FINAL ORDERS OF THE VIRGINIA COURTS

IN

CONTESTED CASES ARISING UNDER THE

VIRGINIA OCCUPATIONAL SAFETY AND HEALTH ACT

VOLUME XXII
JULY 1, 2000 - JUNE 30, 2001

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

PREFACE

This publication contains the orders of the Virginia Circuit Courts in contested cases from July 1, 2000, through June 30, 2001, arising under Title 40.1 of the Code of Virginia, 1950, as amended. 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. 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 § 40.1-22, as amended.

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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF COLONIAL HEIGHTS

JEFFREY D. BROWN,	)	
Commissioner of Labor and Industry,	)	
Plaintiff,	)	
v.	)	Chancery No. CHOO-47
	)	
ACCENT DESIGN, INC	)	
	)	
Defendant	)	

DECREE PRO CONFESSO

Jeffrey D. Brown, Commissioner of the Virginia Department of Labor and Industry, by counsel, moves that a Decree Pro Confesso be entered against Accent Design, Inc. (Accent Design), and in support of this motion, alleges as follows:

1. This cause of action was brought by the Commissioner for violations of the occupational safety and health provisions of Chapter 3, Title 40.1 of the Code of Virginia, and standards, rules and/or regulations adopted pursuant to statutory authority.
2. On May 23, 2000, the Commissioner filed a Bill of Complaint with the Clerk of this Court against Accent Design; Inc., pursuant to Code § 40.1-49.4(E).
3. The Bill of Complaint was served on the Accent Design's Registered Agent on June 5, 2000.

Accent Design has not filed an answer or otherwise responsive pleading in this action nor has any appearance herein been entered on its behalf. Accent Design had twenty-one (21) days from June 5, 2000, the date service was made.upon it, in which to file it's pleadings in response to the Plaintiff's Bill of Complaint. The twenty-one (21) day period expired on June 26, 2000. Accent Design has therefore taken Plaintiff's Bill to be Confessed.

ON THIS BASIS, the Commissioner of Labor and Industry moves the court to issue a DECREE

PRO CONFESSO affirming Citation l, Items 1 and 2a for violating §§ 1926.451(g)(1) and 1926.501(b)(1) of the Virginia Standards for the Construction Industry, the combined penalties of $4125 and requiring abatement of all violations.

THE DECREE IS SO ORDERED, this 8 day of *August,* 2000:

William R. Shelton

Judge

I ASK FOR THIS:

Jeffrey D. Brown, Commissioner

By: *Carol L. Alston*
Carol L. Alston
Special Assistant Commonwealth's Attorney
County of Colonial Heights
c/o Virginia Department of Labor and Industry
13 South 13y Street, Powers-Taylor Building
Richmond, Virginia 23219
(844) 786-0682

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF ARLINGTON

JEFFREY D. BROWN, Commissioner of Labor and Industry, Plaintiff,	)	
v.	)	Chancery No. CHO 1-323
WALTER C. DAVIS & SON, INC. Defendant.	)	

DECREE PRO CONFESSO

This cause came to be heard upon Commissioner Jeffrey D. Brown's Motion for Decree Pro Confesso against Walter C. Davis & Son, Inc., declaring that $2,500.,00 in proposed civil penalties arising from a contested Virginia Occupational Safety and Health (VOSH) citation, identified by VOSH Inspection Number 301806642 and as attached to the Commissioner's Bill of Complaint, be upheld as a final order of this Court.

UPON CONSIDERATION WHEREOF, it appearing to the Court that more than twenty-one (21) days have elapsed since service of process on the Defendant and that no responsive pleadings have been filed by the Defendant, nor has an appearance been made in this action on his behalf, it is therefore

ADJUDGED, ORDERED, and DECREED that Plaintiff be awarded judgment by default in this cause against the Defendant, affirming that Walter C. Davis &. Son; Inc. be held liable for payment to the Commonwealth of Virginia of $2,500.00 in civil penalties, arising from the contested Virginia Occupational Safety and Health (VOSH) citation as set out in Inspection No. 301806642, Citation 1, Item 2. It is also ADJUDGED, ORDERED, and DECREED that the Clerk of this Court shall strike this matter from the docket and place it among the ended chancery cases.

The Clerk shall mail certified copies of this order to the Defendant and to Jeffrey D. Brown, Commissioner of Labor and Industry, at 13 South Thirteenth Street, Richmond, Virginia 23219. Pursuant to Rule 1:13, endorsement by defense counsel shall be dispensed with.

JUDGE: *Joanne Alper* ENTER: *June 15, 2001*

I ASK FOR THIS:

JEFFREY D. BROWN,
Commissioner of Labor and Industry

By: *M. Nicole Wittmann*
Counsel

M. Nicole Wittmann
Assistant Commonwealth's Attorney
County of Arlington
1425 N. Courthouse Road, 5th Floor
Arlington, Virginia 22201
phone 703.228.4410, fax 703.228.7116

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF RICHMOND

JEFFREY D. BROWN, Commissioner of Labor and Industry, Plaintiff, v. FORT MYER CONSTRUCTION CORPORATION Defendant.	)	Chancery No. CH00-21

FINAL ORDER

This day came the parties and represented to the Court that a compromise having been agreed to and this matter settled to the satisfaction of the parties and all insurers thereto, that this matter should be and hereby is ORDERED DISMISSED AGREED, WITH FULL PREJUDICE, all parties to bear their own costs. The Clerk is FURTHER ORDERED to forward a certified copy of this entered order to all counsel of record, and to hereby strike this matter from the docket.

ENTER: *5/21/01*

William H. Ledbetter
Judge of the Circuit Court

We ask for this:

Wyatt B. Durrette, Jr.
Wyatt B. Durrette, Jr, VSB #04719
Amy J. Inge, VSB #39804
DURRETTE, IRVIN & BRADSHAW, P.L.C.
Main Street Centre
600 East Main Street, 20' Floor
Richmond, Virginia 23219
(804) 775-6900 - Telephone
(804) 775-6911- Telecopier

Carol L. Alston
Carol L. Alston
Department of Labor and Industry
13 South 13`h Street
Richmond, Virginia 23219
(804) 786-0682
VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HANOVER

JEFFREY D. BROWN, Commissioner of Labor and Industry, Plaintiff,	)	
v.	)	Chancery No. 469-00
GILBERT HARRIS d/b/a FREEDOM MASONRY, INC. Defendant.	)	

AGREED ORDER

Upon agreement of the parties and for good cause shown, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. *Serious citation 1, grouped item 1 a & 1 b* and the proposed penalty of $225.00 are affirmed as issued;

2. *Serious citation 1, grouped item 2a & 2b* and the proposed penalty of $300.00 are affirmed as issued;

3. *Repeat citation 2, item* 1 and the proposed penalty of $1,600.00 are affirmed as issued;

4. *Repeat citation* 2, *item* 2 and the proposed penalty of $1,600.00 are affirmed as issued;

5. that Gilbert Harris will begin payment of $2,000.00 to the Commonwealth, upon execution of this Order, in the form of an initial payment of $130.00, due upon Mr. Harris' receipt of this executed Order, and shall pay seventeen (17) subsequent monthly payments of $ l10. 00 each. Each subsequent payment is due on the first day of each month for the next seventeen (17) successive months beginning March 1, 2001. Payments will be made by check or money order and will be payable to the Commonwealth of Virginia, with VOSH inspection number 301816120 noted on each payment;

6. that the remaining $1,725.00 of the penalty amount shall be forgiven if Gilbert Harris complies with the payment schedule described above in paragraph 5. Mr. Harris' failure to comply with

the terms of this Agreed Order in a timely manner, particularly the terms of paragraph 5 above, shall constitute a breach of this Order, and upon his breach Mr. Harris shall immediately thereafter owe the remainder of the original proposed penalty amount of $3,725.00;

7. that the responsibilities and duties of Gilbert Harris under this Agreed Order, over and above responsibilities and duties under applicable law and regulation, shall cease on **July 1, 2002,** so long as all penalty amounts due have been paid in full. If penalty payments are owed or are being paid on the above date, the responsibilities and duties of Mr. Harris under this Order shall continue until all such amounts have been paid in full and no further penalty amounts are due. That in accordance with the requirements of § 40(1) of the Virginia Occupational Safety and Health Administrative Regulations Manual, Gilbert Harris will post a copy of this Order for ten (10) working days, beginning from the date of entry of this Order, at his company's workplace if any exists, in conspicuous locations where notices to his employees are generally posted;

8. that as consideration for modifying the penalties above, Gilbert Harris agrees to withdraw his original notice of contest filed with respect to the above-styled case, waives his right to contest the terms contained in this Order, and certifies that all violations alleged in the citations have been abated;

9. that this Order is meant to compromise and settle the above contested claims, and 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; that this Order may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia; furthermore, that this Order will not be construed as an admission of liability by the Employer of civil liability for any violation alleged by the Commissioner;

10. that the Clerk will strike this matter from the docket of this Court, place it among the

ended chancery cases, and will send an attested copy of this Order to both parties.

Entered this 23 day of *March* 2001.

John R. Alderman
Judge John R. Alderman

We ask for this::

JEFFREY D. BROWN,
Commissioner of Labor and Industry

Alfred B. Albiston *3/19/01*

Alfred B. Albiston, Bar # 29851 Date
Special Assistant Commonwealth's Attorney
Department of Labor and Industry
13 South Thirteenth Street
Richmond, Virginia 23219
Phone: 804/ 786-6760
Fax: 804/ 786-8418

Seen and Agreed:

GILBERT HARRIS, d/b/a FREEDOM MASONRY, INC.

Gilbert Harris *1/30/01*

Gilbert Harris, President Date
Freedom Masonry, Inc.
4959 Brock Road
Spotsylvania, Virginia 22553

Phone: 540/ 972-4959

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF SPOTSYLVANIA

JEFFREY D. BROWN, Commissioner
of Labor and Industry,

Plaintiff,

v. Chancery No. CHOO-364

HAZZARD ELECTRICAL CORP.
Defendant.

FINAL DECREE

THIS MATTER came on February 2, 2001 upon the papers formerly read. On that date, the Court heard the testimony of witnesses ore tenus and received into evidence exhibits on behalf of the parties. At the conclusion of trial, the Court considered the evidence and the arguments of counsel. Thereafter, the Court rendered its findings of fact and conclusions of law and stated them on the record. For the reasons stated, and it appearing proper to do so, it is

ADJUDGED, ORDERED and DECREED that judgment is entered for the defendant Hazzard Electrical Corporation; and, it appearing to the Court that there is nothing further pending in this matter, this matter is stricken from the docket.

ENTER: *2/8/01*

W. H. Ledbetter, Jr.
Judge

I ASK FOR THIS:

Kenneth C. Grigg

Kenneth C. Grigg, Esquire
TAYLOR, HAZEN, KAUFFMAN & PINCHBECK, PLC
700 East Main Street, Suite 1700
P.O. Box 2465
Richmond, Virginia 23218-2465
Phone Number: (804) 649-9251
Facsimile Number: (804) 644-1710

SEEN AND OBJECTED TO:

Alberd B. Albiston

Alfred B. Albiston, Esquire
Commonwealth of Virginia
Department of Labor and Industry
Powers-Taylor Building
13 S. Thirteenth Street
Richmond, VA 23219

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday, the 11th day of May, 2001.

Magco of Maryland, Inc.,
Appellant,

against

Record No. 002146
Court of Appeals No. 2377-99-4

John Mills Barr, Commissioner of
Labor and Industry,
Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia on the 1st day of August, 2000.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that it cannot reach the merits of the issues raised by the assignments of error. The Court of Appeals determined not only that the knowledge of the appellant's supervisor regarding hazards on the work site may be imputed to the appellant, but also that the senior officers of the appellant knew or should have known of those hazards. Magco of Maryland, Inc. v. Barr, 33 Va. App. 78, 85, 531 S.E.2d. 614, 617-18 (2000). The appellant did not assign error to the finding that the appellant's senior officers knew or should have known of the hazards. Consequently, since there is an independent basis for the judgment of the Court of Appeals that is not challenged on appeal, this Court cannot reach the merits of those errors assigned by the appellant. Rash v. Hilb, Rogal & Hamilton Co., 251 Va. 281, 286-87, 467 S.E.2d 791, 79495 (1996). The judgment of the Court of Appeals is final in relation to the issue of knowledge by the appellant's senior officers and bars any appellate relief on the issues raised before this Court. United Leasing Corp. v. Thrift Ins. Corp., 247 Va. 299, 308, 440 S.E.2d. 902, 90.7 (1994).

For these reasons, this Court affirms the judgment of the Court of Appeals.

This order shall be certified to the Court of Appeals and to the Circuit Court of Arlington County and shall be published in the Virginia Reports.

A Copy,

David B. Beach,
Clerk

COURT OF APPEALS OF VIRGINIA

Present: Judge Annunziata, Senior Judges Duff and Hodges
Argued at Alexandria, Virginia

MAGCO OF MARYLAND, INC.

OPINION BY
v. Record No. 2377-99-4 JUDGE ROSEMARIE ANNUNZIATA
AUGUST 1, 2000

JOHN MILLS BARR, COMMISSIONER OF
DEPARTMENT OF LABOR AND INDUSTRY

FROM THE CIRCUIT COURT OF ARLINGTON COUNTY
Joanne F. Alper, Judge

Bruce M. Luchansky (Frank L. Kollman; Seth C. Berenzweig; Juliet D. Hiznay; Kollman & Sheehan, P.A.; Albo & Oblon, L.L.P., on briefs), for appellant.

Ellen F. Brown, Assistant Attorney General (Mark L. Earley, Attorney General, on brief), for appellee.

Magco of Maryland, Inc. ("Magco"), appeals from the decision of the Circuit Court of Arlington County, affirming Magco's citation by the Commissioner of Labor and Industry ("Commissioner") for a serious violation of the safety standards promulgated by the Virginia Occupational and Safety Health Program ("NOSH"), 16 VAC §§ 25-175-1926.501 (b) (4) and 1926.502(i)(2), including a penalty of $7,000. Magco contends the trial court erred 1) in imputing to Magco its foreman's knowledge of hazardous conditions on the worksite as a basis for Magco's liability; and 2) in placing upon Magco the burden of proof to establish "unpreventable employee misconduct" as a defense to Magco's liability. We find no error and affirm the decision of the trial court.

BACKGROUND

We view the facts in this case "in the light most favorable to sustaining the Commissioner's action and 'take due account of the presumption of official regularity, the experience and specialized competence of the Commissioner, and the purposes of the basic law under which the Commissioner has acted.'" Sentara Norfolk General Hosp. v. State Health Comm'r, 30 Va. App. 267, 279, 516 S.E.2d 690,

696 (1999) (internal brackets omitted) (quoting Bio-Medical Applications of Arlington, Inc. v. Kenley, 4 Va. App. 414, 427, 358 S.E.2d 722, 729 (1987)). In December, 1996, Magco was engaged in roofing work on a building in Arlington, Virginia. Magco's foreman on the project, John Hataloski, was "solely responsible for this project" as Magco's on-site superintendent. His responsibility was, "inter alia, to make all field calls and to act as the safety officer responsible for project safety." Hataloski had extensive experience and training in safety issues associated with roof construction and repair and "was more familiar with the safety regulations than any of Magco's other foremen," being Magco's "most knowledgeable foreman" with respect to OSHA regulations.

During the course of the project, Hataloski observed various holes in the roof of the building that were not properly covered. On numerous occasions, Hataloski complained to the general contractor, Turner Construction ("Turner"), that the open holes constituted a hazardous condition for the workmen on the roof. Turner was responsible for attending to site safety, including covering holes on the roof. At Hataloski's direction, it covered all the roof openings with three-quarter inch plywood. Periodically, however, the mechanical contractor removed the covers to perform its ductwork and frequently failed to replace the covers. Despite Hataloski's safety concerns and Turner's generally inadequate response to Hataloski's complaints, Magco continued to have its employees work on the roof without wearing fall protection devices, properly covering the holes in the roof, or erecting guardrails around the holes.

Magco employees Kevin Barnes and Frank Allen were working on the site with Hataloski on December 20, 1996. Barnes was "a relatively new employee," who was assigned to work with Hataloski on a section of the roof close to a hole "which opened to a seven to eight story shaft below." Hataloski was aware of the presence of the hole, and he knew that it lay in close proximity to the section of roof where he and Barnes would be working. Upon arriving at the site on the day in question, Hataloski noted that "a portion of the shaft . . . had been covered with a piece of plywood and another portion of the shaft had been covered with a wooden pallet or 'skid.' Neither the plywood-nor the wooden pallet entirely

covered the opening." The uncovered surface area of the hole was approximately 1.2 square feet. A metal beam had been laid across the pallet and rested on cinder blocks placed on either side of the shaft. Hataloski directed Barnes and Allen to move the beam so that they could better access the work area, which was located approximately two feet from the opening of the shaft. Hataloski did not check the pallet to ensure that it was secured. Hataloski testified that "he should have checked the pallet and that he probably knew the pallet was a risk to the safety of the employees that morning."

Allen went to work on another area of the roof, while Hataloski and Barnes began to work near the shaft. They were not wearing fall protection equipment, and no guardrail had been erected around the opening in the roof. The two men squatted in an area between the wall of the building and the opening of the shaft, a space approximately two feet wide. Barnes' back was toward the shaft. As the men worked, Barnes leaned backward as if to sit upon the wooden pallet covering the shaft. When he placed his weight on the pallet, it gave way and Barnes fell through the opening. He landed approximately 71 feet below, suffering fatal injuries.

David Cline, a compliance officer for VOSH, investigated the accident. Based upon his investigation, the Commissioner issued Magco a citation for a "serious violation" of construction safety standards and assessed a penalty of $7,000, citing § 1926.501(b)(4)(i)[1] of the VOSH regulations. The Commissioner found the violation based on the following: "[the wooden pallet] wasn't large enough to cover the hole . . . it wasn't secure. . it had slits in it that an employee could actually step his feet through and break an ankle, sprain, or actually go through. It's not an adequately covered hole using that pallet."

Magco contested the citation, and the Commissioner filed a Bill of Complaint in the Circuit Court of Arlington County, pursuant to Code § 40.1-49.4(F)(1), to enforce the penalty. The circuit court heard the case on August 17, 1999, and issued an order enforcing the Commissioner's citation and

[1] The regulation provides: Each employee on walking/working surfaces shall be protected from falling through holes . . . more than 6 feet (1.8 m)above lower levels, by personal fall arrest systems, covers, or guardrail systems around such holes.

penalty on September 7, 1999. This appeal followed.

IMPUTATION OF SUPERVISOR'S KNOWLEDGE

Magco contends that the trial court erred in imputing to it its foreman's knowledge of hazardous conditions on the worksite. We disagree.

The construction of the specific statutory provisions implementing federal occupational Safety and Health Act ("OSHA") regulations before us raises issues of first impression in the Commonwealth. OSHA regulates conditions in private industry workplaces which affect worker safety and health. The federal government assigned OSHA enforcement responsibilities in Virginia to VOSH. To maintain federal OSHA approval, Virginia is required to maintain an OSHA program standard that is "at least as effective as" the federal standard. See 29 C.F.R. § 1902:37(b)(4)

Under the Virginia OSHA plan, VOSH inspects the private industry workplace for compliance with the applicable standards. Upon "reasonable cause to believe" that a violation has occurred, VOSH will issue a citation to the employer. Code § 40.149.4(A)(1). VOSH identifies a violation as "serious" if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted, or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violations.

Code § 40.1-49.3.

Magco has not challenged the trial court's factual findings in this case. Those findings include: 1) that Hataloski was Magco's foreman on the project; 2) that he was the "superintendent" of the project; 3) that he was responsible for project safety; 4) that he knew of the hazard presented by holes in the roof of the building in question; and 5) that he was specifically aware of the danger presented by the hole through which Barnes fell. Based on these findings, the trial court imputed Hataloski's knowledge of the safety hazard to Magco, a decision which Magco contends constitutes reversible error. Magco's position

is not supported by applicable Virginia law.

Although the proof required to show an employer's knowledge of violations under this statute has not been addressed by our appellate courts, whether knowledge of certain worksite conditions may be imputed to an employer is well settled in Virginia case law. Indeed, it is a longstanding principle in the Commonwealth that a foreman's knowledge of facts or events on a worksite is imputed to his employer. See Duke v. Luck, 150 Va. 406, 409, 143 S.E. 692, 693 (1928) (foreman's knowledge that one of his crewmen had caused accident imputed to employer); Dept. of Game & Inland Fisheries v. Joyce, 147 Va. 89, 97, 136 S.E. 651,654 (1927) (notice to foreman of accident constituted notice to employer); Low Moor Iron Co. v. La Bianca's Adm'r, 106 Va. 83, 91, 55 S.E. 532, 533 (1906) ("Ordinarily the foreman or boss of a gang of hands employed in executing the master's orders is a mere fellow servant with the other members of the gang, but if he is discharging a nonassignable duty of the master, he is to that extent a vice principal. One of these nonassignable duties is to exercise ordinary care to provide a reasonably safe place in which the servant is to work."). Furthermore, the imputation of a supervisor's knowledge of safety hazards to his employer comports with federal law and policy. See Sec. of Labor v. Capform, Inc., 13 OSHC 2219 (1989) (where employer's supervisors were "continually present at the worksite," Secretary established prima facie case that employer knew of safety violations); Sec. of Labor v. Wright & Lopez, Inc-, 8 OSHC 1261 (1980) (foreman's knowledge of conditions at construction site was imputable to employer, considering discretion given to the foreman in regard to safety procedures); Sec. of Labor v. Safeway Stores Inc., 6 OSHC 1176 (1977) (grocery store's produce manager was a "supervisory employee" because he had personnel working under him whom he could discipline, was charged with ordering produce, and was charged with general maintenance of his department, and therefore his actions and knowledge were imputable to his employer). Magco concedes that Hataloski was aware of the danger posed by improperly covered holes on the worksite. Thus, Hataloski's knowledge is to be imputed to Magco, and we, therefore, affirm the trial court's decision.

Moreover, the trial court's decision is fully supported on the ground that, under Code § 40.1-49.3, the Commissioner's burden of proof may be met upon a showing that Magco should have known of the violation in the exercise of reasonable diligence. See, e.g., Kokosing Construction Co., 17 OSHC 1869 (1996) ("The conspicuous location, the readily observable nature of the violative condition, and the presence of Kokosing's crews in the area warrant a finding of constructive knowledge."). See also Austin Building Co. v. OSHRC, 647 F.2d 1063, 1068 (10th Cir. 1981) (evidence sufficient to prove that the company knew or should have known that hazardous practice existed, where "the employee welding in this precarious spot was easily observable. A diligent foreman checking the safety of his workers should have discovered the hazardous conduct.").

Our review of the record establishes that Michael Gaulin, the company's operations manager and vice president, and Mark Gaulin, the company's president, had primary responsibility for inspecting the site and regularly did so. The record also establishes that the safety hazard posed by uncovered or incompletely covered holes in the roof at the site was open and obvious, and the Gaulins were informed about the absence of full coverings for the, holes and the safety hazard they posed. In short, the record fully supports the court's conclusion that Magco knew or should have known of the problem on the worksite that resulted in Barnes' death. Therefore, because Hataloski's knowledge of the hazards on the site may be imputed to Magco, and because the senior officers of Magco knew or should have known of those hazards, we affirm the trial court's decision.

THE BURDEN OF PROVING EMPLOYER DEFENSES

In its defense, Magco argued that it did all it could do to ensure the safety of its employees and that it was not liable for the unforeseeable, idiosyncratic conduct of its foreman who failed to check and secure the pallet. It contends the court erred in placing on it the burden of proving unforeseeable and unpreventable employee misconduct, citing in support Ocean Electric Corms. v. Sec. of Labor, 594 F.2d 396 (4th Cir. 1979), and L. R. Willson & Sons, Inc. v. Occupational Safety and Health Review Comm'n,

134 F.3d 1235 (4th Cir.), cert. denied, 525 U.S. 962 (1998). In these cases, the United States Court of Appeals for the Fourth Circuit has held that unpreventable employee misconduct was not an affirmative defense to a citation[2] and that, although a supervisor's knowledge of a safety hazard could be imputed to the employer, employer liability is not strict liability. Accordingly, the Fourth Circuit has held that when a violation is the result of employee misconduct, i.e., where it is created by an isolated, idiosyncratic act of an employee, the Secretary of Labor[3] must prove as part of his case-in-chief that the employee's conduct was "not unpreventable and not unforeseeable."[4]

The conclusions reached by the Fourth Circuit regarding the burden of proof on the issue of employee misconduct are not binding on this Court, see Maxey v. American Casualty Co. of Reading, Pa., 180 Va. 285, 290, 23 S.E.2d 221, 223 (1942), and we decline to follow its allocation of the burden of proof, because it is inconsistent with Virginia law. While we agree that employer liability based on worksite safety violations is not absolute, see Pike v. Dept. of Labor and Industry, 222 Va. 317, 322-23, 281 S.E.2d 804, 807 (1981), the burden of proof in establishing employee misconduct as a limitation on employer liability resides with the employer. VOSH has enacted regulations defining the parameters of the employee misconduct defense under Virginia law. These regulations are set forth in the VOSH Administrative Regulations Manual, codified at 16 VAC § 25-60-260. According to the pertinent regulation, an employer may avoid liability for a safety violation due to employee misconduct if [the] employer demonstrates that:

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[2] We note that the Fourth Circuit's holding is a minority view, with most of the federal circuits holding that employee misconduct is an affirmative defense, the burden of proof for which falls on the employer. See D. A. Collins Constr. Co. v. Sec. of Labor, 117 F.3d 691, 695 (2d Cir. 1997); Brock v. L. E. Myers Co., High Voltage Div., 818 F.2d 1270, 1276 (6th Cir.), cert. denied, 484 U.S. 989 (1987); Daniel Internat'l Co. v. OSHRC, 683 F.2d 361, 364 (11th Cir. 1982); H. B. Zachry Co. v. OSHRC, 638 F.2d 812, 818 (5th Cir. 1981); General Dynamics Corp. v. OSHRC, 599 F.2d 453, 458-59 (1st Cir. 1979); Danco Constr. Co. v. OSHRC, 586 F.2d 1243, 1247 n.6 (8th Cir. 1978).

[3] Under Virginia law, the Commissioner is the counterpart of the Secretary of Labor.

[4] In Ocean Electric, the specific element that the Secretary of Labor failed to prove was the "adequacy of the employers safety policy." In Ocean Electric, as in Willson, the violation was created by an employee/supervisor's failure to adhere to a specific safety rule. In such instances, it must be determined whether the conduct was foreseeable, implicating the adequacy of the employer's safety regulations and program. See Ocean Electric, 594 F.2d at 402 (where it was stipulated that employee/supervisor's violation of safety regulation was "accidental, not intentional, and purely a human error," it was incumbent upon the Secretary to introduce evidence on the adequacy of the employer's safety program. Having failed to meet its burden of proof on this issue, liability could not be imposed on the employer.).

1. employees of such employer have been provided with the proper training and equipment to prevent . . . a violation;

2 work rules designed to prevent such a violation have been established and adequately communicated to employees by such employer and have been effectively enforced when such a violation has been discovered;

3. the failure of employees to observe work rules led to the violation; and

4. reasonable steps have been taken by such employer to discover any such violation.

16 VAC § 25-60-260 (emphasis added). Thus, under Virginia law, the burden of proving any such defense to a citation, including unforeseeability, is on the employer. Cf. Ocean Electric, 594 F.2d at 401-02 (Secretary has burden of proving inadequacy of safety regulations); cf. also Willson, 134 F.3d at 1241.

Moreover, under the pertinent regulations, employers cannot claim the defense based on the misconduct of "any officer, management official or supervisor having direction, management control or custody of any place of employment which was the subject of the violative condition cited." 16 VAC § 25-60-260. The regulation defines "employee" to exclude supervisory personnel.[5] See id. Thus, under the regulations adopted pursuant to Code § 40.1-22(5), the defense of employee misconduct does not apply to the acts of supervisory personnel and does not insulate Magco from liability in this case.

For the reasons stated, we affirm the decision of the trial court.

Affirmed.

[5] 16 VAC § 25-60-260 provides: "(T]he term 'employee' shall not include any officer,management official or supervisor having direction, management control, or custody of any place of employment which was the subject of the violative condition."

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

JEFFREY D. BROWN, Commissioner of Labor and Industry, Plaintiff, v. OCTAVIO A. ESTEVEZ, trading as O. E. Contractor. Defendant.	)	Chancery No. 169366

DECREE PRO CONFESSO

This cause came to be heard upon Commissioner Jeffrey D. Brown's Motion for Decree Pro Confesso against Octavio A. Estevez, trading as O. E. Contractor, declaring that $15,650.00 in proposed civil penalties arising from contested Virginia Occupational Safety and Health (VOSH) citations, identified by VOSH Inspection Number 302602453 and as attached to the Commissioner's Bill of Complaint, be upheld; and declaring Defendant personally liable for the $15,650.00 in civil penalties pursuant to Code § 13.1-622, since Defendant held himself out as a sole proprietor of his company O. E. Contractor.

UPON CONSIDERATION WHEREOF, it appearing to the Court that more than twenty-one (21) days have elapsed since service of process on the Defendant and that no responsive pleadings have been filed by the Defendant, nor has an appearance been made in this action on his behalf, it is therefore

ADJUDGED, ORDERED, and DECREED that Plaintiff be awarded judgment by default in this cause against the Defendant, affirming that Octavio A. Estevez be held personally liable for payment to the Commonwealth of Virginia of $15,650.00 in civil penalties, arising from contested Virginia Occupational Safety and Health (VOSH) citations as set out in Inspection No. 302602453, Citations 1

and 2. It is also ADJUDGED, ORDERED, and DECREED that the Clerk of this Court shall strike this matter from the docket and place it among the ended chancery cases.

The Clerk shall mail certified copies of this order to the Defendant and to Jeffrey D. Brown, Commissioner of Labor and Industry, at 13 South Thirteenth Street, Richmond, Virginia 23219. Pursuant to Rule 1:13, endorsement by defense counsel shall be dispensed with.

JUDGE: *M. Langhorne Keith* ENTER: *6/4/01*
The Hon. M. Langhorne Keith Date

I ASK FOR THIS:

JEFFREY D. BROWN,
Commissioner of Labor and Industry

By: *John R. Murphy*
Counsel

John R. Murphy
Assistant Commonwealth's Attorney
County of Fairfax
4110 Chain Bridge Road, Room 123
Fairfax, Virginia 22030
phone 703.246.2776, fax 703.691.4004

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF SPOTSYLVANIA

JEFFREY D. BROWN, Commissioner of Labor and Industry,	)	.
Plaintiff,	)	
v.	)	Chancery No. CHOO-541
POWERTEC, INC.	)	
Defendant.	)	.

AGREED ORDER

Upon agreement of the parties and for good cause shown, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1 *Serious citation 1, grouped items 1 a & 1 b* are affirmed with a penalty of $490;

2. Powertec has paid to the Commonwealth the sum of $490.

3. That in accordance with the requirements of § 40(1) of the Virginia Occupational Safety and Health Administrative Regulations Manual, Powertec will post a copy of this Order for ten (10) working days, beginning from the date of entry of this Order, at the company's workplace if any exists, in conspicuous locations where notices to the employees are generally posted;

4. That as consideration for modifying the penalties above, Powertec agrees to withdraw the original notice of contest filed with respect to the above-styled case, waives its right to contest the terms contained in this Order, and certifies that all violations alleged in the citations have been abated;

5. That this Order is meant to compromise and settle the above contested claims, and 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; that this Order may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia; furthermore, that this Order will not be construed as an admission of liability by the Employer of civil liability for any violation alleged by the Commissioner;

6. That the Clerk will strike this matter from the docket of this Court, place it among the ended chancery cases, and will send an attested copy of this Order to both parties.

Entered this 7 day of June, 2001.

W. H. Ledbetter, Jr.
Judge

We ask for this::

JEFFREY D. BROWN,
Commissioner of Labor and Industry

Carol L. Alston *6/4/01*
Carol L. Alston Bar # 43415 Date
Special Assistant Commonwealth's Attorney
Department of Labor and Industry
13 South Thirteenth Street
Richmond, Virginia 23219
Phone: 804/ 786-0682
Fax: 804/ 786-8418

Seen and Agreed:

POWERTEC

Frank Patterson *5/31/01*
Frank Patterson, President Date
Powertec, Inc.
1708 MacTavish Avenue
Richmond, Virginia 23230
Phone: 804/ 359-3600

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF BEDFORD

JEFFREY D. BROWN, Commissioner of Labor and Industry, Plaintiff, v. **LELAND E. PRIBBLE** d/b/a Pribble Construction Co. Defendant.	)	Chancery No. 019CH19684-00

AGREED ORDER

WHEREAS, on or about July 22, 1998, the Commissioner of Labor and Industry (Commissioner), issued citations to Leland E. Pribble, doing business as Pribble Construction Co. (Mr. Pribble), alleging one (1) serious, three (3) willful, and one (1) other than serious violations of the Virginia Occupational Safety and Health (VOSH) Standards for the Construction Industry. A total of $23,250.00 in penalties was proposed by the Commonwealth for the violations. Upon agreement of the parties and for good cause shown, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. Mr. Pribble shall owe a penalty of $2,300.00, in lieu of the penalties as originally proposed in the citations. The citation and proposed penalties for each contested violation are established or amended as follows:

   a. Serious citation 1, Item 1 is affirmed as written, Mr. Pribble will owe $200.00 in lieu of the proposed penalty of $750.00.

   b. Willful citation 2, Item 1 is affirmed as written, Mr. Pribble will owe $700.00 in lieu of the proposed penalty of $7,500.00.

   c. Willful citation 2, Item 2 is affirmed as written, Mr. Pribble will owe $700.00 in lieu of

the proposed penalty of $7,500.00.

d. Willful citation 2, Item 3 is affirmed as written, Mr. Pribble will owe $700.00 in lieu of the proposed penalty of $7,500.00.

e. Other Than Serious citation 3, Item 1 is affirmed as written, with no penalty.

2. Mr. Pribble shall post a copy of this Agreed Order for a period of ten (10) working days at a conspicuous location where notices to his employees, if any exist, are generally posted.

3. Mr. Pribble has submitted payment of $2,300.00 to the Commonwealth, concurrent with his endorsement of this Order, in the form of a check made payable to the Commonwealth of Virginia.

4. As consideration for modifying the penalties above, Mr. Pribble withdraws his original notice of contest filed with respect to the above-styled case, and certifies that all violations alleged in the citations were previously abated.

5. Pursuant to Virginia 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 Agreed Order may be used for future enforcement proceedings and enforcement actions pursuant to Title 40.1 of the Code of Virginia.

6. The Clerk will strike this matter from the docket of this Court, place it among the ended chancery cases, and will send an attested copy of this Order to both parties.

Entered this *18th* day of December, 2000.

James W. Updike, Jr.
Judge

We ask for this:

JEFFREY D. BROWN,
Commissioner of Labor and Industry

By: *Dirk B. Padgett*
Counsel for Plaintiff

Dirk B. Padgett
Chief Assistant Commonwealth's Attorney
County of Bedford
P. O. Box 1071
Bedford, Virginia 24523
Phone 540.586.7628
Fax 540.586.2483

Seen and agreed to:

LELAND E. PRIBBLE

By: *Leland Pribble*
Defendant

Leland Pribble, Owner
Pribble Construction Co.
2127 Burnt Bridge Road
Lynchburg, Virginia 24503
804.384.6915

COURT OF APPEALS OF VIRGINIA

Present: Judges Benton, Willis and Humphreys
Argued at Richmond, Virginia

JOHN MILLS BARR,
COMMISSIONER OF LABOR AND INDUSTRY

v. Record No. 1382-99-2

OPINION BY
JUDGE ROBERT J. HUMPHREYS
AUGUST 22, 2000

S. W. RODGERS COMPANY, INC.

FROM THE CIRCUIT COURT OF HANOVER COUNTY
Richard H. C. Taylor, Judge Designate

Ellen F. Brown, Assistant Attorney General (Mark L. Earley, Attorney General; John R. Butcher, Assistant Attorney General, on briefs), for appellant.

Joseph H. Kasimer (Kasimer & Annino, P.C., on brief), for appellee.

The Commissioner of Labor and Industry ("Commissioner") appeals the decision of the circuit court that dismissed the bill of complaint filed against appellee for violations of the Virginia Occupational Safety and Health ("VOSH") standards for the construction industry. For the reasons that follow, we reverse the decision of the circuit court.

I. BACKGROUND

On March 31, 1995, the Commissioner cited the appellee, the S. W. Rodgers Company, Inc. ("Rodgers") for three violations of VOSH standards for the construction industry. The alleged violations were improper sloping of a trench, spoil piles of dirt located at the edge of a trench, and the absence of a competent, person to inspect the trench. On April 4, 1995, Rodgers submitted a notice of contest to the citation. On July 8, 1996, the Commissioner filed a bill of complaint against Rodgers in the Circuit Court of Hanover County ("trial court"). On July 29, 1996, Rodgers filed a grounds of defense, alleging that the bill of complaint had not been timely filed. The Commissioner responded that the reason for the delay in filing the bill of complaint was that there had been ongoing settlement negotiations between the parties.

On April 21, 1999, the trial judge heard the case. The Commissioner called Compliance Officer Warren Rice, who testified about conversations he had with Saul Kendall. Kendall had identified himself to Rice as Rodgers' foreman and Rodgers' "competent person" for the purpose of complying with the trenching standard. When the Commissioner attempted to question Rice regarding certain admissions Kendall had made with respect to the dimensions of the trench, Rodgers objected to the line of questions as calling for hearsay. Over the Commissioner's objection, the trial court excluded the statements as inadmissible hearsay.

At the conclusion of the Commissioner's case-in-chief, Rodgers moved to strike on the basis that the bill of complaint had not been timely filed. Rodgers presented no evidence in support of this position. The trial court granted Rodgers' motion to strike on the basis that the bill of complaint had not been timely filed.

II. ANALYSIS

Timeliness of Filing the Bill of Complaint

The Commissioner argues that Code § 40.1-49.4 (E) merely requires that the Commonwealth's Attorney be notified "immediately," and that a fifteen-month delay in the filing of a bill of complaint is not inherently unreasonable.[1] The Commissioner also contends that even if the statute contemplates an immediate filing of a bill of complaint, Rodgers did not plead or assert in the trial court that it was prejudiced by the fifteen-month interval between the notice of contest and the filing of the bill of complaint in this case. Rodgers argues that the Commissioner is required to file a bill of complaint

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[1] Code § 40.1-49.4 (E) provides as follows:

> Upon receipt of a notice of contest of a citation, proposed penalty, order of abatement or abatement time pursuant to subdivision A 4 (b), subsection B or C of this section, the Commissioner 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. Upon issuance and service of a subpoena in chancery, the circuit court shall promptly set the matter for hearing without a jury. The circuit court shall thereafter issue a written order, based on findings of fact and conclusions of law, affirming, modifying or vacating the Commissioner's citation or proposed penalty, or directing other appropriate relief, and such order shall become final twenty-one days after its issuance. The circuit court shall provide affected employees or their representatives and employers an opportunity to participate as parties to hearings under this subsection.

"immediately" upon receipt of a notice of contest and that failure to do so bars any action by the Commissioner.

We have not previously addressed the issue raised here. "A primary rule of statutory construction is that courts must look first to the language of the statute. If a statute is clear and unambiguous, a court will give the statute its plain meaning." Loudoun County Dep't of Social Servs. v Etzold, 245 Va. 80, 85, 425 S.E.2d 800, 802 (1993). In this case, the plain meaning of Code § 40.1-49.4 (E) dictates that the only immediate action required of the Commissioner is to notify the Commonwealth's Attorney. The word "immediately" only modifies the phrase "shall notify." The General Assembly did not repeat the word "immediately" in the second portion of the sentence when referring to the filing of a bill of complaint. By virtue of the intervening "shall," the adverb "immediately" does not distribute across the conjunction, "and," into the second part of the sentence.

In addition, we note that if the General Assembly had intended to impose a narrow time limit, it could have done so as it did in other sections of the statute[2]

Because Code § 40.1-49.4 is a remedial statute, it should be "'construed liberally so as to suppress the mischief and advance the remedy,' as the legislature intended." Board of Supervisors v. King Land Corp., 238 Va. 97, 103, 380 S.E.2d 895 , 897-98 (1989) (citation omitted). In addition, it is longstanding public policy that state actors cannot waive the right to enforce public health and safety laws. See Board of Supervisors v. Norfolk & W. Ry. Co., 119 Va. 763, 790, 91 S.E. 124, 133 (1916); Sink v. Commonwealth, 13 Va. App. 544, 547, 413 S.E.2d 658, 660 (1992). Therefore, we find that Code § 40.1-49.4 (E) does not impose upon the Commissioner the requirement that a bill of complaint be filed contemporaneously with the notification of the Commonwealth's Attorney.

In holding that the Commissioner was not required to file a bill of complaint immediately upon

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[2] For example, Code § 40.1-49.4 (A) (3) provides that "[n]o citation may be issued under this section after the expiration of six months following the occurrence of any alleged violation."

receipt of a notice of contest, we do not hold that the Commissioner has an unlimited amount of time in which to do so. We turn now to the questions of whether the fifteen-month delay in this case was inherently prejudicial, and, if not, whether there was any actual prejudice to Rodgers.

Although no statute of limitations applies to the Commonwealth unless the statute expressly so provides, see Code 8.01-231, we note that fifteen months is well within the statute of limitations for the filing of a civil action. Therefore, we find no inherent prejudice in a delay of fifteen months in filing a bill of complaint.

Here, Rodgers did not suggest or argue to the trial court that it was prejudiced by the filing delay. To obtain a dismissal for failure to file a bill of complaint within a reasonable period of time, Rodgers must present credible evidence that it was actually prejudiced by the length of the interval between the notice of contest and the filing of the bill of complaint. See Stewart v. Lady, 251 Va. 106, 114, 465 S.E.2d 782, 786 (1996) (burden of proving laches and prejudice is upon litigant asserting the defense). Rodgers made no claim that such prejudice existed.

Hearsay Objection

Declarations made by a party to litigation when offered through someone other than the declarant, though hearsay, are admissible in Virginia as party admissions. See Goins v. Commonwealth, 251 Va. 442, 461, 470 S.E.2d 114, 127 (1996). The party admission rule includes not only statements made by the party himself or herself, but also statements of other persons who stand in close relationship to the party. See Charles E. Friend, Law of Evidence in Virginia § 18-41 (5th ed. 1993). Thus, an agent's statements may be admitted against his or her principal if the agent made the statements while acting within the scope of employment and the agent had authority to make such statements on behalf, of the principal. See id. Here, the record indicates that Kendall was Rodgers' foreman, he was on the worksite, and he had identified himself as the "competent person" responsible for the trench. Under these circumstances, the trial court erred when it ruled that Kendall's statements to Rice, though hearsay, were

inadmissible as party admissions.

For these reasons, we reverse the decision of the trial court and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Benton, J., concurring and dissenting.

I concur in Part I and the portion of Part II holding that the Commissioner was not required to file a bill of complaint immediately upon notice of contest. Therefore, I would also reverse and remand this matter to the trial judge.

I would not decide the issue of prejudice, however, because the record does not establish that the parties had an opportunity to litigate that issue in the circuit court. As the majority notes, "we have not previously addressed" the meaning of the statute. Moreover, nothing on the face of the statute alerts the parties or the trial judge that prejudice is an element. The statement of facts indicates that the trial judge ruled at the conclusion of the Commissioner's case-in-chief that the bill of complaint was not timely filed. Thus, the judge had no occasion to address the issue of whether Rodgers was prejudiced by the delay of fifteen months. Because the issue of prejudice encompasses factual determinations, see Niese v. Klos, 216 Va. 701, 704, 222 S.E.2d 798, 801 (1976), I would direct the trial judge to consider on remand that issue.

Likewise, the statement of facts establishes only that "Kendall [was] . . . the foreman on site." The record does not contain any further evidence upon which we might conclude that the trial judge erred in excluding Kendall's out-of-court statements. I find no evidence in the record to support a conclusion that Kendall was authorized to speak for the corporation. See Monacan Hills v. Page, 203 Va. 110, 116, 122S.E.2d 654, 658 (1961) (holding that statements of an agent are admissible only if evidence proves the agent has authority to bind the corporation and the agent is speaking in respect to matters within the agent's scope of authority).

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HANOVER

JOHN MILLS BARR, COMMISSIONER, COMMISSIONER OF LABOR AND INDUSTRY, Plaintiff, v. S.W. RODGERS COMPANY, INC., Defendant.	))))))))))	Chancery No. 311-96

FINAL ORDER

THIS MATTER came before the Court upon the submission of an Order consented to by the parties, as evidence by the endorsement of counsel below, and it appearing to the Court that the parties have amicably resolved their differences, it is accordingly

ORDERED that with respect to inspection no. 125429191, Citation 1, Item 1 and Citation 1, Item 2b are vacated. Citation 1, Item 2a is reduced to an Other Than Serious violation with an effective date of April 21, 2000 and a penalty of $625.00 payable within fifteen (15) days of entry of this Order. This Order also incorporates by reference the terms of the parties' settlement agreement dated *Feb. 28*, 2001.

ENTERED this *6* day of *March*, 2001.

John Alderman

JUDGE, Circuit Court Hanover County

WE ASK FOR THIS:

KASIMER & ANNINO, P.C.

Joseph H. Kasimer

Joseph H. Kasimer, Esq. (VSB #15171)
7 5 Leesburg Pike
Falls Church, Virginia 22043
Phone: (703) 893 3914
Fax: (703) 893-6944
Counsel for Respondent S.W. Rodgers Co., Inc.

SEEN AND AGREED:

DEPARTMENT OF LABOR AND INDUSTRY

Diane L. Duell

Diane L. Duell, Esq.
Commonwealth of Virginia
Department of Labor and Industry
Powers-Taylor Building
13 South 13th Street
Richmond, Virginia 23219
Counsel for Commonwealth of Virginia,
Department of Labor and Industry
and Commissioner John Mills Barr