



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.

FUYAO GLASS AMERICA, INC.,
Respondent,

JEREMY GRANT, MICHAEL HECHT,
CYNTHIA HARPER, and JEFFREY D.
MANNIX,
Affected Employees.

OSHR DOCKET NOS.
16-0788, 16-1330, 16-1414, 16-2008,
16-1899, 16-2006

ORDER GRANTING PARTY STATUS TO AFFECTED EMPLOYEES

On February 2, 2017, four employees of Respondent Fuyao Glass America, Inc., Jeremy Grant, Michael Hecht, Cynthia Harper and Jeffrey D. Mannix, filed a request electing party status in the above captioned cases before the Occupational Safety and Health Review Commission, as affected employees.¹ On February 3, 2017 Respondent filed an unopposed² request for an extension of time, to February 22, 2017, to respond to the employees' party status request. Respondent requested additional time to respond to the party status request to ascertain whether the named employees are in fact "affected employees," among other inquiries. By Order, dated February 8, 2017, Respondent's request for an extension of time to respond was granted.

Counsel for Complainant, Hema Steele, filed a Stipulation and Settlement Agreement

¹ The employees designated as their representative, Andrew Comai, Assistant Director Health & Safety Department International Union, UAW. *See* Commission Rules 20, 22(a)(c); 29 C.F.R. §§ 2200.20, 2200.22(a)(c).

² On February 7, 2017, in a supplemental motion, Respondent represented that Mr. Comai's Counsel, Ava Barbour, stated that Mr. Comai had no objection to Respondent's extension of time request.

(settlement agreement) concerning the above captioned cases, dated February 17, 2017, with the undersigned Commission Judge. The settlement agreement is executed by the Complainant and Respondent. The certificate of service shows electronic service to Respondent Counsel. Section XX of the settlement agreement shows posting at the facility, the Fuyao plant located at 2801 West Stroop Road, Moraine, Ohio 45439, on February 17, 2017.

As set forth above, predating the execution of the February 17, 2017 settlement agreement, four Fuyao employees elected party status in these cases, as affected employees. As filed, the settlement agreement does not include proof of service showing service upon all parties in the manner prescribed by Commission Rule 7(c)³, including the affected employees who elected party status on February 2, 2017. *See* Commission Rule 100(c). As filed, the settlement agreement does not state whether any affected employees who have elected party status have raised an objection to the reasonableness of any abatement time. *See* Commission Rule 100(b); February 21, 2017 Order.

On February 22, 2017, Respondent filed an Objection to the February 2, 2017 election of party status, as affected employees, by the four named Fuyao employees. In the Objection, Respondent states that upon filing the settlement agreement with the undersigned Commission Judge, the parties provided Mr. Comai and Ms. Barbour, the employees designated representative and representative's counsel, with a copy of the settlement agreement and information regarding the date the settlement agreement was filed with the Commission Judge and posted at the facility. February Objection 12.

Thereafter, on February 27, 2017, the affected employees filed a Notice of Objection to the reasonableness of the abatement period and Request for expedited hearing, with attachments, including the employees' February 2, 2017 request electing party status and a February 27, 2017 affidavit of Andrew Comai. Also filed was a notice of appearance signed by Andrew Comai, as the designated personal representative in these proceedings of Fuyao employees Jeremy Grant, Michael Hecht, Cynthia Harper and Jeffrey D. Mannix.

The affected employees filed a Reply to Respondent's February Objection, dated March 1, 2017, including as exhibits two Orders issued by Commission Judges⁴ granting party status to

³ Occupational Safety and Health Review Commission Rules of Procedure, 29 C.F.R. § 2200.00 *et seq.*

⁴ *Cintas Corp.*, (No. 07-1710, January 4, 2008)(ALJ Welsch)(Order granting party status to

affected employees in Commission cases and approving the affected employees' designation to be represented by a labor organization that was not an "authorized employee representative" as defined in the Commission Rule 1(g).

Two questions are presented by the Fuyao employees' party status election and Respondent's Objection. First, should Fuyao employees Jeremy Grant, Michael Hecht, Cynthia Harper and Jeffrey D. Mannix be granted party status as affected employees in these proceedings? Second, if party status is granted to the affected employees, do they have a right to be represented in these proceedings before the Commission?

As discussed below, both questions are answered in the affirmative. The election of party status, as affected employees, by Fuyao employees Jeremy Grant, Michael Hecht, Cynthia Harper and Jeffrey D. Mannix is granted. As a party to these proceedings, the affected employees have a right to be represented in proceedings before the Commission by the representative they have chosen. The affected employees have designated Andrew Comai as their representative.

Background

The Cincinnati Ohio Area Office of the Occupational Safety and Health Administration (OSHA) conducted an inspection of the Fuyao Glass America, Inc. worksite, located at 2801 W. Stroop Road, Moraine, Ohio 45439 (the Fuyao facility), between October 16, 2015 and April 6, 2016. The designated OSHA inspection number is 1099224. On April 11, 2016, OSHA issued a two item serious citation and a notification of penalty (citation). The citation alleges a violation of a general industry standard regarding machine guarding (29 C.F.R. § 1910.212(a)(1)) and a violation of a construction industry standard regarding secure covers for service trenches to prevent accidental displacement (29 C.F.R. § 1926.502(i)(3)). The citation states that the alleged violations were corrected during the inspection. The total penalty proposed is \$14,000.00. Respondent filed a timely notice of contest on May 5, 2016. Respondent's notice of contest was docketed with the Occupational Safety and Health Review Commission (Commission) on May 12, 2016, as case no. 16-0788.

OSHA conducted a second inspection at the Fuyao facility between February 4, 2016 and

Antonio Anthony as an affected employee)(unpublished); *Cintas Corp.*, (No. 05-1507, October 28, 2005)(ALJ Sommer)(Order)(unpublished).

July 25, 2016. The designated OSHA inspection number is 1138778. On July 27, 2016, OSHA issued a three item serious citation, with subparts, and a notification of penalty. The citation alleges violations of general industry standards regarding the exit route ceiling height (29 C.F.R. § 1910.36(g)(1)), exit route emergency lighting (29 C.F.R. § 1910.37(b)(1)), exit signage (29 C.F.R. § 1910.37(b)(2)), exit route signage (29 C.F.R. § 1910.37(b)(4)), and employee alarm system in the PVB room (29 C.F.R. § 1910.37(e)). The total penalty proposed is \$21,000.00. Respondent filed a timely notice of contest on August 16, 2016. Respondent's notice of contest was docketed with the Commission on September 7, 2016, as case no. 16-1414.

OSHA conducted a third inspection at the Fuyao facility between April 12, 2016 and June 28, 2016. The designated OSHA inspection number is 114378. On July 14, 2016, OSHA issued a three item serious citation and a notification of penalty. The citation alleges violations of general industry standards regarding ensuring that hazardous chemical containers in the workplace are labeled, tagged, or marked with the product identifier and information regarding the hazards (29 C.F.R. § 1910.1200(f)(6)(ii)), employee training on the specific hazards of the chemicals in their workplace including, but not limited to, isopropyl alcohol and glass cutting fluid (29 C.F.R. § 1910.1200(h)(3)), and employee training on the location and availability of the employer's written hazard communication program or safety data sheets (29 C.F.R. § 1910.1200(h)(2)(iii)). The total penalty proposed is \$12,000.00. Respondent filed a timely notice of contest on August 9, 2016. Respondent's notice of contest was docketed with the Commission on August 18, 2016, as case no. 16-1330.

OSHA conducted a fourth inspection at the Fuyao facility between May 24, 2016 and September 21, 2016. The designated OSHA inspection number is 1149674. On October 6, 2016, OSHA issued a two item serious citation, a one item other than serious citation, and a notification of penalty. The citation alleges violations of general industry standards regarding the use of personal protective equipment for hands (29 C.F.R. § 1910.132(a)), maintenance and ready accessibility to the material safety data sheet for Betaseal Glass Primer (29 C.F.R. § 1910.1200(g)(8)), and written certification of the required workplace hazard assessment regarding required personal protective equipment: gloves (29 C.F.R. § 1910.132(d)(2)). The total penalty proposed is \$23,160.00. Respondent filed a timely notice of contest on November 8, 2016. Respondent's notice of contest was docketed with the Commission on November 15, 2016, as case no. 16-1899.

OSHA conducted a fifth inspection at the Fuyao facility between May 24, 2016 and October 27, 2016. The designated OSHA inspection number is 1151844. On October 31, 2016, OSHA issued an eleven item serious citation, with subparts, and a notification of penalty. The citation alleges violations of general industry standards regarding stair treads on fixed industrial stairs (29 C.F.R. § 1910.24(f)), exit signage (29 C.F.R. § 1910.37(b)(4)(5)), protective helmets where there is a potential for head injuries from falling objects (29 C.F.R. § 1910.135(a)(1)), machine specific procedures for the control of potentially hazardous energy (29 C.F.R. § 1910.147(c)(4)(i)), locks and tags to attach to energy isolating devices (29 C.F.R. § 1910.147(c)(5)(i)), employee training on the safe application, usage and removal of energy isolating devices (29 C.F.R. § 1910.147(c)(7)(i)), following established procedures for the application of energy control (the lockout or tagout procedures) (29 C.F.R. § 1910.147(d)), machine guarding (29 C.F.R. § 1910.212(a)(1)), working space for electrical equipment likely to require examination, adjustment, servicing, or maintenance while energized (29 C.F.R. § 1910.303(g)(1)(i)), ready accessibility to an overcurrent device (29 C.F.R. § 1910.304(f)(1)(iv)), and portable electric equipment and flexible cords used in highly conductive work locations (29 C.F.R. § 1910.333(a)(4)). The total penalty proposed is \$131,836.00. Respondent filed a timely notice of contest on November 15, 2016. Respondent's notice of contest was docketed with the Commission on December 1, 2016, as case no. 16-2006.

OSHA conducted a sixth inspection at the Fuyao facility between August 8, 2016 and September 27, 2016. The designated OSHA inspection number is 1167871. On October 6, 2016, OSHA issued a two item serious citations, with subparts, and a notification of penalty. The citation alleges violations of general industry standards regarding guarding of electric equipment against accidental contact (29 C.F.R. § 1910.303(g)(2)(i)), use of flexible cords and cables attached to building surfaces (29 C.F.R. § 1910.303(g)(1)(iv)), strain relief provided to flexible cords and cables to prevent pull from being directly transmitted to joints or terminal screws (29 C.F.R. § 1910.305(g)(2)(iii)), and inspection for damage of portable cord and plug connected equipment and flexible cord sets (extension cords) (29 C.F.R. § 1910.334(a)(2)(i)). The citation noted that the alleged violation of standard 29 C.F.R. § 1910.303(g)(2)(i) was corrected during inspection. The total penalty proposed is \$24,941.00. Respondent filed a timely notice of contest on November 16 2016. Respondent's notice of contest was docketed with the Commission on December 1, 2016, as case no. 16-2008.

Complaints and answers were filed in each of the cases described above. On December 12, 2016, Chief Judge Rooney issued an Order consolidating the above captioned cases before the Commission and transferring the consolidated cases to Mandatory Settlement Proceedings.

Prior UAW Party Status Request

By letter dated December 14, 2016, the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America – UAW requested election of party status on behalf of workers of Respondent Fuyao, regarding two of the above captioned cases: case nos. 16-1899 and 16-2006.⁵ The UAW’s December Request stated that Andrew Comai, Assistant Director Health & Safety Department International Union, UAW, is “the designated personal representative for health and safety issues of eleven employees at the Fuyao facility, including complainant Cynthia Harper.” Further, “[t]hese employees’ written designation of Mr. Comai as their personal representative [was] submitted to Ken Montgomery, Area Director of OSHA’s Cincinnati office, on August 10, 2016. These employees seek to participate in the hearing over, and possible resolution of, the citations in this case.” *See* UAW December Request 2.

In addition, the UAW noted that pursuant to Commission Rule 22(c) employees who are not members of a collective bargaining unit may elect to participate in proceedings before the Commission. *See* UAW December Request 2.

Respondent objected to the UAW’s party status request. Respondent asserted that the UAW was not an “authorized employee representative” of Respondent’s employees pursuant to the Commission Rules. The UAW had no collective bargaining relationship with Respondent’s employees. *See* December Objection 2. *See also* Commission Rules 1(g); 22(b).

Also Respondent asserted that the allegedly affected Fuyao employees, referenced in the UAW’s December Request, had not made an individual appearance in the above captioned

⁵ The December 14, 2016 election of party status was a resubmission of the UAW’s November 14, 2016 request for party status, regarding the same OSHA inspection citations, docketed with the Commission in case nos. 16-1899 and 16-2006. The November 14, 2016 request inadvertently was not properly served on Respondent’s representatives. On December 8, 2016, due to an apparent administrative error, the UAW’s November 14, 2016 request for party status inadvertently was granted. Respondent objected to the grant of party status. By Order, also dated December 8, 2016, the Order granting party status was vacated by Chief Judge Rooney.

Commission proceedings. There was no filing in the Commission proceedings stating that these Fuyao employees agreed to be represented by UAW Attorney Ava Barbour or Andrew Comai. Respondent stated that the allegedly affected Fuyao employees were not identified by name or other identifier and there was no evidence that the alleged Fuyao employees were “affected employees” pursuant to the Commission Rules. *See* December Objection 3-4. *See also* Commission Rules 1(e); 22(a) and (c).

In the Order denying the UAW’s December 2016 party status request, the Commission’s Procedural Rules were discussed. Commission Rule 1(g) states: “*Authorized employee representative* means a labor organization that has a collective bargaining relationship with the cited employer and that represents affected employees.” During a December 2016 conference call with Complainant Counsel, Respondent Counsel, and UAW Counsel, it was confirmed that the UAW does not have a collective bargaining relationship with Fuyao, the cited employer. Absent a collective bargaining relationship between the UAW and Respondent Fuyao, the UAW’s request for party status in case nos. 16-1899 and 16-2006 was denied. *See* January 4, 2017 Order denying request for party status.

Also discussed, during the December 2016 conference call, were the provisions in the Act and Commission Rules that affected employees may participate in proceedings before the Commission and request party status. *See* section 10(c) of the Act; Commission Rules 1(e), 20, 22(c). Parties have the right to be represented during Commission proceedings. *See* Commission Rule 22(a).

The January 4, 2017 Order denying the request for party status stated that the UAW’s December Request provided insufficient information to determine whether the employees generally identified were “affected employees” pursuant to the Commission Rules. Further, the UAW’s December Request provided insufficient information to determine whether the employees generally identified had requested party status *in proceedings before the Commission*. Reading the UAW’s December Request as a request to serve as the designated party representative, on behalf of alleged affected employees who elect party status, that request also was denied.

Affected Employees’ Party Status Request

On February 2, 2017, four current employees of Respondent Fuyao, Jeremy Grant,

Michael Hecht, Cynthia Harper, and Jeffrey D. Mannix, filed a request with the Commission electing party status in the above captioned cases before the Commission, as affected employees. (Affected Employees' Request). The employees specifically designated as their representative, Andrew Comai, Assistant Director Health & Safety Department International Union, UAW. Detailed contact information for Mr. Comai was provided. The letter is signed by each employee and dated February 1, 2017. The letter states, in part:

In support of our election of party status, we note that we have participated in the OSHA Inspections, and that we are personally exposed to hazards cited by OSHA. Undersigned employee Jeremy Grant is a Bysometric Operator who operates machines that have been cited by OSHA for lockout/tagout violations and lack of proper training. Undersigned employee Cynthia Harper is a Lamination Specialist who has been exposed to hazards cited by OSHA including cuts due to lack of personal protective equipment, electrical wires near water, lack of exit signs, inaudible PA system announcements, and lack of accessible safety data sheets. And, undersigned employees Michael Hecht and Jeffrey David Mannix are Maintenance employees who are responsible for repairing and maintaining equipment which has been cited by OSHA for violations including lockout/tagout, lack of guards, and lack of proper training. We therefore have strong reasons for electing to participate, through our representative, in the proceedings before the OSHRC.

Affected Employees' Request 2. The employees' party status election was filed with the Commission, together with a notice of appearance signed by Ava Barbour, Associate General Counsel International Union, UAW, as counsel for Andrew Comai, the designated personal representative of the Fuyao employees electing party status. Also filed with the employees' letter was a cover letter and a certificate of filing and service, signed by Ms. Barbour, showing service on Complainant Counsel and Respondent Counsel.

Respondent's Objection

On February 22, 2017, Respondent filed an Objection to the February 2, 2017 request by current Fuyao employees Jeremy Grant, Michael Hecht, Cynthia Harper and Jeffrey D. Mannix to elect party status as affected employees, in the Commission cases captioned above. Respondent contends that the electing named employees should not be granted party status in these proceedings as they failed to make a prima facie showing that they are affected employees. February Objection 2-5, 13.

Even though the employees elected party status on February 2, 2017, Respondent argues that the employees' party status election should not be effective until the Commission makes a "finding" that they are affected employees as defined in the Commission's Rules, regardless of any delay in their party status designation resulting from Respondent's extension of time request to investigate their affected employee status. February Objection 2, 9-10.

Further, Respondent objects to the representative designated by the affected employees electing party status. Respondent contends that the affected employees' designated representative Andrew Comai has not filed an appearance in this proceeding in accordance with the Commission Rules.⁶ Respondent objects to any appearance in these proceedings by Mr. Comai's Counsel Ms. Barbour, Associate General Counsel for the UAW, as a "veiled attempt to interject UAW into these proceedings."⁷ February Objection 1-2, 6-8, 13.

Respondent also asserts that as Complainant and Respondent reached agreement and executed a Stipulation and Settlement Agreement on February 17, 2017, the affected employees' party status request is moot and, therefore, should be denied. Respondent states that the settlement agreement was filed with the Commission and posted at Fuyao's facility on February 17, 2017.⁸ Objection 2-3, 12.

⁶ On February 27, 2017, Andrew Comai filed was a notice of appearance, in these proceedings, as the designated personal representative of Fuyao employees Jeremy Grant, Michael Hecht, Cynthia Harper and Jeffrey D. Mannix. *See infra*.

⁷ Respondent mistakenly captioned its February 22, 2017 Objection "Respondent's Objection to International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW)'s Election of Party Status." The only party status request, in these cases, currently before the undersigned Commission Judge is the February 2, 2017 election filed by the four named affected employees. There is no UAW party status request currently before the Commission.

⁸ Respondent contends that the period for affected employees to object to the reasonableness of the abatement time should begin to run on February 17, 2017 and conclude ten calendar days later. February Objection 2-3, 11-12 Respondent time calculation is inaccurate. *See* Commission Rule 4(a) Computation of time:

Computation. In computing any period of time prescribed or allowed in these rules, the day from which the designated period begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or Federal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or Federal holiday. When the period of time prescribed or allowed is less than 11 days, the period shall commence on the first

Affected Employees' Reply

Affected employees Jeremy Grant, Michael Hecht, Cynthia Harper and Jeffrey D. Mannix filed a Reply to Respondent's February Objection, dated March 1, 2017. As current employees at the Fuyao facility they assert that they are affected employees, pursuant to the Commission Rules, as they continue to be exposed to the hazards cited by OSHA in the cases pending before the Commission. They note that Respondent has not disputed any of the information provided by the affected employees in their February 2, 2017 party status election. Affected Employees' Reply 1-4. Further, as affected employees who have elected party status, they assert their right to designate a representative of their choosing in these proceedings before the Commission. They contend that their designated representative Mr. Comai's and his attorney Ms. Barbour's employment with the UAW is not disqualifying. Affected Employees' Reply 1-2, 4-5. As affected employees they have objected to the reasonableness of the abatement period, therefore, their party status request is not moot. Affected Employees' Reply 5-6.

Discussion

Affected employees participation in proceedings before the Commission

The Occupational Safety and Health Act⁹ provides that affected employees . . . shall have the opportunity to participate in proceedings before the Commission. "The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection." Section 10(c) of the Act; 29 U.S.C. § 659(c).

Commission Procedural Rules effectuate this directive. Commission Rule 20(a) "Party status" states: "*Affected employees.* Affected employees . . . may elect party status concerning any matter in which the Act confers a right to participate."

Commission Rule 22(c) also specifically describes the election of party status by affected

day which is not a Saturday, Sunday, or Federal holiday, and intermediate Saturdays, Sundays, and Federal holidays shall likewise be excluded from the computation.

See also Commission Rule 100.

⁹ Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the Act).

employees who are not in a collective bargaining unit. “*Affected employees not in a collective bargaining unit.* Affected employees who are not members of a collective bargaining unit may elect party status under [Commission Rule 20(a)]. If more than one employee so elects, the Judge shall provide for them to be treated as one party.”

Affected employees and representatives of affected employees have the right to participate as parties in Commission hearings. Further, Commission precedent accords affected employees and their authorized representatives, who have elected party status, the right to “meaningful participation” in the settlement process. *See Boise Cascade Corp.*, 14 BNA OSHC 1993, 1994-99 (No. 89-3087, 1991)(consolidated); *Gen. Elec. Co.*, 14 BNA OSHC 1763, 1764-66 (No. 88-2265, 1990); *Kaiser Aluminum & Chem. Corp.*, 6 BNA OSHC 2172, 2173 (No. 76-2293, 1978). *See also* Commission Rule 100(c).

Commission Rules define the term “affected employee.” Commission Rule 1(e) states: “*Affected employee* means an employee of a cited employer who is exposed to or has access to the hazard arising out of the allegedly violative circumstances, conditions, practices or operations.”

In this case, the four current Fuyao employees electing party status, as affected employees, are identified by name, job classification, and a brief description of the cited hazards to which they are exposed or have access to “arising out of the allegedly violative circumstances, conditions, practices or operations,” during their employment at Fuyao’s facility. They allege exposure to hazards at Fuyao’s facility arising from lock out / tag out violations, lack of proper training, lack of machine guards, lack of personal protective equipment, electrical wires near water, lack of exit signs, inaudible PA system announcements, and lack of accessible safety data sheets.¹⁰ *See* Affected Employees’ Request 2; Affected Employees’ Reply 1-3.

A review of the citations above described issued in the cases before the Commission,¹¹ reveals alleged violations of general industry standards regarding lock out / tag out, employee training on the safe application, usage and removal of energy isolating devices, machine guarding, personal protective equipment, portable electric equipment and flexible cords used in

¹⁰ The employees’ summary of their hazard exposure is quoted at p. 8 above.

¹¹ *See* Background section *infra*.

highly conductive work locations, exit signage, employee alarm system, employee training on the location and availability of the employer's written hazard communication program or safety data sheets, among many other alleged violations.

Respondent was granted an extension of time, to February 22, 2017, to respond to the affected employees' party status election. Respondent requested the additional time to respond to the party status election to ascertain whether the named employees are in fact "affected employees." *See* February Objection 10; Respondent's February 3, 2017 Motion 2-3.

In its February Objection Respondent does not challenge or dispute the affected employee status or the facts stated by the named employees. Respondent has access to the employment, human resource, work schedule, assignment, and production records for the named employees electing party status. Respondent has access to facility records and to the Fuyao facility where the alleged violations were identified. Following Respondent's own "fact-finding" regarding the named employees, Respondent does not dispute their affected employee status. *See* February Objection 10. It is reasonable to infer that if Respondent had information disputing the affected employees' statements, Respondent would have included that information in its February Objection. *See Capeway Roofing Sys. Inc.*, 20 BNA OSHC 1331, 1343 (No. 00-1986, 2003).

The settlement agreement signed by Complainant and Respondent on February 17, 2017 discloses that all cited violations have not been abated.¹² Respondent has information regarding the status of its ongoing abatement efforts. *See* February Objection 5. The affected employees assert that Respondent has not yet abated cited hazards related to lock out / tag out, training, and machine guarding. *See* Affected Employees' Reply 3-4.

Party status as affected employees is granted to Jeremy Grant, Michael Hecht, Cynthia Harper and Jeffrey D. Mannix in these proceedings. The employees have been identified by name, job classification, and a brief description of the cited hazards to which they are exposed or to which they have access. The employees' description of the cited hazards corresponds to the alleged violations in the citations at issue in these proceedings. Respondent had an opportunity to ascertain their status as affected employees at the Fuyao facility inspected by OSHA in the six

¹² Of the many citation items issued, only three alleged violations were noted on the citation as corrected during the inspection. *See* Background discussion of case nos. 16-0788 and 16-16-2008, *infra*.

cases consolidated in these proceedings

The OSH Act and Commission Rules specifically direct that affected employees be provided an opportunity to participate as parties in proceedings before the Commission. Read in conjunction with the citations issued in these proceedings, the February 2, 2017 affected employees' party status election presents sufficient information to support the named employees' designation as affected employees. Their status as affected employees is further supported by their March 1, 2017 Reply.

Party status as affected employees is granted in these proceedings to Jeremy Grant, Michael Hecht, Cynthia Harper and Jeffrey D. Mannix.

A party's right to be represented in proceedings before the Commission

Each party appearing before the Commission has the right to designate a representative. See Commission Rules 22, 23. Commission Rule 22(a) provides that "[a]ny party . . . may appear in person, through an attorney, or through another representative who is not an attorney. A representative must file an appearance in accordance with [Commission Rule 23]."

The term "person" is defined in the Act to mean "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." 29 U.S.C. § 652(4).

Absent evidence of misbehavior, a Commission Judge has no involvement regarding a party's designated representative. See Commission Rule 104. Each party is free to designate a representative of their choosing. "[N]either the statute nor the regulations preclude a representative from being affiliated with a union. In fact, the employees' choice of representative is not restricted in any way at all." *In re Perry*, 859 F.2d 1043, 1045 (1st Cir. 1988)(In Commission proceedings affected employees granted party status were free to designate as their representative a non-employee union organizer for the United Brotherhood of Carpenters and Joiners of America, which union was engaged in an organizing campaign at the employer's facility). See also Orders in *Cintas Corp.* cases (No. 07-1710, January 4, 2008)(ALJ Welsch) and (No. 05-1507, October 28, 2005)(ALJ Sommer)(unpublished).¹³

The affected employees who have elected party status in these proceedings designated

¹³ See note 4 above and accompanying text.

Andrew Comai as their representative. Mr. Comai is the Assistant Director Health & Safety Department International Union, UAW. The affected employees' February 2, 2017 designation of Mr. Comai is clearly stated and provides the identifying and contact information requested consistent with the Commission Rules. *See* Commission Rules 6, 22, and 23.¹⁴ Mr. Comai's counsel, Ava Barbour, filed a notice of appearance in these proceedings on February 2, 2017. Ms. Barbour is an Associate General Counsel International Union, UAW. Ms. Barbour's notice is consistent with Commission Rules.

Respondent incorrectly contends that the February 2, 2017 party status election currently before the undersigned Commission Judge is a request to intervene and a request for party status by the UAW. February Objection 6-7. It is not. The February 2, 2017 is an election of party status by the named affected employees. It does not request party status for the UAW. As the UAW is not seeking party status in the February request, Respondent's arguments that the UAW and Ms. Barbour are attempting to "circumvent the established rules of union representation," Commission Rules, and NLRB representation proceedings are rejected. February Objection 6 n.2, 7-8. Respondent's contention that Ms. Barbour has a conflict of interest disqualifying her representation of Mr. Comai in these proceedings is rejected. Ms. Barbour's role as Counsel for Mr. Comai in these Commission proceedings and as UAW Associate General Counsel are positions "not necessarily mutually exclusive." *In re Perry*, 859 F.2d at 1045.

Fuyao employees Jeremy Grant, Michael Hecht, Cynthia Harper and Jeffrey D. Mannix have been granted party status as affected employees in these proceedings. They have a right to designate a representative of their choosing in Commission proceedings. Their designated representative in these proceedings is Mr. Comai.

Effective date of the party status request

In these proceedings before the Commission, there has been no dispute or challenge regarding the affected employee status of the four named Fuyao employees who elected party status on February 2, 2017.¹⁵ Respondent requested an extension of time to February 22, 2017 to investigate and ascertain their affected employee status. Thereafter, Complainant and

¹⁴ Further, as stated above, on February 27, 2017, Mr. Comai filed a notice of appearance in these proceedings. *See infra*.

¹⁵ *See infra*.

Respondent completed settlement negotiations and signed a settlement agreement on February 17, 2017, without including in the agreement a statement “whether any affected employees who have elected party status have raised an objection to the reasonableness of any abatement time” and without including proof of service “showing service on all parties,” including the affected employees who elected party status two weeks beforehand. *See* Commission Rule 100(b)(c); February 21, 2017 Order.

Respondent contends that neither the Complainant nor Respondent needed to comply with the requirements regarding affected employees who have elected party status set forth in Commission Rule 100, because on February 17, 2017, when the Complainant and Respondent executed the settlement agreement, the Commission had not yet made a “finding” that the electing Fuyao employees were “affected employees” entitled to party status. *See* February Objection 9-10. Respondent’s contention is rejected.

In these proceedings, the affected employee status of the Fuyao employees electing party status has never been disputed. Commission Rule 100 identifies the employees “election” of party status - in this case February 2, 2017 - as the relevant event. To find that the relevant event, pursuant to Commission Rule 100, is a Commission “finding” of affected employee status, which event must occur before the parties to the settlement agreement must comply with the Rule 100 requirements regarding affected employees who have elected party status, *in certain cases* may be prejudicial to the electing affected employees. That is especially so in circumstances, such as presented in the instant cases, where Complainant and Respondent execute a settlement agreement before the expiration of an extension of time period *requested by Respondent* to ascertain the electing employees’ affected employee status¹⁶ and, therefore, before a Commission “finding” regarding affected employee status is made. A Commission “finding” of affected employee status is not a precondition to compliance with the requirements of Commission Rule 100 regarding affected employees who have “elected” party status. This is especially so in cases, such as the instant cases, where the affected employee status of the employees electing party status has never been disputed.

¹⁶ Respondent candidly acknowledges that Complainant and Respondent focused their time and efforts on expeditiously finalizing the settlement agreement, rather than investigating the status of the affected employees electing party status, as it concerned their participation in the OSHA inspections at issue in these proceedings. *Compare* February Objection 4 n. 1; *with* Respondent’s February 3, 2017 Motion 2-3.

It is noted, in the instant cases before the Commission, Respondent represents that on February 17, 2017 Respondent informally provided a copy of the settlement agreement executed by Complainant and Respondent to Mr. Comai, the designated representative of the affected employees who elected party status, and to Ms. Barbour, Mr. Comai's Counsel. The settlement agreement was posted at the Fuyao facility on that date. February Objection 12. Thereafter, on February 27, 2017, the affected employees filed Employees' Notice of Objection to the reasonableness of the abatement period and Request for expedited hearing.

Accordingly, receipt of the settlement agreement by the affected employees' designated representative, Mr. Comai, appears to be complete. Further, the position of the affected employees regarding an objection to the reasonableness of any abatement period is known.

The affected employees' designation of party status in these proceedings is not moot.

Respondent contends that the affected employees' election of party status is moot. Complainant and Respondent executed a settlement agreement on February 17, 2017. The settlement agreement was provided to the affected employees' designated representative and posted at Fuyao's facility on February 17, 2017. Respondent argues that the affected employees who have elected party status have no greater right to object to the reasonableness of the abatement period than any other affected employee at the Fuyao facility. Therefore, Respondent contends that the affected employees' election of party status is moot. February Objection 2, 10-11, 13.

I disagree. The affected employees' party status request is not moot. The OSH Act and Commission Rules specifically direct that affected employees be provided an opportunity to participate as parties in proceedings before the Commission. The affected employees granted party status in these proceedings have filed a Notice of Objection to the reasonableness of the abatement period and a Request for an expedited hearing. At this time, the settlement agreement has not been approved and the proceedings before the Commission have not concluded.

Order

Party status as affected employees is granted in these proceedings to Jeremy Grant, Michael Hecht, Cynthia Harper and Jeffrey D. Mannix. The case caption is changed to reflect their party status.

As a party, the affected employees have a right to designate a representative of their choosing in these Commission proceedings. The affected employees have designated Mr. Comai as their representative. Mr. Comai is represented by Ms. Barbour. All future pleadings shall be served electronically on the affected employees through counsel for their designated representative.

SO ORDERED.

Dated: March 2, 2017
Washington, D.C.

/s/ Carol A. Baumerich
Carol A. Baumerich
Settlement Judge, OSHRC