United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., 9th Floor
Washington, DC 20036-3457

Secretary of Labor, Complainant v. OCP Contractors, Inc., Respondent.	OSHRC Docket No. **18-0767**

ORDER DENYING IN PART AND GRANTING IN PART RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Respondent, OCP Contractors, Inc. (OCP), filed a motion for summary judgment. In dispute is a two-item citation alleging serious violations of the construction standards at 29 C.F.R. §§ 1926.20(b)(2) and 1926.200(b)(1). In its motion, OCP contends the Secretary cannot meet his burden of proof with regard to both citation items as a matter of law. OCP argues the Secretary's evidence in support of the alleged violation of § 1926.20(b)(2) is inadequate as a matter of law. Regarding the alleged violation of § 1926.200(b)(1), OCP contends the standard does not require the actions the Secretary alleges it failed to take. The Secretary responds his evidence of a violation of § 1926.20(b)(2) is adequate to establish a violation of the standard. He contends OCP misconstrues the meaning of § 1926.200(b)(1) and OCP's conduct did violate the requirements of the standard. For the foregoing reasons, OCP's Motion for Summary Judgment is **DENIED** in part and **GRANTED** in part.

BACKGROUND

This matter arose at a construction project for which OCP was a subcontractor. The project was to build a new building on the campus of Cleveland State University in Cleveland, Ohio (the Cleveland State Project). Gilbane Building Company was the general contractor. OCP had been hired as the carpentry subcontractor.

Among the tasks required of OCP was the installation of concrete, or TAKTL, panels on the exterior of the building. OCP was to install these panels on all four sides of the building. To install the panels required OCP employees to work from an aerial lift. On October 11, 2017, a fatal accident occurred while OCP employees, working from the aerial lift, were installing panels on the south side of the building. This work placed the OCP employees 60 feet above the

floor below. At approximately 2:30 pm, a panel slipped and fell. It hit another contractor's employee standing below, killing him.

Unlike the other three walls, the south wall had a below-grade access for delivery to the basement. This area also served as a fresh air intake well. The air intake well had been used throughout the project by employees of subcontractors for breaks and other purposes. Prior to the accident, the well had been covered with a grate. At some point, the grate was removed and barricade tape had been put up to restrict access to the area. The decedent was standing in the air intake well when the panel fell.

OCP's foreman for the project attested he conducted daily "walkarounds" of the worksite. He stated he inspected the air intake well at least twice per week. He attested he was aware the air intake well had been taped off prior to the accident but could not say when the tape was present. He had not inspected the area before beginning work on the south wall, or any time on October 11, 2017, prior to 2:30 pm.

Upon notification of the accident, the Cleveland OSHA Area Office conducted an inspection of the worksite. Compliance Safety and Health Officer (CSHO) Rick Dvorak conducted the inspection. Based upon his inspection, CSHO Dvorak recommended OCP be issued a serious citation alleging two violations of § 5(a)(2) of the Act. Item 1, Citation 1, alleges a violation of 29 C.F.R. § 1926.20(b)(2) for failure to conduct frequent and regular inspections of the worksite. Item 2, Citation 1, alleges OCP failed to erect barricades to limit access to the air intake well in violation of 29 C.F.R. § 1926.200(b)(1).

OCP timely contested the citations. Prior to the scheduled hearing, OCP filed its *Motion for Summary Judgment*. The Secretary filed his *Motion for Summary Judgment* and incorporated in his memorandum in support his response to OCP's motion.[1] OCP filed a response to the Secretary's motion. The undersigned has considered all the submissions of the parties in reaching the decision herein.

[1] The Secretary's response to OCP's motion was timely filed; his *Motion for Summary Judgment* was not. The undersigned has considered all the arguments raised by the Secretary. Regardless of treatment of the Secretary's arguments, the outcome is the same.

ANALYSIS

Standard on Summary Judgment

Summary judgment is properly granted only where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The party moving for summary judgment has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). When determining if there is a genuine factual dispute, the fact finder must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962). In *Ford Motor Company—Buffalo Stamping Plant,* 23 BNA OSHC 1593 (No. 10-1483, 2011), the Commission set forth the standards for judges considering summary judgment motions:

> In reviewing a motion for summary judgment, a judge is not to decide factual disputes. . . Rather, the role of the judge is to determine whether any such disputes exist. . . When determining if there is a genuine factual dispute, the fact finder must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. . . Thus, not only must there be no genuine dispute as to the evidentiary facts, but there must also be no controversy as to the inferences to be drawn from them.

Id. (citations and footnote omitted.)

The Secretary has the burden of establishing the employer violated the cited standard. To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Group, Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009). Because the Secretary has the burden of proof, Respondent need only come forward with evidence that undermines one element of the Secretary's case or "demonstrate that the evidence in the record falls short of establishing" that element of the Secretary's case. *International Shortstop, Inc. v. Rally, Inc*., 939 F.2d 1257, 1264 (5th Cir., 1991). In response, the Secretary must come forward with evidence from which a fact finder could return a verdict in his favor. *Id*.

Item 1, Citation 1: Alleged Violation of 29 C.F.R. § 1926.20(b)(2)

In Item 1, Citation 1, the Secretary alleges a violation of 29 C.F.R. § 1926.20(b)(2) which requires an employer to initiate and maintain a safety program that "shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers." This provision is part of the employer's accident prevention responsibilities. 29 C.F.R. § 1926.20(b). The inspection program must ensure no employees "work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health or safety." 29 C.F.R. § 1926.20(a)(1). Inspections must be conducted by a "competent person" defined as a person "capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them." 29 C.F.R. § 1926.32(f).

The Secretary alleges OCP failed to have its competent person conduct adequate, frequent, and regular inspections of the south exterior portion of the worksite prior to the time its employees were working in the aerial lift over the air intake well to which subcontractor employees had access. OCP contends the Secretary cannot meet his burden because his theory inspections were not conducted is based entirely on the existence of a hazard. The Secretary contends it was OCP's repeated failure to identify the open grate during its various walks around the worksite, as well as the failure to conduct an assessment of the area prior to starting the overhead work, that leads to the inference its inspections were neither adequate, as they failed to ensure employees were not working under hazardous or dangerous conditions, nor conducted by someone capable of identifying existing or predictable hazards.

As a preliminary matter, OCP's arguments the Secretary conceded its inspection program met the requirements of the standard based on the language of the citation itself are without merit. It is well-recognized citations are written by non-lawyers, under time constraints, such that they should be liberally construed. *National Realty Construction Co., Inc. v. OSHRC,* 489 F.2d 1257, 1264 (D.C. Cir. 1973). An indication a violation is "corrected during inspection" on a citation means the employer came into compliance or the hazard was eliminated. 29 C.F.R. § 1903.19(b)(1). The hazard alleged is the struck-by hazard resulting from having access to an area below overhead work. The hazard no longer existed at the time of the inspection because

there was no overhead work ongoing. OCP also suggests the reference to "the" competent person is a concession its personnel are competent to conduct inspections. To the contrary, this language can be fairly read to refer to the individual the employer designated as the competent person, not a binding admission the individual is competent as that term is defined in the regulations.

The Commission has held to determine whether an employer failed to comply with the requirements of § 1926.20(b)(2) the court must consider the totality of the circumstances and evaluate whether the employer acted reasonably under those circumstances. *Superior Custom Cabinet Co*., 18 BNA OSHC 1019, 1022 (No. 94-200, 1997).[2] In determining the requirement that inspections be "frequent and regular," the Commission has turned to ordinary dictionary definitions of those terms. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2206-07 (No. 87-2059, 1993). Such definitions for regular "include 'consistent or habitual in action' and 'recurring at set times.'" *Id. citing* Webster's New Work Dictionary 1196 (2d ed. 1972). Regarding the frequency of inspections, the Commission has held consideration must be given to what "a reasonable person familiar with the size of the worksite and the magnitude of the ongoing construction activity would" consider necessary to "keep track of safety hazards at the site*." Id. citing R & R Builders, Inc.*, 15 BNA OSHC 1383, 1388 (No. 88-282, 1991). Material facts remain in dispute whether OCP's safety program included provisions for inspections that were sufficiently regular and occurred with the frequency a reasonable person familiar with the worksite and construction activity would consider necessary to protect workers from unsanitary, hazardous, or dangerous conditions.

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[2] Both parties base their positions on unreviewed decisions of Commission Administrative Law Judges (ALJ) that are not binding and have no precedential value. *Leone Construction Co.*, 3 BNA OSHC 1979 (No. 4090, 1976); and *Elliot Constr. Corp.*, 23 BNA OSHC 2110, n. 4 (No. 07-1578, 2012). Neither discuss controlling Commission precedent. More troubling, OCP quotes from the ALJ decision in *Superior Rigging & Erecting Co*., 1998 WL 152468 (No. 96-0126, 1998), in which the ALJ vacated an alleged violation of § 1926.20(b)(2). The Commission granted the employer's petition for review on those items affirmed by the ALJ and remanded the case. 18 BNA OSHC 2089 (No. 96-0126, 2000). The Secretary did not appeal the decision to vacate the alleged violation of § 1926.20(b)(2) and the Commission did not address it. The ALJ issued a second decision on remand (2000 WL 1280907 (No. 96-0126, 2000)) which was ultimately set aside by the Commission. OCP's reliance on the underlying unreviewed ALJ decision is misplaced.

OCP's safety program, attached as Exhibit A to the affidavit of William (Skip) Powell, Jr., specifies the responsibilities of various personnel in vague terms and gives little indication it applies to the Cleveland State Project. Under the program, the Field Superintendent and the Foreman (neither of whom is identified) are both obligated to inspect the worksite, but only the Foreman is given a frequency. That direction requires he inspect the jobsite daily and fill out a weekly report. The program is silent as to when such inspections are to take place or what they are to cover. OCP provided an exhibit that purports to summarize documentation of "some" inspections of the Cleveland State Project (Exhibit B to Affidavit of William (Skip) Powell, Jr.). Neither the Foreman's affidavit nor the summary exhibit provides any more detail as to the content of the inspections. The summary report does not confirm the Foreman's purported daily inspections, nor does it confirm the Foreman completed his required weekly reports. The majority of the documented inspections were conducted by OCP's Safety Director, not the Foreman. The documentary evidence submitted by OCP belies any claim it followed its own safety program. Material facts remain in dispute as to who conducted, the frequency, and content of OCP's inspections of the worksite.

In his affidavit, the Foreman attests he had previously inspected the air intake well and was aware barricade tape had been erected in the area (Exhibit 4 to Respondent's Reply). The Foreman concedes he did not inspect this area the day of the accident prior to commencement of the overhead work performed by OCP. He contends he inspected the area the day prior to the accident. Other than this single inspection, the Foreman was unable recall when he last inspected the area. The October 10 inspection cannot be definitively confirmed by the summary exhibit. The Foreman's lack of memory of all but one specific inspection, as well as the lack of corroboration, raises a question of credibility that is not properly resolved on summary judgment.

The Foreman contends, on the day of the accident, no work was to be performed in the air intake well. The Secretary presented evidence in the form of the CSHO notes indicating OCP was aware employees entered the area below the air intake well for breaks and that this was a matter discussed during morning contractor meetings (Exhibit F to Complainant's Response at pp. 43-44). From this evidence, an inference can be drawn it was predictable employees might be present in this area, despite no work being performed there. How long the air intake well had been open prior to the day of the accident and whether barricade tape was present are unresolved

material facts on this record. The Secretary contends it was open for two weeks. The Foreman contends barricade tape was present when he inspected it the day prior. Again, resolution of this issue requires a determination of the credibility of the Foreman. The record is devoid of evidence regarding when, other than the day of the accident, work was being performed over the air intake well. This fact is material to the issue of whether the frequency of the Foreman's inspections was reasonable under the circumstances. OCP has failed to establish it is entitled to summary judgement on the issue of whether it conducted inspections that were sufficiently regular and occurred with the frequency a reasonable person familiar with the worksite and construction activity would consider necessary to protect workers from hazardous or dangerous conditions.

The record presented is insufficient to reach a conclusion whether OCP's program of inspections met the requirements of the standard as a matter of law. Summary judgment on Item 1, Citation 1, is **DENIED**.

Item 2, Citation 1: Alleged Violation of 29 C.F.R. § 1926.200(b)(1)

Item 2, Citation 1, alleges a violation of 29 C.F.R. § 1926.200(b)(1). That standard is part of subpart G of the construction standard titled "Signs, Signals, and Barricades." It is under the subheading "Danger Signs" and reads

> Danger signs shall be used only where an immediate hazard exists, and shall follow the specifications illustrated in Figure 1 of ANSI[3] Z35.1-1968 or in Figures 1 to 13 of ANSI Z535.2-2011, incorporated by reference in § 1926.6.

29 C.F.R. § 1926.200(b)(1). In the citation, the Secretary alleges OCP failed to restrict the area below the overhead work. OCP contends the plain language of the standard cannot be read to require a danger sign be posted, only that if an employer posts a danger sign, it must comply with the requirements of the referenced ANSI standard. The Secretary counters that, when the standard is read as a whole and in keeping with the purposes of the Act, it creates a duty to post danger signs where immediate hazards exist.

The plain language of § 1926.200(b) cannot reasonably be read to require posting of danger signs. The standard limits, rather than mandates, those situations in which a danger sign

[3] ANSI refers to the American National Standards Institute.

can be used. Reading the entirety of the cited standard and giving the terms their plain meaning, it restricts the use of danger signs to areas in which an immediate hazard exits. It goes on to prescribe the appearance and content of those danger signs. The purpose of the standard, as stated in the referenced ASNI standard, is to ensure uniformity that provides "an automatic warning, caution, or notice to all employees no matter where they work with a meaning that is clearly understood immediately." ANSI Z35.1-1968: Specifications for Accident Prevention Signs, reprinted in 44 Fed. Reg. 20940, p. 7 (April 6, 1979). Under § 1926.200(b), where an employer posts a danger sign, an immediate hazard must exist, and that sign must conform to the requirements of ANSI Z35.1-1968 or ANSI Z535.2-2011 to ensure employees immediately understand its import. [4]

The Secretary argues "implicit within" the words "danger signs shall be used only where an immediate hazard exists" are the words "danger signs shall be used…where an immediate hazard exists." (Secretary's Motion at p. 8). The Secretary simply reads the word "only" out of the standard. Such a reading is contrary to the tenet of statutory construction that statutes must be read as a whole, "making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous." *Lake Cumberland Trust, Inc. v. E.P.A.*, 954 F.2d 1218, 1222 (6th Cir 1992), *quoting, Boise Cascade Corp. v. U.S. E.P.A.*, 942 F2d 1427, 1431-32 (9th Cir. 1991)). The Secretary points to no authority upon which the court can rely to ignore the words within the standard.[5]

The Secretary appears to concede this point when he notes in his response and motion "The majority of the subpart, from 1926.200(b) through (h), discusses how signs must appear

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[4] OCP notes this interpretation is consistent with an interpretative letter found on OSHA's website dated February 6, 2012 (Exhibit 3 to Respondent's Motion). Such interpretative letters are not binding on either the Secretary or the Commission. *Beaver Plant Operations, Inc*., 18 BNA OSHC 1972, 1974 n. 6 (No. 97-0152, 1999) *citing Chesapeake Operating Co*., 10 BNA OSHC 1970, 1971-93 (No. 78-1353, 1982). Similarly, the unreviewed ALJ decision cited by OCP, in which the ALJ similarly interprets the cited standard, is not binding authority.

[5] The Secretary points to the broad purposes of the Act to ensure safe and healthful working conditions as a rationale for his reading of the standard. Such considerations must be weighed against the employer's right to due process. As the Third Circuit noted in *Bethlehem Steel Corp. v. OSHRC*, 573 F.2d 157, 161 (3d Cir. 1978):

> In an adjudicatory proceeding, the Commission should not strain the plain and natural meaning of words in a standard to alleviate an unlikely and uncontemplated hazard. The responsibility to promulgate clear and unambiguous standards rests with the Secretary. The test is not what he might possible have intended, but what he said.

when posted in various locations." The Secretary finds support for the duty to post danger signs in the incorporation of ANSI Z535.5-2011 in § 1926.200(i). The Secretary contends the incorporation of ANSI Z525.5-2001 in § 1926.200(i) creates "an affirmative duty for employers to use barricade tapes for temporary hazards." (Secretary's Motion at p. 8). Section 1926.200(i) is titled "additional rules" and states it contains "rules in addition to those specifically prescribed in this subpart." The Secretary fails to explain how the incorporation of additional rules in § 1926.200(i) alters the plain language or broadens the requirements of § 1926.200(b).

Equally problematic for the Secretary is the allegation in the citation itself. The alleged violation description reads

> On October 11, 2017, the fresh air intake well located beneath employees who were working from an aerial lift on the south side of the building was not restricted to prevent other subcontractor employees from accessing the area below the overhead work. Employees were thereby exposed to being struck by falling materials.

In his motion and response, the Secretary argues ANSI Z525.5-2011, addressing safety tags and barricade tape for temporary hazards, "applies to the situation at issue in this case." As previously noted, ANSI Z535.5-2011 is incorporated into the construction standards at § 1926.200(i). The cited standard at § 1926.200(b) incorporates two different ANSI standards, both of which address signs, not barricades or barricade tape. The alleged violative conduct, which refers to failure to restrict access, may violate § 1926.200(i); it does not violate § 1926.200(b). This is true even if § 1926.200(b) could reasonably be read to require the posting of danger signs. The Secretary is entitled to an expansive reading of its citations in recognition citations are "drafted by non-legal personnel, acting with necessary dispatch." *National Realty Construction Co.,* 489 F.2d at 1264. But this consideration must be weighed against the employer's right to fair notice. The Secretary has never sought to amend either the standard cited or the alleged violation description. Because the conduct alleged does not violate the terms of the cited standard, the Secretary cannot meet his burden of proof as a matter of law.

For the foregoing reasons, OCP's motion for summary judgment on Item 2, Citation 1, is **GRANTED**. Item 2, Citation 1, is vacated.

CONCLUSION

For the foregoing reasons, Respondent's *Motion for Summary Judgment* is **DENIED** in part and **GRANTED** in part. Consistent with this ruling, Item 2, Citation 1, is hereby **VACATED**.

SO ORDERED.

/s/

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Date: March 28, 2019