UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

RALPH TAYNTON, d/b/a SERVICE SPECIALTY COMPANY,

Respondent.

Docket No. 91-1709

ORDER

This matter is before the Commission on a direction for review entered by Commissioner Donald G. Wiseman on August 27, 1992 . The parties have now filed a stipulation and settlement agreement.

Having reviewed the record, and based upon the representations appearing in the stipulation and settlement agreement, we conclude that this case raises no matters warranting further review by the Commission. The terms of the stipulation and settlement agreement do not appear to be contrary to the Occupational Safety and Health Act and are in compliance with the Commission's Rules of Procedure.

Accordingly, we incorporate the terms of the stipulation and settlement agreement into this order, and we set aside the Administrative Law Judge's decision and order to the extent that it is inconsistent with the stipulation and settlement agreement. This is the final order of the Commission in this case. See 29 U.S.C. §§ 659(c), 660(a), and (b).

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: May 7, 1993

NOTICE OF ORDER

The attached Order by the Occupational Safety and Health Review Commission was issued and served on the following on May 7, 1993.

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
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James D. Burroughs
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309-3119

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K Street N.W.
4th Floor
Washington, D.C. 20006-1246

ROBERT B. REICH, SECRETARY OF LABOR, Complainant, v. RALPH TAYNTON, d/b/a SERVICE SPECIALTY COMPANY, Respondent.	OSHRC CASE NO. 91-1709

STIPULATION AND SETTLEMENT AGREEMENT

In settlement and disposition of the issues in this proceeding, it is hereby stipulated and agreed by and between the Complainant, Secretary of Labor, and the Respondent, Ralph Taynton, d/b/a Service Specialty Company, that:

1. This case is before the Commission upon the granting of the Secretary's Petition for Discretionary Review seeking review of the administrative law judge's decision and order dated June 30, 1992.

2. The Secretary hereby withdraws the citations in the above-captioned case only. The other case between the parties currently pending before an administrative law judge (Docket No. 92-0498) remains pending.

3. Respondent is unable to post a copy of this Stipulation and Settlement Agreement because respondent is out of

business and no longer maintains an office or other place of business.

4. Complainant and respondent will bear their own litigation costs and expenses.

5. There are no authorized employee representatives.

Mark J. Lerner 4/20/93
Mark J. Lerner (Date)
Attorney for the Secretary of Labor

Peter J. Hurtgen 4/19/93
Peter J. Hurtgen (Date)
Counsel for
Ralph Taynton, d/b/a Service Specialty Company

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SECRETARY OF LABOR
Complainant,
v.
SERVICE SPECIALTY COMPANY
Respondent.

OSHRC DOCKET
NO. 91-1709

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on August 5, 1992. The decision of the Judge will become a final order of the Commission on September 4, 1992 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before August 25, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: August 5, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-1709

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. RALPH TAYNTON, d/b/a SERVICE SPECIALTY COMPANY, Respondent.	OSHRC Docket No. 91-1709

APPEARANCES:

Stephen Alan Clark, Esquire
Office of the Solicitor
U. S. Department of Labor
Fort Lauderdale, Florida
For Complainant

Mr. Ralph Taynton
Service Specialty Company
Stuart, Florida
For Respondent

Before: Administrative Law Judge James D. Burroughs

DECISION AND ORDER

Ralph Taynton, d/b/a Service Specialty Company (Service), is a general contracting firm specializing in marine construction. In April of 1991, Service was engaged in the building of a sea wall off of Avery Road in Palm Beach Gardens, Florida (Tr. 11). The Occupational Safety and Health Administration (OSHA) received a formal complaint from Scott Schmidt, a former employee of Service, in mid-April. Schmidt alleged that Service was using an unsafe crane. Corey Neale, a compliance officer for OSHA, was dispatched to the

Avery Road worksite to investigate the allegation. As a result of Neale's inspection, the Secretary issued two citations to Service on May 30, 1991.

The first citation contains allegations of serious violations of eighteen separate standards of the Occupational Safety and Health Act of 1970 (Act). Item 1 alleges a failure to initiate or maintain a safety program. Items 2, 3 and 4 allege violations relating to the use of hazardous chemicals. Items 5 through 13 allege violations of standards covering cranes. Items 14 through 18 allege violations involving marine operations and equipment. The Secretary proposed penalties for the eighteen items contained in Citation No. 1 totaling $32,400. Citation No. 2 alleges an "other" violation for failure to post the required OSHA notice and proposes a penalty of $300 for this violation.

Service contests all items and penalties contained in the two citations. Ralph Taynton, acting *pro se* for Service, defends the company on a number of grounds including the following: the items are duplicative, the allegations are unsubstantiated, the cited standards are inapplicable to the cited conditions, the Secretary did not prove that any accidents occurred as a result of the alleged hazardous conditions, the complaint to OSHA was lodged by a disgruntled ex-employee, and the company is financially unable to pay the penalties.

These defenses are without merit. The items address separate violations and are not duplicative, no proof of an accident is necessary to establish a violation of a standard, the initial complaint made to OSHA was valid, and the employer's financial condition is not determinative of the penalties assessed. Despite Service's claim that the allegations are unsubstantiated, the company did not seriously contest the Secretary's evidence of the numerous violations at the hearing. The gravity of the crane's hazardous conditions was attested to by Corey Neale, a veteran of approximately 1,000 crane inspections, who stated, "I've never seen a crane in any worse condition" (Tr. 60, 197).

Service raises two other defenses. The first, that it was not engaged in a business affecting interstate commerce, thus taking it out of the Review Commission's jurisdiction, is without merit. The second, that Service had no employees at the time of the inspection and, therefore, could not be liable for any exposure, is more substantive.

Service's Business Affects Interstate Commerce

The Act covers employers, and under section 3(5) of the Act, "[t]he term 'employer' means a person employed in a business affecting commerce who has employees . . . ." The statutory phrase "affecting commerce" signals a broad sweep of jurisdiction, as opposed to the phrase "in commerce," which requires that "a fairly specific showing must be made of a connection between the particular employer regulated and interstate commerce." *Usery v. Lacy*, 628 F.2d 1226, 1228 (9th Cir. 1980). In *E.E.O.C. v. Ratliff*, 906 F.2d 1314 (9th Cir. 1990), the court discussed the sweep of the "affecting commerce" (*Id.* at 1316):

> The Supreme Court has interpreted the term "industry affecting commerce" as indicating Congress' intent to exercise its regulatory power to "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226, 83 S. Ct. 312, 313, 9 L. Ed. 2d 279 (1963).

The Commission has not adhered to stringent requirements establishing that a business affects interstate commerce. *See Poughkeepsie Yacht Club, Inc.*, 7 BNA OSHC 1725, 1979 CCH OSHD ¶ 23,888 (No. 76-4026, 1979); *Avalotis Painting Co.*, 9 BNA OSHC 1226, 1227, 1981 CCH OSHD ¶ 25,157 (No. 76-4774, 1981). ("An employer's use of goods produced out of state has been held to 'affect' interstate commerce under the Act.") That is not to say, however, that no burden of proof exists for the Secretary on the issue of jurisdiction. It is not enough for the Secretary merely to allege that the employer's business affects interstate commerce; she must have some facts to back up her allegations. In *Austin Road Co. v. OSHRC*, 683 F.2d 905 (5th Cir. 1982), the court reversed the administrative law judge's finding of jurisdiction. Where the Texas employer was engaged in building residential streets, drains, sanitary sewers and water transmission lines, the court found that the Secretary's allegations regarding Austin's effect on interstate commerce were "speculative and conclusionary." 683 F.2d at 908. Despite the court's statement that the Secretary's "burden is, in the usual case, modest, if indeed not light," (683 F.2d at 907), the Secretary failed to meet even that minimal standard.

In *Vak-Pak, Inc.*, 11 BNA OSHC 2094, 1984 CCH OSHD ¶ 26,974 (No. 79-1569, 1984), the Commission reversed an administrative law judge's finding of jurisdiction over a Florida employer who manufactured water filtration equipment for swimming pools. The Commission held that "the Secretary did not establish that Vak-Pak purchased goods from out of state or that it purchased goods from within the state that were manufactured outside the state." 11 BNA OSHC at 2095. However, in *Clarence M. Jones d/b/a C. Jones Company*, 11 BNA OSHC 1529, 1983-84 CCH OSHD ¶ 26,516 (No. 77-3676, 1983), the Commission affirmed the administrative law judge's finding of jurisdiction over an employer who had undertaken the exterior renovation of a residential apartment building that it owned and leased. The Commission held that the nature of the employer's work was a major factor in the finding that the employer affected interstate commerce (11 BNA OSHC at 1531) (citations omitted):

> Although Jones was engaged in a small construction project and his activities and purchases may have been purely local, his construction activity nevertheless affected interstate commerce. There is an interstate market in construction materials and services and therefore construction work affects interstate commerce . . . . Thus, even if Jones' contribution to this stream of commerce was small and his activity and purchases were purely local, they necessarily had an effect on interstate commerce when aggregated with the similar activities of others.

Service is engaged in marine construction. It was building a sea wall behind a house on a private lot. According to Neale, the house had "a canal behind it, which is -- most canals are thoroughfares" (Tr. 64). In her brief, the Secretary transforms this statement into the assertion that Service "was repairing the seawall on a canal which was a thoroughfare (Secretary's Brief, pg. 3). If the canal was, in fact, a thoroughfare, then the Secretary has a basis for claiming Service was in a business affecting commerce. "[A] place of employment upon a navigable waterway of the United States affected commerce within the meaning of the Act." *Poughkeepsie Yacht Club*, 7 BNA OSHC at 1727, citing *Cable Car Advertisers, Inc.*, 1 BNA OSHC 1446, 1973-74 CCH OSHD ¶ 17,019 (No. 354, 1973).

The Secretary did not, however, establish by a preponderance of the evidence that the canal was a thoroughfare. Neale qualified his statement by saying "*most* canals are thoroughfares," and did not specify that the canal in question was included in that majority. This evidence is similar to that rejected in *Vak-Pak*, when the industrial hygienist qualified her testimony that the Florida employer used chemicals manufactured in California with the words "I think." 11 BNA OSHC at 2095. The Review Commission commented (11 BNA OSHC at 2095):

> This testimony is not definite enough to establish that these purchases affected interstate commerce. We note that testimony of this sort is precisely the type of evidence that the Fifth Circuit found insufficient in *Austin Road, supra*. In that case, testimony by the compliance officer that Austin used "a Bucyrus Erie hydraulic boom crane which he *believed* was made in Bucyrus, Michigan," was held to be inadequate to establish the Secretary's case.

Neale contended that the aluminum sheet piling that Service was using to build the seawall "came out of Alabama" (Tr. 84). Under cross-examination, Neale modified this unequivocal statement (Tr. 159-160):

> Q. Do you have knowledge of the sheet piling being produced in Alabama?
>
> . . . .
>
> A. That specific piling, no; but when I called several different manufacturers of it, they told me the majority of it was. The[y] melt it. They don't make aluminum; they melt the piling from the raw aluminum. They mine the aluminum products out west.
>
> Q. Were you aware of where that particular -- you say you were not aware of where that particular piling came from?
>
> A. No, I didn't know the brand name or I didn't see any stamp. A lot of times, they have "U. S. Steel" or something stamped on it. I didn't notice any stamps on it.

This testimony does not reflect that Neale was aware of where the aluminum sheet piling had been obtained by Service. The testimony does not provide a basis for a finding that Service's business affects interstate commerce.

Neale also stated that Service's P & H crane was manufactured in Milwaukee, Wisconsin (Exh. C-2; Tr. 84). This testimony was undisputed by Service at the hearing. Meager as it is, it is sufficient to establish that Service's business affects interstate commerce. All that is required is proof that an employer uses products produced out of state. The Review Commission has jurisdiction over Service.

Service Had No Employees at the Time of the Inspection

Service argues the following in its brief (Service's Brief, pg. 1):

> No employee was exposed to any hazard as there were no employees. Even by the inspector's [Neale's] own testimony, he had visited the site on two separate days prior to the recorded inspection and there was no activity at the site. On inquiry of neighbors, their response was that there had been no activity for over a week. The equipment was in storage. I, and a friend were seeing to its proper and safe storage at the time of the OSHA inspection. The friend was not an employee. He received no economic or other consideration.

Neale first visited the Avery Road site on April 15, 1991. No one was at the site (Tr. 63). Neale returned the next day, and again no one was on the site. Neale spoke with a resident of the neighborhood (Tr. 64-65). The resident told Neale, "I seen somebody come in for an hour and then leave. I haven't seen anybody over there working for a week or so" (Tr. 160). On that day, Neale took a picture of Service's crane. A bundle of aluminum sheet piling is also visible in the photograph (Exh. C-5; Tr. 65).

On April 17 Neale visited the Avery Road site for the third time (Tr. 68). Neale again snapped a photograph of Service's crane (Exh. C-6). In the photograph, the bundle of aluminum sheet piling is loose (Tr. 69). A jetting hose is connected to the crane's cable (Tr. 70). Neale testified that the crane and a water pump were running (Tr. 68).

Neale observed a man who he took to be an employee at the site. His account of his conversation with this man is crucial to the determination of whether Service had any employees at the time of the inspection. He testified (Tr. 75):

I stopped and showed my credentials to this employee [*sic*] who was there, and I said, "I have to get the names of different employees to see if you have any questions on safety and health, and see if I can answer them.

He gave his name, and I said, "Can I have your address?"

He said, "No, I'm living on a sailboat, and I'll be leaving this week for a six-month cruise and I won't be around."

And, I said, "Do you have an address where your boat is at now?"

And, he said, "No, I don't have an address where you can reach me."

I said, "Okay, thank you. Are you just picking up a little spending money?"

And, he said, "Yes."

Later, Taynton cross-examined Neale about this encounter (Tr. 154-156):

Q. You referred to an alleged employee named Jerry Jamesson. By what means did you substantiate his existence as an employee?

A. I asked him.

Q. And?

A. I asked what his name was. I have to get names of employees. I said, "If you have any complaints on safety or health, or if you have any questions I can try to answer for you. I need your name and address."

He told me, "James." He didn't say, "Gerald." He said, "Jamesson."

. . .

Then I said, "What is your address?" And, he said, "I don't have one. I'm living on a boat. I'm going to be leaving for a six-month cruise, so I don't have one."

. . .

And, that's when I said, "Oh, picking up a little spending money?"

And he said, "Yes."

Q. I would like to ask you further, did you ask him whether he was an employee?

A. Yes. I just stated so.

Q. And, his response was that he was or was not an employee?

A. He never said. He just said, "Yes."

I said, "I'm asking you -- I've got to get the names of the employees." So, I assumed that he was an employee because he gave his name and address, and he never said, "I'm not an employee."

It is the Secretary's burden to prove that Service was an employer, *i.e.*, that it had employees at the time of the inspection. The only evidence the Secretary adduces on this point is Neale's testimony regarding Jamesson. But, as Neale himself stated, he only *assumed* that Jamesson was an employee. Neale appears to believe that Jamesson's affirmative response to, "Picking up a little spending money?" conclusively establishes that Jamesson was in Service's employ. But the exchange between Neale and Jamesson is ambiguous and open to more than the one interpretation given by Neale. Jamesson could have taken the inquiry to be general in nature, believing that Neale was wondering why Jamesson was not yet on the cruise. Neale has demonstrated himself in this and previous hearings to be a genial, gregarious person. It is possible that Jamesson took Neale's substantive question to be small talk. In any event, answering "yes" to "Picking up some spending money?" is not the equivalent of answering "yes" to "Are you an employee of Service's?"

Taynton testified that he had no employees at the Avery Road site (Tr. 209). Taynton explained that Jamesson was a friend who was visiting him (Tr. 211-212):

> . . . [H]e was to the site to satisfy his own curiosity as an ex-Marine contractor himself and was assisting me in cleaning up the site and putting the worksite and barge in order to be safe for storage.
>
> I paid Mr. Jamesson nothing for that assistance or for his appearance or for anything related to that day.

The Secretary argues that the fact that the crane and a water pump were running, and that the bundle of aluminum sheet piling was untied on the day of the inspection, indicates that Service's operations were ongoing that day. Taynton testified that the crane had to be used to remove the stacks of aluminum piling that were adrift and restack them on the barge (Tr. 220). Even if Service was operating that day, it is not enough to establish that Jamesson was an employee of Service. If he agreed to help Taynton without remuneration, he was not an employee. Taynton, the only other person present at the site, is the owner of the company and, therefore, the employer, not an employee.

The record establishes that there had been no activity at the Avery Road site for approximately a week before Neale's inspection. Taynton stated that he had fired his two employees a week before the inspection for habitual tardiness (Tr. 139-140). The Secretary has done nothing to establish that Service's employment situation was otherwise. There is no evidence on which to conclude that an employment relationship existed between Service and Jamesson. Taynton's testimony that Jamesson was a friend who assisted him in cleaning the site for no remuneration was not seriously challenged. Neale's assumption provides no relevant facts that make a determination possible under the "economic realities test" or common law principles utilized by the Commission in resolving such an issue. *See Loomis Cabinet Co.*, 15 BNA OSHC 1635, ___ CCH OSHD ¶ ___ (No. 88-2012, May 20, 1992).

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence 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 cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 1981 CCH OSHD ¶ 25,578 at p. 31,899 (No. 78-6247, 1981). The Secretary has failed to

prove that Service had employees at the time of Neale's inspection. On this basis, the two citations issued to Service are vacated.

A Caveat to Service

The dismissal of the citations in this case should not be taken by Service as a vindication of it approach, or non-approach, to safety. Had the Secretary established the existence of one employee, the evidence was more than sufficient to justify the finding of violations for each of the nineteen items cited. The proposed penalty of $32,400 would most likely have been imposed. Compliance with the Act for employers is mandatory, whether or not an employer considers certain standards to be "ridiculous." If Service intends to continue as a business with employees, it must take drastic steps to shore up its safety program.

FINDINGS OF FACT AND AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

That Citation Nos. 1 and 2 are vacated.

/s/ James D. Burroughs
JAMES D. BURROUGHS
Judge