IN THE MATTER OF	*	**BEFORE THE MARYLAND**
	*	**DEPUTY COMMISSIONER OF LABOR**
	*	**AND INDUSTRY**
	*	
KELLY-SPRINGFIELD TIRE	*	
COMPANY	*	
	*	**MOSH CASE NO. K-9355-008-96**
	*	
	*	**OAH NO. 98-026772-DLR-MOSH-41**
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FINAL DECISION AND ORDER

This matter arose under Maryland Occupational Safety and Health Act, Labor and Employment Article, Title 5, *Annotated Code of Maryland* (the MOSH Act). On July 17, 1996, the Maryland Occupational Safety and Health unit of the Division of Labor and Industry (MOSH) issued a citation to Kelly-Springfield Tire Company (the Employer), charging the Employer with willfully refusing to provide information to MOSH when requested as required by 29 C.F.R. § 1910.20(f)(12) and proposing a penalty of $67,500.

I. CASE HISTORY

On February 4, 1997, Hearing Examiner Thomas G. Welshko convened a "combination Motions Hearing/Pre-hearing Conference" to consider the Employer's pending motion to dismiss the citation in which the Employer asserted, in part, that the citation was untimely within the meaning of the MOSH Act, Labor and Employment Article, § 5-212(d), *Annotated Code of Maryland*. On May 7, 1997, the Hearing Examiner issued a Proposed Order on Motion to Dismiss[1] in which he found

[1] Herein, Kelly Springfield's Motion to Dismiss Citation is referred to as "Employer's Motion to Dismiss;" MOSH's Opposition to Kelly Springfield's Motion to Dismiss Citation" is referred to as "MOSH's Opposition" and the attachments thereto as "MOSH Opposition Ex.___;" Kelly Springfield's Reply to MOSH's Opposition to Kelly Springfield's Motion to Dismiss

merit to the Employer's assertion and recommended that the citation and proposed penalty be dismissed as untimely.

The Commissioner of Labor and Industry at the time, John P. O'Connor, ordered review of the Hearing Examiner's Proposed Order, and on July 29, 1997, heard oral argument. By Order Ruling on Motion to Dismiss dated December 4, 1998, Commissioner O'Connor reversed the Hearing Examiner, ruling that a citation under the MOSH Act is not time barred if the request for information, and the refusal to provide it, occur within the 6-month statutory period of the §5-212(d) of the MOSH Act. Commissioner O'Connor remanded the case to the Hearing Examiner to conduct further proceedings consistent with his Order.

Thereafter, Hearing Examiner Welshko conducted an evidentiary hearing on the merits.[2] On May 19, 1999, following receipt of post-hearing memoranda from the parties, the Hearing Examiner issued his Proposed Decision affirming the citation, and finding that the proposed penalty of $67,500, was properly calculated and should be affirmed. The Employer filed a timely Petition for Review.

The review hearing, originally scheduled for September 8, 1999, was rescheduled by agreement

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Citation is referred to as "Employer's Reply to MOSH's Opposition;" the Hearing Examiner's Proposed Order on Motion to Dismiss is referred to as "Proposed Order;" the parties' exhibits introduced at the remand hearing are referred to as "MOSH Ex.___," "Employer Ex.___," and "Former Employee Ex.___," respectively; citations to the transcript at the remand hearing are referred to as "Remand Tr. At ___;" MOSH's Supplemental Memorandum in Support of Citation filed with the Hearing Examiner is referred to as "MOSH's Post-Hearing Memorandum;" Kelly Springfield Tire Company's Memorandum in Support of Dismissal of Citation is referred to as "Employer's Post-Hearing Memorandum;" the Hearing Examiner's Proposed Decision and Order is referred to as "Proposed Decision;" and citations to the transcript at the review hearing are referred to as "Review Tr. At ___."

[2] The parties agreed that all previously submitted motions, memorandum, and exhibits attached thereto are incorporated into the record in this matter. Remand Tr. At 18-19.

of the parties to September 30, 1999. On September 17, 1999, the Employer filed with the Deputy Commissioner ten volumes of Supplemental Exhibits and, under separate cover, certain "confidential documents under seal," all of which the Employer claims are "…necessary to address several erroneous findings of the hearing examiner." On September 27, 1999, the Employer filed a pre-hearing memorandum, and MOSH and the Counsel for the Employer's former employees filed postponement requests that were not opposed by the Employer. Based on these filings, the Deputy Commissioner rescheduled the review hearing.

The review hearing was conducted by the Deputy Commissioner on October 21, 1999. On the day of the hearing, Counsel for the Employer's former employees filed a pre-hearing memorandum and also sought to introduce supplemental exhibits. On November 4, 1999, the Employer filed a response to the pre-haring memorandum of its former employees. On November 11, 1999, Counsel for the Employer's former employees filed a reply and on November 18, 1999, the Employer filed a response thereto. Thereafter, MOSH and the Counsel for the Employer's former employees filed a joint motion to strike the Employer's response, and the Employer filed a response to the motion to strike.[3]

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[3] At the review hearing, considerable time was devoted to the parties' arguments concerning the Employer's supplemental exhibits. Based on the arguments of the parties, and the relevant law and regulations, the Deputy Commissioner declined to admit the Employer's supplemental exhibits into evidence, and before the close of the hearing, returned these supplemental exhibits, including the unopened alleged trade secret information, to the Employer. The Deputy Commissioner also declined to accept the supplemental exhibits offered on the day of the hearing by Counsel for the Employer's former employees, and at the close of the review hearing returned these documents to the Counsel for the Employer's former employees. The Deputy Commissioner ruled, however, that the parties' pre-hearing memoranda and lists of proposed exhibits were part of the record. She therefore allowed the Employer two weeks from the date of the hearing, to file a reply to the pre-hearing memorandum filed by Counsel for the Employer's former employees, limited in content to the matters raised therein, and allowed

Based upon a review of the entire record, consideration of the relevant law, and the positions of the parties, the Deputy Commissioner adopts the findings of fact, as modified herein, conclusions of law, and Order proposed by the Hearing Examiner.

II. CONCLUSIONS OF LAW

A. Contentions of the Parties

The issue in this case is whether, pursuant to 29 C.F.R. §1910.20(f)(12),[4] the Employer unlawfully failed to provide MOSH with information related to chemicals used in its Cumberland, Maryland, tire manufacturing plant (including cross-index information linking chemical and code names), from the time the plant opened in 1940 until it closed in 1987, so that MOSH could make a suitable determination regarding trade secret status and implement necessary protections before release to an employee or employee representative.[5] The Hearing Examiner found, *inter alia*, that MOSH

MOSH and the Counsel for the Employer's former employees one week after the Employer's filing to respond, adding, "and that will be the end of this discussion." Review Tr. At 132-42. The record on review therefore closed upon the filing of Counsel for the Employer's former employees reply dated November 11, 1999. Accordingly, the Deputy Commissioner grants the joint motion to strike "Kelly Springfield Tire Company's Response to the Workers' Post-Hearing Memorandum" dated November 18, 1999.

[4] The cited standard, 29 C.F.R. §1910.20(f)(12), states:

> Notwithstanding the existence of a trade secret claim, an employer shall upon request, disclose to the …[Commissioner of Labor and Industry] any information which this section requires the employer to make available. where there is a trade secret claim, such claims must be made no later than at the time the information is provided to the …[Commissioner] so that suitable determination can be made and the necessary protection can be implemented.

[5] Contrary to the Employer's suggestion, MOSH has not requested that trade secret information be turned over directly to the former employees. MOSH Opposition Ex. 16 at 2. To the contrary, MOSH has made clear it's understanding that pursuant to the cited standard it is required to review the information sought to determine whether trade secret protection is

established that the information sought exists, that the information is relevant to the Employer's former employees, and that these employees reasonably could have been exposed to chemical hazards.[6] The Hearing Examiner further found that MOSH established that the request for information by MOSH, and the Employer's refusal to provide it, occurred within the 6-month statutory period of §5-212(d). Proposed Decision at 13; FF 12, 13, and 14; MOSH Opposition Ex. 24. The Hearing Examiner rejected the numerous other arguments raised by the Employer in support of its claim that the citation should be dismissed (Proposed Decision at 16-24), and affirmed the citation.[7] The Hearing Examiner found that 29 C.F.R. §1910.20(f)(12) makes provision for the disclosure of trade secret information, and that by using the trade secret claim as a defense for not providing the chemical information

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warranted, and to implement the necessary protections before disclosure. MOSH's Post-Hearing Memorandum at 2.

[6] The Employer excepts to the Hearing Examiner's admission of MOSH Ex. 3/ Former Employees Ex. 1, and his reliance thereon concerning employee exposure, asserting, as it did before the Hearing Examiner, that this material was "not in the possession of MOSH at the time the citation was issued." Employer Petition for Review at 9; Remand Tx. At 21-23. The MOSH Act authorizes the issuance of a citation when the Commissioner or his authorized representative "is of the opinion that an employer has violated a duty under this title…." Labor and Employment Article, §5-212(a)(1), *Annotated Code of Maryland*. The record establishes that at the time the citation issued, the Assistant Commissioner had sufficient evidence to form the opinion that the former employees at issue reasonably could have been exposed to hazardous chemicals during the course of their employment at Kelly-Springfield. MOSH Opposition Ex. 19 at 4-5; Ex. 24. There is no prohibition against MOSH ferreting out, and then relying upon at a contested case hearing, additional evidence to support the allegations of a citation.

[7] In rejecting of the Employer's Fourth Amendment defense raised for the first time in its Post-Hearing Memorandum, the Deputy Commissioner adopts the Hearing Examiner's reliance on the Fourth Circuit Court of Appeals opinion in *Reich v. National Engineering & Contracting Company*, 13 F.3d 93, 16 OSHC (BNA) 1489 (4th Cir. 1993). The Deputy Commissioner finds this opinion to be convincingly reasoned. *See Lahocki v. Contee Sand & Gravel Co., Inc.*, 41 Md.App. 579, 398 A.2d 490 (1979)(federal cases that are convincingly reasoned provide authority for Maryland courts).

requested under this right to know standard, the Employer exhibited an “intentional disregard” or “plain indifference”to the law, and that a finding of willful violation is warranted. Proposed Decision at 12-14.

On review, the Employer argues that the Hearing Examiner’s findings should be reversed and the citation dismissed, or minimally, that the case should be remanded to the Hearing Examiner to allow for the development of a complete record.[8] The Employer contends that the Hearing Examiner made erroneous factual findings, in particular, Findings of Fact 8, 13, and 14, concerning the nature and extent of the requested information actually provided by the Employer. The Employer further contends that the Hearing Examiner improperly characterized the company’s behavior, stating that it made “every attempt to conceal the information on the pretext of trade secret protection” and that it “stonewalled and waffled back and forth about production.” Proposed Decision at 12. The Employer excepts to the Hearing Examiner’s statement that employees still do not know what chemicals they were exposed to in particular areas of the plant (Proposed Decision at 21), and that such lack of information has impeded their medical treatment (Proposed Decision at 23). The Employer asserts that these erroneous findings are largely the result of the Hearing Examiner’s generous adoption of alleged misstatements, misrepresentations, and falsehoods contained in MOSH’s Post-Hearing Memorandum dated March 10, 1999, and filed simultaneous with the Employer’s Post-Hearing Memorandum in support of dismissal. The Employer argues that the inaccuracies and accusations

[8] The Employer has excepted to the Hearing Examiner’s rejection of its various arguments supporting dismissal of the citation, relying in part on positions set forth in earlier filings. *See* Employer’s Petition for Review. However, as discussed *infra*, the Employer’s primary focus at the review hearing regarding the merits of the citation concerned its desire to supplement the record to refute certain factual findings made by the Hearing Examiner.

taken from MOSH's Post-Hearing Memorandum that took the Employer by surprise are central to the outcome of this case, and that in the interest of fairness and to rectify what amounts to a denial of procedural due process, it should now be permitted to introduce voluminous supplemental exhibits.

MOSH and Counsel for the Employer's former employees argue that the Hearing Examiner's decision should be adopted. They contend that the nature of the information sought has been clear since June 1992, when the Counsel for the Employer's former employees initially enlisted MOSH to help secure information from the Employer, and that while the Employer has provided some information, by its own admission, it has not provided all that was requested. With respect to the Employer's effort to supplement the record to refute the Hearing Examiner's findings, MOSH and the Counsel for the Employer's former employees contend that, *inter alia*, there is no provision for the admission of evidence at a review hearing, the Employer had ample opportunity to seek admission of this same evidence at the evidentiary hearing before the Hearing Examiner,but for reasons known only to the Employer, it did not do so, and that the Employer has failed to show exceptional circumstances why it did not introduce this evidence at some earlier point in this lengthy proceeding.

For the reasons set forth below, the Deputy Commissioner reaffirms her ruling at the review hearing that supplemental exhibits are not contemplated by the law or regulations governing this proceeding. In addition, the Deputy Commissioner finds no merit to the Employer's suggestion that it was denied procedural due process by her ruling. Finally, the Deputy Commissioner finds that burdening the record with supplemental exhibits is unnecessary and unwarranted. In this regard, she finds that the outcome of this case is not altered by the Hearing Examiner's alleged factual misstatements because there is ample evidence in the existing record to establish the cited violation.

B. <u>Supplementing the Record at the Review Hearing</u>

The Deputy Commissioner's review of findings of fact in this case is limited to the record made before the Hearing Examiner. The contents of record are defined in Section 10-218 of the Administrative Procedure Act (the APA). State Government Article, §10-201, *et. seq., Annotated Code of Maryland*. The record in a contested case is made by the presiding officer. § 10-218. In most MOSH cases, as here, the Commissioner of Labor and Industry has delegated to a hearing examiner at the Office of Administrative Hearings, the responsibility of presiding officer. Section 10-214 of the APA mandates that findings of fact be based "*exclusively* on the evidence of record in the contested case proceeding and on matters officially noticed in that proceeding." The APA makes no provision for parties to adduce additional evidence after the record before the presiding officer, in this case the hearing examiner, is closed. Here,there is not doubt when the record closed. In his proposed decision, the Hearing Examiner stated, "[t]he record was closed" after March 8, 1999, when the parties submitted their memoranda of law. Proposed Decision at 3. He therefore refused to consider attachments to the Employer's Post-Hearing Memorandum, stating that "I did not request nor permit additional evidence to be submitted after the close of the hearing record." *Id.*

With respect to review, Section 10-216(a)(3) of the APA requires that the final decision maker, in MOSH cases the Commissioner of Labor and Industry or his designee (the Commissioner), "personally consider each part of *the record* that a party cites in its exceptions or arguments before making a final decision." The MOSH law and regulations governing MOSH hearings similarly require that in reviewing a hearing examiner's determination, the Commissioner must "review the proceedings" before issuing an order. Labor and Employment Article, §5-214(f), *Annotated Code of Maryland*; COMAR 09.12.20.16. The Commissioner's notice of hearing on review notifies the parties that they "may present argument based on the testimony and documents introduced before the Hearing

Examiner. No evidence may be introduced at the review hearing." In this case, the initial notice of hearing informed all parties, including the Employer, of this longstanding practice and procedure that is consistent with the APA and MOSH law.

Neither the APA, the MOSH Act, nor the MOSH regulations, make any provision for the Commissioner to admit supplemental evidence on review. When the General Assembly intended to empower a reviewing body with the authority to consider additional evidence, it so provided. Section 10-222(f) of the APA prescribes the narrow circumstances under which a circuit court alone may order the presiding officer to take additional evidence.[9] Based on a review of the law and regulations governing MOSH contested case proceedings, the Deputy Commissioner reaffirms her ruling from the review hearing denying admission of the supplemental evidence offered by the Employer and Counsel for the Employer's former employees.

C. Procedural Due Process

The Employer contends that it was prejudiced because the Hearing Examiner's Proposed Decision is permeated with misrepresentations adopted from MOSH's Post-Hearing Memorandum, and that it has been improperly denied the opportunity to introduce supplemental evidence to refute these errors. The Deputy Commissioner finds no merit to the Employer's contention.

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[9] MOSH contends that at a minimum, the Employer must establish good reasons for its failure to introduce, in the proceeding before the presiding officer, the evidence it now seeks to make part of the record, the same standard that must be met before a circuit court may remand a case for supplemental evidence. *See* State Government Article, §10-222(f)(2)(ii)(2), *Annotated Code of Maryland*. MOSH further contends that the Employer has failed to meet this burden. While the law fails to state any circumstances in which a party should be granted leave to offer additional evidence on administrative review, the Deputy Commissioner finds that even if the standard of §10-222(f)(2)(ii)(2) were applicable to administrative review proceedings, the Employer has failed to show "good reasons" why it did not adduce this evidence in the record before the presiding officer.

"Due process in matters before the Commissioner requires that a party be afforded reasonable notice of the nature of the allegations against it so that the party can prepare a suitable defense." *Bragunier v. Md. Comm. of Labor*, 111 Md.App.698, 718 (1996), citing *Pocono Water Co. v. Public Utility Commissioner*, 158 Pa.Cmwlth. 41, 630 A.2d 971, 973 (1993). In *Bragunier*, like here, the issue was one of notice. The employer asserted that it was denied procedural due process because the Commissioner based a violation finding upon an aspect of an affirmative defense that had not previously been touched upon by the parties or the hearing examiner. The Court of Special Appeals found that the employer had been given a full opportunity to present evidence on all issues before the administrative law judge and had a full opportunity to argue all aspects of the affirmative defense. *Id.* at 714-15. The Employer's allegation of surprise in this case is based on far less compelling circumstances than those in *Bragunier*. Here, the Employer had more than sufficient notice of the issue being litigated. From the outset of this proceeding, MOSH has alleged that the Employer has failed to provide all of the information requested and required under 29 C.F.R. §1910.20(f)(12).[10] MOSH has never deviated in its theory of the case.[11] Further, as in *Bragunier*, the Employer in this

[10] *Compare National Reality and Construction Company, Inc. v. OSHC*, 1 OSHC (BNA) 1422 (1973)(citation charging employer with permitting an employee to ride a loader provides sufficient notice to permit litigation concerning sufficiency of employer's safety program).

[11] *Compare Secretary of Labor v. Trico Technologies Corp.*, 17 OSHC (BNA) 1497, 1503 (1996)(court would be fully justified in rejecting argument of secretary presented on review because it was "diametrically opposed" to one taken before administrative law judge); *General Dynamics Corporation v. OSHRC*, 7 OSHC (BNA) 1373, 1374-78 (1979)(comments by counsel to secretary and administrative law judge about relevance of safety program to the merits of the citation, while misleading, did not prejudice the employer because the issue of safety training was automatically raised by the employer's affirmative defense of idiosyncratic conduct by an employee).

case was given a full opportunity to present evidence on all issues before the Hearing Examiner.

The record establishes that throughout the proceeding the Employer was given a fair opportunity to argue every angle of its defense. The Employer has argued that neither Counsel for its former employees nor MOSH was entitled to most of the requested information because of its trade secret nature. The Employer has also argued that all of the information required under the cited standard has been produced. In addition, the Employer has listed the information it has produced, and the information it was willing to produce provided that a satisfactory confidentiality agreement could be reached. See *discussion infra* at 11-13.

Further, the Employer's Post-Hearing Memorandum reveals that the Employer was not as surprised by the statements in MOSH's Post-Hearing Memorandum as it asks the Deputy Commissioner to find. There, the Employer stated:

> The citation and the arguments put forth by MOSH and counsel for the former employees leaves the impression that Kelly-Springfield has not produced any information to the former employees. Nothing can be further from the truth. Kelly-Springfield has produced voluminous information….

Employer's Post-Hearing Memorandum at 25. The Employer then went on to list the documents provided to date. Yet, at the contested case hearing, the Employer did not attempt to introduce into evidence copies of the actual documents already provided to MOSH or Counsel for its former employees. In retrospect, the Employer obviously believes that having such documents in the record would have benefitted the Hearing Examiner in sorting through representations made by the parties and facilitated his attempt to ascertain exactly which document had and had not been produced, and why. However, such evidence, no matter how pertinent if offered in a timely manner, will not be accepted at this late stage of the proceeding. The purpose of a review hearing is to review the evidence offered at the contested case hearing where all parties were afforded a fair opportunity for cross-examination and rebuttal. Accepting one party's new evidence on review over the objection of the remaining parties, would deny the latter very important procedural rights.

Moreover, as discussed below, the record as it stands contains a significant amount of uncontested evidence regarding what documents have been and have not been provided to MOSH to date, sufficient to correct any factual errors made by the Hearing Examiner. Accordingly, the Deputy Commissioner finds the Employer had clear notice of the allegation against it and a full opportunity to prepare and argue a suitable defense and that her refusal to accept supplemental exhibits at the review hearing does not constitute a denial of procedural due process.

D. Revised Finding of Fact

Regarding the chemical information provided by the Employer to MOSH to date, the record establishes that the Hearing Examiner erred in finding that in September 1994, the Employer provided only Material Safety Data Sheets. FF 8. The Employer, focusing on this error and other chemical information it contends has been turned over, argues that it has satisfied its obligation under the standard, and that the citation should be dismissed. This focus, however, ignores the Hearing Examiner's more critical finding, supported by the record, that the Employer failed "to produce the crucial records that would link the chemical code names and/or numbers to the common names for the chemicals in use." Proposed Decision at 23.

Any suggestion that the Employer has fully satisfied its obligation pursuant to 29 C.F.R. §1910.20(f)(12) to provide the requested information is contradicted throughout the record. In its original filing in this proceeding, the Employer represented, without contradiction, that on September 12, 1994, it provided MOSH with a chemical information list, a department identification list, material safety data sheets, 1980 industrial hygiene status report, and 220 special handling precautions sheets. Employer's Motion to Dismiss at 8, n. 5; MOSH Opposition Ex. 10. The Employer listed three additional items, first identified in a letter from the Employer's counsel to MOSH dated January 1, 1995, containing trade secret information (cross-indexing), that the Employer offered to produce upon the execution of an appropriate confidentially agreement. Employer's Motion to Dismiss at 8, n. 5; MOSH Opposition Ex. 13.[12] In this same document, the Employer strenuously objected to the production of bona fide trade secret information. Employer's Motion to Dismiss at 10-13, Ex. 2-4. Later, in response to MOSH's Opposition, the Employer again took the position that "[t]he withheld documents at issue have been shown to be trade secret." Employer's Reply to MOSH's Opposition at 6. There is nothing in the record to suggest that since September 1994, the Employer has provided any additional evidence to MOSH.

That the Employer possesses additional relevant information that has not been turned over to MOSH is further evidenced from a June 29, 1995, letter from in-house counsel to Goodyear Tire & Rubber Company and the Employer to MOSH. MOSH Opposition Ex. 19. In this letter, the Employer "specifically described the information being withheld as trade secrets…." Employer's Petition for Review at 7. Again, with its September 17, 1999, request that the Deputy Commissioner supplement the record on review, the Employer submitted to the Deputy Commissioner "under seal," six documents for her "in camera inspection" and represented that Counsel for the Employer's former employees "already possess documents three, four, five, and six. They apparently do not have

[12] These items were a 1971 and a 1976 list of "Goodyear Active Codes" and a "large package of 1979 Handling Precaution Sheets, with introduction." MOSH Opposition Ex. 13.

documents one and two."[13] Employer's September 17, 1999, letter accompanying "confidential documents under seal." Document 1 is the "October 13, 1971 Cross-Index List." *Id*. Document 2 is the "March 24, 1976 Cross-Index List." *Id.* The Employer makes no claim that it ever turned over to MOSH any of the documents now offered under seal. Thus, the record establishes that since the early filings in this case, the Employer, while arguing that it provided a significant amount of information, has consistently conceded, in fact strenuously advocated, that certain information particularly that containing cross-indexing, constitutes trade secret information that is not available to MOSH under 29 C.F.R. §1910.20(f)(12).

Based on the record evidence, Finding of Fact 8 is revised to reflect that the Employer has provided MOSH with some records regarding chemicals, including a chemical information list, a department identification list, material safety data sheets, an industrial hygiene status report, and special handling precautions sheets, and that this information does reveal many chemicals that were used in the Kelly-Springfield facility. However, the Employer has not provided all of the requested

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[13] With respect to this latter information, the Employer contends that it is exempt from production under 29 C.F.R. §1910.20(f)(12) because they are Goodyear records and contain an inventory of Goodyear chemicals worldwide and not at the Kelly plant. Employer's Post-Hearing Memorandum at 26-27; MOSH Opposition Ex. 19 at 6. Significantly, it is uncontested that the cover letter to the October 13, 1971, list sent from Goodyear to Kelly's Cumberland plant, entitled "Goodyear active codes used in <u>domestic</u> tire plant," Goodyear stated: "[w]e are sending you a master list of compounds and materials used by <u>each</u> plant to manufacture tires, to which employees may be exposed. This list gives you the code name, the chemical or common description of the material, the area of the plant in which it is commonly used, and its relative toxicity." MOSH Opposition Ex. 11. Further, the Employer concedes that Goodyear's purpose for this correspondence was "…to determine which chemicals were used where." Employer's Post-Hearing Memorandum at 27; MOSH Opposition Ex. 19 at 6.

information, including cross-indexing for chemicals used in the plant before 1984.[14] To the extent that these and other exposure records have not been provided, the Hearing Examiner correctly found that employees still do not know what chemicals they were exposed to in particular areas of the facility because they lack the necessary cross-index to identify the chemical code names. Proposed Decision at 21. Despite its alleged trade secret nature, the Employer is required to make such information available in order to provide MOSH with a complete picture of the chemicals to which employees were exposed at the Kelly-Springfield facility. *Id.*[15]

Based on the foregoing, the Deputy Commissioner finds that the record as a whole supports the Hearing Examiner's conclusion the citation is timely within the meaning of Section 5-212(d) of the MOSH Act, that the Employer had an obligation to provide the requested records to MOSH under 29 C.F.R. §1910.20(f)(12), and that the Employer's continual refusal to do so constitutes a willful violation of this standard.

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[14] According to the Employer, a March 20, 1987, filing with the Department of Health and Mental Hygiene pursuant to "Access to Information about Hazardous or Toxic Substance [Labor and Employment Article, §§5-405-06, Annotated Code of Maryland]", and offered as a "confidential document under seal," contained "two lists of the generic names of chemicals used at its plant as of 1984 and 1987." MOSH Opposition Ex. 19 at 3; Employer's September 17, 1999, letter accompanying "confidential documents under seal;" Employer Reply to MOSH's Opposition at 8.

[15] In order to establish that the Employer violated the cited standard and that the violation is willful, MOSH is not required to prove that medical treatment to individual employees was impeded as a result of the Employer's failure to provide MOSH with the requested information. Accordingly, the Deputy Commissioner finds it unnecessary to adopt the Hearing Examiner's findings in this regard. Proposed Decision at 23.

ORDER

For the foregoing reasons, the Deputy Commissioner of Labor and Industry, on the 23rd day of May, 2000, hereby Orders:

1. Item No. 1 of Citation No. 1, alleging that the Employer engaged in a willful violation of 29 C.F.R. §1910.20(f)(12) is AFFIRMED.

2. The penalty of $67,500 is AFFIRMED.

3. This Order becomes final 15 days after it issues. Judicial review may be requested by filing a petition for judicial review in the appropriate circuit court. Consult Labor and Employment Article, § 5-215, *Annotated Code of Maryland*, and Maryland Rules, Title 7, Chapter 200.

Ileana C. O'Brien

ILEANA C. O'BRIEN
Deputy Commissioner of Labor and Industry