

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 00-2333
R.B.Thomas Electric,Inc.	:	
Respondent.	:	

APPEARANCES

Heather A. Joys, Esq.
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Jon R. Steen, Esq.
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Austintown, Ohio
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

R. B. Thomas Electric, Inc. (Thomas Electric), is an electrical contractor located in Hudson, Ohio. One of its work crews was working at a newly constructed Ameritech Steel processing plant in Streetsboro, Ohio, on October 26, 2000. Occupational Safety and Health Administration (OSHA) compliance officer Daniel Pubal was driving past the plant when he observed a member of Thomas Electric's crew working from an aerial lift while not wearing a safety harness. Pubal stopped and conducted an inspection of Thomas Electric at the site.

As a result of Pubal's inspection, the Secretary issued two citations to Thomas Electric on November 9, 2000. Prior to the hearing, the Secretary withdrew item 1 of Citation No. 1, which alleged a serious violation of § 5(a)(1) of the Occupational Safety and Health Act (Act) for taping the midrail of the aerial lift to the top rail.

Item 2a of Citation No. 1 alleges a serious violation of 29 C.F.R. § 1926.20(b)(2) for failing to ensure that a designated competent person performed frequent and regular inspections of its worksite. Amended item 2b of Citation No. 1, which the Secretary originally cited as a

serious violation of 29 C.F.R. § 1926.454(c), alleges a serious violation of 29 C.F.R. § 1926.21(b)(2), for failing to train employees in the recognition and avoidance of hazards. Item 3 of Citation No. 1 alleges a serious violation of 29 C.F.R. § 1926.453(b)(2)(v) for failing to ensure the employees working from an aerial lift wore a body belt or harness attached with a lanyard to the basket.

Item 1 of Citation No. 2 alleges an other-than-serious violation of 29 C.F.R. § 1910.1200(e)(1) for failing to ensure that a written hazard communication program was maintained at the work site. Item 2 of Citation No. 2 alleges an other-than-serious violation of 29 C.F.R. § 1926.150(c)(1)(i) for failing to provide fire extinguishers at the worksite.

Thomas Electric denies the citations and proposed penalties. Thomas Electric asserts the affirmative defense of unpreventable employee misconduct.

A hearing was held in this matter on April 27, 2001, in Akron, Ohio. The parties stipulated jurisdiction and coverage (Tr. 4). The parties have filed post-hearing briefs.

For the reasons discussed, Thomas Electric's affirmative defense of unpreventable employee misconduct is rejected, and the remaining cited items are affirmed.

Background

Roger B. Thomas, owner and vice-president of Thomas Electric, founded the company in 1972. Thomas Electric performs a wide range of electrical contractor work, including industrial, commercial, and residential installations, as well as service calls (Tr. 251). In September 2000, general contractor Curtis Layer hired Thomas Electric as the electrical subcontractor for the construction of a new Ameritech Steel processing plant in Streetsboro, Ohio. Thomas Electric spent approximately six weeks at the site, installing the electrical system and hanging lights (Tr. 120, 195). Thomas Electric left the site for approximately a week, then returned to the site on October 24 (Tr. 189).

On October 26, 2000, Thomas Electric had a three-man crew working at the site: journeyman electrician and foreman Roy Junn, fourth-year apprentice Matthew Shields, and second-year apprentice Frederick Pozzini. No other subcontractors were on the site (Tr. 173).

At approximately 1:30 p.m., OSHA compliance officer Daniel Pubal was driving south on Route 43, returning to his office. As he passed the Ameritech Steel plant, Pubal noticed an

employee working on an outside wall of the plant. The employee, Pozzini, was in the basket of an aerial lift, which was elevated 15 to 20 feet above the ground. Pozzini was not wearing any form of fall protection (Exhs. C-2, C-3, C-3; Tr. 120-123).

Pubal stopped his car and approached Pozzini, asking him to come down from the aerial lift. Pozzini complied. Pozzini directed Pubal to foreman Junn, who was working inside the plant. Pubal held an opening conference with Junn and questioned him regarding the company's training, fall protection, hazardous communication program, and fire extinguishers.

After Pubal concluded his inspection and as he was getting ready to leave, Roger Thomas and his wife, company president Diane Thomas, arrived at the site. At some point, Jerry Budrevich, vice-president of operations for Thomas Electric, also arrived at the site (Tr. 128). Pubal did not hold another opening conference with the Thomases, but he did inform them that he was going to recommend several OSHA violations, including the failure to ensure that its employees wore fall protection while working from an aerial lift. Roger Thomas responded, "If I get a citation, then I'll terminate this employee [Pozzini]. You're going to have to explain to him why he's losing his job" (Tr. 129). Roger Thomas eventually fired Pozzini (Tr. 16). Pozzini filed an 11(c) complaint with the Secretary, which was still under investigation at the time of the hearing.

Citation No. 1

The Secretary has the burden of proving her case by a preponderance of the evidence.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (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 violation (*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).

In order to establish that a violation is "serious" under § 17(k) of the Act, the Secretary must establish that there is a substantial probability of death or serious physical harm that could result from the cited condition. In determining substantial probability, the Secretary must show that an accident is possible and the result of the accident would likely be death or serious physical harm. The likelihood of the accident is not an issue. *Spancrete Northeast, Inc.*, 15

BNA OSHC 1020, 1024 (No. 86-521, 1991).

Applicability of the Standards

Thomas Electric contends that the Secretary failed to meet the first element of its burden of proof with regard to each of the items in Citation No. 1 because she failed to establish that the cited standards apply to the cited conditions. Thomas Electric argues that it was not engaged in construction work at the time of Pubal's inspection, and thus the construction standards cited by the Secretary are not applicable. Thomas Electric claims that it had completed the electrical installation for the plant by October 26, and its crew was making a service call at the time of the inspection.

Section 1910.12(a) provides that the Part 1926 standards apply "to every employment and place of employment engaged in construction work." Section 1910.12(b) defines "construction work" as "work for construction, alteration, and/or repair, including painting and decorating."

The Ameritech Steel plant was a new facility that was being constructed from the ground up (Tr. 189). Thomas Electric foreman Roy Junn stated that the company's subcontract with Curtis Layer called for "putting in the service, hanging all the lights, doing the office power and lighting and doing some crane rails" (Tr. 182). At the time of the OSHA inspection, Ameritech Steel had started moving some of its equipment into the building, but it had not yet begun steel processing operations (Tr. 190).

Thomas Electric claims that its crew was at the Ameritech Steel site on October 26 on a service call and not to perform work that was originally contracted. Budrevich, who was only on the site four times during the duration of the project, stated that the tasks being performed on October 26 "were additions after the fact" and "[a]dditional extras that the owner wanted before he moved in" (Tr. 231-232, 247). Thomas Electric did not adduce the original contract between it and Curtis Layer, nor did it adduce evidence of a service call or request for additional work.

Also, the testimony of the employees who were actually performing the work for Thomas Electric on October 26 fails to support the company's claim that it was not construction work pursuant to the original contract with Curtis Layer. When asked what the crew was doing at the Ameritech Steel site on October 26, Matthew Shields replied, "Basically, just finishing everything up, putting the switches and outlets. I don't remember everything that I had to do, but

basically just finishing everything” (Tr. 64). Foreman Junn testified that Thomas Electric did perform extra work at a later date, but that on the day of the OSHA inspection, his crew was completing the construction work for which Curtis Layer had hired Thomas Electric (Tr. 182-183):

Q.: Did you reach a point where the job was concluded? There was a final meeting; the project had finished?

Junn: Yes, I was like 99 percent done. I had some changes to do later. Once I got my final, that was pretty much it. But, I did have some other things that came back at later date.

Q.: And, the later date was that additional work that had been ordered?

Junn: It was extra work.

Q.: What work is it that you were doing on the day of the OSHA inspection?

Junn: *Okay, well, that wasn't extra.* Those fixtures, we had to wait on for some reason; but we to wait for on for some reason; but we were hanging wall packs outside--well, one wall pack. (Emphasis added).

The Court of Appeals for the Sixth Circuit (in which circuit this matter arises) held in *Brock v. Cardinal Industries, Inc.*, 828 F. 2d 373 (6th Cir. 1987), that, in determining whether an employer is engaged in construction work, inquiry must be made into both the location of the work and the nature of the work. In the instant case, the location of the work was at a construction site, in a facility that was still being completed.

Construction work refers to “actual construction work or to related activities that are an integral and necessary part of construction work.” *Royal Logging Co.*, 7 BNA OSHC 1744, 1747 (No. 15169, 1979), *aff'd*. 645 F. 2d 822 (9th Cir. 1981). The nature of the work that Thomas Electric was engaged in on October 26 was installing new electrical switches, outlets, and light fixtures. The installation of these parts of a facility’s electrical system constitute an integral and necessary part of the facility’s construction. The Secretary has established that Thomas Electric was engaged in construction work at the time of the OSHA inspection on October 26, 2000. The construction standards cited in items 2a, 2b, and 3 of Citation No. 1 apply to the cited conditions.

Item 2a: Alleged Serious Violation of § 1926.20(b)(2)

The Secretary alleges that Thomas Electric committed a serious violation of § 1926.20(b)(2), which provides:

Such [accident prevention] programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

Section 1926.32(f) defines “competent person” as “one who is 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.”

Pubal assumed that foreman Junn was Thomas Electric’s designated competent person, even though neither Junn nor anyone else told him this was so. Junn did not conduct safety inspections of the site (Tr. 169-170). Thomas Electric claims that Junn was not its designated competent person; only the three management personnel (Roger Thomas, Diane Thomas, and Jerry Budrevich) were designated as competent persons to conduct safety inspections. Roger Thomas testified that they generally conducted safety inspections as a routine part of their visits to project sites (Tr. 270).

The inspections, as contemplated by the standard, are not supported by the record. Shields and Junn testified that the Thomases visited the Ameritech Steel site twice while the project was underway, and Budrevich was there four times. However, none of the three Thomas Electric officers conducted a safety inspection during these visits. The record indicates that no one from Thomas Electric inspected its Ameritech Steel site at any time. Thomas Electric admitted that it did not conduct a safety inspection the day of the OSHA inspection (Exh. C-10, p. 8). Shields testified that the management personnel came on site “if there’s a question or to check out the job, how the progress is going” (Tr. 54). Junn stated that Budrevich did not conduct safety inspections during his four visits to the site (Tr. 203-204). As the self-designated competent persons, the officers knew of their failure to inspect the site.

Thomas Electric argues that § 1926.20(b)(2) does not apply to two-day service calls. As previously discussed, Thomas Electric was engaged in construction work within the meaning of the OSHA standards during OSHA’s inspection. Thomas Electric’s failure to conduct frequent and regular inspections exposed its three employees to the hazardous conditions on the site. The

Secretary has established a serious violation of § 1926.20(b)(2).

Item 2b: Alleged Serious Violation of § 1926.21(b)(2)

The Secretary alleges that Thomas Electric seriously violated § 1926.21(b)(2), which provides:

The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Thomas Electric uses aerial lifts on a regular basis in its work. Accordingly, § 1926.21(b)(2) requires the company to instruct its employees in the regulations applicable to working in aerial lifts, which include the requirement to wear a safety harness, as set out in § 1926.453(b)(2)(v).

Thomas Electric runs its own apprenticeship program. It is a five-year program, taught by the company's managers and employees. Budrevich teaches the first and third years. The classes meet once a week for several hours. At the end of the five years, an apprentice may take a test administered by the state to qualify as a journeyman electrician. During their training, the apprentices also work for Thomas Electric, under the supervision of journeyman electricians (Tr. 55, 227-228).

Pozzini testified that Thomas Electric had never trained him in general fall protection or the requirement to wear a harness while working from an aerial lift. He stated that these topics were not covered in the apprenticeship classes or any of the jobsite safety talks. Junn did not tell him to wear a harness the day of the OSHA inspection. Pozzini did not know that Thomas Electric had a harness on the site, nor did he know how to use one (Tr. 9, 13-14, 19, 22-25).

Shields testified that Thomas Electric did not train him in fall protection until the beginning of his fourth year (Tr. 55-56). Shields testified that he worked off the aerial lift on the Ameritech Steel site without wearing a harness. No one from Thomas Electric instructed him to wear a harness (Tr. 65).

Keith Hopkins, who was employed by Thomas Electric at the time of the hearing, was in the same apprenticeship class as Pozzini. He stated that he had never received training on fall protection. Hopkins worked from aerial lifts for Thomas Electric. He did not wear a safety harness and was unaware of OSHA's requirement to do so (Tr. 69-71, 85-88).

Daniel Shaffer is a former employee of Thomas Electric who was also in Pozzini's second-year apprenticeship class. He testified that he had never received any training in fall protection or the use of a harness in an aerial lift. His work for Thomas Electric included working from aerial lifts. He had never worn a safety harness and had never been instructed to do so (Tr. 97-102).

Bradley Sladky and Nicholas Sladky were both fourth-year apprentices at the time of the hearing and were not in Pozzini's class. They testified that they had been instructed to wear harnesses while working from aerial lifts (Tr. 212-213, 220-221).

Thomas Electric introduced nine pages of "Weekly Safety Meeting" reports into the record (Exh. R-1). The first page of the exhibit addresses aerial lifts and states in pertinent part: "You should use a full body harness and secure the harness to the proper attach bar on the platform[.]" (Exh. R-1, p. 1). No employee signatures indicating who attended the "safety meeting" appear on this page.

The Weekly Safety Meeting sheets come to Thomas Electric as part of a subscription safety program. Vice-president Roger Thomas explained his company's use of the sheets (Tr. 256):

[W]e make lots of copies of them, and we try to send them out to the job site every week. I'm not sure they get there every week, but if the men are in the shop like if the fellows are doing service calls--about half our people are in the shop every day--so sometimes I garner up several of the guys, and I read them to them. And, Diane reads them sometimes, and sometimes Jerry reads them to them. And, then we try to get them to sign it, but generally they don't always sign them.

Five of the nine sheets contain no names under the heading "Meeting Attended By." Of those four that do contain employee signatures, none contains a signature of Pozzini (Exh. R-1). Junn testified that when he received the Weekly Safety Meeting sheets, he handed them to the employees and told them to read and sign it (Tr. 196). Shaffer testified that he received the safety sheets "and [Thomas Electric] basically just said sign them. We never really went over them" (Tr. 99).

The Secretary has established that Thomas Electric failed to instruct each of its employees in the requirement of § 1926.453(b)(2)(v) that they tie off while working from an aerial lift. Thomas Electric had no systematic procedure for training employees in the safety requirements for the use of aerial lifts. The topic of fall protection was addressed haphazardly,

with no meaningful attempt to ensure that each employee received instruction. Employees who had been in the apprentice program for more than two years appeared to be more likely to receive safety training in the use of aerial lifts than first- and second-year apprentices. The cited standard, however, requires each exposed employee to receive the relevant safety instruction prior to the exposure. Item 2b is affirmed as serious.

Item 3: Alleged Serious Violation of § 1926.453(b)(2)(v)

The Secretary alleges that Thomas Electric committed a serious violation of § 1926.453(b)(2)(v), which provides:

A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift.

Thomas Electric does not dispute that Pozzini was not wearing a safety harness at the time of the OSHA inspection (Exhs. C-2, C-3, C-4). Thomas Electric argues that the Secretary failed to prove that it had actual or constructive knowledge of the violation.

To establish an employer's knowledge of a violative condition, the Secretary must show that the employer knew, or, with the exercise of reasonable diligence, should have known of the condition. *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962 (No. 82-928, 1986). A supervisor's actual or constructive knowledge is imputed to the employer. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

Shields and Pozzini regarded Junn as the foreman on the day of the OSHA inspection. Junn identified himself as the foreman on the project, but testified that he did not have the authority to terminate, suspend, or discipline an employee (Tr. 178). Junn did have the authority to direct and supervise the work of Shields and Pozzini. He directed Pozzini to use the aerial lift to hang a light fixture, and he instructed Pozzini in the operation of the lift when Pozzini told him he had never operated one (Tr. 191).

An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer. *A. P. O'Horo*, 14 BNA OSHC 2004, 2007 (No. 85-369, 1991). The record establishes that Junn was a supervisor for Thomas Electric on the day of the OSHA inspection.

Where a supervisory employee is in close proximity to a readily apparent safety violation,

the supervisor may be charged with constructive knowledge of the violation. *Hamilton Fixture*, 16 BNA OSHC 1073 (No. 88-1720, 1993), *aff'd. without published opinion*, 28 F.3d 1213 (6th Cir. 1994). Such supervisor knowledge is imputable to the employer and is sufficient to make a prima facie showing of employer knowledge. *Pride Oil Well Service*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992).

Junn assigned Pozzini to move a light fixture and told him to use the aerial lift (Tr. 11-12). Junn instructed Pozzini in the operation of the lift, but did not give Pozzini a safety harness or instruct him to use one (Tr. 109, 191). The safety harness was locked inside the company's gang box at the site (Tr. 197). Pozzini's failure to wear a safety harness was in plain view to Pubal, who was driving past the site in a car. The Secretary has established that Junn, and through him, Thomas Electric, had constructive, if not actual, knowledge that Pozzini was working from the aerial lift while not wearing a safety harness.

Thomas Electric contends that Pozzini's failure to wear a safety harness resulted from unpreventable employee misconduct, and that no violation should be found. In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *E.g., Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd. without published opinion*, 106 F.3d 401 (6th Cir. 1997). Thomas Electric failed to prove any one of the four elements of its affirmative defense. Thomas Electric did not have a written safety rule designed to prevent its employees from using the aerial lift while not wearing a safety harness. The only written rule that concerns personal fall protection is a general rule stating that safety belts should be worn where the employee is exposed to "insecure unprotected positions at abnormal heights" (Exh. R-3, p. 5).

As discussed under item 2b, Thomas Electric failed to communicate to its employees the requirement to wear a safety harness when working from an aerial lift. The "Weekly Safety Meeting" sheets were distributed in a haphazard manner. Several current and former employees testified that they were unaware of the safety harness requirement.

Also, Thomas Electric failed to take steps to discover violations. As discussed, Thomas Electric did not have a designated competent person make frequent and regular inspections of the worksite. The journeyman electricians who acted as foremen on the sites did not perform safety inspections. The management personnel who were designated as competent persons were at the sites infrequently.

Thomas Electric did not enforce safety rules when violations were discovered. The foremen did not have the authority to discipline employees for safety infractions (Tr. 19, 31, 72, 81, 178, 206). When asked if he knew what Thomas Electric's disciplinary program was, Junn replied, "No, sir. That's totally up to them" (Tr. 199-200). Roger Thomas described the company's approach to enforcement of safety rules (Tr. 280):

Well, I bring it to [the employees'] attention what the violation is, and I make it perfectly clear that the safety--I stay until the safety issue is remedied, or I feel confident that they are reinstructed that they are not going to continue in that manner.

And, then I go back to the office and I talk to Diane and Jerry, and we kind of put our heads together and we kind of--you know, depending upon how serious it is or something, or if we think we have stopped it or whatever, we kind of decide what our reaction is going to be to it.

Adequate enforcement includes a progressive disciplinary plan consisting of higher levels of punishment designed to deter employees who violate the employer's work rules. *Nooter Construction*, 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994). Thomas Electric did not have a progressive disciplinary program. Indeed, the company could articulate no standards of conduct or uniformity that it relied upon in determining disciplinary action. It doled out discipline on an ad hoc basis, and it did that infrequently. Pozzini was fired, but Junn was not even verbally reprimanded for the safety harness violation. Thomas Electric submitted no records of disciplinary action to the compliance officer or to the court.

Thomas Electric has failed to establish the affirmative defense of unpreventable employee misconduct. The Secretary has established a serious violation of § 1926.453(b)(2)(v).

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an

appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Pubal testified that Thomas Electric had 22 employees during the 12 months prior to the hearing. Thomas Electric had received citations for OSHA violations within the 3 years prior to the subject inspection (Exhs. C-5 through C-9; Tr. 135). No credit is given for good faith. Thomas Electric has failed to implement effective programs for safety instruction, safety inspections, and disciplinary actions.

The gravity of items 2a, 2b, and 3 is high. Thomas Electric's failure to inspect its sites and its failure to adequately train its employees directly resulted in Pozzini's failure to wear a safety harness while in the aerial lift. He was exposed to a fall of 15 to 20 feet onto a concrete surface. Other employees testified that they had worked from aerial lifts without using fall protection.

It is determined that the appropriate total penalty for combined items 2a and 2b is \$900.00. The appropriate penalty for item 3 is \$1,500.00.

Citation No. 2

Item 1: Alleged Other-than-serious Violation of § 1910.1200(e)(1)

Section 1910.1200(e)(1) provides in pertinent part:

Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:

(i) A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas)[.]

At the Ameritech Steel site, Thomas Electric's crew was exposed to two hazardous substances: the gasoline in the aerial lift and the scissors lift, and PVC pipe cement in the company's gang box (Tr. 142, 165-166). Thomas Electric does not dispute that it was required to maintain a written hazard communication program at the worksite due to the presence of these

hazardous substances.

Pubal testified that he asked Junn if there was a hazardous communication program on the site during the opening conference. Junn responded that there was, but he was unable to locate it (Tr. 144). Roger Thomas testified that Pubal never asked him about the missing hazardous communication program after he and Diane Thomas arrived at the site, and he did not realize it was an issue (Tr. 273, 285). Budrevich, however, testified that Roger Thomas called him from the site and demanded that Budrevich come out to the site and find the program, which was contained in two manuals: “Well, he was mad at me because it’s my responsibility to get the manuals. I’m supposed to make sure that they’re there on the job. I told him that they were out there, and he told me, ‘Come out here and find them,’ and I did” (Tr. 246).

Pubal was still at the site when Budrevich arrived. Budrevich found the hazardous communication program manuals “in a pile of junk, material,” in the company’s on-site trailer (Tr. 247). He stated that he took the manuals to where the Thomases were speaking with Pubal, said “I got them,” and put them by the job box (Tr. 244). When asked why he did not give them to Pubal, Budrevich stated, “I didn’t know he was looking for them. I was asked where they were at, and I said they were in the trailer. I never had a conversation with the OSHA inspector about anything. He never talked to me directly. We never talked” (Tr. 244).

Roger Thomas acknowledges that Budrevich told him that he had found the manuals. When asked why he did not bring the manuals to Pubal’s attention, Thomas replied, “I didn’t want him maybe to write up anything. I mean, I just didn’t want to bring up anything that he could write maybe another citation for or something I guess” (Tr. 286).

In its post-hearing brief, Thomas Electric attributes its failure to produce the manuals to miscommunication, focusing on Pubal’s failure to raise the issue of the hazardous communication program with the Thomases. It asserts that it did, in fact, have the program on site, and that Pubal should have asked the Thomases or Budrevich about it, rather than Junn. Thomas Electric’s argument ignores that fact that the Thomases and Budrevich were not scheduled to be on the site that day. Junn was the foreman on site, and he could not locate the manuals. Junn was asked, “If some employee, let’s say, one of the other apprentices needed it, you wouldn’t have known where to get it?” He replied, “I just never thought to go look in the

other trailer” (Tr. 199).

The purpose of the cited standard is to provide employee access to the hazardous communication program, should the need arise. The program cannot be said to be maintained at the site if it cannot be located by the employees and the foreman on the site. The Secretary has established an other-than-serious violation of § 1910.1200(e)(1).

Item 2: Alleged Other-than-serious Violation of § 1926.150(c)(1)(i)

Section 1926.150(c)(1)(i) provides:

A fire extinguisher, rated not less than 2A, shall be provided for each 3,000 square feet of the protected building area, or major fraction thereof. Travel distance from any point of the protected area to the nearest fire extinguisher shall not exceed 100 feet.

Pubal estimated that the Ameritech Steel facility measured 80 by 120 feet (Tr. 126). Pubal looked for fire extinguishers but could not find any. He asked Junn if Thomas Electric had any fire extinguishers on site, and Junn replied that it did not (Tr. 145, 162-163). Junn corroborated Pubal’s testimony, but went on to state, “[B]ut if I wasn’t mistaken, the fire marshal had been there either that day or the day before, and there was supposedly six fire extinguishers around the building on the inside, three on one wall and three on the other” (Tr. 185).

Even if Thomas Electric could rely on the fire extinguishers provided by the building’s owner to comply with the standard, it would have to demonstrate that its employees knew the location of the fire extinguishers. Thomas Electric offered no proof that the fire extinguishers were actually installed in the facility. Even if it had, the record shows that its employees would not have known where to go in the event of an emergency. When asked, “If there had been a fire, you wouldn’t have known where to go to get the fire extinguisher to put it out?,” Junn replied, “I can’t say I could” (Tr. 198).

The Secretary has established an other-than-serious violation of § 1926.150(c)(1)(i).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

1. Item 1 of Citation No. 1, alleging a serious violation of § 5(a)(1), is withdrawn by the Secretary;
2. Items 2a and 2b of Citation No. 1, alleging serious violations of §§ 1926.20(b)(2) and 21(b)(2) respectively, are affirmed and a total penalty of \$900.00 is assessed;
3. Item 3 of Citation No. 1, alleging a serious violation of § 1926.453(b)(2)(v), is affirmed and a penalty of \$1,500.00 is assessed;
4. Item 1 of Citation No. 2, alleging an other-than-serious violation of § 1910.1200(e)(1), is affirmed and no penalty is assessed; and
5. Item 2 of Citation No. 2, alleging an other-than-serious violation of § 1926.150(c)(1)(i) , is affirmed and no penalty is assessed.

/s/
KEN S. WELSCH
Judge

Date: October 11, 2001