



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.

OSHRC Docket No. 04-2049

THE RUHLIN COMPANY,

Respondent.

APPEARANCES:

Howard M. Radzely, Solicitor of Labor; Joseph M. Woodward, Associate Solicitor for Occupational Safety and Health; Michael P. Doyle, Counsel for Appellate Litigation; Daniel J. Mick, Counsel for Regional Trial Litigation; Ronald Gottlieb, Attorney; U.S. Department of Labor, Washington, DC

For the Complainant

Tod T. Morrow, Esq.; Buckingham Doolittle & Burroughs LLP; Canton, OH

For the Respondent

DECISION

Before: RAILTON, Chairman; ROGERS and THOMPSON, Commissioners.

BY RAILTON, Chairman; THOMPSON, Commissioner:

Before the Commission on review is a decision by Administrative Law Judge Ken S. Welsch, vacating a citation alleging a violation of 29 C.F.R. § 1926.95(a)—the personal protective equipment (PPE) standard for the construction industry—and affirming an alternative allegation of a violation under the general duty clause, section 5(a)(1) of the Occupational Safety and Health Act (OSH Act), 29 U.S.C. § 654(a)(1). Under both items, the Secretary alleges that employees of The Ruhlin Company (Ruhlin) failed to wear high-visibility vests while working in or near oncoming highway traffic. For the reasons that follow, we vacate the citation in its entirety.

Background

Ruhlin is a construction management and heavy construction company based in Ohio. Ruhlin was the general contractor on a construction project involving the expansion of a four-lane highway in Akron, Ohio. Part of the project involved the replacement of a section of the shoulder along the eastbound, right-hand lane of the highway in order to create an additional traffic lane. Ruhlin established a work zone extending approximately one-eighth of a mile along the eastbound shoulder before beginning construction. The boundary of the work zone was marked by three-foot high orange cones placed between the right and left eastbound lanes, closing the right lane off to traffic. Ruhlin also placed an arrow board in front of the work zone directing traffic to the left lane and informing drivers that the speed limit in the work zone was thirty miles per hour, not the posted fifty miles per hour.

On September 30, 2004, a compliance officer (CO) from the Occupational Safety and Health Administration (OSHA) inspected Ruhlin's worksite. The CO observed various vehicles entering and exiting, and maneuvering within, the work zone. He also observed that nine Ruhlin employees working within the work zone were not wearing high-visibility vests. Ruhlin made such vests available to both flaggers and its other employees working within the work zone, but Ruhlin only required its flaggers to wear the vests. Based on the failure of these employees to wear the vests while working in or near oncoming traffic, the Secretary issued Ruhlin a citation alleging a serious violation of § 1926.95(a). The Secretary subsequently amended the citation to allege, in the alternative, a violation of section 5(a)(1) of the OSH Act.

At issue here is (1) whether the language of § 1926.95(a) encompasses high-visibility vests; (2) whether, under Commission precedent, the Secretary's alleged section 5(a)(1) violation is preempted; and (3) whether Ruhlin had fair notice that it must provide high-visibility vests to its employees working within a highway construction work zone under section 5(a)(1) of the OSH Act.

Discussion

I. Application of 29 C.F.R. § 1926.95(a)

We first address the judge's dismissal of the § 1926.95(a) item. The judge concluded that "reflective warning vests"¹ were not protective equipment within the meaning of § 1926.95(a) and that the standard did not apply to the cited conditions. He reasoned that the standard only requires protective equipment that provides an actual physical barrier between the potential hazard and the employee. He concluded that "reflective warning vests" operate as a warning signal in contrast to the specific forms of "protective equipment" addressed by the other standards within Subpart E of 29 C.F.R. Part 1926. The judge also concluded that the Secretary does not consider "high visibility vests" or "warning vests" to be personal protective equipment because she promulgated other standards requiring such equipment outside the provisions of § 1926.95(a).

In determining whether the Secretary has met her burden of proving that a standard applies, we first look to the language of the standard. *See Oberdorfer Indus. Inc.*, 20 BNA OSHC 1321, 1328-29, 2002-04 CCH OSHD ¶ 32,697, p. 51,643 (No. 97-0469, 2003) (consolidated cases). Here, the Secretary argues on review that § 1926.95(a) is ambiguous with regard to whether warning garments can be considered PPE.² We agree that the language of

¹ Throughout his opinion, the judge referred to the warning garments at issue as "reflective warning vests." We note, however, that the Secretary alleges in the citation that Ruhlin's "employees were observed missing 'personal protective equipment' (safety vests) while working in or near oncoming traffic." Moreover, in the citation the Secretary references an advisory standard that recommends the use of "bright, highly visible clothing." During the hearing, the testimony of the Secretary's expert witness primarily pertained to high-visibility clothing rather than just reflective clothing. Accordingly, we believe that the judge mischaracterized the warning garments at issue as "reflective warning vests" and consider it more accurate to describe them here as either "high-visibility" or "warning" garments.

² Section 1926.95(a) provides as follows:

Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

§ 1926.95(a) standing alone does not indicate whether “protective equipment” includes high-visibility vests. We reach a similar conclusion in *United States Postal Service (USPS)*, OSHRC Docket No. 04-0316, a case that we decide today as well. In *USPS*, we find that the phrase “protective equipment” as used in 29 C.F.R. § 1910.132(a)—the general industry counterpart to § 1926.95(a)—does not indicate whether it includes reflective vests, another type of warning garment.

When the language of the standard fails to provide an unambiguous meaning, we look to the standard’s legislative history. See *Oberdorfer Indus. Inc.*, 20 BNA OSHC at 1328-29, 2002-04 CCH OSHD at p. 51,643. The legislative history of § 1926.95(a) does not resolve the question of ambiguity with regard to warning garments. In promulgating § 1926.95(a), the Secretary merely incorporated the regulatory text of § 1910.132(a). See *Incorporation of General Industry Safety and Health Standards Applicable to Construction Work*, 58 Fed. Reg. 35,076 (June 30, 1993). Section 1910.132(a), in turn, was based on an existing federal standard and promulgated under section 6(a) of the OSH Act, 29 U.S.C. § 655(a). See *General Industry*, 39 Fed. Reg. 23,502 (June 27, 1974). As we discuss in *USPS*, nothing in the legislative history of § 1910.132(a) “directly and explicitly” indicates that, in promulgating this regulation, the Secretary intended this PPE standard to include warning garments, such as the high-visibility vests at issue in the case before us. See *Exxon Mobil Corp. v. Allapattah Servs.*, 125 S. Ct. 2611, 2626-27 (2005) (in interpreting the meaning of a statute, the Court looked for a direct and explicit statement in statute’s legislative history). Because the phrase “protective equipment” is ambiguous and legislative history does not clarify the Secretary’s intent in promulgating § 1926.95(a), we must evaluate whether the Secretary’s interpretation of the phrase is reasonable. See *Oberdorfer Indus. Inc.*, 20 BNA OSHC at 1329, 2002-04 CCH OSHD at p. 51,643.

In assessing the reasonableness of the Secretary’s interpretation, we “tak[e] into account such factors as the consistency with which the interpretation has been applied, adequacy of notice to regulated parties, and the quality of the Secretary’s elaboration of pertinent policy considerations.” See *id.*, 20 BNA OSHC at 1328-29, 2002-04 CCH OSHD at pp. 51,643-44 (citing *Martin v. OSHRC*, 499 U.S. 144, 157-58 (1991)); *Union Tank Car Co.*, 18 BNA OSHC 1067, 1069, 1995-97 CCH OSHD ¶ 31,445, p. 44,472 (No. 96-0563, 1997); *Martin v. Am. Cyanamid Co.*, 5 F.3d 140, 146 (6th Cir. 1993) (“[w]hether the Secretary has consistently interpreted a regulation is a factor bearing on the reasonableness of that interpretation”).

Here, we conclude that the Secretary’s interpretation is not reasonable. As in *USPS*, an examination of the PPE standard as a whole—in this case § 1926.95(a)—suggests that warning garments may *not* be considered PPE. Section 1926.95(a), which is the general PPE provision for Subpart E, requires that PPE be provided and used whenever it is necessary to protect against hazards “capable of causing injury or impairment . . . through absorption, inhalation or physical contact.” The types of protective equipment listed in the standard itself and in the sections that follow it in Subpart E do not include equipment that “warns.” *Cf. Carlyle Compressor Co.*, 683 F.2d 673, 675-76 (2d Cir. 1982) (finding that the Secretary could not reasonably interpret “hazards such as” in 29 C.F.R. § 1910.212(a) to include hazards that are not similar to those enumerated in the section). Rather, the only types of equipment identified are those that act as a barrier or shield. *See* 29 C.F.R. §§ 1926.96 (safety-toe footwear), .100 (protective helmets), .101 (ear protective devices), .102 (eye and face protection equipment), .103 (respiratory protection), .104 (safety belts, lifelines, and lanyards), .105 (safety nets), .106 (life jackets and buoyant work vests). Moreover, as we note in *USPS*, where OSHA requires the use of warning garments, OSHA specifically identifies them as such in the standard. *See, e.g.*, 29 C.F.R. §§ 1917.71(e) (requiring marine terminal employees to wear high visibility vests), 1918.86(m) (requiring cargo-handling personnel to wear high visibility vests), 1926.201(a) (requiring flaggers in the construction industry to wear warning garments). Thus, OSHA’s failure to reference warning garments in § 1926.95(a) cuts against finding that high-visibility vests are covered under that provision. *See FTC v. Sun Oil Co.*, 371 U.S. 505 (1962) (when a term is specifically used in a regulation but excluded in another, it should not be implied where excluded).

Additionally, we note that § 1926.201(a), which requires flaggers to wear “warning garments,” is located in Subpart G of Part 1926—which pertains to “Signs, Signals, and Barricades”—rather than Subpart E—which pertains to “Protective and Life Saving Equipment” and is at issue in this case. Thus, the Secretary apparently considers a warning garment a type of “signal” or “barricade” for those employees engaged in flagging work, but considers the same garments to be PPE for all other employees. If the Secretary intended for this internal inconsistency to exist in Part 1926, she could have drafted § 1926.95(a) to specifically include warning garments as PPE when she first promulgated the standard in 1993, or she could have revised § 1926.95(a) in this manner when she amended § 1926.201(a) in 2002. *See Safety Standards for Signs, Signals, and Barricades*, 67 Fed. Reg. 57,736 (Sept. 12, 2002). Her failure

to do so strongly suggests that she never intended to treat warning garments as PPE in any context under Part 1926. *See Erik K. Ho*, 20 BNA OSHC 1361, 1376, 2002-04 CCH OSHD ¶ 32,692, pp. 51,585-86 (No. 98-1645, 2003) (consolidated) (in finding that Secretary's interpretation is not reasonable, noting that Secretary failed to draft or amend language of standard in a manner that provided fair notice to the regulated community), *aff'd*, 401 F.3d 355 (5th Cir. 2005).

Finally, we find that the Secretary has failed to consistently interpret the PPE standard to include high-visibility vests, and she has not adequately explained this inconsistency. In a July 1984 letter from John B. Miles, Jr., Director of OSHA's Directorate of Field Operations, the Secretary explained that under 29 C.F.R. § 1926.28(a)³—OSHA's then general PPE standard for the construction industry—"high visibility vests would fall under the broad definition of [PPE]." In reaching this conclusion, the Secretary noted that the National Safety Council and the American National Standards Institute considered high-visibility clothing to be PPE.⁴ Then in a May 2004 letter from Russell B. Swanson, the Director of OSHA's Directorate of Construction, the Secretary addressed whether "[c]onstruction employees working on highway/road construction work zones" were required to wear "high-visibility apparel." The Secretary in the May 2004 letter explained that under § 1926.201(a),⁵ such apparel is required for certain flaggers. Noting that Subpart G of Part 1926 does not, otherwise, "address the circumstances in

³ Section 1926.28(a) requires compliance with the specific PPE and lifesaving equipment contained in 29 CFR Part 1926, Subpart E, where § 1926.95(a)—adopted by the Secretary in 1993—is now located. The language of § 1926.28(a) has not changed since 1984, and states as follows: "The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees."

⁴ The Secretary has taken a similar litigation position in other cases. *See USPS*, OSHRC Docket No. 04-03116; *AAA Delivery Servs., Inc.*, 2002-04 CCH OSHC ¶ 32,673 (No. 02-0923, 2003), *aff'd on other grounds*, 21 BNA OSHC 1219 (No. 02-0923, 2005); *Farrens Tree Surgeons, Inc.*, 15 BNA OSHC 1793, 1991-93 CCH OSHD ¶ 29,770 (No. 90-998, 1992).

⁵ Section 1926.201(a) requires as follows: "Signaling by flaggers and the use of flaggers, including warning garments worn by flaggers shall conform to Part VI of the Manual on Uniform Traffic Control Devices, (1988 Edition, Revision 3 or the Millennium Edition), which are incorporated by reference in § 1926.200(g)(2)."

which it is necessary to provide warning garments to protect against the hazard posed by traffic,” the Secretary further explained:

It is well recognized in the construction industry that construction workers in highway/road construction work zones need to be protected from traffic. The MUTCD reflects industry practice with respect to identifying the types of situations where these workers need high-visibility warning garments. In such cases, Section 5(a)(1) requires the use of such garments.

Not only are these two interpretative letters inconsistent, the May 2004 letter effectively supersedes the July 1984 letter, thus removing the primary basis of the § 1926.95(a) enforcement policy that the Secretary followed in this case. We do not suggest that the Secretary may never change her point of view on a particular issue. *See Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1296 (D.C. Cir. 2004) (although “[a]n agency is free to discard precedents or practices it no longer believes correct,” before doing so it must supply a “reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored”). Here, however, the Secretary failed to elaborate her reasons for changing this policy. Instead, she tries to explain away the May 2004 letter by noting that “it does not address the scope of § 1926.95(a) or any of [her] prior pronouncements construing the phrase ‘personal protective equipment’ as including reflective vests.” While the May 2004 letter does not explicitly address these issues, its apparent message is that section 5(a)(1), and not a specific standard, governs whether non-flaggers in highway construction zones are required to wear high-visibility vests. Consequently, the Secretary’s decision to identify high-visibility vests as PPE required by § 1926.95(a) is a change of course that lacks a reasoned analysis. *See Oberdorfer Indus. Inc.*, 20 BNA OSHC at 1329, 2002-04 CCH OSHD at pp. 51,643-44 (citing *Greater Boston Television Co. v FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)).

As explained in *USPS*, however, the most troubling aspect of the Secretary’s approach in this case is her attempt to impose a warning clothing requirement under the guise of an interpretation in order to avoid the statutory requirements for rulemaking, as set forth in section 6 of the OSH Act, 29 U.S.C. § 655. In both the case before us and *USPS*, the Secretary would “interpret” her PPE standards as imposing the substantive requirement to use warning clothing. Given the history of the construction PPE standard, as detailed in *USPS*, we must reject the Secretary’s attempt to sidestep her obligation to proceed under the rulemaking provisions of the OSH Act.

We therefore conclude that the Secretary’s interpretation is unreasonable, and affirm the judge’s decision to vacate the § 1926.95(a) item.

II. Alleged Violation of Section 5(a)(1) of the OSH Act

The judge concluded that an advisory (as opposed to a mandatory) standard in the Manual on Uniform Traffic Control Devices (MUTCD)⁶ did not preempt a citation under section 5(a)(1). Reaching the merits, the judge found that Ruhlin violated section 5(a)(1) by not requiring its employees who worked within the highway construction work zone to wear high-visibility vests. We agree with the judge that the citation was not preempted, but we vacate for lack of fair notice.

A. Preemption

Ruhlin argues that, based on the reasoning in *A. Prokosch & Sons Sheet Metal, Inc.*, 8 BNA OSHC 2077, 1980 CCH OSHD ¶ 24,840 (No. 76-576, 1980) (consolidated cases) (“*Prokosch*”), section 6D.02 of the MUTCD (Millennium Edition) preempts a citation under section 5(a)(1). Section 6D.02 states that “workers close to the motor vehicle traveled (sic) way should wear bright, highly-visible clothing.” Title 29 C.F.R. § 1926.200(g)(2), in turn, states that “[a]ll traffic control signs or devices used for protection of construction workers shall conform to . . . Part VI of the [MUTCD], Millennium Edition, December 2000, FHWA, which are incorporated by reference.” Because § 1926.200(g)(2) incorporates Part VI of the MUTCD, Ruhlin reasons that section 6D.02 governs whether its employees are required to wear high-visibility vests. We disagree with Ruhlin’s reasoning.

At issue in *Prokosch* was an ANSI standard made applicable via 29 C.F.R. § 1926.550(b)(2). Even though the ANSI standard was advisory and did not require the employer to abate the cited hazard, the Commission held that it preempted a citation under section 5(a)(1) because, as an incorporated standard, it “represent[ed] the considered judgment of the Secretary, after receiving input from safety experts and persons who will be affected by the standard[], of the proper means to guard against particular hazards.” *Prokosch*, 8 BNA OSHC at 2080-81, 1980 CCH OSHD at pp. 30,629-30. In response to *Prokosch*, the Secretary revised the

⁶ The Federal Highway Administration of the United States Department of Transportation promulgates the MUTCD, which defines the standards used by road managers nationwide to install and maintain traffic control devices on all streets and highways.

relevant portion of 29 C.F.R. § 1926.31, the provision outlining the process for incorporating standards, to read:

The standards of agencies of the U.S. Government, and organizations which are not agencies of the U.S. Government which are incorporated by reference in this part, have the same force and effect as other standards in this part. Only the mandatory provisions (i.e., provisions containing the word “shall” or other mandatory language) of standards incorporated by reference are adopted as standards under the Occupational Safety and Health Act.

See 29 CFR Parts 1910 and 1926 Standards Improvement (Miscellaneous Changes) for General Industry and Construction Standards, 63 Fed. Reg. 33,450, 33,462 (June 18, 1998) (“In order to address [the issues raised in *Prokosch*], the Agency is revising § 1926.31(a) to clarify that only the mandatory requirements of incorporated consensus standards are adopted as OSHA standards.”). We hold that because section 6D.02 is an advisory, not a mandatory, standard in the MUTCD, the provision is *not* incorporated as an OSHA standard via § 1926.200(g)(2) and therefore does not preempt a citation under section 5(a)(1) of the OSH Act.⁷

B. Fair notice

A citation issued under section 5(a)(1) will be vacated if the Commission determines that the employer lacks fair notice of what conduct is required. See *Southern Ohio Bldg. Sys., Inc. v. OSHRC*, 649 F.2d 456, 460-61 (6th Cir. 1981). In light of the interpretation that the Secretary provided in the May 2004 letter, we find that Ruhlin lacked fair notice that it could have an obligation under section 5(a)(1) to require its employees to wear high-visibility vests. See *Billeke-Tolosa v. Ashcroft*, 385 F.3d 708, 711 (6th Cir. 2004) (“[t]he consistent application of an

⁷ Chairman Railton would also find that the Secretary failed to establish industry recognition of a hazard under section 5(a)(1). The question here—whether employees working within a highway construction work zone are required to wear high-visibility vests—is addressed by section 6D.02 of the MUTCD. As noted, that standard’s language reflects that wearing “highly-visible clothing” is suggested but not required. Because the use of such clothing is not mandatory for employees working near a motor vehicle travel way, the Chairman would conclude that the MUTCD cannot serve as the basis for proving that the construction industry has recognized that a non-flagger’s failure to wear a high-visibility vest poses a hazard recognized under section 5(a)(1). See *Oberdorfer Indus. Inc.*, 20 BNA OSHC at 1326, 2002-04 CCH OSHD at pp. 51,641-42 (“[a] hazard is ‘recognized’ within the meaning of the general duty clause if the hazard is known either by the employer or its industry”). By treating the MUTCD advisory standard as industry recognition of a hazard, the Secretary makes it a mandatory practice. Chairman Railton would require additional proof of industry practice, as the Secretary attempted in this case.

agency's precedents, like the consistent application of its regulations, serves a critical purpose: the provision of fair notice to those subject to the agency's decisions"). The Secretary suggested in the May 2004 letter that, as to "[c]onstruction employees working on highway/road construction work zones" who are *not* flaggers, "[t]he MUTCD reflects industry practice with respect to identifying the types of situations where these workers need high-visibility warning garments," and "[i]n such cases, Section 5(a)(1) requires the use of such garments." However, section 6D.02 of the MUTCD states that "workers close to the motor vehicle traveled (sic) way *should* wear bright, highly-visible clothing." (Emphasis added.) Because this provision uses optional and not mandatory language, Ruhlin could have reasonably concluded that its employees were not in "the type of situation" where high-visibility warning garments were needed and, therefore, it was not required by section 5(a)(1) to use such garments. The language of the MUTCD is consistent with the Secretary's enforcement policy. According to her Field Inspection Reference Manual (FIRM) at chapter III, section C.2.c.(3)(e), "Section 5(a)(1) shall not be used to enforce 'should' standards." See *Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1392, 2002-04 CCH OSHD ¶ 32,690, p. 51,558 (No. 97-0755, 2003) (FIRM confers no substantive rights on employers and does not bind the Secretary during litigation).

Under these circumstances, we find that Ruhlin could not have been sufficiently apprised of a duty to require use of high-visibility vests by employees other than flaggers. See *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1120, 1993-95 CCH OSHD ¶ 30,048, pp. 41,277-78 (No. 88-572, 1993) (citing cases "which indicate that section 5(a)(1) may be inapplicable in certain limited circumstances, amounting to unfairness, *i.e.*, where the Secretary has stated, or in a substantially clear way has implied, that an existing applicable standard or body of standards cover the hazard or hazards, and set forth the entire duty of employers and employees engaged in the particular operations or activities presenting such hazards"); *cf. Southern Ohio Bldg. Sys., Inc.*, 649 F.2d at 460-61 (noting that an employer "could not have been sufficiently apprised of his potential liability under the general duty clause for failing to erect a catch platform in light of the language of [29 C.F.R. §] 1926.451(u)(3)" (quoting and following *R. L. Sanders Roofing Co. v. OSHRC*, 620 F.2d 97, 100 (5th Cir. 1980) (per curiam))). We thus conclude that Ruhlin cannot be held liable under section 5(a)(1) of the OSH Act.

Order

Accordingly, we affirm the judge's vacatur of the § 1926.95(a) item, but we reverse the judge's affirmance of the section 5(a)(1) item and thus vacate the citation in its entirety.

SO ORDERED.

/s/ _____
W. Scott Railton
Chairman

/s/ _____
Horace A. Thompson
Commissioner

Dated: November 20, 2006

ROGERS, Commissioner, concurring:

While I concur with my colleagues' decision to vacate the citation in this case, I respectfully disagree with their reasoning. I agree that the phrase "protective equipment," as used in 29 C.F.R. § 1926.95(a), is ambiguous. However, for reasons that are fully articulated in my dissenting opinion in *United States Postal Service (USPS)*, OSHRC Docket No. 04-0316, I would conclude that the Secretary's interpretation of § 1926.95(a) in this case is reasonable. See *Martin v. OSHRC*, 499 U.S. 144, 158-59 (1991) ("CF & I"). The language of § 1926.95(a) and 29 C.F.R. § 1910.132(a)—the general industry counterpart to § 1926.95(a)—is identical. Moreover, as my colleagues note, the Secretary merely incorporated the regulatory text of § 1910.132(a) when she promulgated § 1926.95(a). Thus, my analysis regarding the reasonableness of the Secretary's interpretation in *USPS* applies as well here.

Nonetheless, I would vacate the § 1926.95(a) citation due to lack of fair notice. In *USPS*, I described the May 2004 interpretative letter issued by Russell B. Swanson as "somewhat confusing and obtuse." While the letter is not directly on point to the interpretation of the cited standard, § 1926.95(a), it addresses obligations of construction employers (specifically in the highway/road construction context) and predates the inspection here by more than four months. In this context, unlike in *USPS*, the letter goes directly to fair notice and, in my view, served to deprive Ruhlin of fair notice that the cited standard applied. However, because I would have otherwise found that § 1926.95(a), as reasonably interpreted by the Secretary, is applicable to the cited condition, I would not reach the Secretary's alternative allegation under the general duty clause, section 5(a)(1) of the OSH Act, 29 U.S.C. § 654(a)(1).

/s/ _____
Thomasina V. Rogers
Commissioner

Dated: November 20, 2006



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant

v.

Ruhlin Company,

Respondent.

OSHRC Docket No. **04-2049**

Appearances:

Mary Anne Garvey, Esquire
Office of the Solicitor, U. S. Department of Labor
Cleveland, Ohio,
For Complainant

Tod T. Morrow, Esquire
Buckingham, Doolittle & Burroughs
Canton, Ohio,
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Ruhlin Company, a heavy highway construction contractor, began widening a section of Highway 224 in Akron, Ohio, on September 30, 2004. Ruhlin closed the outside eastbound (right) lane to motorists, used orange cones to create a work zone, and placed an arrow board to warn traffic of the road work and to reduce the speed limit from 50 mph to 30 mph. Ruhlin's employees working inside the work zone were not required to wear reflective warning vests. As a result of an inspection by the Occupational Safety and Health Administration (OSHA), Ruhlin received a serious citation on October 25, 2004. Ruhlin timely contested the citation.

The serious citation alleges Ruhlin violated § 5(a)(1) of the Occupational Safety and Health Act (Act) (item 1) for employees working/walking within the swing radius of a backhoe machine; 29 C.F.R. § 1926.95(a) (item 2) for employees not wearing personal protective equipment (reflective vests) while working in the work zone; and 29 C.F.R. § 1926.100(a) (Item 3) for an employee working under an excavator bucket without proper head protection.

The citation proposes a penalty of \$3,000 for Items 1 and 2 and a penalty of \$900 for Item 3. The Secretary amended Item 2 regarding the alleged violation of §1926.95(a) to plead in the alternative a violation of § 5(a)(1) of the Act.

The hearing was held on May 11, 2005, in Akron, Ohio. The parties stipulated jurisdiction and coverage (Tr. 4). The Secretary withdrew Items 1 and 3; leaving Item 2, the failure to require reflective vests, at issue in this case (Tr. 3).

It is undisputed Ruhlin does not require its employees to wear reflective warning vests while working in a work zone established during highway construction work. Ruhlin asserts that neither §1926.95(a) nor §5(a)(1) of the Act require the use of such vests.

For the reasons discussed, the alleged violation of §1926.95(a) is vacated. However, the alternative alleged violation of § 5(a)(1) of the Act is affirmed.

The Inspection

Ruhlin is engaged in the business of construction management and heavy highway construction. Ruhlin has been in business since 1910. Its office is located in Sharon Center, Ohio. Ruhlin employs approximately 80 full-time employees and 200 seasonal workers (Tr. 171-172, 186).

In 2004, the Ohio Department of Transportation contracted Ruhlin to widen and improve a one mile section of Highway 224 in Akron, Ohio (Tr. 188, 197). Highway 224 is a four-lane highway with two eastbound lanes and two westbound lanes. The posted speed limit is 50 mph (Exh. R-3; Tr. 11, 45, 177).

Ruhlin began the project on September 30, 2004, the day of OSHA's inspection (Tr. 187). It was a clear and sunny day with good visibility (Tr. 33, 36). Ruhlin started work by replacing a section of the shoulder along the eastbound lane with concrete for eventual use in re-routing traffic (Tr. 40, 187). To work on the shoulder, Ruhlin's crew established a work zone for approximately one-eighth of a mile (Tr. 11, 31, 75). The work zone was designated by 3-foot high orange cones placed along the outside (right) lane, closing it off to vehicular traffic (Exh. C-6; Tr. 32-33). The inside (left) lane remained open to traffic. The work zone was approximately 11 feet wide (Tr. 11, 75). An arrow board placed in front of the work zone directed traffic to the inside lane and informed motorists that the speed limit was reduced to 30 mph (Tr. 32, 177).

At approximately 12:30 p.m., Compliance Officer (CO) Jacko Vermillion while driving along Highway 224, observed nine employees of Ruhlin including project foreman Mike Adelman, working in the work zone without wearing reflective vests. The nine employees were wearing regular work clothing. CO Vermillion saw only one Ruhlin employee and two employees of the City of Akron wearing reflective vests. After parking his car, Vermillion initiated the OSHA inspection (Exh. C-5 thru C-11; Tr. 12, 14, 16, 18-19, 27, 73). The inspection took less than one hour (Tr. 36).

During the inspection, the employees were not observed outside the work zone without vests (Exhs. C-7 thru C-11; Tr. 54). Once, CO Vermillion saw foreman Adelman remove and replace an orange cone to allow a concrete truck to enter the work zone (Exhs. C-12, C-13; Tr. 17). Pickup trucks and a dump truck were also seen inside the work zone (Tr. 76). Foreman Adelman told Vermillion that Ruhlin had vests on site but the employees had not put them on that morning because they were in a hurry (Tr. 18). Adelman retrieved several vests from his truck for the employees to wear (Tr. 19).

As a result of Vermillion's inspection, Ruhlin received the serious citation for violation of § 1926.95(a) for failing to require employees to wear reflective warning vests. The Secretary amended the citation to include in the alternative, a violation of § 5(a)(1) of the Act based on the same allegation.

Discussion

The parties agree Ruhlin's employees were not wearing reflective vests during the OSHA's inspection and Ruhlin did not require them to wear the vests in the designated work zone. Ruhlin's policy only requires flaggers to wear reflective vests for highway projects (Tr. 175). Although not required, employees are allowed to wear vests which Ruhlin will provide or the employees could use their own (Tr. 175, 190). In this case, Ruhlin's project foreman retrieved several vests from his truck and some employees had their own (Exh. C-10, Tr. 18, 22). According to CO Vermillion, Ruhlin's employees generally wear reflective vests while in the work zone (Tr. 42).

The Secretary does not dispute that the placement of orange cones and an arrow board establishes a work zone for highway construction and such signage was appropriate. Also, there

is no evidence Ruhlin's employees at any time were outside the work zone without wearing reflective vests (Tr. 54).

At issue in this case is whether Ruhlin is required to have its employees wear reflective vests working in the work zone by § 1926.95(a) or § 5(a)(1) of the Act.

A. Applicability of § 1926.95(a)

Section 1926.95(a) provides:

Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

_____ In order to establish a violation of a safety standard such as § 1926.95(a), the Secretary has the burden of proving, among other elements, that the cited standard is applicable to the conditions and work performed by the employer.¹ *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Judge Simko in *AAA Delivery Services, Inc.*, 2002 CCH OSHD 32,673 (No. 02-923, 2003), addressed the application of § 1910.132(a)², to not requiring reflective vests by newspaper vendors at a busy intersection. Judge Simko found § 1910.132(a) did not apply because a

¹The other elements of the Secretary's burden of proof include the employer's noncompliance with the standard's terms, the employee access to the violative conditions, and the employer's actual or constructive knowledge of the violation. If applicability of the standard is established, there is no issue in this case that Ruhlin did not require employees to wear the vest, employees were exposed to a struck-by hazard, and Ruhlin knew the employees were not wearing the vests.

²Section 1910.132(a) is identical to §1926.95(a) and requires the same protective equipment in general industry as §1926.95(a) does in construction. Section 1910.132(a) states:

Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

reflective vest was not protective equipment within the meaning of the standard. The standard requires protective equipment which provides an actual physical barrier between the potential hazard and the employee. Reflective vests operate as a warning signal to others and not as a barrier or shield. The Review Commission by decision dated September 1, 2005, also vacated citation but on other grounds. The Commission found that the Secretary failed to establish that AAA was the employer of the vendors. Commission did not address the application of § 1910.132(a). The court agrees with Judge Simko's analysis and applies it to this case under § 1926.95(a).

_____ Unlike § 1910.132(a), § 1926.95(a) is located in OSHA's construction standards under Subpart E entitled *Personal Protective and Life Saving Equipment*. The standard requires an employer to provide appropriate protective equipment including personal protective equipment to its employees based on the nature of the hazards in the workplace. The standard does not define "protective equipment" or "personal protective equipment." Therefore, the words are given their most common sense definition when viewed in the context of the standard. *Globe Industries*, 10 BNA OSHC 1596 (No. 77-4313, 1982).

The dictionary defines "protective" as "affording or serving as a safeguard," "providing a defense or shelter against danger or harm," and "tending to shield." *Webster's Third New International Dictionary*.

This definition of "protective" as a guard or shield is reflected by the specific forms of "protective equipment" addressed by the other standards within Subpart E. Such protective equipment includes safety-toe footwear, helmets, ear protection devices, eye and face protective equipment, respiratory protection, safety belts, lifelines, lanyards, safety nets, and life jackets, if working over or near water. *See § 1926.96 - § 1926.106*. The common factor among these various types of protective equipment discussed in Subpart E is they provide actual physical protection or barrier between the potential hazard and the employee. None of the protective equipment identified in Subpart E operates solely as a warning garment, as in the case of reflective vests. The protection offered by a reflective vest is as a visual warning. The wearing of a vest will do nothing to reduce or prevent the impact on the employee if struck by a vehicle. Reflective vests lack the guarding or shielding quality of the protective equipment required by § 1926.95(a). Reflective vests or similar warning equipment is not addressed in Subpart E.

Reflective vests are referenced in Subpart G, *Signs, Signals, and Barricades*. Section 1926.201(a), under Subpart G, provides:

Flaggers. Signaling by flaggers and the use of the flaggers, including warning garments worn by flaggers shall conform to Part VI of the Manual on Uniform Traffic Control Devices, (1988 Edition, Revision 3 or the Millennium Edition), which are incorporated by reference in § 1926.200(g)(2).

It is noted that § 1926.201(a) uses the term “warning garment” as opposed to reflective vests. Also, this section was amended in April 2002, but it continued to reference “warning garment” and its limitation to flaggers.³ By amending Subpart G in 2002, the Secretary showed her intent on keeping the warning garment requirements in Subpart G rather than relocate them to the “protective equipment” provisions of Subpart E.

Also, it is noted the Secretary has promulgated standards requiring “high visibility vests” or “warning vests” for employees who perform excavation work exposed to vehicular traffic [29 C.F.R. §1926.651(d)], work at marine terminals [29 C.F.R. §1917.71(e)], or perform cargo unloading work [29 C.F.R. § 1918.86(m)]. Thus, the Secretary has chosen to place the standards requiring vests or warning garments in standards outside the provisions of § 1926.95(a). She has not considered vests or warning garments as personal protective equipment.

The Review Commission and administrative law judges have discussed reflective vests as a type of protective equipment in several cases. In *Farrens Tree Sugeons, Inc.*, 15 BNA OSHC 1793 (No. 90-998, 1992), the Commission vacated a violation of § 1910.132(a) for not requiring vests on the basis of lack of employer knowledge. The Commission did not specifically address the issue of applicability. In *National Engineering & Contracting Co.*, 1995-97 CCH OSHD 31,023 (No. 94-2787, 1996) and *Nelson Tree Service, Inc.*, 19 BNA OSHC 1982 (No. 00-1130, 2001), violations of § 1926.95(a) and § 1910.132(a) were vacated by administrative law judges on the basis that orange cones, barrels, signs, flashing lights made vests redundant and were designed to prevent the same hazard.

³There is no dispute Ruhlin’s flaggers wore reflective vests as required by §1926.201 (Tr. 175).

It is noted OSHA's standard interpretation issued May 11, 2004, recognizes § 1926.95(a) may not apply. The interpretation states:

[it] is well recognized in the construction industry that construction workers in highway/road construction work zones need to be protected from traffic. The MUTCD⁴ reflects industry practice with respect to identifying the types of situations where these workers need high visibility warning garments. In such cases, Section 5(a)(1) requires the use of such garments. (Exh. C-15).

The alleged violation of § 1926.95(a) is vacated. The Secretary failed to establish in this case the applicability of § 1926.95(a) in requiring the use of reflective warning vests by employees working in a designated work zone.

B. Applicability of § 5(a)(1) of the Act

Section 5(a)(1) of the Act, referred to as the general duty clause, provides:

Each employer -

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

A citation alleging a violation of § 5(a)(1) of the Act is inappropriate when a specific standard applies to the facts. In this case, it is determined that § 1926.95(a) does not require reflective vests as a warning device in highway construction work. Also, § 1926.201(a) which requires flaggers to wear vests, is not applicable to employees in the work zone.

Ruhlin argues § 5(a)(1) cannot be cited because OSHA's Field Inspection Reference Manual (FIRM) prohibits the use of § 5(a)(1) to enforce an advisory standard. According to the FIRM, CPL 2.103, Section 7 - Chapter III, C.2.c. "*Violations of the General Duty Clause*" under C.2.c.(3) entitled "*Limitations on Use of the General Duty Clause*," it states:

Section 5(a)(1) shall not be used to enforce 'should' standards. (Exh. R-5).

⁴"MUTCD" is the *Manual on Uniform Traffic Control Devices* developed by the Federal Highway Administration.

The citation at issue refers to the MUTCD, section 6D.02. Section 6D.02 which is incorporated by 29 C.F.R. § 1926.200, states “workers close to the motor vehicle traveled way *should* wear bright, highly visible clothing” (Exh. R-2, emphasis added). According to the MUTCD, the verb “should” is characterized as guidance which is recommended, but not mandatory (Exh. R-2, page 1-3). Also, § 1926.31(a) provides that only mandatory provisions are incorporated and adopted as standards. Also, see *A. Prokosch & Sons Sheet Metal, Inc.*, 8 BNA OSHC 2077, 2082 (No. 76-406, 1980) (“a hazard addressed by an advisory standard cannot be the subject of a citation under section 5(a)(1)”).

In this case, the Secretary’s reference to the MUTCD was to show the industry recognition of a hazard as required to establish a § 5(a)(1) violation. See *OSHA Standard Interpretation issued May 11, 2004*. It is noted that the focus of the MUTCD is temporary traffic control and not a manual for worker safety (Tr. 152). Also, OSHA’s internal documents and interpretations such as the FIRM do not have the force and effect of law and do not confer procedural or substantive rights or duties on employers. *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2173 (No. 87-0922, 1993). Ruhlin’s argument that OSHA cannot cite § 5(a)(1) is rejected.

In order to prove a violation of §5(a)(1) of the Act, the Secretary must show:

- (1) there was an activity or condition in the employer's workplace that constituted a hazard to employees, (2) either the cited employer or its industry recognized that the condition or activity was hazardous, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) there were feasible means to eliminate the hazard or materially reduce it.

Waldon Healthcare Ctr., 16 BNA OSHC 1052, 1058 (No. 89-2804, 1993).

1. The Hazard

As the first element in establishing a § 5(a)(1) violation, a “hazard” is defined in terms of conditions or practices deemed unsafe over which an employer can reasonably be expected to exercise control. *Morrison-Knudson Co./Yonkers Contracting Co., A Joint Venture*, 16 BNA OSHC 1105, 1121-1122 (No. 88-572, 1993). “[T]he existence of a hazard is established if the hazardous incident can occur under other than a freakish or utterly implausible concurrence of circumstances.” 16 BNA OSHA at 1060.

The hazard in this case is characterized as a struck-by hazard (Tr. 44, 144). With one lane remaining open to motorists adjacent to the work zone and the number of construction vehicles entering and exiting the work zone, the record establishes the presence of a struck-by hazard (Exhs. C-9A and 9B; Tr. 76-77, 80).

Ruhlin's OSHA 300 log, which reflects employees' lost time due to accidents and illness, shows its employees on highway projects have been struck by vehicles (Tr. 179, 192). Ruhlin's safety director Jeffery Peecook recalled two incidents where the employees were wearing vests. One employee was struck by an automobile and other struck by a construction vehicle (Tr. 192-193). He was aware other companies have had employees injured by vehicles in the work zone (Tr. 193). Mark Potnick, director of labor relations for the Ohio Contractors Association, testified to the existence of a struck-by hazard to employees from highway motorists as well as construction vehicles in the work zone (Tr. 218-220).

A struck-by hazard is also established by OSHA's CPL 04-00, October 1, 2004, which referenced an NIOSH study finding that 1 of 3 workers killed in construction work zones were struck-by motorists (mostly truck related), (Exh. C-1). A DHHS/NIOSH document (Pub. No. 2001-128) reported that for the period of 1992-1998, 492 fatalities occurred in highway or street construction work zones. Of these fatalities, 318 or approximately 70 percent involved a worker on foot struck by a vehicle. The worker was as likely to be struck by a construction vehicle (154 fatalities, primarily from backing vehicles) as by a passing traffic vehicle (152 fatalities) (Exh. C-18, pp. 12-13; Tr. 121). In Region V, which includes Ohio, OSHA found that a majority of the 54 fatalities in the 5 years prior to October 2004, of employees working on road construction sites were the result of employees struck-by highway and construction vehicles (Exh. C-1).

The record establishes the existence of a struck-by hazard to employees in the work zone.

2. The Hazard was Recognized

A hazard is deemed "recognized" when the potential danger of a condition or activity is either actually known to the particular employer or generally known in the industry. *Pepperidge Farm, Inc.*, 117 BNA OSHC 1993 (No. 89-0265, 1997).

As discussed, the record in this case establishes employees' exposure in the work zone to automobile traffic and construction vehicles is a recognized hazard by Ruhlin and the highway construction industry.

3. A Hazard Likely to Cause Death or Serious Injury

There can also be no dispute the struck-by hazard from an automobile or a truck could cause death or serious injury to an employee (Tr. 134-135).

4. Feasibility of Means to Eliminate or Reduce the Hazard

As the final element in establishing a §5(a)(1) violation, the Secretary must show the proposed abatement will “eliminate or materially reduce the hazard.” *Cardinal Operating Company*, 11 BNA OSHC 1675 (No. 80-1500, 1983). In this case, OSHA’s proposed abatement is the use of reflective warning vests by employees in the work zone.

Although not a company requirement, Ruhlin encourages employees to wear reflective vests within the work zone and even provides them (Tr. 175, 190). Ruhlin’s safety director agrees “it’s probably a good idea for Ruhlin employees to wear vests” (Tr. 182). He typically wears a vest on road construction sites (Tr. 184).

The record fails to establish, however, the reflective vests will eliminate or materially reduce the employees’ risk of severe injury from highway motorists who unexpectedly enter the work zone. The work zone with 3-foot high orange cones and signage already alerts motorists to the road side construction work. The additional warning provided by the reflective vests may provide another level of warning. But, the Secretary fails to show vests in conjunction with cones and signage would materially reduce the employee’s risk to the struck by hazard from motorists. As Judge Brady observed in *National Engineering & Contracting Co.*, 1995-97 CCH OSHD 31,023 (No. 94-2787, 1996), “a motorist who could not control an automobile well enough to avoid hitting orange barrels would not be able to stop for a reflectorized vest.” In this case, there is no evidence Ruhlin’s employees went outside the work zone without vests (Tr. 54). Also, it is noted on the day of the inspection, the weather was clear and sunny. The visibility was good (Tr. 33, 36).

On the other hand, with regard to the employees’ exposure to construction vehicles already inside the work zone, vests would be the only means of warning drivers of construction vehicles of the location of employees and afford some protection to employees. CO Vermillion observed, “there was traffic in the work zone that they were working in, such as concrete trucks, dump trucks and pick-up trucks” (Tr. 53). He also saw a backhoe in the zone (Tr. 77). The dump truck was seen entering and exiting the work zone (Tr. 80).

Dr. James Sayer,⁵ who testified for the Secretary as an expert in pedestrian conspicuity and the design of high visibility garments, opined that employees working in a work zone are exposed to a struck-by hazard. He testified all workers in the zone should wear high visibility safety apparel at all times because they “dramatically reduce the likelihood of a struck-by injury” (Tr. 117, 119, 122, 130). In support of his opinions, Dr. Sayer relied upon a NIOSH document which showed 70% of all road worker fatalities were associated with moving vehicles in the work zone and a document by the American Road and Transportation Builders Association (ARTBA) which identified the frequency workers are struck-by vehicles within the work zone ((Exh. C-18; Tr.121-122, 128).

Dr. Sayer considered reflective vests important in reducing the struck-by hazards posed by both highway motorists and construction vehicles. However, unlike orange cones which warn motorists, there is no means of warning drivers of construction vehicles already inside the work zone of the presence of employees. The number of fatalities caused by highway motorists (152) is the same as caused by construction vehicles (154) (Exh. C-18). Dr. Sayer opined that a high visibility garment such as a vest reduces the likelihood of struck-by injury or fatality because it makes the worker more conspicuous so that the driver can more easily detect the worker and avoid a collision (Exh. C-18; Tr. 130-131). Unlike the cones which warn highway motorists of the work zone, there is nothing in the zone which warns the driver of a construction vehicle, if employees are in front or behind his vehicle. A highway construction zone is more confined, only 11 feet wide in this case, and employees are working in close proximity to the construction vehicles (Exhs. C-5, C-6, C-10).

The record in this case establishes that reflective vests will materially reduce the struck-by hazard to workers in the work zone from construction vehicles. Such warning is not provided by the orange cones and appropriate signage.

A serious violation of § 5(a)(1) is established. If an accident occurred and an employer is struck by a construction vehicle in the work zone, the resulting injury would likely be broken bones or death.

⁵Dr. Sayer received a Ph.D. in industrial and systems engineering from Virginia Tech. in 1993 and is currently an assistant research scientist with the University of Michigan (Exh. C-17; Tr. 108-109).

Penalty Determination

In determining an appropriate penalty, consideration of the size of the employer's business, history of the employer's previous violations, the employer's good faith, and the gravity of the violation is required. Gravity is the principal factor.

With 80 salaried employees and 200 seasonal employees, Ruhlin is given no credit for size (Tr. 186). Ruhlin is also not given credit for history because it has received serious citations within the past three years (Tr. 79). Ruhlin does receive credit for good faith because the employees generally wore vests, and Ruhlin provided vests to the work site. Also, the work zones had the appropriate signage and cones.

A penalty of \$2,000 is reasonable for violation of § 5(a)(1) of the Act. There were nine Ruhlin employees not wearing reflective vests including the project foreman. During the inspection, Vermillion observed a number of construction vehicles working inside the work zone.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that serious Citation:

1. Item 1, alleged serious violation of §5(a)(1) of the Act, is withdrawn by the Secretary.
2. Item 2, alleged serious violation of 29 C.F.R. §1926.95(a) is vacated. The alternative violation of § 5(a)(1) of the Act, is affirmed and a penalty of \$2,000 is assessed.
3. Item 3, alleged serious violation of 29 C.F.R. § 1926.100(a), is withdrawn by the Secretary.

SO ORDERED.

/S/ KEN S. WELSCH

Date: October 17, 2005

Judge Ken S. Welsch