

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Building Contractors, Inc.,

Respondent.

OSHRC Docket No. **05-1476**

Appearances:

Paul Spanos, Esq., U. S. Department of Labor, Office of the Solicitor, Cleveland, Ohio
For Complainant

Ms. Anna Peric, Safety Director, Building Contractors, Inc., Willoughby, Ohio
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Building Contractors, Inc., is a small masonry contractor located in Willoughby, Ohio. It specializes in masonry construction for commercial projects. In May 2005 Building Contractors erected exterior block and brick columns and walls at a new outdoor shopping mall in Avon, Ohio. The project required cutting some of the masonry brick. In response to a complaint from a subcontractor about excessive airborne dust generated when Building Contractors cut brick, the Toledo office of the Occupational Safety and Health Administration (OSHA) assigned industrial hygienist (IH) Chad Positano to investigate the complaint (Tr. 25-26). As a result of the May 19, 2005, inspection, OSHA issued to Building Contractors two one-item citations on July 28, 2005. Citation no. 1 asserts a violation of the respirator protection standard at § 1910.134(a)(2). Building Contractors did not contest Citation no. 2. The case was placed into simplified proceedings. The undersigned heard the case on December 22, 2005, in Cleveland, Ohio. The parties presented evidence and filed written arguments in support their positions.

The parties dispute whether Building Contractors violated § 1910.134(a)(2). The Secretary asserts Building Contractors's failure to have a respirator protection program violated the standard.

According to Building Contractors, if the Secretary cannot show its employee was over-exposed to respirable silica, she cannot establish the violation, regardless of other proof. Although Building Contractors's premise is wrong, in this case the Secretary failed to establish the violation.

Factual Background

In May 2005 Building Contractors laid cementitious "masonry brick" or "stone" (hereafter, "brick") at the multi-employer construction worksite for the new Avon shopping mall. To construct the walls and columns, some of the standard-sized brick had to be cut into smaller pieces. For several days before the inspection, foreman Curtis Reno sawed and stockpiled stacks of the cut bricks he would need for the upcoming work (Tr. 27).

Like most masonry contractors, Building Contractors cuts brick using either a "dry" or a "wet" method. The dry method (simply cutting through the brick with a mechanized saw) can be expected to generate significant airborne dust. In the wet method, water flows onto the cutting blade to cool the blade and to flush over the cutting surface and the cut particles. The wet method substantially reduces airborne dust and, if silica is present in the product, the respirable silica. The wet method is considered a feasible control for excessive silica exposure and is the preferred cutting method (Tr. 28, 39-40).

Reno dry cut the brick that week. Reno explained to OSHA's Positano that he used the dry method because he feared the wet method would discolor the brick (Tr. 30). While he cut, downstream employees of other contractors, such as the ironworkers, were exposed to the brick dust he generated. Eventually, those workers and Reno engaged in a heated dispute about the dust, apparently including a physical confrontation. The general contractor became involved, and an employee complaint was filed with OSHA alleging that the masons were exposing other trades to silica (Tr. 24).

Positano arrived at the site on May 19, 2005, to conduct the complaint inspection. He met with Reno and, later, with owner Tony Peric. Positano observed stacks of cut-brick waiting to be installed. Reno notified Positano he would not cut brick that day, but agreed to cut one brick to demonstrate how he cut the brick earlier in the week. Reno's demonstration of dry cutting generated a plume of dust (Exh. C-1; Tr. 28, 30).

Positano took a bulk sample of the dust deposited on the bricks. Since Reno did not intend to continue cutting brick, Positano did not monitor for airborne contaminants. The bulk sample, which was analyzed by OSHA's Technical Support laboratory in Salt Lake City, showed the dust contained 50 percent silica quartz (Exh. C-2; Tr. 31-33, 76). It is widely known that masons are subject to a potential silica exposure when respirable particles of silica become airborne. Building Contractors had not evaluated silica exposure for its employees "cutting brick of motor," although it told them to wear dust masks at those times. It had no respiratory protection program (Exh. C-3, C-4; Tr. 34, 36-37).

Discussion

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of those conditions.

Southwest Bell Telephone Co., 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

Item 1: § 1910.134(a)(2)

Applicability of the cited standard

The Secretary asserts a violation of § 1910.134(a)(2), a so-called "general industry" standard. Building Contractors was engaged in construction. Although the standards at Part 1926 generally cover construction activities, OSHA correctly cited Building Contractors under the Part 1910 standards. Both the language of the introduction to § 1910.134 ("[t]his section applies to . . . Construction (part 1926)") and of § 1926.103 ([t]he requirements applicable to construction work under this section are identical to those set forth at 29 CFR 1910.134 . . .") establish the cited standard applies.

Noncompliance with the standard

The Secretary contends Building Contractors violated § 1910.134(a)(2) because it failed to have a respiratory protection program to protect employees dry-cutting brick from respirable silica. Building Contractors argues it did not violate the specific terms of the standard. Section 1910.134(a)(2) provides:

(a) *Permissible practice.* *** (2) Respirators shall be provided by the employer when such equipment *is necessary to protect the health* of the employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protection program which *shall include the requirement outlined in paragraph (c) of this section.* (Emphasis added)

The Secretary's citation sets out the specific allegation:

29 CFR 1910.134(a)(2): The employer did not establish and maintain a respiratory protection program which included the requirements outlined in 29 CFR 1910.134(c):

(a) Building Contractors, Inc. – 389900 Chester Road, Avon, Ohio: On or about May 19, 2005 the employer failed to ensure that a respiratory protection program was established for employees performing dry-cutting of exterior masonry brick at the jobsite. *The employer failed to provide appropriate respiratory protection, conduct an evaluation of respiratory hazards, conduct a medical evaluation for employees using respiratory protection, conduct fit-testing, or conduct employee training.* (Emphasis added).

The emphasized language paraphrases requirements “outline in paragraph (c).” § 1910.134(a)(2).

Other sections of 1910.134 and Secretary's Motion to Amend in the Alternative

Inclusion of specific requirements from § 1910.134(c) in the citation appears to have confused Building Contractors. Adding to the confusion, the language of § 1910.134(a)(2) contains similar requirements to those found in other sections of the § 1910.134, although the circumstances which trigger the requirements differ. Building Contractors candidly admits it may have violated other sections of the § 1910.134 respiratory protection standard, but *not* § .134(a)(2).² Building Contractors argues the cited conduct is addressed by other standards.

At the beginning of the hearing, counsel for the Secretary moved to amend to assert, in the alternative, a violation of either § 1910.134(c) or the originally cited § .134(a)(2) (Tr. 10-12). Even

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²For example, both §§1910.134(a)(2) and .134(c)(1) mandate a written respiratory protection program. Subparagraph (c) mandates the protection program if the employer requires employees to use respirators. Building Contractors requires its employees to wear dust mask respirators when “in the process of cutting brick or mortar” (Exh C-4). Likewise, both §§ 1910.134(a)(2) and .134(d)(1)(i) require that respirators be appropriate to the hazard. Building Contractors requires its employees to use non-NIOSH approved dust masks. Even the packaging of the respirators warns: “Do not use this mask for protection against . . . silica . . .” (Exh R-4; Tr. 30-31, 58).

though recognizing amendments are to be “freely given” (*Foman v. Davis*, 371 U.S. 178 (1962); *Paschen Contrs., Inc.*, 14 BNA OSHC 1755 (No. 84-1285, 1990)) and despite the fact that § 1910.134(a)(2) and the Secretary’s citation reference § .134(c), the undersigned denied the motion (Tr. 12). The *pro se* representative appeared diligent but struggled to understand many aspects of the Secretary allegations, even after the pre-hearing conference and subsequent discussions with the Secretary’s counsel.³ Discussions about the issues, the fact the case was under simplified proceedings, and the confusion of the *pro se* employer convinced the undersigned it would not be possible to cure the prejudice to Building Contractors of such a late amendment.

No Violation of Section 1910.134(a)(2)

The Secretary’s citation thus stands or falls on the requirements of § 1910.134(a)(2). Building Contractors mistakenly relies on OSHA’s Instruction CPL 2-0.120 (1998, Reviewed July 14, 2004) (Exh. R-2) to establish OSHA should have cited it for violations other than § 1910.134(a)(2). OSHA issues instructions, such as CPLs, only as a guide to OSHA personnel to promote efficiency and uniformity in the field. It is not binding on OSHA, and it accords no rights or defenses to employers. *E.g., Caterpillar*, 15 BNA OSHC 2153, 2173 n.24 (Docket No. 87-092, 1993); *Consolidated Freightways*, 15 BNA 1317, 1323 n. 10 (Docket No. 86-351, 1991). Positano explains his recommendation to cite § 1910.134(a)(2) (Tr. 73-74):

Our Compliance Directive, Exhibit R-2, gives us guidance on how to cite under different circumstances. The circumstance in this case, I observed employees performing dry cutting of brick which has a potential for a silica hazard. I took a bulk sample to confirm that silica was present in the brick and dust was being generated.

In further evaluation during the inspection, we noted that there was no respiratory protection program in place at all with the exception of wearing a nonNIOSH-approved dust mask.

The evaluation that I made and the way that I addressed the situation was to consider the fact that since the dust mask was nonNIOSH approved, that it did not conform to OSHA regulations and, therefore, absolutely no component of a respiratory protection program was in place, which given that scenario, the Compliance Directive R-2 says that you issue a citation under 1910.134(a)(2).

Had a NIOSH-approved respirator been in place, then, I guess the opposite argument could be made that they had some component of a respiratory protection program, and if that

³ The representative continued to believe the Secretary claimed Reno was overexposed to respirable silica, something which the Secretary repeatedly stated she was not alleging. At the pre-hearing conference and during other conversations, that erroneous belief was apparently not dispelled.

was the case, then each individual paragraph under 1910.134 from paragraph (c) through the end of the standard would be cited individually. So my assessment was basically favorable for the Company

The Secretary agrees she could have cited other § 1910.134 violations as well. She views the sections of the standard as providing alternate vehicles to cite for similar, although distinguishable, conduct. However, complying with OSHA's field instructions and citing an appropriate standard does not mean the Secretary presented sufficient proof to prove the violation.

Respirators not shown "necessary to protect the health of the employee" – Totality of Circumstances

As stated, § 1910.134(a)(2) requires an employer to institute a respiratory protection program when respirators are "necessary to protect the health of the employee." The Commission looks to the totality of the circumstances in assessing when respirators are "necessary" under that standard. *Snyder Well Servicing, Inc.*, 10 BNA OSHC 1371, 1375-76 (No. 77-1334, 1982). Clearly, respirators will be "necessary" when a chemical exposure is over the PEL. In addition, they may be necessary when an exposure has a realistic potential to be over the PEL or when immediate harm may result from a potential exposure.

The Secretary suggests two bases to find respirators (and a respiratory protection program) "necessary." She points to the fact silica is listed as a hazardous airborne contaminant in the Table of Threshold Limit Values for Airborne Contaminants for Construction – Mineral Dusts, Appendix A of § 1926.55 and in Table Z-3 of § 1910.1000. She explains that inhaling crystalline silica dust leads to development of silicosis and other serious lung diseases. Still, not all degrees of exposure to silica result in serious disease. The evidence of silica exposure, here, is limited to proof the brick dust contained 50 percent silica. The bulk sample was not shown to correlate to a known exposure to respirable silica (Tr. 75). Nor does the failure to have a medical evaluation before using a respirator relate to whether respirators are "necessary" under § 1910.134(a)(2).

The most relevant evidence of a realistic potential for overexposure to silica comes from Building Contractors itself. Approximately six months after the OSHA inspection, the company hired EA Group, an accredited environmental contractor, to conduct personal air monitoring for employees who were dry and wet cutting. The resulting report first explains, "[i]f the Severity of Exposure

