Secretary of Labor,	*	
Complainant,	*	
	*	
v.	*	OSHRC Docket No. **97-1975**
	*	
Peach Auto Painting and Collision	*	
of Montgomery, Inc.,	*	
Respondent.	*	

Appearances:

Marsha L. Semon, Esquire
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

Bob Humphries, Esquire
Montgomery, Alabama
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Peach Auto Painting and Collision of Montgomery, Inc. (Peach Auto), contests the citation issued to it by the Occupational Safety and Health Administration (OSHA) on October 23, 1997. Prior to the hearing, the Secretary withdrew items 1 and 2 of Citation No. 1, and item 1 of Citation No. 2. Remaining for decision is item 3 of Citation No. 1, which the Secretary classified as repeated. A hearing was held in this case on May 21, 1998, in Montgomery, Alabama.

The Secretary alleges that Peach Auto did not require its painter to wear eye protection during spraying operations in violation of § 1910.133(a)(1). Peach Auto maintains that if the painter failed to wear eye protection at all times while spraying, it was the result of employee misconduct. For the reasons stated below, the Secretary's position prevails.

Background

Peach Auto is an automobile repair company. As part of its operation, Peach Auto paints and details the automobiles it repairs.

In July 1996, OSHA inspected Peach Auto. As a result, on August 22, 1996, OSHA issued a citation, which alleged, among other things, that Peach Auto's spray painter did not use eye protection. Peach Auto eventually resolved the matter with OSHA and corrected the violations

(Exh. C-2). After the 1996 inspection, Peach Auto purchased what was referred to during the hearing as "welding type" goggles. Peach Auto employee Herman Caffey, a painter, tried to wear this type of goggles but found them to be hot, uncomfortable, and easily fogged (Tr. 110, 122-123).

In July, 1997, OSHA's inspector David Gilreath responded to a formal complaint (later unsubstantiated) relating to fumes from Peach Auto's spray painting operation. In order to assess the validity of the complaint, Gilreath asked permission from Peach Auto's manager Gary Fail to inspect the spraying operations. Fail told him that he should "just do what he had to do" (Tr. 7, 10).

Gilreath observed Caffey don protective clothing and equipment and spray paint three automobiles.[1] Although Caffey wore other protective equipment, he did not use any type of eye protection (Tr. 22-23). Gilreath interviewed Caffey and noticed that Caffey's eyes were bright red (Exh. C-9; Tr. 12). According to Gilreath, Caffey explained that his eyes were red because of spray painting.[2] As Gilreath left the establishment, he told Fail that Caffey was not wearing eye protection but should be (Tr. 13-14, 88).

Gilreath, who was a "safety" inspector, referred the matter of Caffey's possible chemical overexposure to a "health" inspector, industrial hygienist Albert Smith, Jr. The next day Smith went to Peach Auto and requested and received permission to inspect the spraying operation. As Smith was setting up his equipment and Caffey was preparing to spray paint, Fail advised Smith that the spray booth was out of commission and could not be used that day (Tr. 30, 32).

Smith left but returned on August 10, 1997, to conduct personal sampling for the spray painting operation. Although Caffey wore a respirator and other protective equipment while he spray painted, he again failed to wear any type of eye protection. When asked, Caffey explained to Smith that he did not like wearing the "welding type" goggles. Caffey had not tried to use other goggles or alternate eye protection. Later, manager Fail repeated Caffey's complaint that goggles fogged badly during the painting process (Tr. 35, 36, 40-41).

---

[1] It is not significant whether Caffey initially intended to spray paint or whether, as Peach Auto contends, Caffey only painted to accommodate Gilreath. The important point is that Caffey wore no eye protection during the spraying process. Caffey demonstrated how he usually spray painted, and he usually spray painted without wearing protective glasses.

[2] At the hearing, Caffey testified that he had diabetes and that the disease, together with his medications, caused his eyes to be red. He did not believe that his eyes were affected by the spray painting (Tr. 112).

Item 3 of Citation No. 1

The Secretary contends that Peach Auto did not utilize protective eye equipment in violation of § 1910.133(a)(1). The standard requires:

> The employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation.

It is the Secretary's burden to establish each of four elements of a violation:

> (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Peach Auto maintained material safety data sheets (MSDSs) for the products it used in its spray painting operation. These included enamel mixing color (Exh C-3), synthetic enamel (Exh. C-4), and a synthetic enamel reducer (Exh. C-5). Each of these products contained potentially hazardous organic chemicals, including the two which most worried Smith: toluene and xylene. The "health hazard data" found on the MSDSs declared that "exposure may be by eye contact." The MSDSs also described the serious heath hazards which could result from overexposure to the chemicals in the products (Exh. C-3, C-4, C-5). The products presented an "eye hazard" from "chemical vapors." Based on Smith's testimony and the MSDSs, the Secretary has met the first element of her proof, *i.e.*, that the terms of the standard apply.

Peach Auto's painter, Herman Caffey, was a skilled painter, who usually worked 10-hour days, 4 to 8 of which were spent actually spray painting (Tr. 93, 115). Without protective glasses, Caffey's eyes were exposed to hazardous chemical vapors during spray painting. Each MSDS included under the heading "PROTECTION RECOMMENDED FOR THE PAINTERS: . . . "Wear safety spectacles with unperforated sideshields." Caffey seldom wore protective eye wear (Tr. 110, 123). He was exposed to the hazard addressed by the standard. The Secretary has met the second

element of proof.

The Secretary has also shown that Peach Auto had knowledge of the violation. In addition to the notice afforded by the MSDSs, Peach Auto's own job hazard assessment for Caffey's position required the use of eye protection during spray painting (Exh. C-8; Tr. 97). The offices of Peach Auto's manager Fail and its assistant manager were approximately 40 feet from the spraying booth. They were often in the area while Caffey was painting (Tr. 10, 99).

Fail understood why Caffey did not like wearing the "welding" goggles. The paint booth was heated to facilitate baking the paint onto the vehicles. The goggles were hot and tended to fog up (Tr. 82). Caffey was a skilled and valued employee. He had been a painter for 22 years, and Peach Auto naturally did not wish to lose his services (Tr. 102). Rather than continuing to search for alternate protective eye wear, which could be more compatible with its intended use for spray painting, Peach Auto acquiesced in Caffey's decision simply to forgo using eye protection.

The Secretary established each of the elements of proof for a § 1910.133(a) violation. The burden then shifts to Peach Auto to establish its defense of employee misconduct.

Employee misconduct defense

In order to negate a violation on the grounds of employee misconduct, the employer must show that: (l) it established work rules designed to prevent the specific violation from occurring; (2) the work rules were adequately communicated to its employees; (3) it took steps to discover violations of those rules; and (4) it effectively enforced the rules when violations were discovered. *E.g., Gary Concrete,* 15 BNA OSHC 1051, 1055 (No. 86-1087, 1991).

Since the evidence demonstrates that Peach Auto did not adequately attempt to discover violations of or to enforce its workrule, it is unnecessary to discuss the first two elements of the defense. Peach Auto primarily relies on the fact that it issued Caffey two disciplinary notices (dated February 5, 1997, and April 10, 1997) for his failure to wear eye protection (Exh. R-1 and R-2). However, as Fail's testimony illustrates, the discipline had no real effect (Tr. 99):

> Q. Approximately how often since the date of the [last] disciplinary action . . . did you observe Mr. Caffey spray painting without his eye protection?
>
> A. I've probably caught him a time or two.

Q. Did you issue another written disciplinary report?

A. I did not but I had a strong conversation with him.

The "welding" goggles were not a good choice for Peach Auto's spray painting operation, and resulted in Caffey's refusal to wear them. Given that Caffey rarely wore eye protection and that Fail so often observed him painting, it is concluded that the disciplinary action was not aimed at enforcement. It is telling that Caffey did not wear eye protection during either of the two times OSHA observed him on site. One would expect that if Peach Auto ever sought to enforce its work rule (a work rule, moreover, adopted because of a previous OSHA inspection), it would have done so when it knew that OSHA would be reviewing its spraying operation. For this and for the other reasons discussed, Peach Auto failed adequately to discover violations or to enforce its work rule. The employee misconduct defense fails. The violation of § 1910.133(a)(1) is affirmed.

Repeated Classification

The repeat classification is based on the final order citation issued to Peach Auto on August 22, 1996. Item 2a of that citation (No. 1) cited § 1910.133(a)(1) and read:

> (b) Paint booth: Employees exposed to irritating mists and vapors while spraying various mixtures of solvent-based coatings were not required to wear eye protection.

The Commission has held that a violation may be classified as "repeated" if the same employer has received a final order citation for a substantially similar violation.

> Unless the standard at issue is a general standard, the Secretary establishes a prima facie case of similarity by showing that both violations are of the same standard. However, if the standard at issue is a general standard, then the Secretary would have the burden of proving that the two violations are substantially similar in nature

Edward Joy Co.,15 BNA OSHC 2091, 2092 (No. 91-1710, 1993) (citation omitted).

Because the Secretary has met the higher burden of establishing substantially similar circumstances, it is unnecessary to decide whether § 1910.133(a)(1), as amended in 1994, is a general or a specific standard. The same spray painting operation, the same establishment, the same supervisory employee, and the same exposed employee were involved in both citations. Peach Auto

had actual notice that Caffey should wear protective glasses or goggles. The Secretary has met her burden of showing that the violation was repeated.

Penalty Determination

> The Commission must give "due consideration" to the size of the employer's business, the gravity of the violation, the employer's good faith, and history of past violations in determining an appropriate penalty. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not accorded equal weight. The gravity of the violation is the primary element in the penalty assessment. *Trinity Indus.*, 15 BNA OSHC 1481, 1483 (No. 88-691, 1992).

The gravity of the violation is moderate. One employee spray painted for prolonged periods each day without using eye protection. The penalty must reflect the fact that the violation was repeated. The Secretary's proposed penalty did not afford Peach Auto any statutory credit because the violation was repeated. However, the penalty will reflect that this small establishment of nine employees bought and supplied eye protection for the spraying operation, even though the type it provided was inappropriate until after the second citation (Tr. 8, 77-78). Overall, it was more successful with other parts of its safety and health initiative. After the current inspection, Peach Auto experimented with different types of eye protection until it found eyewear that was appropriate to the job, and the use of which could be enforced (Tr.88, 100-101). A penalty of $5,750.00 is assessed.

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), Fed. R. Civ.P.

ORDER

Based on the foregoing decision, it is ORDERED that:

(1) Items 1 and 2 of Citation No. 1 and item 1 of Citation No. 2, withdrawn by the Secretary at the beginning of the hearing, are vacated; and

(2) Item 3 of Citation No. 1, a violation of § 1910.133(a)(1), is affirmed as "repeated" and a penalty of $5,750.00 is assessed.

NANCY J. SPIES

Judge

Date: September 4, 1998