



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.

ESHBACH BROTHERS, LP,

Respondent.

OSHRC DOCKET NO. 09-1148

Appearances: Michael P. Doyle, Esquire
U.S. Department of Labor
Philadelphia, Pennsylvania
For the Complainant.

James F. Sassaman, President
Sassaman, LLC
Conshohocken, Pennsylvania
For the Respondent.

Before: Covette Rooney
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) inspected a work site of Respondent, located in Graterford, Pennsylvania, on July 20, 2009. As a result, OSHA issued to Respondent a serious citation alleging a violation of 29 C.F.R. 1926.51(f)(1), which requires the employer to provide adequate washing facilities where employees are engaged in operations involving contaminants that may be harmful to them. Respondent contested the citation, and this case was designated for the Commission’s Simplified Proceedings. The hearing in this matter was held on November 23 and 25, 2009, in Philadelphia, Pennsylvania. Both parties have filed post-hearing briefs.

The OSHA Inspection

Kevin Chambers, a compliance officer (“CO”) with OSHA, arrived at the work site on July 20, 2009. The site was a construction project that involved building a maintenance facility for the Pennsylvania Army National Guard. The CO held an opening conference with John Yeich, the superintendent for Dolan Construction (“Dolan”), the general contractor. He then walked around the job site with Mr. Yeich. The main work being done at the site was masonry. The CO learned that Eshbach Brothers (“Eshbach”) was responsible for that work and had about 20 employees on the job. He observed the masonry work taking place and an area where there were cement mixers as well as materials such as sand and bags of portland cement; he took photographs of what he saw. He also observed an employee who was mixing sand, portland cement and water to make concrete. CO Chambers met with the employee, Timothy O’Brien, and asked him what he used for washing up. Mr. O’Brien told him he used a water hose and a 55-gallon drum. CO Chambers next met with Eshbach’s job site foreman, John Gechter. The CO explained his concerns about the portland cement, *i.e.*, that it can cause severe burns to skin or eyes when wet. When the CO asked what employees used to wash up, Mr. Gechter said they used a water hose. The CO told Mr. Gechter that soap and clean towels were also required. He then held a closing conference with Mr. Yeich in Dolan’s job site trailer. He discussed the hazards of portland cement and the fact that clean water, soap and clean towels were required for proper sanitation. Mr. Yeich indicated that he would assist Eshbach to ensure the condition was corrected. Before departing, CO Chambers left pamphlets for Eshbach in Dolan’s trailer. The pamphlets explained the sanitation measures that were needed when working with portland cement. (Tr. 10-30, 35, 38-39).

Later that day, the CO phoned Wilson Eshbach at Eshbach’s corporate office, as that was suggested during the inspection. The CO explained what had happened during the inspection, the hazards of portland cement, and the fact that while water was available, soap and clean towels were not available to the employees. Mr. Eshbach indicated the situation would be resolved. (Tr. 30-31).

Jurisdiction

The parties have stipulated that Eshbach is engaged in interstate commerce and that the Commission has jurisdiction over this matter. *See* Joint Pre-hearing Statement, p. 3. I find, therefore, that the Commission has jurisdiction over the parties and the subject matter in this case.

The Cited Standard and the Secretary’s Burden of Proof

The cited standard, 29 C.F.R. 1926.51(f)(1), provides as follows:

The employer shall provide adequate washing facilities for employees engaged in the application of paints, coating, herbicides, or insecticides, or in other operations where contaminants may be harmful to the employees. Such facilities shall be in near proximity to the worksite and shall be so equipped as to enable employees to remove such substances.

To establish a violation of an OSHA standard, the Secretary has the burden of proving that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

The Secretary contends that she has met all of the required elements to establish the alleged violation. Respondent contends it did not violate the standard and that Messrs. O'Brien, Gechter and Yeich all testified that an adequate washing facility was available to employees at the site.

Whether the Cited Standard Applies

As the Secretary notes, the cited standard applies to conditions in which (1) employees are engaged in construction work, and (2) they are exposed to harmful contaminants. S. Brief, p. 8. The record shows Eshbach's employees were performing construction work at the site. The CO described the site as a "construction project," *i.e.*, a maintenance facility, for the Pennsylvania Army National Guard. (Tr. 12). Mr. O'Brien testified that he was working at an Eshbach "construction site" in Graterford in July 2009. (Tr. 42). And, the parties have stipulated that Mr. O'Brien "was engaged in masonry operations at a construction worksite at RT. 113, Graterford, PA." *See* Joint Pre-Hearing Statement, p. 2. Eshbach's employees were clearly engaged in construction work at the site.

The record also shows Eshbach's employees were exposed to portland cement. Mr. O'Brien testified that he was mixing portland cement with water on the day of the inspection, that he was getting the cement on his bare arms, and that on July 20, 2009, he had been working at the site for about three weeks. (Tr. 49-50). Mr. Gechter, Eschbach's foreman on the project, testified that about 20 Eshbach employees were handling portland cement at the job site on the day of the inspection and that it was possible they had gotten it on their hands and arms. (Tr. 63).

The record shows, in addition, that portland cement is a harmful contaminant. The Secretary presented G-3, a publicly-available OSHA guidance document entitled “Preventing Skin Problems from Working with Portland Cement.” G-3 states, on page 6, that employers must “take steps to protect employees from the hazards associated with exposure to portland cement,” as follows:

Construction employers must make washing facilities available for employees exposed to portland cement. Washing facilities must provide clean water, non-alkaline soap, and clean towels.

The Secretary also presented G-4, OSHA Directive CPL 02-02-074, another publicly-available document, entitled “Inspection Procedures for the Chromium (VI) Standards.” In the section relating to portland cement,¹ G-4 states, on page C-2, that:

In order to effectively remove portland cement, employers must provide washing facilities with clean water, non-alkaline soap and clean towels.

The Material Safety Data Sheet (“MSDS”) for the portland cement used at the site, prepared by Lehigh Heidelberg Cement Group (“Lehigh”), is further evidence that portland cement is a harmful contaminant. *See* G-5. G-5 states, on page 1, as follows:

When in contact with moisture in eyes or on skin, or when mixed with water, portland cement becomes highly caustic (pH > 12) and will damage or burn (as severely as third-degree) the eyes or skin.

The CO testified that he took G-7a, which shows an open bag of the Lehigh portland cement at the site. G-7b and G-8, closeups of the back of the bag, show a “DANGER” heading and give a warning similar to the one set out in G-5 above. (Tr. 22-24). G-7b and G-8 additionally show a “PROTECTION” heading, appearing underneath the “DANGER” heading, which states that:

Immediately after working with cement or cement-containing materials, wash with soap and water. Precautions must be taken. A cement burn occurs with very little warning as little heat is sensed by the skin.

In light of all of the foregoing, the Secretary has shown that the cited standard applied to Eshbach’s work site in Graterford, Pennsylvania.

¹A discussion of portland cement is apparently included in G-4 because hexavalent chromium, or Cr(VI), is a trace constituent of the cement. G-4 notes, however, that the Cr(VI) standards do not apply to portland cement as OSHA has determined that complying with pre-existing OSHA general standards (such as the cited standard) provides adequate protection for employees exposed to the trace amounts of Cr(VI) found in portland cement. G-4, pp. C-2-3.

Whether Eshbach Failed to Comply with the Standard

As the Secretary points out, the cited standard does not define “adequate washing facilities,” except to require that they be in near proximity to the work site and be equipped such that employees can remove the contaminants. S. Brief, p. 11. The Commission has held that 29 C.F.R. 1926.51(f)(1) is a “performance standard,” which means that it allows employers some leeway in developing the specific methods to protect against the hazard. *See Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007). The discussion above shows the Secretary has already established the parameters for “adequate washing facilities” when employees are exposed to portland cement. In particular, OSHA describes what is required in G-3 and G-4. Lehigh’s MSDS, G-5, and the warnings on the portland cement bag at the site, shown in G-7b and G-8, are consistent with the Secretary’s determination of the sanitation means required for employees working with the cement. The Secretary’s interpretation is entitled to deference as long as it is reasonable. *See Martin v. OSHRC*, 499 U.S. 144, 150-51 (1991). I find the Secretary’s interpretation to be reasonable in this case. Respondent was, therefore, required to provide clean water, non-alkaline soap and clean towels to its employees at the site who were exposed to the portland cement.²

The CO’s testimony is summarized on page 2. It establishes that no one the CO spoke to at the site told him that clean water, soap and clean towels were available to Eshbach’s employees. Messrs. O’Brien and Gechter told him that a water hose was used for washing up, and Mr. Yeich indicated only that he would help Eshbach correct the condition. The CO spoke later with Wilson Eshbach, a senior Eshbach manager with safety oversight, who also indicated the situation would be corrected. (Tr. 24-31, 35, 38-39). Thus, no one at the site, and not even the Eshbach manager who oversaw safety, indicated that a washing facility that met what OSHA requires was available to Eshbach’s employees.³ This is so even though the CO specifically discussed the hazards of portland cement and what was required with Messrs. Gechter, Yeich and Eshbach. (Tr. 30-31, 35-39).

²Eshbach’s arguments in regard to the Secretary’s interpretation of the standard have been considered and rejected. *See R. Brief*, pp. 3-4.

³The CO testified he saw no area at the site where employees might wash up using soap and towels. He did see “port-a-johns” at the site that contained alcohol-based hand sanitizer. He said that the sanitizer would not effectively remove the cement from skin. (Tr. 25-26).

Eshbach asserts that the testimony of three witnesses shows that an adequate washing facility was available at the site. R. Brief, pp. 2-3. Mr. O'Brien testified that when the CO asked him where his wash station was, he pointed to the hose in the water barrel. He also testified that there was a hand-washing facility, *i.e.*, a bathroom, inside Dolan's trailer. He knew about the bathroom as Eshbach had safety meetings in that trailer. He had access to that trailer, as did other employees, and he knew one who went in the trailer for breaks and lunch because it had air conditioning. Mr. O'Brien said he never used the bathroom in the trailer and that Mr. Gechter never told him to wash up with soap and water. He also said he used the hose to clean off the cement, that he used soap and water to wash off at home, and that in his three years of working for Eshbach he had never had any burns. Mr. O'Brien stated that he had been nervous when speaking to the CO. (Tr. 43-51).

Mr. Gechter testified that he had worked for Eshbach for 25 years, that he had been a foreman for a number of years, and that he was the "competent person" at the job site with responsibility for employee safety.⁴ He further testified that there were two trailers right next to each other, one of which was Mr. Yeich's, and that Eshbach had its safety meetings in the other trailer. That trailer had air conditioning and a bathroom, and it was open to anybody, including his employees, some of whom would go in it to get out of the heat. Mr. Gechter said he was not aware of the hand-washing facility requirement when the CO spoke to him. He also said that the CO "kept going on" about the hazards of the cement and that he was "floored" by how adamant the CO was about the "hand-washing thing." According to Mr. Gechter, it had not occurred to him to tell the CO about the bathroom in the trailer. He had not inspected that bathroom and did not know if it had soap, but he thought it had towels. Mr. Gechter noted that in the 25 years he had been in masonry and worked with cement he had never known employees using cement to have skin rashes or burns. (Tr. 52-67).

Mr. Yeich testified that he had rented two trailers for the job, one for his use and the other for the Department of General Services ("DGS"). The DGS trailer had a bathroom, while his did not, and the DGS trailer also had a water cooler and air conditioning. Mr. Yeich further testified that employees had access to both trailers, that they used the DGS trailer for the water cooler and the air conditioning, and that he was aware of Eshbach employees using the DGS trailer "several times."

⁴Mr. Gechter has also been a limited partner of Eshbach for about a year. (Tr. 60).

He said Eshbach had its safety meetings in the DGS trailer, and he indicated that some employees had lunch there. Mr. Yeich recalled the OSHA inspection, and he said the CO never asked him if there were any lavatory facilities. He also recalled talking to the CO in his trailer and the CO telling him that Eshbach's employees were not washing off with soap and water. He did not remember telling the CO that he would help Eshbach to correct the situation. (Tr. 74-89).

I agree with the Secretary that Eshbach's argument appears to be that because a bathroom was available in a trailer at the site, it complied with the standard. S. Brief, pp. 13-15. While Messrs. O'Brien, Gechter and Yeich testified to this effect, it is noteworthy that not one of them stated that any employee ever actually used the bathroom. Mr. O'Brien specifically testified that he never used that bathroom and that Mr. Gechter never told him to wash up with soap and water. (Tr. 51). Mr. Gechter testified that he was not aware of the hand-washing facility requirement when he talked to the CO.⁵ (Tr. 58, 62-63). In light of this testimony, and particularly the lack of evidence that any employees had ever used the bathroom in the trailer for any purpose, it is reasonable to infer that Eshbach's employees did not in fact use that bathroom for washing up. That they did not is supported by Mr. Gechter's testimony that he had to ask permission in advance to hold safety meetings in that trailer. (Tr. 54-55). There was no evidence that employees were ever given permission to use the bathroom in the trailer. A conclusion that employees did not have such permission is supported by the fact that there were "port-a-johns" at the site. (Tr. 25-26).

It is even more noteworthy that no one at the site, and not even Wilson Eshbach, a senior company manager with responsibility for safety oversight, ever told the CO that there was a facility for washing up at the site. (Tr. 25, 28-31, 35-37). Messrs. O'Brien and Gechter did, however, tell the CO that a water hose and drum were used for washing up. (Tr. 25, 28, 35, 44, 58). Respondent suggests that the CO should have specifically asked if there was such a facility. It also suggests that Mr. O'Brien's nervousness upon being questioned by the CO, and Mr. Gechter's being "floored" by the CO's adamance about the "hand-washing thing," explain why they did not mention the bathroom in the trailer. R. Brief, pp. 2-3. I disagree. As the Secretary points out, "Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in

⁵Mr. Gechter also admitted that he did not know if the bathroom in the trailer had soap, although he thought it had towels. (Tr. 63-64).

which that fact naturally would have been asserted.” *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980). S. Brief, p. 15. I find that no one mentioned the bathroom in the trailer as being available as a hand-washing facility because it was not in fact available to employees for such use. I further find that Respondent Eshbach did not provide adequate washing facilities to employees as required. The Secretary has established that Eshbach failed to comply with the cited standard.

Whether Employees had Access to the Cited Condition

The record plainly shows that Eshbach’s employees were exposed to the portland cement at the site. The CO testified that July 20, 2009 was a warm day and that Mr. O’Brien was perspiring as he used the portland cement to make concrete. (Tr. 22). Mr. O’Brien, who had been at the site for about three weeks, testified that he was perspiring the day of the inspection, that the work was messy and he was getting cement on his arms, and that he had on a short-sleeved shirt. (Tr. 49-50). Mr. Gechter testified that about 20 Eshbach employees were handling portland cement at the site on July 20, 2009, and that it was possible that they had gotten it on their hands and arms. (Tr. 63). The Secretary has demonstrated employee access to the cited condition.

Whether Eshbach had Knowledge of the Cited Condition

To establish knowledge, the Secretary must show the employer either knew or could have known with the exercise of reasonable diligence of the violative condition. As the Secretary notes, “Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation. It need not ... be shown that the employer understood or acknowledged that the physical conditions were actually hazardous.” *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995). S. Brief, p. 15. Mr. Gechter, the foreman, testified that he was not aware of the hand-washing facility requirement at the time of the inspection. (Tr. 58, 62-63). It is clear, however, that Mr. Gechter knew what Mr. O’Brien and the other employees were doing at the time of the inspection, *i.e.*, they were working with the portland cement. He also knew that it was possible the employees were getting the cement on their hands and arms. (Tr. 62-63). Finally, he knew the employees were using “the hose or the water barrel” to wash up. (Tr. 58). Under these conditions, Mr. Gechter had at least constructive knowledge that employees were not washing up as required,

that is, with clean water, soap and clean towels.⁶ Mr. Gechter was a foreman and a limited partner of Eshbach on July 20, 2009. (Tr. 52-53, 60). His knowledge may thus be imputed to Eshbach. *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1080 (No. 99-0018, 2003). The Secretary has demonstrated the knowledge element. Respondent was, therefore, in violation of the cited standard.

Whether the Violation was Serious

A violation is serious when “there is a substantial probability that death or serious physical harm could result” from the hazardous condition or practice at issue. *See* section 17(k) of the Act. Exhibits G-3, G-4 and G-5, discussed on page 4 of this decision, establish that when in contact with moisture in eyes or on skin, or when mixed with water, portland cement becomes highly caustic. Such contact can damage or burn the eyes or skin, and burns can be as severe as third-degree. G-3 also states, on page 4, that:

Wet portland cement can cause caustic burns, sometimes referred to as cement burns. Cement burns may result in blisters, dead or hardened skin, or black or green skin. In severe cases, these burns may extend to the bone and cause disfiguring scars or disability.

The record shows that Mr. O’Brien was mixing portland cement with water and other materials on the day of the inspection, that he was perspiring due to the warm temperatures that day, and that he was getting the cement on his bare arms. (Tr. 22, 50). Mr. O’Brien had worked at the site for about three weeks, and he testified that his “habit” was to wash off with the hose and to wash off with soap only when he got home after work. (Tr. 48-49). Mr. Gechter testified, in addition, that he did not know that washing facilities were required. (Tr. 58, 62-63). On these facts, it is reasonable to infer that Mr. O’Brien was exposed to the hazard of cement burns for the three weeks preceding the inspection. This evidence, along with the above statement from G-3, demonstrates the serious nature of the violation in this case. The violation is affirmed as serious.

Penalty Determination

The Secretary has proposed a penalty of \$1,125.00 for this citation item. In assessing penalties, the Commission is required to give due consideration to the gravity of the violation, and to the size, history and good faith of the employer. *See* section 17(j) of the Act. The CO testified the

⁶Mr. Gechter also should have known that employees were not washing up as required in light of the information on the bags of portland cement at the site. *See* G-7b, G-8.

violation had low severity, because most of the time employees recover from cement burns without any permanent disfigurement or disability, but greater probability, due to the amount of cement he saw on Mr. O'Brien and the fact that all it takes to activate the cement is contact with water. The resulting gravity-based penalty was \$2,500.00. The CO further testified that that Eshbach received a 40 percent credit for size, based on the corporate size of the company, and a 15 percent credit for good faith, based upon his determination that the company had a sufficient safety and health management system. No credit for history was given, in that Eshbach had had a prior citation within the past three years. The resulting proposed penalty was \$1,125.00. (Tr. 32-33; G-2). I find the proposed penalty to be appropriate. The proposed penalty of \$1,125.00 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).

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ordered that:

1. Item 1 of Serious Citation 1, alleging a violation of 29 C.F.R. 1926.51(f)(1), is affirmed, and a penalty of \$1,125.00 is assessed.

/s/ _____
Covette Rooney
Judge, OSHRC

Dated: February 16, 2010
Washington, D.C.