

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.

John R. Jurgenson Company,

Respondent.

OSHRC Docket No. **10-2646**

Appearances:

Patrick DePace, Esquire, U. S. Department of Labor, Office of the Solicitor, Cleveland, Ohio  
For Complainant

Corey V. Crognale, Esquire, Ice Miller, LLP, Columbus, Ohio  
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

**DECISION AND ORDER**

John R. Jurgensen Company (Jurgensen) is a general highway contractor. On September 24, 2010, Jurgensen was working on a project to widen State Route 4 Bypass, in Butler County, Ohio. Sometime between 9:45 p.m. and 10:00 p.m., a dump truck driven by a subcontractor's employee backed over a Jurgensen employee. The employee died as a result of his injuries.

Occupational Safety and Health Administration (OSHA) compliance safety and health officer (CSHO) James Denton inspected Jurgensen's worksite. As a result of his inspection, on December 8, 2010, the Secretary issued a citation to Jurgensen alleging three serious violations of the construction standards of the Occupational Safety and Health Act of 1970 (Act).

Item 1 of the Citation alleges a serious violation of 29 C. F. R. §1926.20(b)(1), for failure to initiate and maintain an adequate safety program. Item 2 of the Citation alleges a serious violation of 29 C. F. R. § 1926.21(b)(2), for failure to instruct each employee in the recognition and avoidance of unsafe conditions in the workplace. The Secretary withdrew Item 3 prior to the hearing. The Secretary proposed penalties of \$4,500.00 each for Items 1 and 2.

Jurgensen timely contested the citation. The court held a hearing in this matter on January 11, 2012, in Cincinnati, Ohio. Jurgensen stipulates the Commission has jurisdiction over the proceeding under § 10(c) of the Occupational Safety and Health Act of 1970 (Act), and that it is a covered business under § 3(5) of the Act.

The parties have filed post-hearing briefs. Jurgensen argues it did not violate the cited standards. It also asserts the affirmative defense of unpreventable employee misconduct.

For the reasons set out in this decision, the court vacates Items 1 and 2 of the Citation, and assesses no penalty.

### **Background**

Jurgensen is a general highway contractor specializing in asphalt paving, storm, sewer, and road construction work. In April 2010, the Ohio Department of Transportation (ODOT) awarded Jurgensen the contract for the widening of State Route 4 Bypass (SR4B) in Butler County. The SR4B project required Jurgensen to widen the bypass of State Route 4 from south of Hamilton Mason Road to the eastbound ramp of State Route 129. The project was designed to accommodate through traffic during construction activities. The Director of the ODOT designated the project site as a limited access highway.

The SR4B project required Jurgensen to remove 19 inches of pavement and shoulder beginning at State Route 129 and continuing south along State Route 4 before tapering up to grade with Hamilton Mason Road. Due to this configuration, Jurgensen could establish an entry and exit point for construction vehicles only off of Hamilton Mason Road. Jurgensen arranged for Hamilton Mason Road to be closed to public traffic, and then established an opening for construction vehicles to enter and exit the work zone.

ODOT specifications require travel within the work zone to be in the same direction as that traveled by the adjacent public traffic, to prevent the drivers' vision from being impaired by the oncoming headlights of the construction vehicles. Jurgensen had subcontracted with Ritter Trucking, who provided approximately fifteen dump trucks and drivers to deliver asphalt to the worksite. To comply with ODOT specifications, the drivers backed the dump trucks onto a designated truck route and proceeded, in reverse, north towards State Route 129 to the unloading site.

On September 24, 2010, Jurgensen's crew began its nighttime paving operation. One employee operated a paver that laid down the crushed asphalt, while another employee operated a screed. Two laborers raked, shoveled, and leveled the asphalt as they followed behind the paver. They were followed by employees operating two rollers. Jurgensen's foreman arranged for the trucks to enter Hamilton Mason Road and back up along a designated route to a staging area where they lined up to unload.

Jurgensen's crew began paving a 12 foot lane at the north end of the project off State Route 129 and proceeded south toward Hamilton Mason Road. The crew completed the lane at the edge of Hamilton Mason Road. The paver then pulled off the joint and began turning around to head north back to State Route 129 where it would begin another pass. The laborers shoveled and raked the asphalt in order to backfill the joint between the paved lane and the edge of Hamilton Mason Road. As Jurgensen's crew was backfilling the joint, Ritter dump trucks were entering the work zone off of Hamilton Mason Road and backing up along the designated route to the point where they would stage for unloading the asphalt.

At some point, one of the laborers left the area where Jurgensen's crew was working and moved to a spot along the route designated for dump trucks. The dump trucks were equipped with balloon lights, which provided limited illumination. One of the dump trucks struck the laborer and ran over him. The driver initially believed that he had run over a slab of asphalt that had fallen off this truck. It was only when a Jurgensen employee jumped on the side of the truck and said, "You just ran over one of our guys," that the driver realized he had hit a person (Tr. 73).

Jurgensen's crew alerted emergency personnel at 9:59 p.m. Fairfield Township police officer Brandon McCroskey arrived at the site at 10:33 p.m. The Fairfield Township Police Department impounded the Ritter dump truck that had struck the decedent. When the police later tested the dump truck, they determined the backup alarm was working properly.

### **The Citation**

The Secretary has the burden of establishing the employer violated the cited standard.

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) the employer

failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

*JPC Group Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

The cited standards apply to employers engaged in construction work. Jurgensen's crew was engaged in highway construction at the time of its employee's death. The cited standards apply to Jurgensen's worksite.

**Item 1: Alleged Serious Violation of 29 C. F. R. § 1910.1926.20(b)(1)**

Item 1 of the Citation alleges:

29 CFR 1926.20(b)(1): The employer did not initiate and maintain such programs as may be necessary to comply with the standards set forth in this part (i.e., 29 CFR 1926):

- (a) On or about September 24, 2020, and prior to that time the employer did not implement and maintain workplace procedures or work rules to ensure that workers were protected while on foot from trucks traveling in reverse through the work zone area(s).

The standard at 29 C. F. R. § 1926.20(b)(1) provides:

It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

The Commission in *Northwood Stone & Asphalt Inc.*, 16 BNA OSHC 2097, 2099 (No. 91-3409, 1994), held that, under 29 C. F. R. § 1926.20(b)(1), "an employer may reasonably be expected to conform its safety program to any known duties and that a safety program must include those measures for detecting and correcting hazards which a reasonably prudent employer similarly situated would adopt."

Jurgensen concedes that highway construction, especially at night, requires specialized safety training. The company argues it provides specialized training to its employees. Travis Davis is Jurgensen's safety manager. He has worked for the company for 13 years. He is responsible for implementing and enforcing Jurgensen's safety policy and for providing safety training to its employees. Davis testified that Jurgensen works with two different safety

consultants to train its employees: Alexander Safety Solutions and Schiff-Kreidler-Shell.

On February 10, 2010, seven months before the employee fatality that gave rise to this proceeding, Alexander Safety Solutions presented safety training at the Sharonville Training Center in Ohio. All members of the Jurgensen crew working on the SR4B project the night of the accident attended the training, including the decedent. The sign-in sheet lists the topics covered by the training as “Orientation, Hazcom/Hazard Awareness, Night Work, D.F.W.P., Fleet Program, P. P. E.” (Exh. R-10).

A portion of the training is taught using a PowerPoint presentation, which is divided by topics into modules. Davis discussed Module Five of the PowerPoint:

Module Five, Night Work, basically goes over all what’s out there in regards to potential hazards you may see at night. That goes from impaired drivers to visibility is really down at night, working in work zones, watching—as you can see, if you have the module printed out, you can see that they have—we have an equipment module in there for –you know, looking out when equipment backs up, making sure backup alarms are working, making sure you stay with your crew, everybody knows where you’re at when you work at night. Basically we try to preach brother’s keeper out there at night shift.

(Tr. 232).

Exhibit R-13 is a printout of Module Five. It states, in pertinent part:

Objectives

--Identify the types of hazards that exist during night work

--Recognize the key characteristics of these hazards

--Identify prevention, control, or abatement methods associated with reduced visibility, impaired motorists, higher traffic speeds, bright lights and shadows

--Recognize additional hazards and solutions to night work problems

\* \* \*

How Can We Protect Ourselves at Night?

...

#### Know your surroundings

- Vehicle and equipment paths
- Assigned work areas
- Safe paths to/from work locations
- On foot, watch out for equipment
- On equipment, watch out for workers

\* \* \*

#### What About Construction Equipment?

Treat equipment and vehicles with caution.

#### Around equipment, vehicles

- Stay out of “blind spots”
- Communicate with operators by radio and/or eye contact
- Don’t approach until you communicate with operator and he/she acknowledges you
- Stay outside a “safety circle” around equipment
- Stay clear of vehicles, know traffic control plan
- Use spotters when you must work with your back to equipment or traffic

(Exh. R-13).

The Secretary contends Jurgensen violated 29 C. F . R. § 1926.20(b)(1) “by failing to implement and maintain workplace procedures or rules to ensure that the workers on foot were protected from trucks traveling in reverse through the work zone area(s)” (Secretary’s brief, p. 13). The above-quoted portions from Jurgensen’s PowerPoint training belie the Secretary’s contention. The record establishes Jurgensen had implemented and communicated work rules designed to prevent employees from being struck by vehicles traveling in reverse through the work zone. Specifically, Jurgensen trained its employees to stay in their assigned work areas, to know the traffic control plan, and to stay clear of vehicle and equipment paths. All of Jurgensen’s crew members working on SR4B project, including the decedent, attended the training.

The Secretary has failed to establish Jurgensen was not in compliance with 29 C. F. R. § 1926.20(b)(1). Item 1 is vacated.

**Item 2: Alleged Serious Violation of 29 C. F. R. § 1926.21(b)(2)**

Item 2 of the Citation alleges:

29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:

(a) Employees had not been trained on how to work near construction vehicles in order to reduce their vulnerability from being struck by or being caught between construction vehicles. Specifically, there had been no training of employees required to mark pavement for the areas in which trucks were backing up.

The standard at 29 C. F. R. § 1926.21(b)(2) provides:

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.

The Secretary cited the employer in *W. G. Fairfield Company*, 285 F.3d 499, 504 (6<sup>th</sup> Cir. 2002), for violations of the same two standards at issue in this case. The Court of Appeals for the Sixth Circuit summed up the different requirements for each of the cited standards: “Stated simply, one citation was for not making the proper policies, and the other was for not instructing employees on those policies.” The standard at 29 C. F. R. § 1926.21(b)(2) requires the employer to instruct the employees in the work rules that apply specifically to their working conditions.

The Secretary contends Jurgensen failed to train its employees in safely marking pavement in the area where trucks were backing up. It is the Secretary’s theory that Jurgensen foreman Todd Koenig assigned the decedent the task of marking the gravel with a line for the paver to follow, and that the decedent was performing this assigned activity when he was struck by the dump truck. Jurgensen disputes this theory, speculating instead that the decedent left his assigned work area to use his cell phone to call his wife, with whom he was fighting. Jurgensen had implemented a strict policy forbidding the use of cell phones during work.

Jurgensen's construction superintendent Jonathan Little stated the only place the decedent should have been located was in the area where the other laborers were backfilling the joint: "He should have been with these other guys shoveling. If they were all behind this paver, he should have been behind the paver" (Tr. 135). He further explained that, even if the decedent had been assigned to mark the gravel, he should not have been in the area where he was struck by the dump truck:

[T]here's no sense marking it on this end if you're going to drive dump trucks right across it. You would go to the other end and mark it back in the way you're going to be paving. . . . Because if he marks it on this end and as he's moving the trucks drive over it, they're going to take the marks right back up. . . . If he's going to mark lines, he would have gone immediately to this end and marked in this direction. As the paver moved, he would have marked along with the paver. If he starts here marking lines, coming this way, and you've got to back forty dump trucks back through here, there won't be any line.

(Tr. 149-150).

Jurgensen introduced the decedent's cell phone records, which indicate that he placed a call at 9:36 p.m. the night of his death, and the call terminated approximately 8 minutes later (Exh. R-1). The Fairfield Township Police Department received the 911 call reporting the decedent's accident at 9:59 p.m. It is Jurgensen's theory that the decedent was struck by the dump truck at approximately 9:45, which is the cause of the termination of the cell phone call. While it is unknown whether the decedent was struck while he was using his cell phone or a few minutes after he ended the call, the record supports Jurgensen's theory that the decedent had left his assigned work area in order to place a prohibited call without being seen.

"An employer's obligation to instruct and train is dependent upon the specific conditions, whether those conditions create a hazard, and whether the employer or its industry has recognized the hazard." *W. G. Fairfield Company*, 285 F.3d at 506-507. In order to establish a violation of 29 C. F. R. § 1926.21(b)(2) for this item, the Secretary must prove "there had been no training of employees required to mark pavement for the areas in which trucks were backing up."

The Secretary has failed to meet this burden. She has not shown that it is more likely than not that the decedent was engaged in the activity of marking the pavement in an area where trucks



were backing up. The Secretary concedes as much in her brief, stating, “It cannot be established definitively what [the decedent] was doing at the time he was hit by the truck” (Secretary’s brief, p. 8). None of the hourly employees testified. There is no evidence that they did not receive the training the Secretary cites Jurgensen for failing to provide. Foreman Koenig stated he reviewed the working conditions with his crew before each work shift. There is no evidence Koenig failed to provide his crew with instructions regarding specific conditions of the worksite.

The Secretary has failed to establish Jurgensen was in noncompliance with 29 C. F. R. § 1926.21(b)(2). Item 2 is vacated.

### **Findings of Fact and Conclusions of Law**

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

### **ORDER**

Based upon the foregoing decision, it is ORDERED that:

1. Item 1 of the Citation, alleging a serious violation of § 1926.20(b)(1), is vacated, and no penalty is assessed;
2. Item 2 of the Citation, alleging a serious violation of § 1926.21(b)(2), is vacated, and no penalty is assessed; and
3. Item 3 of the Citation, alleging a serious violation of § 1926.56(a), is withdrawn by the Secretary. No penalty is assessed.

Date: July 23, 2012  
Atlanta, Georgia

/s/  
STEPHEN J. SIMKO, JR.  
Judge