UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. D. C. PAGERS, INC., d/b/a SUPERIOR SERVICE, Respondent.	Docket No. 01-0162

Appearances: Paul Spanos, Esq.
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U.S. Department of Labor
Cleveland, Ohio
For Complainant

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For Respondent

BEFORE: MICHAEL H. SCHOENFELD,
Administrative Law Judge

DECISION AND ORDER

Background and Summary of Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970) ("the Act"). On December 19, 2000, a Compliance Officer ("CO") from the U.S. Occupational Safety and Health Administration ("OSHA") visited Respondent's work site in St. Clairsville, Ohio. As a result of the inspection, OSHA issued a citation to Respondent on January 5, 2001, alleging three violations of construction safety standards appearing in Title 29 of the Code of Federal Regulations ("CFR"). Respondent timely contested the citation. A hearing was held in

Pittsburgh, Pennsylvania on June 5, 2001. No affected employees sought party status. Both parties have filed post-hearing briefs.[1]

Jurisdiction

It is alleged and undenied that at all relevant times Respondent has been an employer engaged in electrical contracting. There is no dispute that Respondent uses goods or materials which have moved in interstate commerce. I find as fact that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of section 3(5) of the Act. Accordingly, the Occupational Safety and Health Review Commission ("the Commission") has jurisdiction over the parties and the subject matter.

Discussion

This is a case in which the two citation items remaining in contest[2] are both vacated because

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[1] Complainant's brief makes several arguments regarding an employer identified as "Complete General." While not a party to this case, it will be assumed that the brief, or portions thereof, were excerpted from a similar document used in another case. Nonetheless, the substance of the arguments made in behalf of this other employer have been considered as far as they are relevant to this case.

[2] Respondent's motion to dismiss Item 3 of Citation 1 was granted at the hearing. (Tr. 9)

The Secretary's brief falsely states that the Administrative Law Judge "sua sponte vacated Citation 1, Item 3....." (Sec. Brief, fn. 1 at p. 2).

The item was dismissed as a result of granting Respondent's motion. In fact, Respondent raised the issue of it having been cited under a non-existent standard as early as the informal conferences at the OSHA area office. (Tr. 8) It sought dismissal or amendment of this item in writing to the area director by letter dated January 23, 2001. In that letter, Respondent even identified for OSHA the relevant sections of OSHA's own Field Inspection Reference Manual regarding withdrawal or amendment of the citation where an incorrect standard had been cited. Respondent specifically moved to dismiss the item on March 12, 2001, in its Answer to the complaint. Respondent's Pretrial Statement of May 11, 2001, again noted that "Respondent has moved to dismiss Citation 1, Item 3. It is believed that such motion still pends." Finally, in his very first opportunity to address the bench at the hearing, Respondent's counsel stated, "[n]umber one, we move to dismiss Citation [1, Item] Number 3, for the reasons set forth in the pleadings....This has been raised repeatedly and has not been addressed by briefs from the government." (Tr. 7-8). The

the Secretary has failed to show, by a preponderance of the evidence, that particular hazards which would trigger the requirements of the cited standards were present or likely to be present at the work site. In each instance, the investigating Compliance Officer lacked experience, accurate information or any basis, other than speculation, upon which to base his conclusion that hazards arose or were likely to arise out of the operations being performed.

In general, to prove a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) noncompliance with the terms of the standard, (3) employee exposure or access to the hazard created by the noncompliance, and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the condition. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand*, 13 BNA OSHC 2147 (1989). Where the allegation is that Respondent failed to train employees in recognizing and avoiding dangerous circumstances at the particular site (Item 1) or that its employees at the site failed to use eye protection appropriate for the working conditions with which they were actually confronted, (Item 2), the Commission looks to the language of the cited standard in determining whether it applies to the facts of a case. *Unarco Commercial Prod.*, 16 BNA OSHC 1499, 1502 (No. 88-1555, 1993).

Citation 1, Item 1
29 CFR § 1926.21(b)(2)[3]

The Commission has long been acquainted with the standard cited in Item 1. Its decisions interpreting this standard have their genesis in the opinion of the United States Court of Appeals for the Sixth Circuit in *H.C. Nutting Company v. OSHRC*, 615 F.2d 1360 (6th Cir. 1980). There, faced

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Secretary was afforded yet another opportunity to reply to the motion. After both parties were heard in the issue, Respondent's motion was granted.

[3] The cited standard provides:

> (2) 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.

with the argument that the standard was vague, the court said:

> Fairly read, the regulation requires that an employer inform employees of safety hazards which would be known to a reasonably prudent employer or are which are addressed by specific OSHA standards.

For example, the Commission said in its recent decision in *Capform, Inc.* , 19 BNA OSHC 1374, 1376 (No.99-0322, 2001)("*Capform*");

> Under § 1926.21(b)(2), an employer must instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware. [T]o prove a violation of § 1926.21(b)(2)...the Secretary must show that [the] employer failed to provide the instructions which a reasonably prudent employer would have given in the same circumstances. Employees must be given instructions on (1) how to recognize and avoid the unsafe conditions which they may encounter on the job, and (2) the regulations applicable to those hazardous conditions. An employer's instructions must be "specific enough to advise employees of the hazards associated with their work and the ways to avoid them" and modeled on any applicable standards.

(Citations omitted.)

In this case, for the reasons which follow, I find that the Secretary has established neither the presence of hazards nor the existence of another regulation applicable to such hazards which would require a reasonably prudent employer to take the actions which Respondent has been cited for failing to take.

The citation alleged that Respondent did not comply with the cited standard because "[O]n the site, training of the procedures for safety related work practices when working on live electrical was not provided.". He testified that he based this alleged violation on his belief that employees were not using required eye protection while testing an electrical panel or while cutting plastic pipe ("PVC").

Under *Capform,* where there is an alleged failure of an employer to properly instruct employees regarding hazards at their particular work site, it is incumbent on the Secretary to show that certain hazards existed or could reasonably be anticipated to occur at the site and that the employees' training failed to properly deal with those hazards. Here, the CO, in a general statement, correctly opined that the standard requires that "employees be trained (about) specific hazards which

could be encountered during working on electrical equipment." (Tr. 24) He was less than clear, however, in attempting to identify any particular hazards which could occur at this site and for which employees were not appropriately instructed.

The CO testified that according to his interviews, the employees

> had not had training in safety-related work practices in regard to arc blast zones or working on live electrical in determining what hazards or what personal protective equipment would be suitable for that particular work.

(Tr. 24-5). Based on this statement, the CO apparently believed that two hazards existed at the site for which the employees had not been trained, *i.e.*, "determining where the arc blast zone was, or what type of equipment would be suitable for working on the energized equipment at that particular site." (Tr. 25, 29).[4] I conclude, however, that the Secretary failed to show that Respondent's employees were required to receive training about arc blasts. I further conclude that the employees did, in fact, receive the required training about general electrical hazards.

First, the CO's testimony as to his interviews of Respondent's employees at the site gives little confidence to the conclusions he reached. According to the CO, he interviewed Mr. Dillon at the site. The CO stated that Dillon described himself as "a foreman" [for Respondent]. (Tr. 16). The CO, however, could not even identify the other employee he supposedly interviewed at the site, (Tr. 17), and based upon his demeanor and behavior at the hearing and his propensity to give evasive or incomplete answers, his testimony is found to be generally lacking in credibility.

Second, no arc blast occurred and the record does not support the CO's assumption that there was a reasonable expectation that there could be an arc blast at this site. It is less than clear from his testimony that the CO even understood the nature of arc blasts. His statements in this regard were gelogenic. They were neither elucidating nor did were they accompanied by any indicia of reliability. (Tr. 19-20) In addition, the evidence does not show that he had any expertise, education or experience in electrical equipment or circuits. (Tr. 12-3). On the other hand, the testimony of Roy Dutcher is far more probative and reliable. Even taking into account his stake in the proceedings and possible bias, I find Dutcher's testimony more credible than that of the CO. His demeanor at the

[4] At other times during his testimony, the CO seemed to identify a lack of training in dealing with electrical hazards more generally. (Tr. 25-26).

hearing was indicative of a forthright and candid witness. Further, his understanding of the nature of arc blasts and his opinion as to the likelihood of them occurring under the circumstances at the site was far more reliable in that it was based on significant and relevant experience and established credentials to offer such an opinion. (Tr. 41-42, 48-49, 57-60) Additionally, the reliability of his opinion was bolstered during cross-examination. (Tr. 51-56) Considering the testimony of these two witnesses, the CO's reliance on the possibility of an arc blast to conclude that Respondent's employees lacked appropriate training is rejected. In the absence of a reasonable expectation that an arc blast could occur on the site,[5] Respondent cannot be found in violation of the cited standard for not instructing its employees in how to deal with such an event.

Third, even if the CO's testimony were interpreted to mean that Respondent lacked a reasonable safety program or failed to provide safety training in general, (*e.g.*, Tr. 25-6) his testimony is rejected. The CO did not have a copy of Respondent's safety program or training materials at the time the citations were issued, but he did have an employee statement that such a materials in fact existed. (Tr. 23) There is no claim or evidence that the CO made any requests of more senior company officials for these materials and he did not receive a copy of such materials until the informal conference. (Tr. 28-9). The CO thus had little or no basis on which to fairly evaluate the nature, extent or content of Respondent's training when he issued the citation. Without such a basis, his determination lacks merit.[6]

For the above reasons, I conclude that the record in this case does not show by a preponderance of the reliable evidence that Respondent failed in its responsibility to instruct or train employees as alleged in Item 1 of the Citation. Accordingly, the Item is VACATED.

Citation 1, Item 2

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[5] Moreover, there is no substantial evidence that an arc blast hazard should be known to Respondent by virtue of a specific OSHA standard. The CO conceded that the hazard of an arc blast is not included in the "417 standard, which is safety-related work practices" (presumably relating to electrical hazards.)

[6] There is also credible testimony that both of Respondent's employees at the site had received training appropriate to the cited standards. (Tr. 46- 47; Ex. R-1,2)

29 CFR § 1926.102(a)(1)[7]

This item alleges that Respondent's employees did not use appropriate eye and face protection while performing electrical work at the site as required by the cited standard.

For reasons similar to those stated above, I find that the Secretary has failed to show the existence or likelihood of an "operation (that) present(ed) potential eye or face injury" under the circumstances of this case.

The Commission has held that the personal protective equipment general industry standard requiring eye protection in almost the same language [8] "applies when an employee is 'exposed to eye or face hazards from flying particles.' " *Nordam Group,* 2001 *OSHARC LEXIS 37,* (No. 99-0954, May 18, 2001). The CO testified that there were two bases for his issuance of this Item. The first was that employees were testing an electrical panel which if energized, could create an arc blast causing injury to the employees' eyes or face. The second was that in cutting PVC pipe, the employees were exposed to potential eye injury from fragments of the pipe. (Tr. 19).

As discussed above, the record in this case does not show that an arc blast hazard existed or could reasonably be anticipated at the site.[9] By itself, this is a sufficient reason to reject the CO's theory. There is, however, a matter of factual testimony warranting resolution.

There is some dispute as to whether Dillon was testing the electrical panel or merely observing the labels on the breakers within the panel. The CO initially testified that he observed an

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[7] The cited standard states:

> (1) Employees shall be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents.

[8] The standard at 29 CFR § 1910.133(a)(1) provides;

> Eye and face protection. (a) General Requirements. (1) The employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation.

[9] On cross-examination, the CO later opined that "eye protection is needed anytime you're working on any kind of electrical." Indeed, the CO further expanded his theoretical universe of safety stating that eye protection would be needed "anytime you're on the site." (Tr. 35).

employee of Respondent testing a circuit at an electrical panel. (Tr. 15) He later used more ambiguous terms, testifying that his interview with Dillon "indicated" that Dillon was doing testing and that he was "right up at the panel." (Tr. 21, 38) The second of Respondent's employees at the site, Mr. Thalman, who is also a qualified electrician (Tr. 63-4), testified that he was "standing right behind" Dillon when Dillon was "checking the markers on the breakers to match the receptacles." (Tr. 66) Thalman had turned off the power to the box at two points. (Tr. 66-67) The record shows that Respondent's employees routinely carry electrical testers with them and that it is considered "standard procedure" "to check the voltage coming in (to a panel)" with a tester. (Tr. 68-69.) Although Thalman conceded that he did not know if Dillon actually tested the panel in question, (Tr. 68), Dillon clearly had a tester with him at the box and testing the box would have conformed to their "standard procedure." It is thus reasonable to infer that Dillon tested the panel before proceeding to check the markings. And were it determinative, I would find that Dillon used his tester to make sure there was no voltage to the box before proceeding to do anything else, whether checking labels or other work. Such a finding does not, however, make the Secretary's case.[10] There is still no substantial, reliable evidence that if the panel were energized or if Dillon used a tester at the panel, or both, there was a reasonable expectation that such conditions would, in the words of the standard, "present potential eye or face injury...."

Finally, the CO's rationale for asserting that a condition raising potential injury arose from the cutting of PVC pipe at the site is rejected. On this record, the CO's conclusion is highly speculative, at best. He did not observe any cutting of PVC pipe during inspection. (Tr. 32). In fact, he admitted that he had never experienced anyone having an eye injury resulting from the cutting of PVC pipe with a hack saw. (Tr 32-33.) Neither had any of Respondent's employees been aware of any injuries arising from the operation they were performing. (Tr. 48; 66). Dutcher explained why an injury of the type speculated by the CO was unlikely. (Tr. 56-56). Thus, there was no condition of "flying particles" as asserted by the Secretary. (Sec Brief, p. 2). For the reasons previously set forth, Dutcher's testimony as to conditions arising from the cutting of PVC pipe with a hand -held hack saw, as in this case, is given far more probative weight than that of the CO. Accordingly, it

[10] The failure of either party to call Dillon as a witness raises no inference as to the nature of the factual testimony he would have given.

is found that the Secretary has not shown that the cutting of PVC pipe with a hack saw created a condition under which eye protection was required by the cited standard.

Accordingly, Item 2 of the Citation is VACATED.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651- 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in not violation of section 5(a)(2) of the Act in that it did not fail to comply with the construction safety standards as alleged in Citation 1, Items 1, 2 and 3.

ORDER

1. Citation 1, Items 1, 2 and 3, are VACATED.

/s/
Michael H. Schoenfeld
Judge, OSHRC

Dated: 8/13/01
Washington, D.C.