

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

FUYAO GLASS AMERICA, INC.,

Respondent.

OSHRC DOCKET NOS.

# 16-1899 (inspection no. 1149674),

# 16-2006 (inspection no. 1151844)

**ORDER DENYING REQUEST FOR PARTY STATUS**

By letter dated December 14, 2016, the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America – UAW requested election of party status on behalf of workers of Fuyao Glass America, Inc., Respondent herein, regarding the above captioned cases, inspection numbers 1149674 and 1151844 (Request).<sup>1</sup> Respondent objected (Objection). The Secretary filed a brief response taking no position regarding Respondent’s objection.<sup>2</sup> For the reasons discussed below, the UAW’s December 14, 2016 Request for party status in the above captioned cases is denied.

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<sup>1</sup> The December 14, 2016 election of party status was a resubmission of the UAW’s November 14, 2016 request for party status, regarding OSHA inspection numbers 1149674 and 1151844. The November 14, 2016 request inadvertently was not properly served on Respondent’s representatives. On December 8, 2016, due to an apparent administrative error, the UAW’s November 14, 2016 request for party status inadvertently was granted. Respondent objected to the grant of party status. By Order, also dated December 8, 2016, the Order granting party status was vacated by Chief Judge Rooney.

<sup>2</sup> The Secretary’s response states that “nothing in the Commission’s Rules of Procedure places the onus upon the Secretary to notify parties about an employee representative’s decision to elect party status.”

## *Background*

The Cincinnati Ohio Area Office of the Occupational Safety and Health Administration (OSHA) conducted an inspection of the Fuyao Glass America, Inc. worksite, located at 2801 Stroop Road, Moraine, Ohio 45439, between May 24, 2016 and September 21, 2016. The designated OSHA inspection number is 1149674. On October 6, 2016, OSHA issued a two item serious citation, a one item other than serious citation, and a notification of penalty (citation). The citation alleges violations of general industry standards regarding the use of personal protective equipment for hands (29 C.F.R. § 1910.132(a)), maintenance and ready accessibility to the material safety data sheet for Betaseal Glass Primer (29 C.F.R. § 1910.1200(g)(8)), and written certification of the required workplace hazard assessment regarding required personal protective equipment: gloves (29 C.F.R. § 1910.132(d)(2)). The total penalty proposed is \$23,160.00.

Respondent filed a timely notice of contest on November 8, 2016. Respondent's notice of contest was docketed with the Occupational Safety and Health Review Commission (Commission) on November 15, 2016, as case no. 16-1899. Thereafter, the Complaint was filed on December 5, 2016. The Answer was filed on December 8, 2016.

OSHA conducted another inspection at the same Fuyao worksite, located in Moraine, Ohio, between May 24, 2016 and October 27, 2016. The designated OSHA inspection number is 1151844. On October 31, 2016, OSHA issued an eleven item serious citation, with subparts, and a notification of penalty (citation). The citation alleges violations of general industry standards regarding stair treads on fixed industrial stairs (29 C.F.R. § 1910.24(f)), exit signage (29 C.F.R. § 1910.37(b)(4)(5)), protective helmets where there is a potential for head injuries from falling objects (29 C.F.R. § 1910.135(a)(1)), machine specific procedures for the control of potentially hazardous energy (29 C.F.R. § 1910.147(c)(4)(i)), locks and tags to attach to energy isolating devices (29 C.F.R. § 1910.147(c)(5)(i)), employee training on the safe application, usage and removal of energy isolating devices (29 C.F.R. § 1910.147(c)(7)(i)), following established procedures for the application of energy control (the lockout or tagout procedures) (29 C.F.R. § 1910.147(d)), machine guarding (29 C.F.R. § 1910.212(a)(1)), working space for electrical equipment likely to require examination, adjustment, servicing, or maintenance while energized (29 C.F.R. § 1910.303(g)(1)(i)), ready accessibility to an overcurrent device (29 C.F.R. § 1910.304(f)(1)(iv)), and portable electric equipment and flexible cords used in highly

conductive work locations (29 C.F.R. § 1910.333(a)(4)). The total penalty proposed is \$131,836.00.

Respondent filed a timely notice of contest on November 15, 2016. Respondent's notice of contest was docketed with the Commission on December 1, 2016, as case no. 16-2006. Thereafter, the Complaint was filed on December 5, 2016. The Answer was filed on December 8, 2016.

On December 12, 2016, Chief Judge Rooney issued an Order consolidating the above captioned cases with four additional cases pending before the Commission, involving the same parties. Further, this Order transferred the consolidated cases to Mandatory Settlement Proceedings.

#### *The UAW's Party Status Request*

In the December Request, the UAW stated that it was electing party status on behalf of the workers at Fuyao Glass America in Moraine, Ohio, regarding OSHA inspection numbers 1149674 and 1151844. The Request stated that Andrew Comai, Assistant Director Health & Safety Department International Union, UAW, is "the designated personal representative for health and safety issues of eleven employees at the Fuyao facility, including complainant Cynthia Harper." Further, "[t]hese employees' written designation of Mr. Comai as their personal representative [was] submitted to Ken Montgomery, Area Director of OSHA's Cincinnati office, on August 10, 2016. These employees seek to participate in the hearing over, and possible resolution of, the citations in this case." See UAW Request, p. 2, ¶ 1.

In addition, the UAW noted that pursuant to Commission Rule 22(c)<sup>3</sup> employees who are not members of a collective bargaining unit may elect to participate in proceedings before the Commission. "[A]ffected employees may effectuate their statutory rights via a representative such as Mr. Comai." See UAW Request, p. 2, ¶ 2.

#### *Respondent's Objection*

Respondent asserts that the UAW is not an "authorized employee representative" of Respondent's employees pursuant to the Commission Rules. The UAW has no collective bargaining relationship with Respondent's employees. The UAW has not obtained representative status of Respondent's employees. There is no collective bargaining agreement between Fuyao and the UAW. See Objection p. 2. See also Commission Rules 1(g); 22(b).

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<sup>3</sup> Occupational Safety and Health Review Commission Rules of Procedure, 29 C.F.R. § 2200.00 *et seq.*

Also Respondent asserts that the allegedly affected Fuyao employees, referenced in the UAW's December Request, have not made an individual appearance in the above captioned Commission proceedings. There is no filing in the Commission proceedings stating that these Fuyao employees agreed to be represented by UAW Attorney Ava Barbour or Andrew Comai. Respondent states that the allegedly affected Fuyao employees are not identified by name or other identifier and there is no evidence that the alleged Fuyao employees are "affected employees" pursuant to the Commission Rules. See Objection pp. 3-4. See also Commission Rules 1(e); 22(a) and (c).

### *Discussion*

The Occupational Safety and Health Act<sup>4</sup> provides that affected employees or representatives of affected employees shall have the opportunity to participate in proceedings before the Commission. "The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection." Section 10(c) of the Act; 29 U.S.C. § 659(c).

Commission Procedural Rules<sup>5</sup> effectuate this directive. Commission Rule 20(a) "Party status" states: "*Affected employees.* Affected employees and authorized employee representatives may elect party status concerning any matter in which the Act confers a right to participate."

Affected employees and representatives of affected employees have the right to participate as parties in Commission hearings. Further, Commission precedent accords affected employees and their authorized representatives, who have elected party status, the right to "meaningful participation" in the settlement process. See *Boise Cascade Corp.*, 14 BNA OSHC 1993, 1994-99 (No. 89-3087, 1991)(consolidated); *Gen. Elec. Co.*, 14 BNA OSHC 1763, 1764-66 (No. 88-2265, 1990); *Kaiser Aluminum & Chem. Corp.*, 6 BNA OSHC 2172, 2173 (No. 76-2293, 1978). See also Commission Rule 100(c).

Commission Rules define the terms "affected employee" and "authorized employee representative." Commission Rule 1(e) states: "*Affected employee* means an employee of a cited employer who is exposed to or has access to the hazard arising out of the allegedly violative circumstances, conditions, practices or operations."

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<sup>4</sup> Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the Act).

<sup>5</sup> See note 3 above.

Commission Rule 1(g) states: “*Authorized employee representative* means a labor organization that has a collective bargaining relationship with the cited employer and that represents affected employees. “

Commission Rules describe the election of party status by affected employees in a collective bargaining unit, as follows:

*Affected employees in collective bargaining unit.* Where an authorized employee representative [see Commission Rule 1(g)] elects to participate as a party, affected employees who are members of the collective bargaining unit may not separately elect party status. If the authorized employee representative does not elect party status, affected employees who are members of the collective bargaining unit may elect party status in the same manner as affected employees who are not members of the collective bargaining unit. See [Commission Rule 22(c)].

Commission Rule 22(b). *See Ga.-Pac. Corp.*, 15 BNA OSHC 1127, 1129 (No. 89-2713, 1991); *United States Steel Corp.*, 11 BNA OSHC 1361, 1364 (No. 80-2425, 1983). *See also* Rules of Procedure, 51 Fed. Reg. 23184, 23185 (proposed June 25, 1986) (to be codified at 29 C.F.R. Part 2200) (proposing an expansion of the rule “to allow members of collective bargaining units to elect party status if the authorized employee representative does not so elect.”)

Commission Rule 22(c) also specifically describes the election of party status by affected employees who are not in a collective bargaining unit. “*Affected employees not in a collective bargaining unit.* Affected employees who are not members of a collective bargaining unit may elect party status under [Commission Rule 20(a)]. If more than one employee so elects, the Judge shall provide for them to be treated as one party.”

A conference call was held, on December 21, 2016, with Counsel for the Secretary Hema Steele, Counsel for Respondent Mary Lentz, Cassandra Rice and Micah Siegal, and Counsel for the UAW Ava Barbour, to discuss the UAW’s requested election of party status. During the call, Ms. Barbour confirmed that the UAW does not have a collective bargaining relationship with Fuyao, the cited employer. Absent a collective bargaining relationship between the UAW and Respondent, the UAW’s request for party status in the above captioned cases is denied. During the call, Ms. Barbour and counsel for the parties were so advised.

It is the absence of a “collective bargaining relationship” between the UAW, a labor organization, and Fuyao, the cited employer, that precludes the grant of party status to the UAW in these cases. To elect party status the labor organization must have a collective bargaining relationship with the cited employer and the labor organization must represent affected

employees. *See* Commission Rules 1(g), 20, 22(b). Respondent’s contention is inaccurate that a labor organization must be able to “present a collective bargaining agreement” in order to appear as an authorized employee representative and elect party status in a Commission proceeding. Objection p. 2.

Commission Rule 1(g) does not define “authorized employee representative” as a labor organization that has completed negotiations for a “collective bargaining agreement” with the cited employer. Rather, Commission Rule 1(g) defines “authorized employee representative” more broadly as a labor organization that has a “collective bargaining relationship” with the cited employer. A collective bargaining relationship describes the mutual obligation of an employer and the collective bargaining representative chosen by a majority of the employer’s employees, in an appropriate unit,<sup>6</sup> to collectively bargain with one another in good faith, regarding wages, hours, and other terms and conditions of employment.<sup>7</sup> This collective bargaining relationship and mutual obligation to bargain *of necessity* begins before collective bargaining negotiations are completed and an agreement reached.

Also discussed, during the December 2016 conference call, were the provisions in the Act and Commission Rules that affected employees may participate in proceedings before the Commission and request party status. *See* section 10(c) of the Act; Commission Rules 1(e), 20, 22(c). Parties have the right to be represented during Commission proceedings. *See* Commission Rule 22(a).

The UAW’s December Request provides insufficient information to determine whether the employees generally identified are “affected employees” pursuant to the Commission Rules. Further, the UAW’s Request provides insufficient information to determine whether the employees generally identified have requested party status, in the above captioned cases, *in proceedings before the Commission*. Reading the UAW’s December Request as a request to serve as the designated party representative, on behalf of alleged affected employees who elect

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<sup>6</sup> When the representative for the purposes of collective bargaining is selected by the majority of the employer’s employees, in an appropriate unit, in a secret ballot election directed by the National Labor Relations Board, the Board shall certify the election results. *See* National Labor Relations Act (NLRA), section 9(a) - (c); 29 U.S.C. §§ 159(a)-(c). *See generally, In re Perry*, 859 F.2d 1043, 1045 (1st Cir. 1988) (“[The Union] itself is not a party to the proceedings [before the Commission], because it has not been certified as the employees’ collective bargaining representative.”)

<sup>7</sup> *See* NLRA, sections 8(a)(5), 8(b)(3), and 8(d); 29 U.S.C. §§ 158(a)(5), (b)(3), and (d). *See generally, NLRB v. Borg-Warner Corp., Wooster Div.*, 356 U.S. 342 (1958).

party status, this request also is denied. During the call, Ms. Barbour and counsel for the parties were so advised.

*Order*

The UAW's December Request for party status on behalf of workers of Fuyao Glass America, Inc., in the above captioned cases, is denied.

SO ORDERED.

Dated: January 4, 2017  
Washington, D.C.

*Carol A. Baumerich*  
Carol A. Baumerich  
Judge, OSHRC