Secretary of Labor, Complainant, v. Complete General Construction Company, Respondent.	OSHRC Docket Nos. **00-1902 & 00-1903** (Consolidated)

Appearances:

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U. S. Department of Labor
Cleveland, Ohio
For Complainant

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Columbus, Ohio
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Complete General Construction Company (CGCC) is a general contractor with its main office in Columbus, Ohio. In August and September 2000, CGCC was the general contractor for a highway renovation project. The Occupational Safety and Health Administration (OSHA) inspected the project at two different locations. On August 22, 2000, OSHA Compliance Officer Stephen Medlock conducted an inspection of the highway project at Interstate 75 between Edwin C. Moses and Stanley Avenue in Dayton, Ohio. As a result of this inspection, OSHA issued CGCC one serious citation (Docket No. 00-1903) on October 6, 2000. On September 19-20, 2000, OSHA Industrial Hygienist Deborah Wallace conducted an inspection of CGCC's sidewalk project at Third Street under the I-75 overpass in Dayton, Ohio. As a result of this inspection, OSHA issued CGCC one serious citation and one other than serious citation (Docket No. 00-1902) on September 25, 2000.

Docket No. 00-1902: Citation No. 1 is classified as serious and relates to silica exposure. Item 1 alleges a violation of § 1910.134(f)(2) for failing to fit test respirators (in this case, dust masks). Item 2 alleges a violation of § 1910.134(g)(1)(i)(A) for allowing employees wearing respirators to have facial hair which could interfere with the facepiece seal. Item 3 alleges a violation of § 1910.1200(h)(1) for failing to train employees on a hazardous chemical. Citation No. 2 is classified as other than serious. Item 1 alleges a violation of § 1910.134(d)(1) for failing

to provide a medical evaluation to determine the employees' ability to wear a respirator. Item 2 alleges a violation of § 1910.134(k) for failing to train employees who were required to wear respirators. Docket No. 00-1903: Citation No. 1, item 1, alleges a serious violation of § 1926.302(b)(7) for failing to have a self-reducing pressure safety device for the Sullair air compressors.

CGCC timely contested the citations. The cases were consolidated on November 27, 2000. A hearing on the consolidated cases was held in Dayton, Ohio on February 22, 2001. The parties submitted post-hearing briefs, and the case is ready for decision.

The Secretary contends that she established each of the alleged violations. CGCC primarily argues in Docket No. 00-1902 that it was not the employer and that it did not require the use of respirators. In Docket No. 00-1903 it asserts that the valves on the compressor hoses were acceptable. For the reasons that follow, in Docket No. 00-1902, while the Secretary established the CGCC was the employer, she did not prove that respirator use was required. In Docket No. 00-1903, the Secretary established that CGCC's valve device did not meet the requirements of the standard.

DISCUSSION

The Secretary has the burden of proving, by a preponderance of the evidence:

> (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violations (*i.e.,* the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

DOCKET NO. 00-1902

Background

When Wallace inspected the jobsite, five employees were engaged in constructing a sidewalk under the I-75 overpass. On the first day of the inspection she observed employees dry-cutting paver blocks, laying the blocks, and tamping sand between the blocks. The dry-cutting and tamping created a cloud of dust around the employees and dust collected on their clothing (Tr. 10-12). Wallace conducted a 15-minute air sample test and found silica in the air (Tr. 13). The next day when Wallace arrived at the site, the employees were soaking the paver blocks in water. Wallace asked them to dry-cut paver blocks in order to conduct a lengthier air sample

under the conditions she noted the day before.

Each crewmember wore the Moldex 2200 series dust masks (Tr. 19). Employees Steven Lindsey and Richard Scott had beards (Tr. 28, 100-101). These employees told Wallace that they had not been fit tested for the face masks, they had not received a medical evaluation to wear the face masks, and they had not been trained on the hazards of silica. Wallace telephoned CGCC's Safety Director Al Tambini, who confirmed that none of the employees had been fit tested (Tr. 19).

CGCC was an Employer of the Exposed Employees

The Secretary contends that CGCC was the employer of the five-member sidewalk crew at the time of the inspection, or alternatively, that CGCC controlled the crew's employment under the multi-employer worksite doctrine. CGCC counters that Gene (or G.) Marchi & Son (Marchi) was the actual employer of the crew because Marchi employed some of the original crew, who returned to Marchi's employment after the project was completed, and because the employees continued to use Marchi's equipment.

After work began on the project, issues arose which resulted in the project's becoming a union job (Tr. 186). In order to continue working, Marchi's employees were to become union members (Tr. 168). Marchi, a non-union employer, made a "deal" with CGCC, the general contractor and a union employer, that CGCC would be the crew's employer instead of Marchi (Tr. 187, 190). Consequently, the crew was notified that they were CGCC employees and CGCC would pay them (Tr. 92, 163, 171, 187). The crew continued work on the project from August 2000 through November 2000, when the work was completed. All crewmembers, as well as its other new hires, signed CGCC's application to work and its Safety Manual Release Form (Tr. 92-94, 163-164, 168, 183). The release stated (Exh. C-1, -13, -15):

> It is the policy of Complete General Construction Company/Complete Resources Company to take all practical steps to ensure employee safety while maintaining an effective operation. We require each of our employees to learn and follow the policies within this manual along with any others which may be issued from time to time as part of our ongoing safety program so that they may safeguard their own health and well-being as well as that of their fellow employees. * * *
>
> This released (*sic*) is to be signed by the employee and forwarded to the Company Safety Director to be kept on file.

At some point before the inspection, CGCC requested the local union to send them Scott

(and perhaps another union employee). Scott signed the release, received the manual, and worked with the sidewalk crew (Tr. 34, 100). At the time of the inspection CGCC did not indicate that the crew was other than its bonafide employees.

"The key factor in determining whether a party is an employer under the Act is whether it has the right to control the work involved." *Abbonizio Constrctors, Inc.,* 16 BNA OSHC 2125, 2126 (No. 91-2929, 1994) [citing *Vergona Crane Co.,* 15 BNA OSHC 1782,1784 (No. 88-1745, 1992)]. That authority passed from Marchi to CGCC when the crew became CGCC employees. As far as the employees were concerned, CGCC was their employer. CGCC kept Goodrich in the position of foreman. Goodrich, as well as Lindsey and the later-hired Scott, told Wallace that they worked for CGCC. At the hearing the three confirmed their continuing belief that CGCC had been their employer (Tr. 17, 92, 163, 183). Day-to-day, Goodrich directed the sidewalk construction on behalf of CGCC (Tr. 172). CGCC's Safety Director Tambini periodically visited the work site (Tr. 31). The signed releases implicitly gave Tambini authority to direct the crew's activity in the safety arena and to discipline them if they failed to follow the manual.

CGCC held itself out as the individuals' employer to various agencies (*e.g.,* OSHA) and organizations (*e.g.*, the union). CGCC received economic benefit as the employer of these employees. If CGCC is to be believed on the issue, it created paper positions and made misleading statements for business purposes. The standard of proof is a preponderance of the evidence. The evidence establishes more than a paper arrangement. At the time of the inspection CGCC had the authority to control the employees constructing the sidewalk, and it was their employer.[1]

DOCKET NO. 00-1901:

§§ 1910.134(f)(2), 1910.134(g)(1)(i)(A), 1910.134(e)(1) and 1910.134(k)

Each of the five crewmembers wore filtering dust masks while they cut and laid the pavers. It is OSHA's position that non-voluntary use of dust masks (disposable paper type dust

[1] Had CGCC not been the employer, its responsibility under the multi-employer worksite doctrine would be evaluated. A general contractor may be held responsible for violations of other employers where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite. *Centex-Rooney Construction Co.,* 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994).

respirators) trigger the protections of the respiratory standards.[2] Citation No. 1, item 1, alleges that CGCC failed to fit test the employees for the dust masks. Section 1910.134(f)(2) provides:

> The Employer shall ensure that an employee using a tight-fitting facepiece respirator is fit tested prior to initial use of the respirator, whenever a different respirator facepiece (size, style, model or make) is used, and at least annually thereafter.

Citation No. 1, item 2, alleges that employees' facial hair could have interfered with the sealing surface of the dust masks. Section 1910.134(g)(1)(i)(A) provides:

> *(1) Facepiece seal protection.* (i) The employer shall not permit respirators with tight-fitting facepieces to be worn by employees who have: (A) Facial hair that comes between the sealing surface of the facepiece and the face or that interferes with valve function.

Citation No. 2, item 1, alleges that CGCC did not provide medical evaluations to the sidewalk construction crew who were exposed to silica dust. Section 1910.134(e)(1) provides:

> The employer shall provide a medical evaluation to determine the employee's ability to use a respirator, before the employee is fit tested or required to use the respirator in the workplace. The employer may discontinue an employee's medical evaluations when the employee is no longer required to use a respirator.

Citation No. 2, item 2, alleges that CGCC did not provide necessary training to the employees required to wear dust masks. Section 1910.134(k) provides:

> This paragraph requires the employer to provide effective training to employees who are required to use respirators. The training must be comprehensive, understandable, and recur annually, and more often if necessary. This paragraph also requires the employer to provide the basic information on respirators in Appendix D of this section to employees who wear respirators when not required by this section or by the employer to do so.

These provisions apply only if CGCC required employees to wear dust masks while dry-cutting paver blocks containing silica or while working in the resulting dusty environment.

Did CGCC require its employees to use respirators?

As the Secretary concedes, voluntary use of the dust masks does not trigger application of these four respirator protection standards. Wallace saw each of the employees wear dust masks as they cut and laid the sidewalk pavers. She testified that foreman Goodrich told her that the

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[2] Employees wore only dust masks while cutting pavers. The Secretary has not alleged that dust masks were inappropriate. Because of the disposition on the "required use" issue, it is unnecessary to address whether dust masks fit "tightly" within the meaning of the standards.

dust masks were required (Tr. 19). She also took a signed statement from Lindsey which asserted, "I am required to wear dust mask anytime we are creating dust such as tamping or cutting" (Exh. C-14).

At the hearing Goodrich convincingly explained that while he strongly suggested to the employees that they wear dust masks, wearing dust masks was voluntary with each employee (Tr. 191). Goodrich himself wore a respirator while cutting pavers, and he brought face masks to the worksite for everyone to wear (Tr. 192). Contradicting his statement to Wallace, Lindsey testified to his understanding that the employees were not required to wear a dust mask when cutting pavers (Tr. 165). He was told by foreman Goodrich that he "should" wear one for his own health but that the decision was his (Tr. 176). Lindsay testified that sometimes he did not wear a dust mask when cutting the pavers (Tr. 180). Lindsay agreed that he signed a statement taken by Wallace asserting that he was required to wear the respirator. He explained that the statement was correct because on the second day of the OSHA inspection he was told to be sure to wear it. Lindsay assumed that this was because OSHA was there (Tr. 181).

The demeanor of the witnesses and the fact that they have no continuing employement relationship with CGCC was weighed in determining that, with the possible exception of the second day of the OSHA inspection, the sidewalk crew was encouraged, but not required, to wear the dust masks. Given the longer-term planning needed to enforce the cited standards, consideration is given to all factual circumstances of the employees' respirator use. It is concluded that Goodrich allowed the employees to make their own final decision on whether to wear the dust mask. The aberration of telling an employee to be sure to wear one while OSHA was there does not change the underlying voluntary nature of CGCC's policy for those employees.

The Secretary failed to prove that the employer required employees to wear dust masks, and accordingly, §§ 1910.134(f)(2), 1910.134(g)(1)(i)(A), 1910.134(e)(1), and 1910.134(k)[3] are not applicable. The items are vacated.

Alleged Serious Violation of § 1910.1200(h)(1)

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[3] While the first two sentences of § 1910.134(k) govern the more comprehensive training for required wearers, the third sentence mandates that even voluntary wearers be given the information stated in Appendix D. Although having found that the employees were voluntary wearers, failure to provide Appendix D was not the cited violation. The record is silent on whether CGCC's manual contained the Appendix D information.

The Secretary asserts at Citation No. 1, item 3, that employees were exposed to the hazardous chemical of silica but were not provided the requisite training. Section 1910.1200(h)(1) provides:

> (h) *Employees information and training.* (1) Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (*e.g.,* flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and material safety data sheets.

Respirable silica is listed as a hazardous chemical in § 1910.1000, Table Z-3 – Mineral Dusts. CGCC did not provide information or training on the hazards of silica. CGCC argues, however, that "all exposures to silica dust were well within the limits permitted and there was no hazard" (R. brief, p.16). Evidence of silica exposure above the permissible exposure limit (PEL) is not necessary. The standard requires training on hazardous chemicals in the work area regardless of the amount of exposure. The existence of a standard presumes that a hazard is present when the terms of the standard are not met. *See Wright & Lopez*, 10 BNA OSHC 1108, (No. 76-256, 1981). Arguing that a hazard does not exist despite a violation is an "impermissible challenge to the wisdom of the standard." *Heath & Stich, Inc.*, 8 BNA OSHC 1640, 1643 (No. 14188, 1980).

Wallace observed a cloud of dust around the employees and dust on the employees' clothing resulting from the work of cutting and laying the paver blocks. In order to build the sidewalk, CGCC employees dry-cut paver blocks at least from August until the inspection in September. Their exposure to the silica dust was not an isolated incident. *See Holly Springs Brick & Tile Co.,* 16 BNA OSHC 1856, 1860 (No. 90-3312, 1994).

The sidewalk construction and accompanying dust was in plain sight, and further foreman Goodrich worked with it. The actions and knowledge of the supervisor is imputed to his employer. *Todd Shipyards Corp.,* 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). The Secretary established the elements of the violation.

Seriousness of the Violation

Noting that the PEL for silica has remained unchanged since established in 1969, the

Secretary countered the argument that silica exposure must exceed the PEL to be a serious health hazard. Both the American Conference of Governmental Hygienists (ACGIH) and the National Institute of Occupational Safety & Health (NIOSH) established more recent threshold limits for silica exposure at 0.05 mg/m³. ACGIH and the International Agency on Research on Cancer (IARC) designate silica as a suspect human carcinogen.

Wallace's test results showed Goodrich was exposed to silica at 44% of OSHA's PEL (.7123 mg/m³); one laborer was exposed at 33% of the PEL (.4673 mg/m³); and another laborer was exposed at less than 10% of the PEL (.1503 mg/m³) (Exh. R-1, Tr. 80, 86). These readings, however, exceed the recommended 0.05 mg/m³ limits of the other organizations from 3 to 14 times.[4] Breathing silica dust causes silicosis, which results in permanent lung damage and disability. CGCC's violation of § 1910.1200(h)(1) is affirmed as serious.

DOCKET NO. 00-1903

Background

On August 22, 2000, Medlock inspected the highway project on Interstate 75 between Edwin C. Moses and Stanley Avenue, accompanied by Tambini and the job's union steward. Tambini informed Medlock that he made periodic safety inspections of the jobsite roughly every week or so (Tr. 113).

Medlock observed employees jackhammering out the old concrete before pouring new concrete to resurface the highway. The pneumatic jackhammers were powered by two air compressors manufactured by Sullair. Employees Seth Fuldoff and a Mr. Carr operated jackhammers powered by a Sullair Model 185 air compressor. An employee Mr. Harris operated a jackhammer powered by a Sullair Model 250 air compressor (Exhs. C-3, C-9; Tr. 109). The connections to the air compressors were made with three hoses, each having a ¾ inch inside diameter (Tr. 114). CGCC had installed manually-operated gate valves (ball valves) to reduce air pressure in event of a hose rupture or failure (Tr. 118).

[4] As CGCC repeatedly points out, only the OSHA standard's threshold limits govern the existence of violations. Nevertheless, evidence of possible health effects at lesser limits are relevant to the degree of injury for violations such as the instant one.

Alleged Serious Violation of § 1926.302(b)(7)

Citation No. 1, item 1, alleges that ¾ inch inside diameter air hoses, connected to Sullair 185 and 250 air compressors used to power pneumatic jackhammers, were not protected by appropriate pressure reducing devices. The Secretary contends devices must be *automatic.* CGCC asserts that its *manually-operated* gate valve meets the standard's requirement for a safety device to reduce air pressure. Section 1926.302(b)(7) provides:

> b) *Pneumatic power tools.* (7) All hoses exceeding ½-inch inside diameter shall have a safety device at the source of supply or branch line to reduce pressure in case of hose failure.

The purpose of a safety device at the supply or branch line of an air compressor is to reduce the air pressure in case of hose failure. If the hose ruptured or came apart, the pressure on the hose would cause it to whip around with great force and possibly hit employees or knock them from heights. If a pressure reducing valve must be turned off manually, employees are in danger of being hit by the whipping hose until someone can come to turn down the valve. Also, depending upon where the break occurs, a person turning off the valve may be hit by the whipping hose while trying to reach it.

"It is well established that a statute or, in this case, a standard must be construed so as to avoid an absurd result." *Unarco Commercial Properties*, 16 BNA OSHC 1499 (No. 89-1555, 1993), citing *Griffin v. Oceanic*, 458 U.S. 564 (1982). Here, the Secretary's interpretation of the term gives effect to the standard's safety objective while keeping that interpretation within anticipated bounds. The manufacturer's instructions lend support to the Secretary's interpretation. On the side of the compressor is a warning label that states: "Connect air hoses only in full compliance with OSHA standard 29 C. F. R. 1926.302(b)(7). The required safety device should be tested in accordance with the manufacturer's recommendations to verify that they reduce pressure in case of failure and will not nuisance trip with the hose and tool combinations in use" (Exh. C-8). As Medlock testified, "nuisance tripping" occurs where a valve automatically shuts itself off because it too easily senses a rush of air through the hose, as if the hose had ruptured (Tr. 127). A manual valve cannot nuisance trip and was not anticipated by the manufacturer.

The Secretary also points to the fact that a National Safety Council data sheet on air-

powered hand tools requires that such hoses "immediately" shut off air from a broken hose and prevent whipping (Tr. 132). A flow-limiting or velocity valve automatically stops the air pressure from coming into the hose whereas the manually-operated gate valve does not (Tr. 125). CGCC's manually-operated gate valve does not meet the requirements of the standard. CGCC was aware that it used the manual shut off. The Secretary established the elements of the violation.

Seriousness of Violation

The hoses carried 120 pounds of pressure. Being hit by a ruptured hose could result in serious bodily harm (causing concussion, eye injury, broken bones, and/or lacerations) or possibly death (Tr. 133). The violation is affirmed as serious.

Penalty Assessment

The Commission is the final arbiter of penalties in all contested cases. Section 17(j) of the Act requires that when assessing penalties, the Commission gives "due consideration" to: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the prior history of violations. 29 U. S. C. § 666(j). Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.,* 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation "depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *J. A. Jones Construction Co.,* 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

CGCC is a large employer with 500 employees (Tr. 26). The recommended penalty included a credit for good faith because CGCC had an ongoing safety and health program. It allowed no credit for history because of previous serious violations within a 3 year period (Tr.27, 141). CGCC cooperated with the inspection (Tr. 146). The gravity of failing to train and provide information on the health hazard of silica is at least moderate. Five employees were exposed to dust containing respirable crystalline quartz silica for at least 1 month. The degree of silica exposure was also considered. Employees may take fewer or no precautions if they have not been trained and do not understand the nature of the hazard.

On the highway project three employees were exposed to injury by a ruptured hose. The conditions under which the jackhammers were operated increased the likelihood that a hose

would rupture, and the gravity of the violation is heightened (Exh C-4, -5; Tr. 133-134, 137).

Based on these factors, the assessed penalty for the violation of § 1910.1200(h)(1) is $2000.00 and for 1926.302(b)(7) is $2,500.00.

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

It is ORDERED that:

Docket No. 00-1902:

1. Citation No. 1, Item 1, alleging a serious violation of § 1910.134(g)(2), is vacated.
2. Citation No. 1, Item 2, alleging a serious violation of § 1910.134(g)(1)(i)(A), is vacated.
3. Citation No. 1, Item 3, alleging a serious violation of § 1910.1200(h)(1), is affirmed and a penalty of $2,000.00 is assessed.
4. Citation No. 2, Item 1, alleging an other than serious violation of § 1910.134(e)(1), is vacated.
5. Citation No. 2, Item 2, alleging an other than serious violation of § 1910.134(k), is vacated.

Docket No. 00-1903:

6. Citation 1, Item 1, alleging a serious violation of § 1926.302(b)(7), is affirmed and a penalty of $2,500.00 is assessed.

/s/
NANCY J. SPIES
Judge

Dated: June 18, 2001