



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

SECRETARY OF LABOR, :
 :
Complainant, :
 :
v. :
 :
MCWANE, INC., d/b/a ATLANTIC :
STATES CAST IRON PIPE CO., :
 :
Respondent. :

OSHRC DOCKET NO. 05-0846

Appearances:

Jeffrey S. Rogoff, Esquire
U.S. Department of Labor
New York, New York
For the Complainant.

Carla J. Gunnin, Esquire
Constangy, Brooks & Smith, LLC
Atlanta, Georgia
For the Respondent.

Before: JOHN H. SCHUMACHER
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). Respondent, McWane, Inc., d/b/a Atlantic States Cast Iron Pipe Company, operated a pipe manufacturing facility in Phillipsburg, New Jersey, at all times relevant to this case. Respondent admits that it is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act.

Background

Between October 5, 2004 and April 1, 2005, the Occupational Safety and Health Administration (“OSHA”) conducted an inspection of Respondent’s work site. As a result of the inspection, on April 1, 2005, OSHA issued to Respondent a citation alleging “repeat” violations of OSHA standards. Specifically, Item 1 of the citation alleged a violation of 29 C.F.R. 1910.132(a), Item 2a alleged a violation of 29 C.F.R. 1910.1000(a)(2), and Item 2b alleged a violation of 29 C.F.R. 1910.1000(e); the citation proposed a total penalty of \$11,000.00 for the alleged violations. Respondent filed a timely notice of contest, bringing this matter before the Commission.

On June 27, 2005, the Secretary filed her complaint, in which she amended the citation to allege that Items 2a and 2b were serious rather than repeat violations. On December 12, 2005, the parties reached a Stipulation of Partial Settlement, wherein the Secretary amended Item 1 to delete the allegation that a worker was not using “heat resistant gloves” and to allege instead that a worker was exposed to thermal and chemical burns from exposure to calcium oxide by failing to wear “heat/chemical resistant coveralls.” Respondent withdrew its notice of contest as to the violation alleged in Item 1, as amended, but not as to the classification of the violation as repeated or as to the penalty; Respondent also withdrew its notice of contest as to Item 2, as amended. As agreed to by the parties, the only issues remaining for the undersigned are the proper classification of Citation 1, Item 1, as amended, and the proper penalty for that item. The Secretary contends the item is properly classified as a repeat violation and seeks a penalty of \$10,000.00. Respondent contends the item is properly classified as a serious violation and that the penalty should be no more than \$2,500.00.

Each party has submitted its respective Motion for Summary Judgment in this matter.

Statement of Uncontested Material Facts

On January 26, 2006, the parties entered into a Statement of Uncontested Material Facts. Exhibit 1 to the Statement contains the stipulated facts the parties have agreed to, as follows:

1. Atlantic States Cast Iron Pipe Company, located at 183 Sitgreaves St. Phillipsburg, NJ (“the Philipsburg foundry”) is a cast-iron foundry which manufactures and supplies iron pipes used for the transportation of domestic water and for fire hydrants.

2. In the casting clean-up area of the Philipsburg foundry, workers typically work an eight hour shift and use tools, such as shovels, to remove slag and other materials from the casting machines.

3. Each shift a worker cleans out a section of the casting clean-up area of the Phillipsburg foundry known as the “bull ladle pit.”

4. The bull ladle pit is a dirt excavation measuring approximately 10 feet in diameter and 7 feet deep.

5. The bull ladle pit contains lime (whose chemical name is calcium oxide) which is added to a machine known as the “U-ladle” or “bubbler” to de-sulfurize the melted iron. During the bubbling and pouring of melted iron, lime falls from the U-ladle and onto the floor of the bull ladle pit. After the material is sprayed with water to cool it down, a worker then enters the pit to clean the hot hardened iron and lime from the area. The worker climbs into the pit and uses a pick, bar, and sledge hammer to loosen the hardened lime in the pit, and a shovel and broom to transfer excess lime from the pit to a bin.

6. Employees enter the bull ladle pit to remove spilled debris typically during the third shift each work day.

7. On or about October 5, 2004, Respondent’s employee was wearing short-sleeved shift without coveralls while working the bull ladle pit shoveling/sweeping debris, exposing the employee to the hazard of having his unexposed skin come into contact with hot metal, which could cause thermal burns and the lime, which could cause chemical burns.

8. As a result of the condition described above, Respondent was issued a citation which alleged a violation of 29 CFR 1910.132(a). Pursuant to the parties’ partial settlement agreement the citation and complaint was amended (see partial settlement agreement attached hereto as Exhibit A) to allege the following description of the violation of 29 CFR 1910.132(a):

29 CFR 1910.132(a): Protective equipment was not provided, used and maintained when necessary whenever hazards capable of causing injury and impairment were encountered:

a. Melting Department - Personal protective equipment to include heat/chemical resistant coveralls were not used by a worker exposed to thermal and chemical burns while cleaning out the bull ladle/lime pit. During such operations the worker performed chipping, shoveling and manually lifting of hot, hardened iron along with

shoveling/sweeping debris containing calcium oxide. Condition noticed on or about 10/05/2004.

McWane, Inc. dba Atlantic States Cast Iron Pipe Co. was previously cited for a serious violation of this Occupational Safety and Health Standard or its equivalent standard, 29 CFR 1910.132(a), which was contained in OSHA inspection Number 113673248, Citation 1, Item Number 1, issued on 06/03/2003 pertaining to a workplace located at 183 Sitgreaves St. Phillipsburg, NJ 08865. The citation was not amended and became a final order on 06/25/2003.

9. On June 3, 2003, Respondent was issued a citation for a violation of 29 C.F.R. § 1910.132(a) at the Phillipsburg facility (“the June 3, 2003 citation”). The June 3, 2003 citation stated:

29 CFR 1910.132(a): Protective equipment was not provided, used and maintained when necessary whenever hazards capable of causing injury and impairment were encountered:

a) Facility Wide – Personal Protective Equipment to include footwear and gloves were not provided and maintained in good working condition exposing workers to thermal and chemical burns. Steel toe shoes and protective gloves were worn/damaged with holes in their leather, suede, canvas and/or rubber material construction. Workers used duct tape around gloves to ensure that they last longer. Protective gloves and footwear are required to be used during operations to include but not limited to core making, casting pipe, spray painting, cleaning and/or maintenance equipment. Condition noted on or about 4/3/03.

(copy of June 3, 2003 citation item attached hereto as Exhibit B).

10. Respondent did not contest the June 3, 2003 citation and paid the penalty in full.

11. The June 3, 2003 citation became a final order on June 25, 2003.

Discussion

To avoid the expense of an evidentiary hearing, in that the underlying facts are uncontested, the parties have agreed to the admission of the foregoing Statement of Uncontested Material Facts as part of the evidence of record. The parties further agree that Respondent’s Motion for Summary Judgment and the Secretary’s Motion for Summary Judgment will be admitted into evidence as part of the record that the undersigned judge will consider in entering a final order in this case.

I have examined the record before me, which consists of the citation, the notice of contest, the complaint and answer, the parties’ Statement of Uncontested Material Facts (consisting of Exhibits 1, A, B, 2 and 3), Respondent’s Motion for Summary Judgment, the Secretary’s Motion for

Summary Judgment, and the Secretary's Memorandum of Law in Support of her Motion for Summary Judgment.

Based on the record, I find that the Secretary has met her burden of proof and has established a repeated violation of 29 C.F.R. § 1910.132(a). My reasons follow.

The Commission has held that “[a] violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation.” *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Secretary may establish a prima facie case that a violation is repeated by showing that the two violations were of the same standard, or if they were not, that they otherwise were substantially similar. *Id.* (“substantially similar” test explained, with illustration that permitting use of unguarded scaffold for two different projects – such as construction work the first time, and replacing light bulbs the second time – could result in repeated violation under two entirely different standards). *See also J. L. Foti Constr. v. OSHRC*, 687 F.2d 853, 857 (6th Cir. 1982), wherein the court upheld as reasonable the Commission’s test in *Potlatch* that a repeated violation may be based on “substantially similar” violations of different standards.

The Commission has also held that “the principal factor in determining whether a violation is repeated is whether the two violations resulted in substantially similar hazards.” *Amerisig Southeast, Inc.*, 17 BNA OSHC 1659, 1661 (No. 93-1429, 1996), *aff’d without published opinion*, 117 F.3d 1433 (11th Cir. 1997). Here, the hazards created by the prior and current violations are the same – that is, burn hazards from a lack of required protect clothing. *See Superior Elec. Co.*, 17 BNA OSHC 1635, 1638 (No. 91-1597, 1996) (installing guardrails without midrails on work platform resulted in same hazard as installing no guardrails at all), *rev’d on other grounds without published opinion*, 124 F.3d 199 (6th Cir. 1997); *Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1389-90 (No. 76-5089, 1980) (minor factual distinctions do not make scaffold guardrail violations dissimilar – same hazards exist in all instances).

In addition to the above, the Sixth Circuit has noted that “[u]nder *Potlatch*, circumstances such as the geographical proximity of the violations, the commonality of supervisory control over the violative condition, and the time lapse between the violations bear only on the size of the penalty to be assessed, not on the ‘repeated’ character of the infractions.” *J. L. Foti*, 687 F.2d at 857.

Further, the Fifth Circuit has stated that “factors such as the employer’s attitude ... were declared irrelevant ... to the substantial similarity of the past and present violations.” *Bunge v. Sec. of Labor*, 638 F.2d 831, 837 (5th Cir. 1981).

Contrary to Respondent’s arguments, the surrounding circumstances here are almost indistinguishable from those at issue in the 2003 citation. Both cases involve missing items of protective clothing, at the same workplace, and in a foundry performing the same type of manufacturing work, namely, the casting of iron pipe. In both cases, the hazard involved laborers who were exposed to potential chemical and thermal burns, throughout the facility. The alleged violation in each case – missing personal protective clothing – is virtually identical. The only difference is that one of the employees was missing protective coveralls, while the other was missing protective footwear and gloves. The underlying hazards, however, are the same, and I find, based upon the record and the foregoing precedent, that the current violation is substantially similar to the serious violation affirmed in 2003.¹ Respondent was therefore in repeat violation of the cited standard, and Item 1 of the citation is accordingly affirmed. I further find the stipulated penalty of \$10,000.00 to be appropriate for this item, and a penalty of \$10,000.00 is assessed.

Findings of Fact and Conclusions of Law

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

¹Respondent takes great pains to distinguish between missing protective coveralls in the instant case and missing protective footwear and gloves in the former case. However, both cases involve the absence of “personal protective clothing,” and employees performing duties facility-wide without the articulated protective clothing would be exposed to both thermal and chemical burn hazards.

ORDER

Based upon the foregoing, it is hereby ORDERED that:

1. Citation 1, Item 1, alleging a repeat violation of 29 C.F.R. § 1910.132(a), is AFFIRMED, and a penalty in the amount of \$10,000.00 is assessed.

2. Citation 1, Item 2, alleging serious violations of 29 C.F.R. § 1910.1000(a)(2) and 29 C.F.R. § 1910.1000(e), has been previously disposed of in accordance with the terms of a STIPULATION OF PARTIAL SETTLEMENT, dated December 12, 2005.

/s/

JOHN H. SCHUMACHER
Judge, OSHRC

Dated: April 13, 2006
Washington, D.C.