

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,

Complainant,

v.

Diversified Maintenance Systems,

Respondent.

OSHRC DOCKET NO. 10-0617

Appearances:

Abigail Daquiz, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington
For Complainant

Timothy Miguel Willardson, Esq., Diversified Maintenance Systems, Salt Lake City, Utah
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

Procedural History

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"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a Diversified Maintenance Systems ("Respondent") worksite in Portland, Oregon on January 15, 2010. As a result of that inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent alleging one violation of the Act. Citation 1 Item 1 alleges an other-than-serious violation of 29 C.F.R. §1926.50(b) with no proposed penalty. Respondent timely contested the citation and a trial was conducted on August 27, 2010 in Portland, Oregon. Both parties submitted timely post-trial briefs.

Jurisdiction

Jurisdiction of this case is conferred upon the Commission pursuant to Section 10(c) of the Act. At all times relevant to this action, Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). *Resp. Answer; Slinghuff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). Furthermore, because Oregon manages its own OSHA state plan, it is important to note that Respondent was a Federal contractor engaged in construction on a Federal military installation under Federal OSHA jurisdiction. (Tr. 8, 57).

Applicable Law

To establish a *prima facie* violation of a specific regulation promulgated under Section 5(a)(2) of the Act, the Secretary must prove by a preponderance of the evidence that: (1) the cited standard applied to the condition; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharmaceutical Products*, 9 BNA OSHC 2126, 1981 CCH OSHD ¶125,578 (No. 78-6247, 1981).

Stipulations

The parties stipulated to the following facts:

- Diversified Maintenance Systems was the general contract contractor for the contract at issue;
- The work site at issue had an address of 6767 North Basin Avenue, Portland, Oregon;
- American Heating, Inc. was retained by Diversified Maintenance Systems as a subcontractor;
- Frank Dallas was the only employee of Diversified Maintenance Systems on the work site;
- Frank Dallas has been trained in CPR and First Aid;
- At the time of the inspection, Frank Dallas did not have a current certification in CPR;
- At the time of the inspection, Frank Dallas did not have a current certification in First Aid; and
- The Accident Prevention Program (C-3) is a plan prepared by DMS to govern accident prevention

on the subject contract.

In addition, Respondent admitted to the following allegations in its *Answer to the Complaint*:¹

- Respondent, Diversified Maintenance Systems, at all times material hereto, engaged in business in Portland, OR;
- Respondent was at all times material hereto engaged in the business of construction at a worksite and place of business and employment at 6767 N. Basin Ave., Portland, OR 97217-3929 (hereinafter, the “worksite”) on the date of the alleged violations, January 15, 2010, and at times prior thereto. At all times material hereto, Respondent is and was engaged in the use of materials, machinery, and other goods brought directly or indirectly to Respondent from points outside the State of Oregon and also utilized mails, telephone, and other facilities of interstate commerce. Therefore, the Respondent was and is engaged in a business affecting commerce within the meaning of §3(5) of the Act, 29 U.S.C. §652(5), as amended on September 28, 1999;
- The Secretary of Labor, pursuant to the authority vested by §6 of the Act, duly issued and promulgated the Occupational Safety and Health Standards for general industry (29 C.F.R. Part 1910). The Secretary, pursuant to the authority vested by §6 of the Act, duly issued and promulgated the Safety and Health Regulations for Construction (29 C.F.R. Part 1926);
- No penalty has been proposed for the violation alleged in Citation Number 1;
- Respondent filed a timely notice of contest with a representative of the Secretary of Labor, which was duly transmitted to the Occupational Safety and Health Review Commission. By its terms, the notice of contest contests the citation.

¹ By Order dated May 21, 2010, this matter was designated to proceed under the Commission’s Conventional Proceeding rules by the Chief Administrative Law Judge. By Order dated July 29, 2010, the undersigned designated the case to proceed under the Commission’s Simplified Proceeding rules.

Additional Findings of Fact

Four witnesses testified at trial: Troy Rose, a Pipe Fitter employed by American Heating (an on-site subcontractor); Alex Bedard, OSHA Compliance Safety and Health Officer (“CSHO”); Jeff Sevrin, Respondent’s General Manager, and Frank Dallas, Respondent’s on-site Superintendent. (Tr. 16, 25, 54). Based on their testimony and the evidentiary exhibits received in evidence, the court makes the following additional findings:

Respondent was the General Contractor on a jobsite located on the Swan Island U.S. Coast Guard Station in Portland, Oregon in January 2010. (Tr. 17-18, 35, 40, 57). CSHO Bedard was assigned to perform a programmed OSHA inspection of this jobsite on January 15, 2010. (Tr. 30-31). Frank Dallas, Respondent’s on-site Superintendent, was Respondent’s only employee working at the location during the inspection. (Tr. 18, 33). The project consisted of HVAC system remodeling and window replacements for an existing building. (Tr. 31). To complete the project, some demolition work also needed to be performed. (Tr. 18, 31). Employees of one of the subcontractors, American Heating, were performing demolition work on the day of the inspection using Sawzall saws, torches, ladders, and other various hand tools. (Tr. 18-19, 21, 36).

Respondent’s General Manager Jeff Sevrin, who helped plan this particular project, anticipated their response to serious employee injuries that might occur at this site through subcontractor orientations led by Respondent’s on-site Superintendent, which would include the locations of a First Aid kit, a nearby medical infirmary, and the closest hospital. (Tr. 52). Superintendent Dallas, who also helped plan this project, knew before the project began that: (1) the building being renovated originally contained a medical infirmary which was being temporarily relocated to the building next door during the construction, (2) there was a fire station approximately three quarters of a mile away from the construction site, (3) there was a hospital a few minutes away from the construction site, and (4) a First Aid kit would always be available at the site. (Tr. 56, 58-59, 61, 64). Troy Rose, an employee of one of the on-site subcontractors, confirmed that

Superintendent Dallas provided his crew with an orientation, which included information concerning the location of a First Aid kit and the location of an infirmary in the building next door to the worksite. (Tr. 23).

CSHO Bedard acknowledged that there was both a fire station nearby and a hospital four to seven minutes away, but he “wasn’t sure if [Frank Dallas] knew about that one.” (Tr. 33, 35, 40). CSHO Bedard did not know at the time of his inspection that there was a medical infirmary located in the building next door. (Tr. 42).

Respondent’s Accident Prevention Program requires that at least two employees on each shift be qualified and certified to administer First Aid and CPR. (Tr. 36-37; Ex. C-3). Although his certifications had lapsed, Superintendent Dallas testified that he had the ability to provide basic First Aid treatment and CPR, if necessary, at the time of the inspection. (Tr. 68-69). If a serious injury had occurred, he would have taken the injured employee(s) to the infirmary located approximately fifty feet from the worksite. (Tr. 59, 64).

In not proposing a monetary penalty for the alleged violation, CSHO Bedard considered that Superintendent Dallas had been trained in First Aid and CPR, but had simply allowed his certifications to lapse. (Tr. 38). He testified that the condition would “not cause immediate harm or injury to employees.” (Tr. 38).

Citation 1 Item 1

Complainant alleges that the Respondent violated the Act as follows:

29 CFR 1926.50(b): Provisions were not made prior to commencement of the project for prompt medical attention in case of serious injury: U.S. Coast Guard base, Portland, Oregon - (a) the employer was unaware, at the time of the inspection, of a first aid facility, nor were any employees current with CPR or First Aid training.

The cited regulation provides:

29 CFR 1926.50(b): Provisions shall be made prior to commencement of the project for prompt medical attention in case of serious injury.

Respondent does not dispute that it was engaged in construction work at this project. (Resp. Answer). The cited regulation identifies medical response considerations that must be undertaken at the planning stage of construction projects. Therefore, the court finds that the cited standard applied to the condition.

In terms of violating the requirements of the cited standard, Complainant's evidence focused heavily on Superintendent Dallas's lack of current certifications in First Aid and CPR. In fact, Complainant's counsel described the primary issue in the case as being whether or not Respondent complied with its own medical response plan, and more specifically, Respondent's requirement that at least two of its onsite employees have current First Aid and CPR certifications. (Tr. 11-12). However, as Respondent's counsel correctly pointed out, Complainant alleged a violation of §1926.50(b), rather than §1926.50(c). 29 C.F.R. §1926.50(c) articulates the requirement to have an employee with "a valid certificate in First Aid training" present when medical facilities are not reasonably accessible. The regulation cited in this case, §1926.50(b), addresses only whether or not Respondent, at the planning stage for this project, made "provisions...for prompt medical attention in case of serious injury."

