

**STATE OF VERMONT
OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD**

COMMISSIONER,
VERMONT DEPARTMENT OF LABOR,
Complainant

v.

Docket No. RB 962

JANITRONICS, INC.,
Respondent

**FACTUAL FINDINGS AND CONCLUSIONS,
LEGAL REASONING and CONCLUSIONS, DECISION and ORDER**

Introduction

On August 25, 2014, the Department of Labor [Department] served a serious violation citation [citation] [29 U.S.C. 666(k); 21 V.S.A. 210(a)(2)] on Janitronics, Inc. [Janitronics] for violating a federal regulation [29 C.F.R. 1910.1200(g)(8)] adopted pursuant to 654(a)(2) of the respective federal Occupational Safety and Health Act (OSHA) [29 U.S.C. 651-678] and the Vermont Occupational Safety and Health Act (VOSHA) [21 V.S.A. 201-231]. The Department's citation essentially charged Janitronics with not having safety data sheets available in its workplace for two chemicals at Bennington, VT in February and March 2014. Section 1910.1200(g)(8) requires that "[t]he employer shall maintain in the workplace copies of safety data sheets for each hazardous chemical, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area." A safety data sheet is defined in the code of federal regulations [C.F.R.] as "written or printed material concerning a hazardous material that is prepared in accordance with paragraph (g) of this Section." 19 C.F.R. 1919.1200(a). Safety data sheets are written communications prepared by manufacturers/importers for use by employers and employees that describe a hazardous chemical's properties, hazards, routes of exposure, safety precautions for handling and use, first aid procedures, and control measures to help respond to chemical exposure situations. Oregon OSHA Fact Sheet, What is a Material Safety Data Sheet (MSDS). Those who deal with safety data sheets also refer to them as a "material safety data sheets," or the initialism, "MSDS."

Janitronics is a company with 1600 employees that provides janitorial services for commercial businesses in Vermont and New York. It has been in business for forty-three years; and Janitronics and its employees have unblemished workplace safety and health records.

The Department's serious violation citation followed the Department investigation of Janitronics on February 28 and March 6, 2014 that were instigated by a February 26, 2014 telephone complaint. The complaint alleged that Janitronics used an unknown chemical without a safety data sheet and kept it in a storage cabinet at its Bennington, Vermont workplace. This was where it provided janitorial services to a company known as Energizer.

Factual Findings and Conclusions

1. The following are factual findings based on evidence presented at hearing, and the Department's citation of Janitronics for a serious violation on file in the Vermont Occupational Safety and Health Review Board's [VOSHRB] case file.
2. After due notice, this matter was heard on January 28, 2015 at the VOSHRB's offices, Baldwin Street, Montpelier, pursuant to its Simplified Proceedings Rules [Subpart M, Rules 2200. 200-2200.209].
3. Dirk Anderson, Esq. represented the Vermont Department of Labor and Industry [Department]; and Mr. Christopher Patrie, Janitronics' Director of Human Resources, represented Janitronics.
4. Also present at the hearing were the Honorable Thomas Jagielski, a member of the Board, Ms. Carolyn Desch, the Board's Clerk, and Ms. Debra L. Kingsbury, a Senior Occupational Safety and Health Compliance Specialist [inspector] for the Department.
5. There were two witnesses: the inspector and Mr. Patrie.
6. The first action at the hearing was the administration of the oath to both witnesses.
7. The second action was the admission without objection of the Department's exhibits 1 through 7 and the admission of Janitronics' exhibits 1 through 3. Department exhibits 8 and 9 also were admitted during the hearing without objection.
8. The third action was providing a copy of the "Summary of Pre-Hearing Conference" [pre-hearing summary] conducted on the afternoon of January 27, 2015.

9. The summary had been provided to the parties electronically late on the afternoon of January 27, 2015.
10. The parties reviewed the summary and approved with one exception.
11. Mr. Patrie corrected the number "33," which is at the very end of line 10 in paragraph three of the summary, by changing it to "43;" and the summary was entered into the record.
12. The "33" was a typographical error, as 43 was recalled to be what Mr. Patrie said at the pre-hearing conference.
13. After the close of the evidence, the parties were provided three weeks, i.e., until February 18, 2015 for providing to the hearing officer any post hearing matters, that included, but were not limited to, requests for findings or memos of law.
14. On February 26, 2014 the Department received a telephone complaint at its Montpelier office that alleged Janitronics "located at 401 Gage Street in Bennington, VT" had an "unknown chemical cleaner [that was] being used" without an "MSDS," and kept "[i]n [a] storage cabinet in the basement." [See Department of Labor Exhibit 1, copy of citation.].
15. Janitronics was founded in 1972, and is a Vermont and New York company that provides janitorial services for commercial businesses and, at the time it was cited in this matter, had 1600 employees.
16. At the time of the complaint, it was providing janitorial services for a company in Bennington known as Energizer.
17. Janitronics has an unblemished, perfect forty-three [43] year OSHA record.
18. Its 43 year perfect record evidences its respect for OSHA and devotion to the work place safety and health of its employees.
19. Following receipt of the February 26, 2014 complaint against Janitronics, a Department inspector conducted two inspections of Janitronics' Bennington workplace.
20. The first occurred February 28, 2015, and the second on March 6, 2014.
21. On August 25, 2014, the Department issued Janitronics a Vermont Occupational Safety and Health Act citation for a "serious violation" [21 V.S.A section 210 (a)(2) and (b); 29 U.S.C. section 666 (k); 29 CFR 1910.1200(g)(1)] and proposed a \$956 penalty.

22. The citation was subsequently amended during, and after the January 28, 2015 hearing to include that Janitronics also allegedly violated 29 *C.F.R.* section 1910.1200(g)(8) by not making safety data sheets readily accessible to its employees.
23. On Friday, January 30, 2015, two days after the hearing, the Department provided Janitronics and the hearing officer the citation of the regulation that required safety data sheets be readily accessible to employees. This regulation was 29 *C.F.R.* 1910.1200(g)(8).
24. At hearing, the Department attempted to prove that its inspections at Janitronics discovered the hazardous chemicals known as “Sure Bet” on February 28, 2014, and “3M Enzyme Digester” [3M] on March 6, 2014, without safety data sheets readily accessible for its employees.
25. At the inspection on February 28, 2014, the Department’s inspector spoke to Mr. James Cahill, Janitronics’ regional manager, as Mr. Joe Labaffe, Janitronics’ night manager, was unavailable during that day.
26. Mr. Cahill oversees hundreds of buildings where Janitronics provides janitorial services. [Hearing Disc 11:19:58].
27. The inspector and Mr. Cahill observed Janitronics work area during which time Mr. Cahill responded to the inspector’s inquiries.
28. Janitronics workplace consisted of an office with a storage cabinet and desk, and a closet for storage of cleaning chemicals and equipment with machines, supplies and a binder with safety data sheets hanging on the closet wall.
29. These two workspaces were separately and proximately located off a common Energizer hallway.
30. Upon observation of the storage cabinet, it was found to be secured with a combination lock and could not be opened.
31. Only Mr. Joe Labaffe, Janitronics’ night manager, knew the combination to the lock.
32. He was the only Janitronics employee with access to the storage cabinet.
33. Since the combination and Mr. Labaffe were unavailable, the inspector next observed the storage closet.

34. In the closet, the inspector observed the binder with safety data sheets that was an inch to an inch and a half thick hanging on the closet wall, and a cleaning machine with a sealed container of Sure Bet sitting on it.
35. Sure Bet is considered a hazardous cleaning chemical.
36. Mr. Cahill, had brought the Sure Bet and machine to the workplace the night that preceded Ms. Kingsbury's February 28, 2014 inspection.
37. At the same time, Mr. Cahill also brought a safety data sheet for the Sure Bet along with him.
38. He brought the Sure Bet and machine to Janitronics to attempt to better clean Energizer's shower walls, because he had received an Energizer complaint that it was experiencing shower wall build-up.
39. Mr. Cahill wanted to determine whether the Sure Bet would clean the walls better than the shower wall cleaning chemical Janitronics had been using.
40. Mr. Cahill used the Sure Bet on only one occasion at Janitronics's workplace.
41. No other Janitronics employee used the Sure Bet.
42. No other Janitronics' employee was authorized to use the Sure Bet and no other Janitronics employee was exposed or had access to the Sure Bet during the very brief period it was at Janitronics. This brief period was the period of time between Mr. Cahill's departure from Janitronics after using the Sure Bet on the night just prior to the inspector's inspection and the inspector's observance of Sure Bet in the storage closet on the following day, February 28, 2014.
43. Mr. Cahill's single, isolated use occurred the night Mr. Cahill brought it to the workplace.
44. During the entire time he had the Sure Bet at Janitronics' workplace, including the time he used it, he had the safety data sheet for the Sure Bet readily accessible to him.
45. He had not placed this safety data sheet in the safety data sheet binder as soon as he arrived at Janitronics with it because he did not know whether the Sure Bet would work well enough so as to necessitate keeping it at the Bennington site for continued use.
46. When he finished with the Sure Bet that night, Mr. Cahill determined that the Sure Bet had not worked well.
47. He wanted to remove the Sure Bet and its cleaning machine and safety data sheet from the workplace immediately; but he did not because the machine, that accommodated the

Sure Bet for cleaning the shower walls, was too heavy for him to lift and move to his vehicle by himself.

48. Since no one was available to help him, he concluded it would be better to remove the machine the following day when someone else could assist.
49. Consequently, when he left the workplace that night, he left the cleaning machine at the workplace.
50. He also left the sealed Sure Bet container on the cleaning machine and its safety data sheet.
51. He thought he left the safety data sheet on the office desk.
52. He intended to remove the Sure Bet and its safety data sheet when he removed the machine the following day, February 28, 2014.
53. When the inspector asked Mr. Cahill the following day to show her the safety data sheet for the Sure Bet, he responded that he thought he left it on the desk in the office.
54. He looked for the Sure Bet safety data sheet on the desk, but was unable to locate it during the February 28, 2014 inspection.
55. Subsequent to the Department's inspections on February 28, 2014 and March 6, 2014, Janitronics discovered the safety data sheet for the Sure Bet in a locked cabinet at its Bennington work place.
56. The time the Sure Bet safety data sheet was not readily accessible in the binder on February 27-28, 2014 was therefore brief.
57. During this brief period, the Sure Bet container was sealed.
58. During this brief period, there was no evidence that any Janitronics' employee entered the storage closet where the sealed Sure Bet container was located.
59. Mr. Cahill had been employed by Janitronics since 2001.
60. Mr. Cahill's OSHA safety record with Janitronics was unblemished.
61. Mr. Cahill's failure to place the safety data sheet in the data sheet binder was an accident, a mistake, the first blemish on Janitronics' 43 year perfect VOSHA record.
62. Janitronics did not, and could not with the exercise of reasonable diligence, know of the presence of – or prevented – Mr. Cahill's accidental violation.
63. Mr. Joe Labaffe's safety performance with Janitronics also was unblemished.

64. Since Mr. Labaffe was not available during the February 28, 2014 VOSHA inspection, the inspector and Mr. Cahill scheduled a return visit on March 6, 2014, a time convenient for both parties, for an inspection of the cabinet.
65. Before leaving Janitronics on February 28, 2014, the inspector asked that the cabinet not be opened until her return on the 6th.
66. Janitronics honored that request.
67. When they returned on the 6th of March and unlocked and opened the cabinet, they found two chemical containers.
68. There was a container for "Butchers All Purpose Cleaner" [Butchers], a hazardous chemical, and a container of a hazardous chemical known as 3M Enzyme Digester [3M].
69. The Butchers container had at best only a trace amount of chemical residue, and therefore was virtually empty.
70. The purpose of these chemicals was combating bathroom odors.
71. The Butchers had not been used for three to four years.
72. Janitronics no longer had a safety data sheet for the Butchers.
73. The Butchers had been replaced by 3M.
74. Janitronics had an "MSDS for [the 3M] . . . in the binder with all the other MSDS's, and [it had been there] since [Janitronics] used [the 3M] . . . product." [Janitronics, Inc.'s exhibit 1, affidavit of James Cahill, para. 18]
75. The inspector asked Mr. Cahill "if he had a material safety data sheet for *that product* and he was unable to locate one." [Hearing disc: 10:40:40 - 10:42::10] (Emphasis added.)
76. But, the inspector's concern during this March 6, 2014 portion of her investigation was the Butchers. [Janitronics, Inc.'s exhibit 1, para. 6]
77. The inspector failed to inspect the unlocked cabinet for a safety data sheet for the 3M container.
78. The inspector failed to inspect Janitronics' readily accessible safety data sheet binder on the wall in the storage closet that was located proximately with the office with the cabinet where the 3M and Butchers containers were found.
79. The inspector failed to interview Mr. Joe Labaffe to determine the circumstances regarding the frequency and manner of Janitronics' use of the 3M.

80. The Department had the burden to prove whether or not there was a safety data sheet for the 3M readily accessible on March 6, 2014.
81. This burden placed a duty on the inspector to conduct a reasonably thorough impartial investigation, which should have included her interview of Mr. Labaffe, and inspections of the unlocked cabinet and especially the safety data sheet binder.
82. There appeared to be a conflict between the testimony of the inspector and Mr. Cahill, in that the inspector testified Mr. Cahill was unable to locate an MSDS for the 3M, and Mr. Cahill attesting to the fact that there was an MSDS for the 3M in Janitronics' binder with all of its other readily accessible data sheets.
83. However, "[i]f there is a conflict in the evidence, . . . it is . . . [the fact finder's, i.e., in this case, the hearing officer's] duty to reconcile, if possible, all of the evidence, without arbitrarily imputing perjury to any of the witnesses, or to reconcile conflicts, or seeming conflicts, in the evidence, if possible." 75B Am Jur 2d Trial section 1452.
84. The seeming conflict referred to above in paragraph 83 is reconciled with the following findings:
- a. Neither the inspector nor Mr. Cahill perjured themselves.
 - b. It is possible and reasonable to reconcile the seeming difference in their sworn testimony as follows:
 - [i.] Mr. Cahill heard and understood the inspector's concern to be the Butchers, when the inspector asked Mr. Cahill "if he had a material safety data sheet for that product, [and] . . . [Mr. Cahill] was [un]able to locate one;" ¹
 - [ii] Mr. Cahill thought the inspector had asked him to locate an MSDS for the Butchers, not the 3M;
 - [iii] Consequently, he was looking for an MSDS for the Butchers, not the 3M; and,
 - [iv] when Mr. Cahill, in his response to the inspector's inquiry, was unable to locate an MSDS, it was for Butchers not 3M.

¹ Hearing disc: 10:41:51 - 10:42:10: Mr. Anderson: "Did you you ask him if he had a material safety data sheet for that product? [Inspector:] Yes, I did. [Mr. Anderson:] "Was he able to locate one? [Inspector:] No, he did not."

85. Had the inspector inspected Janitronics' readily accessible safety data sheet binder hanging in Janitronics' storage closet on March 6, 2014, she would have found Janitronics' safety data sheet for the 3M.
86. But for the inspector's failure to inspect the binder, Janitronics could, would and should not have been cited for a 29 C.F.R. 1910.1200(g)(1) and (8) violation for March 6, 2014.
87. This failure to inspect the binder was not a reasonable, thorough, impartial inspection, and was a failure to meet the Department's objective investigative burden to establish whether or not Janitronics had a data sheet for 3M readily accessible on March 6, 2014.
88. The Department also had the burden to prove, in accordance with 29 U.S.C. 666(k) and 21 V.S.A. 210(b), that Janitronics did not, and could not with the exercise of reasonable diligence, know of the presence of any VOSHA violation.
89. Janitronics did not, and could not with the exercise of reasonable diligence, know of the presence of Mr. Cahill's violation before it occurred on the night before the violation occurred and was discovered on February 28, 2014.
90. Mr. Cahill's violation was not reasonably foreseeable and preventable.
91. Mr. Cahill's violation was "an isolated incident of unforeseeable . . . idiosyncratic behavior, [which] common sense and the purposes behind [VOSHA] require . . . [that Janitronics] citation be set aside." *Ocean Electric Corporation v. Secretary of Labor*, 594 F.2d 396, 401 (4th Cir. 1979).
92. Even if there was no safety data sheet at Janitronics for the 3M on March 6, 2014, it would not have changed the decision and order in this matter because the Department failed to prove the essential element that the 3M, a mistaken violation of VOSHA by Janitronics' employee, also was foreseeable and preventable by Janitronics.
93. Assuming for the sake of argument that Janitronics had no safety data sheet for the 3M, this also would not have made Mr. Cahill's violation and/or Mr. Labaffe's violation foreseeable.
94. Assuming for the sake of argument that Janitronics had no safety data sheet for the 3M, both violations would have occurred simultaneously, as they both existed on February 28, 2014, and neither could have made the other foreseeable.
95. As well, there was no Department evidence or proof that Janitronics' safety program was in any way inadequate.

96. Janitronics' VOSHA safety program was adequate.

97. Janitronics' VOSHA safety program's safety precautions, training of employees and supervision had no inadequacies.

Contentions

At the January 28, 2015 hearing, the Department alleged and argued that its evidence proved Janitronics did not have safety data sheets readily accessible potentially to its employees for Sure Bet, the chemical found in the Janitronics' closet in late February 2014, and 3M [in a cabinet at the same time, but removed six days later when the cabinet was unlocked]. Janitronics contested the citation and contended: first, the Department had the burden to prove each and every element required by VOSHA, which included proof that Janitronics knew of the alleged violations of its employees, or with reasonable diligence, could have known and prevented them; second, the Department failed to meet this burden; and third, at most, this matter should have been resolved with no more than a de minimus notice.

Issue

Whether the Department met its burden to prove Janitronics knew or with the exercise of reasonable diligence could have known and prevented the alleged violations.

Law

“The [Department] bears the burden of proof with respect to every element of a [VOSHA] violation. (Citation omitted). The prevailing view among the federal circuits is that the employer’s knowledge or ability to discover a [VOSHA] violation is an element of the [Department’s] case-in-chief.” *Pennsylvania Power & Light Company v. Occupational Safety and Health Review Commission*, 737 F.2d 350, 357 (3rd Cir. 1984). “[T]he [Department] must be constrained to specify the particular steps a cited employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of those measures.” *Ocean Electric Corporation v. Secretary of Labor*, 594 F.2d 396, 402 (4th Cir. 1979)

VOSHA “does not impose strict liability on employers for isolated and idiosyncratic instances of employee misconduct. . . . [T]he purposes of the Act are best served by limiting citations for serious violations to conduct that could have been foreseen and prevented by employers with the exercise of reasonable care.” *Pennsylvania Power & Light Company*, 737 F.2d 354. (Citing *Brennan v. OSHRC* (Hanovia Lamp), 502 F.2d 946, 951-52 (3rd Cir. 1974). Also see, *Ocean Electric Corporation*, 594 F. 2d 401.

[Janitronics] “may not escape all responsibility for the acts of its supervisors. A corporation can only act through its agents and to excuse [Janitronics] simply because its foreman was negligent would emasculate the Act. However, an imputation of a supervisor’s acts to the company in each instance would frustrate the goals behind the Act. . . . ‘Such a holding would also not tend to promote the achievement of safer workplaces. If employers are told that they are liable for violations regardless of the degree of their efforts to comply, it can only tend to discourage its efforts.’ 1974-75 CCH OSHD s 20167, at 22,993. Further, it does not appear that Congress intended the employer to be an insurer of employee safety. ‘The Congress declares it to be its purpose and policy . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources’ 29 U.S.C. s 651(b) And, as stated in the Act’s legislative history: ‘An employer’s duty . . . is not absolute.’ H.R.Rep.No. 92-1201, at 21, cited in *National Realty and Construction Co. v. OSHRC*, . . . 489 F.2d 1257, 1266 (1973).”

Ocean Electric Corporation, 594 F.2d 399. Thus, “if a violation by an employee is reasonably foreseeable, the company may be held responsible. But if the employee’s act is an isolated incident of unforeseeable or idiosyncratic behavior, then common sense and the purposes behind the Act require that a citation be set aside.” *Id.*, at 401.

Moreover, . . . [VOSHA] specifies that an employer cannot be cited for a serious violation if the employer ‘did not, and with the exercise of reasonable diligence, know of the presence of the violation. 29 U.S.C. section 666(k); [21 V.S.A section 210(b)].’ Therefore, although an employer must actively endeavor to keep its workplace free of recognized hazards, and to comply with specific OSHA regulations, that duty does not extend to the abatement of dangers created by unforeseeable or unpreventable employee misconduct. [This] . . . ‘provides employers with an incentive to take affirmative steps in instructing and training its employees as to proper methods of complying with the requirements of the standards.’ *Floyd S. Pike Electrical Contractor*,

Inc., 6 O.S.H.Cas. (BNA) 1675, 1677 (June 4, 1978).

Pennsylvania Power & Light Company, 737 F.2d 354.

[As well, the Vermont Occupational Safety and Health Review Board and] “Commission rule(s) 73(a), . . . provide() that ‘(i)n all proceedings commenced by the filing of a notice of contest, the burden of proof shall rest with the Secretary.’ Reasonably construed, this rule requires the Secretary to prove the elements of a violation. See *Brennan v. OSHRC*, 511 F.2d 1139 (9th Cir. 1975). The Fourth Circuit, in reviewing a Commission decision . . . held, the Commission may not place the burden on the employer. *Ocean Elec. Corp. v. Secretary of Labor*, 594 F.2d 396 (4th Cir. 1979). See also *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564 (5th Cir. 1976); *Brennan v. OSHRC*, 511 F.2d 1139 (9th Cir. 1975)”

Mountain States Telephone and Telegraph Company v. Occupational Safety and Health Review Commission, 623 F.2d 155, 157-58 (10th Cir. 1980).

The Department may not be permitted to argue that: “All the [Department] would have to show is the violation; the employer then would carry the burden of nonpersuasion.” *Id.*, 158. This is a circular argument. To allow it, would be permitting the Department to shift the burden to the employer by imputing employer knowledge of an employee violation with the existence of the violation. It “would . . . impose on Janitronics the ultimate risk of nonpersuasion in violation of the [Department’s/] Commission’s own rule 73(a).” *Id.*, 158. “[T]he [Department] may not shift to the employer the ultimate risk of non-persuasion in a case where the inference of employer knowledge is raised only by proof of a supervisor’s misconduct.” *Pennsylvania Power & Light Company*, 737 F.2d 358.

“In general, an employer is only responsible for violations it has the ability to prevent. If an employer has a safety program which would normally be adequate to prevent a violation of a particular standard, then a violation which occurs in spite of its program is unpreventable, and the employer is not responsible. Elements of an effective safety program include work rules designed to prevent violations, adequate communication of the rules to the employee, methods of discovering whether violations occur, and enforcement of the rules if violations are discovered.” *Secretary of Labor v. Howard P. Foley Company*, OSHRC Docket No. 13244, May 23, 1977

May 23, 1977, p.3. (Citing:*Utilities Line Construction Co.*, 76 OSAHRC 121/A2, 4 OSHC 1681, 1976 77 OSHD para. 21,098, (1976); *Scheel Construction, Inc.*, 76 OSAHRC 138/B6, 4OSHC 1681, 1976 77 OSHC para. 21,263 (1976); *The Weatherhead Co.*, 76 OSAHRC 61/E7, 4OSHC 1296, 1976 para. 20,784 (1976)).

The courts of appeals have consistently held that the adequacy of a company's safety program, broadly construed is the key to determining whether an OSHA violation was reasonably foreseeable and preventable. *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 569 (5th Cir. 1976) (citing *Brennan v. Butler Lime & Cement Co.*, 520 F.2d 1011, 1018 (7th Cir. 1975)). In *Capital Electric Line Builders, Inc. v. Marshall*, 678 F.2d 128 (10th Cir. 1982), the court held that the Secretary must shoulder the burden of proving that a violation of OSHA . . . regulations . . . was preventable, even though a supervisor had participated in the violation. The burden could be discharged 'by showing that the violation was foreseeable because of inadequacies in safety precautions, training of employees, or supervision.' *Id.* at 130. Under the approach taken by these courts, a violation is not deemed "preventable" simply because the employer does not have a work rule that tracks the Secretary's interpretation of the governing regulation.

The Commission itself has applied a less exacting scrutiny to employer's safety programs in previous cases. In *Marson Corp.*, 10).S.H.Cas. (BNA) 1660 (May 27, 1982), the Commission merely demanded proof that an employer 'has established workrules designed to prevent the violation, has adequately communicated these rules to its employees, has taken steps to discover violations, and has effectively enforced the rules when violations have been discovered.' *Id.* at 1162 (emphasis added). Applying the same standard in *Jones & Laughlin Steel Corp.*, 10 O.S.H.Cas. (BNA) 1778 (June 25, 1982), the Commission cautioned the Secretary not to 'overemphasize the formal aspects of [a company's] safety program and fail to give proper significance to its substance.' *Id.* at 1782.

We agree with the logic of these circuit court opinions and commission decisions. Employers should be encouraged to develop work rules that will reasonably respond to their particular working conditions and safety needs. An employer's safety rules should be evaluated with that end in mind, and not with a myopic view toward literal conformance with OSHA regulations. The goal of safety in the workplace can best be achieved if employers strive to implement OSHA regulations by developing simple and understandable rules, safety information, and training programs tailored to their respective operations. Indeed, if an employer merely duplicated and distributed all OSHA regulations applicable within its trade or industry, the result would likely be greater confusion and less workplace safety.

Legal Reasoning and Conclusions

"[A] serious violation shall be deemed to exist in a place of employment . . . unless the employer did not, and could not, with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. 666(k); 21 V.S.A. 210(b). "The statement of congressional purpose contained in the Act evidences an intent to ensure worker safety only 'so far as possible.' . . . The Act does not impose strict liability on employers for isolated and idiosyncratic instances of employee misconduct. . . . [T]he purposes of the Act are best served by limiting citations for serious violations to conduct that could have been foreseen and prevented by employers with the exercise of reasonable diligence and care." *Pennsylvania Power & Light Company v. Occupational Safety and Health Commission*, 737 F.2d 350, 354 (3rd Cir. 1984).

VOSHRB and OSHRC Rule 73(a) provides that "[i]n all proceedings commenced by the filing of a notice of contest, the burden of proof shall be with the [Department]." As well, "[t]he prevailing view among the federal circuits is that the employer's knowledge or ability to discover a violation is an element of the [Department's] case-in-chief." *Pennsylvania Power and Light Company v. Occupational Safety and Health Commission*, 737 F.2d 350, 357 (3rd Cir. 1984). Also, "the Department may not shift to the employer the ultimate risk of non-persuasion in a case where the inference of employer knowledge is raised only by proof of a supervisor's misconduct." *Id.*, at 358. And, "the [Department] must be constrained to specify the particular steps a cited employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of those measures." *Ocean Electric Corporation v. Secretary of Labor*, 594 F.2d 396, 402 (4th Cir. 1979).

The above cited Third and Fourth Circuit cases involved single, isolated employee violations, and the circuits reasoned that since there was an isolated incident of misconduct in each case, the employer in each case was not guilty of a serious violation because the isolated nature of each incident made them unforeseeable and unpreventable with the exercise of reasonable diligence

and care. It could have been argued by the Department: [a] there was no safety data sheet for the 3M, regardless of the finding herein there was; [b] since the Department proved two violations, they were not isolated; and [c] the circuit court "isolated incident of unforeseeable or idiosyncratic behavior" rule should not be applied herein because the cumulative nature of the two violations caused them not to be isolated.

However this too, would be Department error, because, in this case, the incidents were not sequential so that one would have noticed Janitronics of the problem before the existence of the other in time for Janitronics to have prevented it. The violations in this case were simultaneous. The Sure Bet violation and, assuming for the sake of argument, that the 3M violation occurred, they both would have been in existence on February 28, 2014. The only reason that the 3M was not discovered till March 6, 2014 was the inspector's request that Janitronics not unlock and open the cabinet until she returned on the 6th. Hence, even if it was believed for the sake of argument that there was no safety data sheet for the 3M, Janitronics violations would have been simultaneously isolated, and as such neither made the other foreseeable and preventable with the exercise of reasonable diligence and care.

The key to understanding and applying the correct rule to the facts in this case is the reason behind the Third and Fourth Circuits' respective rulings in *Pennsylvania Power & Light Company and Ocean Electric Corporation*, i.e., "The purposes of the Act are best served by limiting citations for serious violations to conduct that could have been foreseen and prevented by employers with the exercise of reasonable diligence and care" *Pennsylvania Power and Light Company*, 737 F.2d at 354; and "the employer's knowledge and or ability to discover a violation is an element of the [Department's] case-in-chief." *Id.*, at 357. Since the Sure Bet violation and hypothetical 3M violation remained isolated, albeit simultaneously v. individually, Janitronics would not have committed serious violations because Janitronics could not have foreseen or prevented the simultaneous misconduct with the exercise of reasonable diligence and care. There was no evidence or proof offered by the Department or otherwise available to make Mr. Cahill's February 28, 2014 violation and Mr. Labaffe's alleged violation foreseeable and preventable by Janitronics.

"The courts of appeals [also] have consistently held that the adequacy of a company's safety program, broadly construed, is the key to determining whether an OSHA violation was reasonably foreseeable and preventable." (Citations omitted). . . . The burden could be discharged 'by showing that the violation was foreseeable because of inadequacies in safety precautions, training of employees, or supervision.'" *Pennsylvania Power & Light Company*, 737 F.2d at 358.

Though the inspector testified at the hearing that she routinely reviewed employers' safety and health programs as part of her inspections [Hearing disc, 11:45:00 - 11:46:35], she did not testify there were any inadequacies with Janitronics' VOSHA safety programs. Since no evidence existed that would have made Janitronics' employee violations reasonably foreseeable and preventable, Janitronics' safety programs apparently were in good order, and the Department was unable to specify any particular steps Janitronics should have taken to avoid citation, the Department failed to meet its burden to prove an essential element of its case-in-chief.

Decision and Order

Since Janitronics' actual or constructive knowledge of its employees' alleged simultaneous, isolated, idiosyncratic mistakes at the end of February 2014 was an essential element of the Department's burden of proof to sustain its serious violation citation, and there was no evidence before me that proved Janitronics knew or with the exercise of reasonable diligence could have known of the presence of the alleged VOSHA violations, I find the Department failed to meet its burden of proof of an essential element in this matter; and given the Department's failure to meet its burden and applying the appropriate test to the record before me, the Department's serious violation in this matter and its suggested penalty are hereby vacated and dismissed without any inclusion of any alternative lesser/non-serious violation.

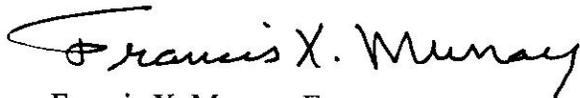
Recommendation

If the Review Board upholds the above vacation of the serious violation, but for some reason is uncomfortable with outright dismissal, i.e., for some reason feels or believes that some further

lesser action would be appropriate, the Board is hereby, albeit respectfully, urged that any such further action be no more than a de minimus notice, i.e., that it not be a non-serious, or some other lesser citation violation. No one is suggesting that chemicals without safety data sheets and the Department's work in this case were unimportant. However, there was no proof that any employee entered the closet while the Sure Bet was there. The 3M was locked away in a cabinet to which only Mr. Labaffe had access. Both containers were sealed. Janitronics has made great efforts to comply with OSHA for 43 years and there is no doubt that Janitronics takes its duty to protect the safety and health of its employees and respect for VOSHA very seriously. Again, respectfully, if the Board would hold Janitronics liable for any violation in this matter, "[s]uch a holding would . . . not tend to promote the achievement of safer workplaces. If employers [like Janitronics] are told that they are liable for violations regardless of their efforts to comply, it can only tend to discourage its efforts. (Citation omitted.). Further, it does not appear that Congress intended the employer to be an insurer of employee safety." *Ocean Electric Corporation*, 594 F.2d 399. Finally, the Board has the authority to issue a de minimus notice in this matter. *Secretary of Labor v. Symms Fruit Ranch, Inc.*, 242 F.3d 894, 898 (9th Cir.).

Dated: April 21, 2015

Respectfully submitted,



Francis X. Murray, Esq.
Hearing Officer