conduct hazard communication training for all employees, including those previously trained. Specific emphasis shall be placed on the physical and health hazards for all the chemicals to which employees are exposed. It is of particular importance that the person responsible for conducting these training sessions be fully aware of the physical and chemical hazards of the materials in order to conduct an effective training program. The first session of this training will be conducted within thirty days of the date of execution of this settlement agreement. Records of the first training session shall be sent to the address listed in Paragraph 5 above, and shall include a summary of the content of the session, the names of all persons attending, the name of the person(s) conducting the training, the instructors qualifications to conduct the training, and the scheduled dates of future sessions.

7. The Defendant agrees to post a copy of this Settlement Agreement for a period of thirty (30) days at a conspicuous location where notices to its employees are generally posted.



8. Pursuant to Va. Code § 40.1-51.3:2, the fact of an issuance of a citation, the voluntary payment of a civil penalty by a party, or the judicial assessment of a civil penalty under Chapter 3 of Title 40.1 of the Code of Virginia shall not be admissible in evidence in the trial of any action to recover for personal injury or property damage sustained by any party. This agreement may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia.

WHEREFORE, upon the agreement of the parties and for good cause shown, it is hereby ORDERED that the Virginia Occupational Safety and Health Citations as amended above, and the total penalty of \$1,080.00, are AFFIRMED and become a final order of this Court in accordance with Code § 40.1-49.4.E, (1992 Suppl.).

The Clerk shall mail certified copies of this Agreed Order to the parties listed below, and to the Commissioner of Labor and Industry, 13 South Thirteenth Street, Richmond, Virginia 23219.

Enter: George F. Tidey  
Judge

June 8, 1993  
Date



**CONSTRUCTION SAFETY**

**PART II**

-----  
VIRGINIA:

THE GENERAL DISTRICT COURT OF THE COUNTY OF STAFFORD

COMMONWEALTH OF VIRGINIA <u>ex rel.</u>	)	
Commissioner of Labor and Industry	)	
Plaintiff,	)	
	)	
v.	)	Case No. V92-06
	)	
CARL E. SMITH, INC.	)	
Defendant.	)	

**AGREED ORDER**

Comes now the Commissioner of Labor and Industry (Plaintiff) by counsel, Irene Ultee, Assistant Commonwealth's Attorney for Stafford County, and Carl E. Smith, Inc. (Defendant) by counsel, in order to provide for the health, safety, and welfare of defendant's employees and to conclude this matter without the necessity for further litigation, do stipulate and agree as follows:

1. The parties are before this Court pursuant to Va. Code Ann. § 40.1-49.4.E (1991 Supp.), to be heard on Defendant's contest of certain Virginia Occupational Safety and Health (VOSH) Citations and Proposed Penalties, arising from inspection number 112374236, and issued to Defendant by Plaintiff on August 16, 1991. The citations alleged the following violations of VOSH Standards for

the Construction Industry:

**SERIOUS VIOLATIONS**

1-1a        § 1926.21(b)(2) - The employer did not observe a requirement to instruct its employees in the observation and recognition of unsafe conditions, specifically, the recognition and avoidance of unsafe trenching and excavation situations.

1-1b        § 1926.651(j)(1) - In a trench measuring 6 to 10 feet deep, the employer failed to provide protection against rocks falling from the edge of the trench on to employees.

1-1c        § 1926.651(k)(1) - In two trenches measuring 6 to 10 feet deep, the employer failed to ensure that inspections of the area were conducted by a competent person prior to entry by employees.

1-1d        § 1926.652(b) - In a trench measuring 6 feet 6 inches deep, the employer failed to provide adequate sloping of the trench walls in accordance with this standard.

For the grouped violations 1-1a through 1-1d a single penalty of \$810.00 was proposed.

1-2a        § 1926.59(g)(8) - The employer did not maintain and make available on the work site copies of the Material Safety Data Sheets (MSDS) for compressed acetylene and oxygen, welding rods, and gasoline.

1-2b        § 1926.59(h) - The employer did not provide training on hazardous chemicals used in the work site, or on the requirements of the Hazard Communication Standard.

For the grouped violations 1-2a and 1-2b a single penalty of \$540.00 was proposed.

1-3        § 1926.100(a) - The employer did not ensure that hard hats were worn while employees were exposed to injury when working in a 6 to 10 feet deep trench. A civil penalty of \$720.00 was proposed.

1-4        § 1926.601(b)(4) - The employer had in use a Harvester-International truck which was not equipped with an operable back-up alarm. A civil penalty of \$630.00 was proposed.

**REPEAT**

2-1        § 1926.652(a)(1) - In a trench measuring 6 feet 6 inches deep, and an excavation measuring 7 to 10 feet deep, the employer failed to provide protection from cave-in

through either sloping or shoring of the trench walls in accordance with this standard. A civil penalty of \$1,400.00 was proposed.

#### **OTHER THAN SERIOUS**

- 3-1 § 1926.150(C)(1)(viii) - On the employer's Harvester-International truck a portable fire extinguisher did not have a tag indicating the last annual inspection. No civil penalty was proposed.
- 3-2 § 1926.152(a)(1) - Employer was using two gas cans, which were not approved metal containers equipped with self-closing lids. No civil penalty was proposed.
- 3-3 § 1926.350(j) - An oxygen cylinder stored in the bed of a flatbed truck were not separated by a noncombustible barrier from a stored acetylene cylinder. No civil penalty was proposed.

The total proposed penalty of \$4,100.00 was determined according to provisions of the VOSH Field Operations Manual, and calculated according to the severity of the violations, the duration of exposure, and the previous history of the employer.

2. No employee or employee representative appeared in this matter or has filed a notice of contest.

3. Defendant withdraws its notice of contest to the violations and penalty as amended below. The Plaintiff and Defendant agree to the following amendments of the citations at issue:

#### **SERIOUS VIOLATIONS**

- 1-1a § 1926.21(b)(2) - This violation is vacated.
- 1-1b § 1926.651(j)(1) - This violation remains as issued.
- 1-1c § 1926.651(k)(1) - This violation remains as issued, with a civil penalty for the grouped items 1-1b and 1-1c of \$405.00.
- 1-1d § 1926.652(b) - This violation is vacated.

- 1-2a § 1926.59(g)(8) - This violation is vacated.
- 1-2b § 1926.59(h) - This violation is vacated.
- 1-3 § 1926.100(a) - This violation remains as issued with a civil penalty of \$720.00.
- 1-4 § 1926.601(b)(4) - This violation remains as issued with a civil penalty of \$630.00.

**REPEAT**

- 2-1 § 1926.652(a)(1) - This violation is amended to a general violation classified as serious, whereby VOSH may, for three years from the entry of the final order in this case, treat any violation of this section as a second Repeat violation. Defendant retains the right to contest the underlying citation but agrees not to contest the characterization of the penalty for purposes of penalty calculation. A civil penalty of \$1,400.00 is attached to this violation.

**OTHER THAN SERIOUS**

- 3-1 § 1926.150(C)(1)(viii) - This violation remains as issued with no civil penalty.
- 3-2 § 1926.152(a)(1) - This violation remains as issued with no civil penalty.
- 3-3 § 1926.350(j) - This violation is vacated.

Based on the above amendments, the total civil penalty is amended to \$3,155.00.

4. Defendant agrees to remit to the Commissioner of Labor and Industry, at 13 South Thirteenth Street, Richmond, Virginia 23219, the civil penalty of Three Thousand One Hundred and Fifty-Five Dollars, (\$3,155.00), as assessed in paragraph 3 above, no later than fifteen days after notification of entry of this Agreed Order. A check or money order shall be made payable to "Commonwealth of Virginia."

5. This Agreed Order shall be posted by the Defendant with the original citations for ten (10) working days at a conspicuous place, or where notices to employees are normally posted.

6. By entering into this Agreed Order, the defendant does not admit any of the allegations contained in these citations. The defendant specifically denies each allegation and states that it has executed this Agreed Order solely for the purpose of settling this matter economically and amicably without further litigation. Pursuant to Va. Code § 40.1-51.3:2 and § 4.3 of the VOSH Administrative Regulations Manual, this Order may not be construed as an admission to any civil liability in any action for personal injury or property damage.

WHEREFORE, upon the agreement of the parties and for good cause shown, it is hereby ORDERED that the Virginia Occupational Safety and Health Citations and proposed penalties as amended above, be AFFIRMED and become a final order of this Court in accordance with Va. Code Ann. § 40.1-49.4.E, (1991 Suppl.).

The Clerk shall mail certified copies of this Agreed Order to the parties listed below, and to the Commissioner of Labor and Industry, 13 South Thirteenth Street, Richmond, Virginia 23219.

Enter: July 15, 1992

John W. Scott, Jr.  
Judge

We ask for this:

By: \_\_\_\_\_ /S/  
Irene Ultee  
Assistant Commonwealth's Attorney  
P.O. Box 66  
2127 Jefferson Highway  
Stafford, Virginia 22554-0066  
(703) 659-8780

Seen and agreed:

By: \_\_\_\_\_ /S/  
Dana L. Rust, attorney for Defendant  
McGUIRE, WOODS, BATTLE & BOOTHE  
One James Center  
901 East Cary Street  
Richmond, Virginia 23219  
(804) 775-1082



VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

**CAROL A. AMATO,**  
Commissioner of Labor and Industry,

Plaintiff,

v.

**DOREY ELECTRIC COMPANY,**

Defendant.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

No. L92-990

**ORDER**

On October 6, 1992, Commissioner Amato came in person and by counsel and Dorey Electric Company came by counsel to be heard upon Dorey's Plea In Bar and Commissioner Amato's motion for a declaration tht Virginia Occupational Safety and Health Standards are constitutional.

Upon consideration of the pleadings and the arguments of counsel, the court is of the opinion that Commissioner Amato is not collaterally estopped to bring this action. Accordingly, Dorey's plea in bar is OVERRULED.

The Clerk shall certify copies of this order to Messrs. Ware and Frank.

ENTER this 15th day of December, 1992.

John C. Morrison  
Judge

FOURTH JUDICIAL CIRCUIT OF VIRGINIA  
CIRCUIT COURT OF THE CITY OF NORFOLK

June 15, 1993

Guilford D. Ware, Esq.  
Crenshaw, Ware & Martin  
1640 NationsBank Center  
Norfolk, Virginia 23510

John R. Butcher, Esq.  
Assistant Attorney General  
Commonwealth of Virginia  
Office of the Attorney General  
Supreme Court Building  
101 North Eighth Street  
Richmond, Virginia 23219

Re: Carol A. Amato, Commissioner of Labor and Industry  
v. Dorey Electric Company  
L92-990 and C92-1766

Gentlemen:

This action is pending in this Court on the motion of Carol A. Amato, Commissioner of Labor and Industry, to declare that, notwithstanding the ruling in a previous criminal proceeding that the rules and regulations Dorey was accused of violating were adopted under an unlawful delegation of legislative authority, the Virginia Occupational Safety and Health statute setting forth the same is not unconstitutional.

On December 5, 1990, a grand jury indicted Dorey for willful violations of Code §40.1-49.4(K). This Court, on January 6, 1992, dismissed the indictment holding that the VOSH safety and health rules and regulations were promulgated pursuant to an unconstitutional delegation of legislative power and thus, were void. On January 13, 1992, a summons of the General District Court of the City of Norfolk was issued to Dorey upon its notice of contest to the civil citations made against it (Code §40.1-49.4(E)). That Court, by letter of March 17, 1992, held that the Commissioner was collaterally estopped by the dismissal of the criminal prosecution to prove the civil action. That decision was appealed to this Court, where it was held that collateral estoppel did not bar this action as the Commonwealth did not have a full and fair opportunity to litigate these matters as it could not secure appellate review since the defendant was charged with only a misdemeanor.

Guilford D. Ware, Esq.  
John R. Butcher, Esq.  
June 15, 1993  
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The Commissioner's motion to consolidate for argument two separate cases has been granted and thus the requested determination of the constitutionality of the statute providing the rules and regulations in question pends in two cases where Dorey contests the citations against it; L92-990 and C92-1766.

The Commonwealth argues that the safety and health codes board has been provided adequate standards to guide the promulgation of rules and regulations for the safety and health of employees. The defendant argues that it is being charged with the violation of rules and regulations promulgated by an administrative body under enabling legislation which does not provide a standard to give the Safety and Health Codes Board any guidance or provide proper control for the exercise of discretion allowed and that the effect is to give unbridled discretion to the administrative agency in question and that this is an unconstitutional delegation of legislative power and violative of due process of law. The Court is persuaded that it should adhere to its previous decision and declare that the statute providing for the rules and regulations in question is unconstitutional.

Code §40.1-22(5) states as follows:

"The Board, with the advice of the Commissioner, is hereby authorized to adopt, alter, amend, or repeal rules and regulations to further, protect and promote the safety and health of employees in places of employment over which it has jurisdiction and to effect compliance with the Federal Occupational Safety and Health Act of 1970 (P.L. 91-596), and as may be necessary to carry out its functions established under this title. The Commissioner shall enforce such rules and regulations. All such rules and regulations shall be designed to protect and promote the safety and health of such employees. In making such rules and regulations to protect the occupational safety and health of employees, the Board shall adopt the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity. However, such standards shall be at least as stringent as the standards promulgated by the Federal Occupational Safety and Health Act of 1970 (P.L. 91-596). . . ." (Emphasis added)

Guilford D. Ware, Esq.  
John R. Butcher, Esq.  
June 15, 1993  
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The legislature has failed to set forth a sufficient standard by which action under the delegated legislative power should be exercised in the promulgation of rules and regulations.

In the case of Chapel v. Commonwealth, 197 Va. 406 (1955), a case from Norfolk, our Supreme Court at page 410 citing Thompson v. Smith, 155 Va. 367, 379, 154 S.E. 579, 71 A.L.R. 604, said as follows:

"It is a fundamental principle of our system of government that the rights of men are to be determined by the law itself and not by the let or leave of administrative officers or bureaus. This principal ought not to be surrendered for convenience or in effect nullified for the sake of expediency. It is the prerogative and function of the legislative branch of the government whether state or municipal, to determine and declare what the law shall be and the legislative branch of the government may not divest itself of this function or delegate it to the executive or administrative officers. ... The majority of the cases lay down the rule that statutes or ordinances vesting discretion in administrative officers and bureaus must lay down rules and tests to guide and control them in the exercise of the discretion granted in order to be valid;..."

The court in Chapel further cites at page 413 language in the case of State v. Harris, 216 N.C. 746, 6 S.E. (2d) 854:

"In licensing those who desire to engage in professions or occupations as may be proper subjects of such regulation, the legislature may confer upon executive officers or bodies the power of granting or refusing to license persons to enter such trade or professions only when it has prescribed a sufficient standard for their guidance. (Emphasis added) 16 CJS, Constitutional Law, page 373 §138, and cases cited. Where such a power is left to the unlimited discretion of a board to be exercised without the guide of legislative standards the statute is not only discriminatory but must be regarded as an attempted delegation of the legislative function offensive to both the state and federal constitution ..."

Guilford D. Ware, Esq.  
John R. Butcher, Esq.  
June 15, 1993  
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As stated above, the Court is convinced that such is the case here and that no adequate standard is expressed by the legislature. To the contrary, it is stated clearly in the enabling legislation that "the board shall adopt the standard... However such standard shall be at least as stringent as the standards promulgated by the Federal Occupational Safety and Health Act of 1970..." (Emphasis added) This legislation further says that the board may adopt rules and regulations, etc. to further protect and promote the safety and health of employees in the place of employment. The Commonwealth argues that reference to the federal act is sufficient but the Court finds first, that it is the legislature and not the Board which must adopt the standards, and that even if the Board could so act, the language of the statute establishes only a floor with regard to the stringency of such regulations and standards but it does not define them adequately and leaves the board free to adopt almost any standards above that floor that it sees fit.

As pointed out by the defendant, the fact that the statute specifies that the rules and regulations shall be designed to "protect and promote the safety and health" of employees does not cure the defect.

"A delegation of legislative power to an administrative officer or board is not brought within the permissible limits of such designation by describing the public welfare or good as a standard for the actions of the administrative officer or board." Andrews v. Board of Supervisors, 200 Va. 637 641 (1959) (citing Panama Refining Company v. Ryan, 293 U.S. 388 (1934); Connelly v. General Construction Company, 297 U.S. 385 (1926)).

The case of Noblecraft Industries, Inc. v. Secretary of Labor, 614 F.2d 199 (9 Cir. 1980) is instructive here regarding the provision for appropriate standards. The case basically stands for the proposition that Congress did not, by resorting to National Consensus Standards for implementation of the Federal Occupational Safety and Health Act, improperly delegate legislative and administrative power to private organizations, i.e., American National Standards Institute. The term "National Consensus Standard" is defined as any occupational safety and health standard or modification thereof which (1) has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary of Labor that persons interested and affected by the scope or provisions of the standard have

Guilford D. Ware, Esq.  
John R. Butcher, Esq.  
June 15, 1993  
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reached substantial agreement on its adoption; (2) was formulated in a manner which afforded an opportunity for diverse views to be considered, and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.

The adoption of such standards by the legislature, or a more clearly written statute referencing specific standards and more particularly defining the limits of same, if this was the intent of the legislature, would cure the defect perceived by this Court.

For all of the reasons stated then, the Court finds that the power granted by the legislature in this arena has left to the board in question unlimited discretion to be exercised without the guide of sufficient standards and that the statute must be regarded as an attempted delegation of the legislative function offensive both to the state and federal constitution. The summonses citing violations in both cases are dismissed.

I will ask that Mr. Ware prepare an appropriate order reflecting the views stated herein, and submit the same to Mr. Butcher for endorsement and presentation to the court.

Very truly yours,

/S/

John C. Morrison, Jr.  
Judge

JCM:emp

VIRGINIA:

THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

COMMONWEALTH OF VIRGINIA <u>ex rel.</u>	)	
Commissioner of Labor and Industry	)	
Plaintiff,	)	
	)	
v.	)	Case No. V92-119466
	)	
FALLS CHURCH CONSTRUCTION CORPORATION	)	
Defendant.	)	

AGREED ORDER

Comes now the Commissioner of Labor and Industry (Plaintiff) by counsel, John R. Murphy, Assistant Commonwealth's Attorney for Fairfax County, and Falls Church Construction Corporation (Defendant) by counsel, in order to provide for the health, safety, and welfare of defendant's employees and to conclude this matter without the necessity for further litigation, do stipulate and agree as follows:

1. The parties are before this Court pursuant to Va. Code Ann. § 40.1-49.4.E (1992 Supp.), to be heard on Defendant's contest of certain Virginia Occupational Safety and Health (VOSH) Citations and Proposed Penalties, arising from inspection number 105724116, and issued to Defendant by Plaintiff on February 25, 1991, (copy of the citations attached). This case was transferred to this Court by Order of the General District Court, concurrent with recent amendments to Va. Code § 40.1-49.4.E, which changed jurisdiction effective July 1, 1992. The citations alleged the following violations of VOSH Standards for the Construction

Industry:

**SERIOUS VIOLATIONS**

- 1-1        § 1926.300(a) - The employer did not maintain a safe power tool, in that a portable power saw was being used with a broken blade guard. A civil penalty of \$350.00 was proposed for this violation.
- 1-2        § 1926.403(i)(2)(i) - The employer left exposed live parts of electrical equipment operating at over 50 volts, in that employees were using a 220 volt masonry saw which had an uninsulated power cable. A civil penalty of \$420.00 was proposed for this violation.
- 1-3        § 1926.500(b)(1) - On the 2nd and 3rd floors of the construction site floor openings over an elevator shaft and stairways were not guarded by guardrails or a secured cover. A civil penalty of \$490.00 was proposed for this violation.
- 1-4        § 1926.500(b)(2) - On the 2nd and 3rd floors of the construction site floor access openings were not guarded by standard guardrails. A civil penalty of \$490.00 was proposed for this violation.
- 1-5        § 1926.500(d)(1) - On the 2nd and 3rd floor level of the construction site the open-sided floors were inadequately guarded by 1/4 inch wire cable, which sagged to the floor between supports. A civil penalty of \$810.00 was proposed for this violation.

**OTHER THAN SERIOUS**

- 2-1        § 1926.151(a)(3) - The employer did not have posted within the vicinity of a 250 gallon refueling tank a conspicuous sign reading, "No Smoking Or Open Flame." No civil penalty was proposed for this violation.
- 2-2        § 1926.152(c)(3) - The employer did not erect a 12 inch dike around a 250 gallon diesel fuel storage tank to contain or divert possible spills. No civil penalty was proposed for this violation.

The total proposed penalty of \$2,560.00 was determined according to provisions of the VOSH Field Operations Manual, and calculated according to the severity of the violations, the duration of exposure, and the previous history of the Defendant.



2. No employee or employee representative appeared in this matter or has filed a notice of contest.

3. Defendant withdraws its notice of contest to the violations and penalty as amended below. The Plaintiff and Defendant agree to the following amendments of the citations at issue:

**SERIOUS VIOLATIONS**

1-1 § 1926.300(a) - The item is amended to than Other Than Serious, and affirmed with a civil penalty of \$350.00.

1-2 § 1926.403(i)(2)(i) - The item is affirmed as issued with a civil penalty of \$420.00.

1-3 & §§ 1926.500(b)(1) & (b)(2) - The two items are combined  
1-4 as two instances of § 1926.500(b)(2) and affirmed as a grouped Serious violation. A civil penalty of \$490.00 is assessed.

1-5 § 1926.500(d)(1) - The item is amended to a Serious violation of § 1926.500(f)(1)(vi)(b), affirming the alleged violation description and civil penalty of \$810.00.

**OTHER THAN SERIOUS VIOLATIONS**

2-1 § 1926.151(a)(3) - The item is affirmed as issued.

2-2 § 1926.152(c)(3) - The item is affirmed as issued.

Based on the above amendments, the total civil penalty is amended to \$2,070.00.

4. The Employer certifies that the alleged violations have been abated. With the signed and notarized copy of this agreement, Defendant encloses payment to the Commonwealth of Virginia of \$2,070.00, as the total civil penalty assessed in paragraph 3 above.

5. This Agreed Order shall be posted by the Defendant with the original citations for ten (10) working days at a conspicuous place, or where notices to employees are normally posted.

6. Pursuant to Va. Code Ann. § 40.1-51.3:2 (1990 Repl. Vol.), in the trial of any action to recover for personal injury or property damage sustained by any party, in which action it is alleged that an employer acted in violation of or failed to act in accordance with any provision of this chapter or any state or federal occupational safety and health standards act, the fact of the issuance of a citation, the voluntary payment of a civil penalty by a party charged with a violation, or the judicial assessment of a civil penalty under Chapter 3 of Code § 40.1, or any state or federal occupational safety and health standards act, shall not be admissible in evidence.

WHEREFORE, upon the agreement of the parties and for good cause shown, it is hereby ORDERED that the Virginia Occupational Safety and Health Citations and proposed penalties as amended above, be AFFIRMED and become a final order of this Court in accordance with Va. Code Ann. § 40.1-49.4.E, (1992 Suppl.).

The Clerk shall mail certified copies of this Agreed Order to the parties listed below, and to the Commissioner of Labor and Industry, 13 South Thirteenth Street, Richmond, Virginia 23219.



VIRGINIA:

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY

COMMONWEALTH OF VIRGINIA

V.

:

ORDER

MONTGOMERY PARKS INCORPORATED

D/B/A VISTA VIA DEVELOPMENT COMPANY

FILE NO. 11039

And it appearing unto the Court that the above-named defendant was indicted by the Grand Jury of Montgomery County on April 1, 1991, with the following offense: that it did "willfully violate safety statutes and/or regulations promulgated under Title 40.1 of the Code of Virginia thereby causing the death of their employee, Simon Peter Eyre, by suffocation from an earthen trench cave-in" in violation of Virginia Code Section 40.1-49.4(K). This is known as a "criminal willful" violation.

However, the above-named defendant has since that time filed a Petition in Bankruptcy asking for a reorganization under Chapter 11 of the Bankruptcy Laws of the United States. The penalty for a violation of Virginia Code Section 40.1-49.4(K) is a fine of \$10,000 and/or a jail sentence of six months. The jail sentence could not be imposed against a corporation and only the fine would be a possible punishment, should the defendant be convicted of the "criminal willful" violation. It is the opinion of this Court that the Bankruptcy filing will result in a stay of the collection of any penalty which might be assessed against the above-named defendant.

Therefore the Court does grant the Commonwealth's Motion for a nolle prosequi on the indictment against Montgomery Parks Incorporated D/B/A Vista Via Development Company. Further, the Court does ORDER this matter stricken from its active docket.

I ask for this Order.

                  /s/                    
Phillip E. Keith  
Commonwealth's Attorney

I have seen this Order.

                  /s/                    
John S. Huntington  
Attorney for the defendant

ENTER THIS ORDER THIS 15TH  
DAY OF April, 1993.

                  Kennith I. Devore                    
JUDGE

LLOYD C. SULLENBERGER, JUDGE

Sixteenth Judicial Circuit  
P.O. Box 230  
Orange, Virginia 22060

February 19, 1993

Mr. Paul R. Walther  
Assistant Commonwealth's Attorney  
135 W. Cameron Street  
Culpeper, Virginia 22701

Mr. Joseph H. Kasimer  
Attorney at Law  
7653 Leesburg Pike  
Falls Church, Virginia 22043

RE: Amato, Commissioner, etc.  
v.  
Shirley Contracting Corporation  
Culpeper 92-C-211

Dear Counsel:

Pursuant to Virginia Code §40.1-49.4(E), as amended effective July 1, 1992, Carol A. Amato, Commissioner of Labor and Industry (the Commissioner), filed a bill of complaint against Shirley Contracting Corporation (Shirley) seeking to enforce proposed penalties for alleged violations by Shirley of the Virginia Occupational Safety and Health (VOSH) Standards, Virginia Code Title 40.1, Chpt. 3, Art. 5. Shirley has filed a demurrer and a plea in bar.

The demurrer avers that the Commissioner failed to allege necessary steps in the enforcement procedure which the plea in bar avers she failed to take. The court will address the plea in bar because if the case must be dismissed, the demurrer is obviously moot.

From the bill of complaint and the plea in bar, facts necessary to understand the posture of the case may be gleaned. Shirley has filed a supporting and a rebuttal memorandum, and the Commissioner has replied to the supporting memorandum, all of which the court has considered.

Following a workplace inspection by the Commissioner's agent on May 28, 1991, the Commissioner issued citations against Shirley on September 10, 1991.

Shirley notified the Commissioner on September 20, 1991 of its intention to contest the citations. On September 25, 1992, the Commissioner, through the office of the Commonwealth's Attorney for Culpeper County, filed the bill of complaint in this court.

Shirley's procedural complaint is that almost a year elapsed from the date it notified the Commissioner of its contest of the citations to the date on which the bill of complaint was filed.

Shirley points out that until July 1, 1992, when a statutory amendment became effective, Code § 40.1-49.4(E) required that the Commissioner, upon receipt of the notice of contest, "shall immediately notify the attorney for the Commonwealth for the jurisdiction wherein the violation is alleged to have occurred and upon issuance and service of a proper summons, the general district court shall promptly set the matter for hearing."

Under the pre-July 1, 1992, statute the decision of the general district court was appealable of right for a de novo trial in circuit court as a preferred docket matter. § 40.1-49.5.

Now Code § 40.1-49.4(E) requires that the Commissioner, upon receipt of notice of contest, "shall immediately notify the attorney for the Commonwealth for the jurisdiction wherein the violation is alleged to have occurred and shall file with the circuit court a bill of complaint." The current statute requires the circuit court to promptly set the matter for hearing.

Shirley argues that the statutes--prior and current--contemplate prompt litigation of claims of safety violations. The statutes provide that the citation must issue within six months of the alleged violations; that the employer must contest by notice sent within 15 days after receipt of the citation; and then the Commissioner must proceed according to the requirements outlined above.

Shirley says the suit must be dismissed. It avers that its ability to prepare and defend has been compromised by the delay in that several employees from the time of the alleged violations no longer work for it, and the whereabouts of at least one of those employees is unknown to it.

The Commissioner says that dismissal should not be granted. In essence, the Commissioner suggests she can proceed when she wishes to file the suit because there was not and is not a specific statutory period within which to bring the suit. The word "immediately" as used in the statute, according to the Commissioner, refers only to when the Commonwealth's attorney had to be notified by the Commissioner.

In the Commissioner's brief she states that the Commonwealth's attorney was not notified until September 1992; that her office and Shirley negotiated the matter--ultimately unsuccessfully--from September 1991 until February 1, 1992; that because the 1992 General Assembly amended the statute to grant original jurisdiction to the circuit court beginning July 1, 1992, the Commissioner wanted to wait until the new law was in effect. She suggests that had she proceeded in general district court before July 1, 1992, on that date that court would have been divested of jurisdiction. This court does not address that issue.

The Commissioner makes a detailed argument based on sentence structure that "immediately" in § 40.1-49.4(E) modified only when she shall notify the Commonwealth's attorney and not when the suit shall be filed.

The entire statutory scheme, before and after amendment, indicates the intent of the General Assembly that prompt resolution be had of contested claims of safety violations. Clearly the Commissioner does not have unfettered discretion as to when to sue.

The court has reviewed administrative decisions under the federal Occupational Safety and Health Act (OSHA) which the VOSH Standards parallel.

A failure by the Commissioner to comply with procedural requirements, without more, does not constitute adequate grounds for dismissing the suit. Noranda Aluminum Inc., 1981 OSHD 25, 086 (No. 79-1059, 1980). Dismissal would only be appropriate when procedural noncompliance causes prejudice to the opposing party. See Choice Electric Corp., 14 OSHC 1899 (No. 88-139, 1990); Pennsylvania Electric Co., 11 OSHC 1235 (No. 80-5211, 1983); TRG Drilling Corp., 1982 OSHC 32, 319 (No. 80-6008, 1981).

The issue is prejudice to Shirley. Loss of relevant testimony could deny Shirley the opportunity to prepare and present its defenses.

Since it would be wasteful to the litigants and to the court to allow the matter to go to full trial with Shirley being permitted to establish that it has been prejudiced by the Commissioner's delay, the court will conduct a hearing on the limited issue of the prejudicial effect of the delay on Shirley's ability to prepare and present its case.

The Commissioner having caused the inordinate delay, Shirley shall have the burden of going forward with evidence that it is prejudiced thereby.



If Shirley presents credible evidence of prejudice, the Commissioner shall have the burden of persuasion that the suit should not be dismissed.

Counsel for Shirley shall prepare an order reflecting this ruling, and ordering a hearing on the issue of prejudice due to delay. Counsel may set up such a hearing through my office in Orange, estimating the time necessary for hearing evidence and argument on the limited issue. In lieu of ore tenus hearing the parties may agree to take and present depositions and written argument.

Yours very truly,

/S/

Lloyd C. Sullenberger

LCS:f

cc: Patricia M. Payne, Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF CULPEPER COUNTY

CAROL A. AMATO, Commissioner of	)	
Labor & Industry,	)	
	)	
Plaintiff,	)	
	)	
v.	)	In Chancery No. 92-C-211
	)	
SHIRLEY CONTRACTING CORP.	)	
	)	
Defendant.	)	

ORDER

This cause came to be heard upon the demurrer and plea in bar filed by the Defendant Shirley Contracting Corporation, the memoranda of counsel, and the argument of counsel. Upon mature consideration, the Court finds that the Plaintiff has not complied with procedural requirements. Accordingly, it is

ORDERED, that a hearing shall be held on a mutually agreed date in order to allow Shirley to establish that it has been prejudiced by loss of relevant testimony or otherwise. Shirley will have the burden of going forward with evidence that it is prejudiced by the delay. If Shirley presents credible evidence of prejudice the Commissioner shall have the burden of persuasion that the suit should not be dismissed.

The Court's letter of opinion, of February 19, 1993 is incorporated herein by reference as is fully set forth.

ENTERED this 17th day of March, 1993.

\_\_\_\_\_  
/S/  
Lloyd C. Sullenberger  
Circuit Court Judge

SEEN AND OBJECTED TO as to the  
failure to dismiss without further hearing.

\_\_\_\_\_/S/  
Joseph H. Kasimer  
Kasimer & Ittig, P.C.  
7653 Leesburg Pike  
Falls Church, Virginia 22043  
(703) 893-3914

SEEN AND OBJECTED TO:

\_\_\_\_\_/S/  
Paul Walther  
Assistant Commonwealth Attorney  
135 West Cameron Street  
Culpeper, Virginia 22701  
(703) 825-0020





VIRGINIA:

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY

COMMONWEALTH OF VIRGINIA

V.

:

ORDER

GEORGE EDWARD VIA

FILE NO. 11040

And it appearing unto the Court that George Edward Via was indicted on April 1, 1991 by the Grand Jury of Montgomery County for the crime of involuntary manslaughter of Simon Peter Eyre on June 6, 1990, in violation of Virginia Code Section 18.2-36. And it further appearing unto the Court that a Stipulation of Facts was entered into by the Commonwealth and the defendant, and was filed with the Clerk of this Court on March 3, 1993. The defendant also filed a Memorandum of Law and a Motion to Strike the indictment on March 3, 1993.

The Court has had the opportunity to study the Stipulation of Facts and the Memorandum of Law. In addition, both parties have had the opportunity to present their case ore tenus. The Court sees no evidence from the Stipulation of Facts that the defendant was in any way guilty of criminal negligence, that is, that conduct required to prove the case of involuntary manslaughter.

Therefore, it is the ORDER of this Court that the defendant's Motion to Strike the indictment be granted and that the case be cleared from the active docket of this Court.

I ask for this Order.

/s/                    
John S. Huntington

I have seen this Order.

                  /s/                    
Phillip E. Keith

ENTER THIS ORDER THIS   16TH    
DAY OF   April  , 1993.

                  Kennith I. Devore                    
JUDGE

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