



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.

THOMAS INDUSTRIAL COATINGS, INC.,

Respondent.

OSHRC Docket No. 05-1935

FINAL ORDER

Thomas Industrial Coatings, Inc. filed a Petition for Discretionary Review regarding the Administrative Law Judge's disposition of Citation 1, Item 2 (Citation Item). The Commission thereafter directed the case for review and issued a briefing notice.

The parties subsequently signed a Settlement Agreement that the Secretary has filed together with the Secretary's Request for a Final Order. The Secretary agrees to withdraw the Citation Item, and does not oppose the request of Thomas Industrial Coatings, Inc. that the Commission vacate as moot the Administrative Law Judge's disposition of the Citation Item.

The Settlement Agreement is approved. Commission Rule 100, 29 C.F.R. § 2200.100. The Secretary having withdrawn the Citation Item, the Commission vacates as moot the Administrative Law Judge's disposition of that item.

So ordered.

BY DIRECTION OF THE COMMISSION

Dated: June 22, 2007

/s/
Ray H. Darling, Jr.
Executive Secretary

Secretary of Labor,

Complainant,

v.

Thomas Industrial Coatings, Inc.,

Respondent.

OSHRC Docket No. **05-1935**

Appearances:

Leigh Burleson, Esq., U. S. Department of Labor, Office of the Solicitor,, Kansas City, Missouri
For Complainant

Russell C. Riggan, Esq., and Julie O'Keefe, Esq., Armstrong Teasdale, LLP, St. Louis, Missouri
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Thomas Industrial Coatings, Inc. (TIC), is an industrial painting contractor who paints structures such as water towers, ground storage tanks, bridges, locks, and dams. On October 24, 2005, the Secretary issued a citation to TIC alleging four violations of the Occupational Safety and Health Act of 1970 (Act). The citation resulted from an inspection conducted by Occupational Safety and Health Administration (OSHA) compliance officer Samuel Stuck on August 20, 2005.

The Secretary withdrew item 3 of the citation prior to the hearing. Item 1 alleges a serious violation of § 5(a)(1) because TIC did not provide a crash cushion or truck mounted attenuator (TMA) vehicle to protect employees in work zones on and near a highway. Item 2 alleges a serious violation of § 1926.95(a) , or, in the alternative, a serious violation of § 5(a)(1) for failing to require employees to wear high-visibility clothing or warning vests as part of their personal protective equipment (PPE) while crossing open traffic lanes on or near a highway. Item 4 alleges a serious violation of § 1926.453(b)(2)(v) for allowing an employee to work from an aerial lift elevated 18 to 20 feet without wearing a body belt and lanyard attached to the basket.

The undersigned held a hearing in this matter on May 17 and 18, 2006, in St. Louis, Missouri. The parties have filed post-hearing briefs. TIC argues it did not violate the cited standards, and, in the alternative, that any violation resulted from unpreventable employee misconduct for item 4.

For the reasons stated below, the undersigned vacates items 1 and 4, and affirms item 2 as a violation of § 5(a)(1).

Facts

In August 2005, TIC was working as a subcontractor to Millstone Bangert on a site located at the intersection of Interstate 70 and Highway 61 in Lake Saint Louis, Missouri. TIC's job was sandblasting and painting an overpass bridge. The work was usually performed during one shift which stretched from late evening to early morning. TIC's onsite foreman was Alan Jackson. Kevin Sparks was its supervisor. Employees Raul Morales, Manuel Andres, James Hoffner, and James Belfield worked as TIC's crew on the site.

The jobsite was located on a highway divided by a central median, with three westbound and three eastbound lanes. Most of TIC's work required the crew to be in the eastbound lane and the westbound lane closest to the median (the fast lanes of eastbound and westbound I-70). The overpass bridge was 20 feet high. TIC used at least two aerial lifts to reach the bridge.

TIC created a containment area by hanging tarps from the bottom of the bridge to the ground. TIC's crew fastened the tarps to the beams of the bridge with C-clamps. The containment area catches sand from the sandblasting operation and overspray from the painting operation.

On August 20, 2005, OSHA compliance officer Samuel Stuck was driving westbound on I-70 when he saw TIC's work activities. The employees started the shift at 7:00 p.m. on August 19 and by the early morning of August 20 they were running late. Stuck observed what he perceived to be violations of the Act. Stuck pulled over and stopped his car, and then took several photographs. He approached the worksite and spoke first with a representative of general contractor Millstone Bangert, and then with TIC supervisor Kevin Sparks. Based upon Stuck's observations and his conversations with employees, he recommended that TIC be cited by the Secretary for violations of the Act. The Secretary followed Stuck's recommendations and issued the instant citation.

The Citation

Item 1 : Alleged Serious Violation of § 5(a)(1)

The Secretary alleges TIC committed a serious violation of § 5(a)(1), the general duty clause, when employees were inside work zones on an interstate highway without the control of a specific traffic device. Section 5(a)(1) requires that each employer "[s]hall furnish to each of his employees

employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”

In order to prove a violation of section 5(a)(1), the Secretary must show that a condition or activity in the workplace presented a hazard, that the employer or its industry recognized this hazard, that the hazard was likely to cause death or serious physical harm, and that a feasible and effective means existed to eliminate or materially reduce the hazard.

Arcadian Corporation, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004).

The citation states:

a/ Employees were working in the west bound side of I-70 in a lane drop for lane 1 behind barrels without being provided a crash cushion vehicle (truck mounted attenuator) or other means to separate employees from the oncoming vehicles traveling at a posted rate of speed of 45 miles per hour. Traffic was being funneled from lane 1 and was merging into lane 2.

b/ Employees were working on the east bound side of I-70 in a lane drop for lane 1 behind barrels without being provided a crash cushion vehicle (truck mounted attenuator) or other means to separate employees from the oncoming vehicles traveling at a posted rate of speed of 45 miles per hour. Traffic was being funneled from three lanes (lanes 1, 2, &3) to one lane (lane 2).

While ultimate responsibility for correcting the hazards rests with the employer, given his/her superior knowledge of the work place, feasible and acceptable methods of abatement to correct this hazard, among others are:

1. To follow the required guidelines of the Missouri Department of Transportation for work zone safety and place a crash cushion or truck mounted attenuator [TMA] vehicle behind/between the workers in the work zone and the oncoming traffic along with using the required warning signs and lane drop cones and barrels.
2. Follow the guidelines of the 2003 Edition with Revision of the 2003 MUTCD, Manual on Uniform Traffic Control Devices and Title 23 United States Code, 655 Section 109(d) and 23 CFR 655.603, and as approved as the national standard for designing, applying, and planning traffic control devices.
3. Follow the requirements of 23 U.S.C. 402(a)(3)) which requires that all traffic control devices installed in construction areas using

Federal-aid funds shall conform to the MUTCD. Traffic plans for handling traffic and pedestrians in construction zones and for the protection of workers shall conform to the requirements of 23 CFR part 630, subpart J, Traffic Safety in Highway and Street Work Zones which requires the use of barricades, crash cushions, and/or truck mounted attenuator vehicles.

TIC had implemented a traffic control system, which included the following:

1. Four or five road signs were on each side of I-70, indicating the presence of a work zone, the closing of lanes, and the reduction of the speed limit from 75 to 45 mph (Tr. 331-332, 335-336, 382).
2. A flashing arrow board (approximately 4 by 8 feet) was on each side of I-70, indicating traffic should merge into another lane (Tr. 329, 332, 382).
3. The center and fast lane on each side of I-70 were closed and traffic was diverted into the far right lane on each side (Tr. 345).
4. Orange traffic barrels were placed diagonally across the closed lanes and alongside the work zone (Tr. 329, 331, 382).
5. Several 55-gallon drums of concrete were positioned in a rectangular perimeter around the containment area (Tr. 334).

1. Was there a hazard?

The first element of § 5(a)(1) the Secretary must prove is that a condition or activity in the workplace presented a hazard. In her citation, the Secretary described the alleged hazardous condition as employees working on I-70 “without being provided a crash cushion vehicle (truck mounted attenuator) or other means to separate employees from the oncoming vehicles traveling at a posted rate of speed limit of 45 miles per hour.” This description does not identify the hazardous condition to which employees were exposed; it formulates a hazard in terms of the absence of abatement.

The hazard is not defined in terms of absence of a particular abatement method. *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 11051121-22, 1993-95 CCH OSHD ¶ 30,048, p. 41,279 (No. 88-572, 1993) (hazard was excessive levels of airborne lead being generated by ongoing bridge demolition work, not absence of protective clothing). A hazard is defined “in terms of the physical agents that could injure employees rather than the means of abatement.” *Chevron Oil Co.*,

11 BNA OSHC 1329, 1331, n. 6, 1983-84 CCH OSHD ¶ 26,507, p. 33,722, n.6 (No. 10799, 1983). . . . The adequacy of the employer's work practices to reduce the risk of, or prevent the occurrence of, the hazard is a separate issue from the question of how the recognized hazard is defined.

Arcadian Corp., 20 BNA OSHC at 2007.

The Secretary wants TIC to use a specific traffic safety control device, and cites TIC's failure to use it as a hazard. This is incorrect. The undersigned is not required to accept the Secretary's formulation of the hazard. "The Commission may define the hazard itself. *See, e.g., Davey Tree Expert Co.*, 11 BNA OSHC 1898, 1899, 1983-84 CCH OSHD ¶ 26,852, p. 34,399 (No. 77-2350, 1984) (Commission defined hazard after determining Secretary's definition is too broad)." *Arcadian Corp.*, 20 BNA OSHC at 2007-2008. It is determined the alleged hazardous condition to which TIC's employees were exposed was being struck by vehicles traveling on a highway, while the employees were located in a designated work zone. Did this condition present a hazard?

In June 2001, the Center for Disease Control and Prevention (CDC) and the National Institute for Occupational Safety and Health (NIOSH) issued a document entitled "Building Safer Highway Work Zones: Measures to Prevent Worker Injuries from Vehicles and Equipment" (Exh. C-9). The document reports that between 1992 and 1998, 841 workers were killed while performing highway or street construction. Of these, 492 were killed while located in a highway or construction work zone. Most of the fatalities occurred when a vehicle struck the worker. The deaths by vehicles were almost evenly divided between construction vehicles (154) and passing traffic vehicles (152). The introduction to the document provides examples of the risks to which highway workers are exposed. One of the examples states (Exh. C-9, p. 1):

Highway workers are at risk of injury from passing traffic vehicles:

An 18-year-old flagger, outfitted in full reflective vest, pants, and hard hat, was directing traffic at one end of a bridge approach during a night milling operation. The work zone was correctly marked with cones and signs, and the entire bridge was illuminated with street lights. The flagger was standing under portable flood lights in the opposing traffic lane close to the center line, facing oncoming traffic. A pickup truck traveling in the wrong lane at an estimated 55 to 60 miles per hour struck the flagger head on and carried him approximately 200 feet. He died at the scene of multiple traumatic injuries [Minnesota Department of Health 1992].

The Secretary has established that working on or near a highway in a designated work zone presents a hazard.

2. Was the hazard recognized?

The second element the Secretary must establish is that TIC or the industry recognized this hazard. (In the post-hearing briefs, both the Secretary and TIC proceeded on the erroneous assumption the hazard at issue was failing to use a TMA, as described by the Secretary in the citation. Their arguments will be applied to the hazard of working on or near a highway in a designated work zone.) The Secretary does not contend TIC itself recognized the hazard, but that she established industry recognition by citing recommendations made by the Federal Highway Administration's "Manual on Uniform Traffic Control Devices for Streets and Highways" (MUTCD). TIC argues the Secretary has improperly categorized its industry as the highway construction industry, when in fact its industry is the bridge painting industry.

"[W]here a practice is plainly recognized as hazardous in one industry, the Commission may infer recognition in the industry in question." *Kelly Springfield Tire Co. v. Donovan*, 729 F.2d 317, 321 (5th Cir. 1984). In this case, the undersigned does infer the bridge painting industry recognizes working in a designated work zone on or near a highway as a hazard. The introduction to "Building Safer Highway Work Zones" states, "Highway and street construction presents a complex work situation in which workers face multiple injury risks under conditions that may change without warning" (Exh. C-10, p. 1). Page ix of the document lists the Federal Highway Administration's MUTCD as a primary source for safety recommendations, noting, "Highway workers, regardless of their assigned tasks, work in conditions of low lighting, low visibility, and inclement weather, and may work in congested areas with exposure to high traffic volumes and speeds."

The Commission has acknowledged the common-sense observation that highway work is inherently hazardous:

Simply put, unless [a multiple-lane interstate] highway has been completely closed to active traffic, employees engaged in highway construction work are in danger of being hit by a moving vehicle whether they are working adjacent to the highway, flagging motorists on the highway, or crossing the highway.

W. G. Fairfield Co., 19 BNA OSHC 1233, 1236 (No. 99-0344, 2000) (discussing the training standard § 1926.28(a)). Identifying a worker as belonging to the bridge painting industry rather than

the highway construction industry makes him no less vulnerable to being struck by a passing vehicle. The Secretary has established the exposure of TIC's workers to passing vehicular traffic was a recognized hazard in the bridge painting industry, as well as in any industry that requires its workers to work adjacent to or on a highway open to traffic.

3. Was the hazard likely to cause death or serious physical harm?

The third element the Secretary must prove is the hazard is likely to cause death or serious physical harm. The fatality statistics for highway construction workers establish working on or near a highway exposes them to death and serious injury.

4. Was there an effective and feasible means of abatement?

The last element of the Secretary's case is proving a feasible and effective means existed to eliminate or materially reduce the hazard. It is this element the Secretary fails to establish. She relies on the Missouri Department of Transportation (MoDOT) manual to support her claim TIC was required to use a TMA at its worksite. Stuck testified a drawing in the MoDOT manual mandates the TMA be used when closing lanes on a divided highway (Exh. R-30, p.81, drawing TA-13; Tr. 159-160). In focusing on the TMA, the Secretary loses sight of the other effective means implemented by TIC to materially reduce the hazard. TIC used standard temporary traffic control devices to slow traffic and channel it away from its work zone. Neither the MoDOT manual nor the MUTCD requires the use of a TMA under the conditions existing at TIC's site.

Scott Stotlemeyer is a technical support engineer for the MoDOT (Tr. 253). He helped draft the MoDOT manual upon which the Secretary relies (Tr. 255). Stotlemeyer testified the manual was intended for purposes internal to the MoDOT and does not impose requirements upon outside contractors such as TIC (Tr. 256-258). Furthermore, the drawing in the manual to which Stuck refers expressly exempts the MoDOT from using a TMA at a work site when the speed limit is reduced to 45 mph, as it was on TIC's site (Exh. R-30, p. 81, drawing TA-13; Tr. 195-196). Stuck also referred to Figure 6H-30 of the MUTCD when testifying that document requires the use of a TMA. Figure 6H-30 states the use of a TMA is optional (Exh. C-34; Tr. 208).

Nothing in the record indicates a TMA was the only feasible and effective means to materially reduce the hazard available to TIC. Stuck admitted a TMA would not have protected the entire site, and its presence would not have prevented all workers from being struck by an errant

vehicle (Tr. 201-202). TIC took steps to protect its employees from a recognized hazard, and the Secretary failed to show a TMA afforded a more effective means to address the hazard. The Secretary failed to establish a violation of § 5(a)(1) with respect to item 1.

**Item 2: Alleged Serious Violation of § 1926.95(a),
or, in the Alternative, of § 5(a)(1)**

In her original citation, the Secretary alleged TIC committed a serious violation of § 5(a)(1) by failing to require its workers to wear reflective vests when they “were working on an interstate highway, where traffic was present and where workers were crossing the open traffic lane.” On April 24, 2006, the Secretary moved to amend her complaint under item 2 to allege a serious violation of § 1926.95(a), claiming “The employer did not provide high visibility reflective clothing to employees working on an interstate highway, where traffic was present and while working in a work zone and crossing lanes of traffic.” She alleged in the alternative that TIC violated § 5(a)(1) as alleged in the original citation. The undersigned granted the Secretary’s motion.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (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., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Stuck testified he noticed only one member of TIC’s crew was wearing a vest, and it was not reflective but was “a hunting vest that was a netted vest and was very badly worn. It was almost brown it had been worn so much. It wasn’t bright orange” (Tr. 71). Stuck observed the employees crossing one of the open lanes of traffic on their way to the laydown area (Exh. ALJ-1; Tr. 89). Stuck told Sparks “it was required for anybody who was working within 15 feet of the roadway” to wear a reflective vest (Tr. 69). (This is, in fact, not a requirement found in OSHA’s construction standards.) Wayne Long, TIC’s environmental manager, testified that generally TIC does not require its crew members to wear reflective vests (Tr. 379-380):

Because of the nature of our work on 95 percent of our jobs, we’re usually the only contractor on site, and the nature of our work, blasting and painting, if you wear a reflective or safety vest when you are blasting, it doesn’t last ten minutes. And, if

you wear it while you're painting, it gets covered by overspray in a matter of a couple of minutes.

It's not feasible, it's impractical because they don't last long enough. You can't buy enough for the day to keep them on the men. But when it's requested of us, we come out with a containment procedure or work rule, and on that particular site at Blanchep [the job TIC completed prior to the one at issue] you are to wear it when you're outside of the containment if required, if outside.

MoDOT inspectors had requested TIC to require its crew members to wear reflective vests on the earlier Blanchep job. Long felt the inspectors might want the same requirement on the job at issue, so he implemented it as a policy for the site. Long emphasized his rule was not prompted by safety concerns (Tr. 381): "Just if you appease them, to make them happy, things go fine. If you don't appease them, they will make it rough on you." The work rule Long allegedly instituted on his initiative for these two jobs was a verbal accommodation for MoDOT, but did not appear to be followed by the TIC crew.

Section 1926.95(a)

Section 1926.95(a) provides:

Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

Applicability

The first element the Secretary must prove is that the cited standard applies to the cited conditions. TIC argues § 1926.95(a) does not apply to reflective vests. The issue of the applicability of § 1926.95(a) (or of the identical general industry standard found at § 1910.132(a)) to reflective vests has recently been addressed in detail in *The Ruhlin Company*, OSHRC website, 2006 – No. 28 (Docket No. 04-2049, November 20, 2006) and *United States Postal Service*, OSHRC website, 2006 – No. 22 (Docket No. 04-0316, November 20, 2006).

In *Ruhlin*, the employer's crew was widening a section of highway. The crew closed the outside eastbound lane, used cones to create a work zone, and placed an arrow board to warn traffic

of the road work and to reduce the speed limit. Ruhlin's employees working inside the work zone were not required to wear reflective vests. The Secretary cited Ruhlin for a violation of § 1926.95(a). Judge Ken S. Welsch vacated the citation. In affirming that portion of his decision, the Commission held that Subpart E, where § 1926.95(a) is found (Personal Protective and Life Saving Equipment), does not encompass high-visibility clothing or other warning garments. Those standards provide an actual physical protection or barrier between the potential hazard and the employee, rather than the protection of a visual warning to others offered by high visibility or warning garments. Because the Secretary's interpretation to the contrary was inconsistent with other construction standards, with her more recent interpretative letter, and with statutory requirements for rulemaking, the Commission considered the interpretation unreasonable and rejected it. *Ruhlin*, 2006 OSHRC No. 28, p. 5-8).

Section 1926.95(a) does not apply to high-visibility clothing or warning garments. Item 2, alleging an alternative violation of § 1926.95(a), is vacated.

Section 5(a)(1), in the Alternative

1. Was there a hazard?

The Secretary again incorrectly frames the hazard alleged in item 2 under § 5(a)(1) in terms of the absence of abatement, *i.e.*, not wearing high-visibility clothing or warning garments. Again, the undersigned rejects this framing. The alleged hazardous condition to which TIC's employees were exposed was being struck by vehicles as they walked across open lanes of traffic when crossing the highway.¹ The CDC/NIOSH publication "Building Safer Highway Work Zones" establishes that working both inside and outside a highway work zone constitutes a hazard.²

¹ In its post-hearing brief, TIC defines the hazard as "errant vehicles entering the workzone," and high-visibility clothing would not prevent a driver who has lost control of his or her car from striking a worker in the work zone. In her original citation and amended complaint, the Secretary focuses on workers crossing the highway on foot. In her post-hearing brief, she also focuses only on workers crossing the highway, not on workers located within the work zone. This decision addresses only the struck-by hazard to employees crossing the highway.

² TIC argues a hazard addressed by an advisory standard of MoDOT cannot be the subject of a citation under § 5(a)(1), citing *A. Prokosh & Sons Sheet Metal, Inc.*, 8 BNA OSHC 2077, 2082 (No. 76-406, 1980). The Review Commission rejected the argument in *Ruhlin*, 2006 OSHRC No. 23, p. 8-9, holding the advisory provision "*not* incorporated as an OSHA standard via § 1926.200(g)" (emphasis in original) does not preempt a general duty violation.

2. Was the hazard recognized?

The record also establishes the hazard as recognized. The Commission in *W. G. Fairfield*, 19 BNA OSHC at 1236, states that, of the three practices of working adjacent to the highway, flagging motorists on the highway, or crossing the highway, “crossing an active highway on foot is clearly the most dangerous.”³ TIC also recognized the hazard. TIC supervisor Jackson testified that at the beginning of a shift when employees need to get to the work zone from the laydown area where they park their vehicles and where equipment is stored, TIC does a “rolling lane drop” (TR. 336): “I’ll take my truck with the lights on it, and I’ll actually slow the traffic down in the live lane and even stop it if I have to to allow them time to cross that line into the lane drop area.” When asked how employees got back to the laydown area, Jackson stated, “Normally, they would stay [in the work zone] until lunch time or whatever, and then we would get in my truck and come across” (Tr. 337).

3. Was the hazard likely to cause death or serious physical harm?

As in Item 1, the Secretary established the third element (the hazard is likely to cause death or serious physical harm) by introducing the fatality statistics for highway construction.

4. Was there a feasible and effective means of abatement?

The last element the Secretary must prove is that a feasible and effective means existed to eliminate and materially reduce the hazard. TIC argues it eliminated the hazard by implementing the rolling lane drop and by ferrying the employees across the highway by truck. This method would be acceptable if the record established TIC’s employees followed it without fail. The Secretary presented evidence, however, that TIC’s employees crossed the active lane of the highway on foot, without wearing high visibility clothing. Stuck testified he observed TIC’s crew walk across the open lane from the work zone to the laydown area carrying equipment (Tr. 89). Stuck stated four of the five

³ The undersigned agrees that crossing an active highway on foot is a recognized hazard. When considered in terms of the duration of exposure, it may constitute the greatest hazard. However, “Building Safer Highway Work Zones” indicates it is not the activity associated with the greatest number of highway construction fatalities. Of the 841 deaths recorded from 1992 to 1998, 492 occurred inside the work zone, and 465 of those were vehicle or equipment-related. Deaths occurring outside the work zone (which would include crossing the highway on foot) numbered 349, 198 of which were vehicle or equipment-related. The document states, “In all but 13 of the [152] incidents involving a traffic vehicle, the motorist left the traffic space and intruded into the work space, striking the worker,” (Exh. C-9, p. 5).

crew members he saw crossed over the open lane (Tr. 90-91). TIC claims generally its employees wore reflective vests on that site, but provided no specific evidence they did so (Tr. 288-289):

Q. How many employees at that time [of the inspection] were wearing reflective vests, do you recall?

Sparks: I don't.

Q. Do you know if anyone was wearing reflectorized vests?

Sparks: I'm sure they were. That's our policy.

Stuck's eyewitness account of four crew members crossing on foot without high-visibility clothing bringing equipment is credited over the speculative testimony by TIC personnel based on an alleged policy. While wearing high-visibility clothing would not eliminate the hazard of being struck by a traffic vehicle, it does materially reduce the hazard. In TIC's scenario, reflective vests may provide little protection for workers in work zones against errant vehicles whose drivers have lost control. For employees crossing a lane on foot, however, wearing brightly colored reflective vests increases their visibility and reduces their risk of being struck by a vehicle. The Review Commission's recent decision in *United States Postal Service (USPS)*, 2006 OSHRC No.23 (decided the same day as *Ruhlin*), does not invalidate this analysis. In *USPS*, the Postal Service required letter carriers walking or crossing a roadway in low-light or dark conditions to wear garments with reflective strips and reflective vests. The Secretary argued the reflective garments did not comply with the criteria in ANSI-ISEA 107-1999 and offered inadequate protection. She failed, however, to prove why the protection was inadequate or why the ANSI criteria more effectively protected or warned against the hazard of being struck by a vehicle. In contrast to the Postal Service in *USPS*, TIC did not enforce wearing highly visible reflective vests or warning garments while crossing open highway lanes. Even if it existed, TIC's alleged job-specific "policy" was ineffective.

Traditionally, the bright reflective colors of the warning vests or garments visually cue the highway driver that individuals are in the area designed only for automobile traffic. Drivers routinely see people required to work in and around traffic in dark or daylight, such as traffic police, school crossing guards, or flaggers, all of whom wear highly-visible or reflective clothing. (Many bicyclists and joggers who are on the roadways also wear reflective garments.) Just as speeding motorists

reflexively slow down when they spot blue flashing lights, drivers who see the bright colors of the reflective or warning garments reflexively slow down, drive more carefully, and avoid aiming towards individuals wearing reflective clothing. Drivers reasonably have come to expect workers crossing active highway lanes will wear highly-visible warning garments. Failure to wear the warning garments creates additional danger in a dangerous environment.

The Secretary established the existence of a feasible and effective means of abatement. The serious violation of § 5(a)(1) for failing to require that employees crossing an open highway lane on foot wear high-visibility clothing is affirmed.

Item 4: Alleged Serious Violation of § 1926.453(b)(2)(v)

The Secretary alleges TIC committed a serious violation of § 1926.453(b)(2)(v), which provides:

A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift.

It is undisputed the cited standard applies to TIC's employees working in aerial lifts, and employees not tied off would be exposed to fall hazards. Compliance and knowledge are at issue.

Stuck contends he observed TIC employee Raul Morales working from an aerial lift elevated 18 to 20 feet. Stuck says Morales was not wearing a body belt. TIC attacks the credibility of Stuck, arguing his testimony is contradicted by the other witnesses and not supported by the evidence. TIC also argues that, even if Morales was working at a height of 18 feet without being tied off, TIC had no knowledge of the condition. TIC also asserts the affirmative defense of employee misconduct.

Stuck's Testimony

Stuck was driving westbound on I-70 at approximately 6:30 a.m. on August 20, 2005, when he saw a highway work zone (Tr. 61, 171, 183). Approximately ¼ of a mile from the work zone, westbound traffic stopped and Stuck observed Morales in an aerial lift 18 to 20 feet in the air (Tr. 171-172). Stuck observed Morales "working up in the beams of the bridge, below the bridge" (Tr. 61). Stuck stated he watched him "for three or four minutes while I was moving toward him in my own personal vehicle. As I was driving, I could see him out of the corner of my eye." (Tr. 151-152). As the traffic began moving, Stuck stopped looking at Morales and focused on driving and finding a parking place (Tr. 173-174). Stuck was unable to photograph Morales working at a height

of 18 feet because his camera was on the back seat of his car while he was driving (Tr. 152). Stuck exited his car approximately 10 minutes after first seeing Morales in the lift (Tr. 242). Stuck returned to his car and drove over to the opposite side of the road, from where he observed Morales again. The second time Stuck saw Morales in the elevated lift was approximately 20 minutes after he first observed him (Tr. 241-242). When Stuck saw him, Morales was handling a piece of equipment, possibly a hose (Tr. 153).

Stuck pulled into the work zone past the last piece of equipment, put on his PPE, and approached the nearest person on the site (Tr. 62). Stuck first spoke to a representative from the general contractor Millstone Bangert (Tr. 62). The representative directed Stuck to Kevin Sparks (Tr. 67).⁴ According to Stuck, Sparks told him Morales was not wearing his harness because “it was across the road in a laydown area” (Tr. 69).

Morales’s Testimony

Raul Morales testified through a Spanish translator. Morales stated he always wore a harness when working in the aerial lift. When Stuck arrived at the site, Morales was moving the aerial lift because it was on top of one of the containment tarps (Tr. 29). Morales had exited the lift and was changing out of his coveralls and cleaning up when other members of his crew asked him to re-enter the lift and move it off of the tarp so they could roll it up (Tr. 30-31). Morales could not remember if he put his harness back on to move the lift (the basket was not elevated, but TIC’s rule is to wear a harness and tie off any time a worker is in the lift (Tr. 39-40)). Morales testified he always followed the tie-off rule (Tr. 40). Stuck did not interview Morales (Tr. 33).

Kevin Sparks

Sparks testified he did not recall telling Stuck that Morales’s harness was across the street. He stated he never told Sparks he was aware Morales was in the lift while not being tied off (Tr. 287, 290). He arrived at the site “right after daybreak,” near the end of crew’s shift at 7:00 a. m. The TIC crew members had finished their work and “were derigging, rolling up hoses, rolling up tarps. We

⁴ Stuck testified when he met with Sparks, another man was standing nearby, whom Stuck identified as TIC foreman Alan Jackson (Tr. 66-67). Jackson denies meeting with, or even seeing, Stuck during the OSHA inspection (Tr. 303, 356).

were trying to get off the highway” (Tr. 286-287). When Stuck arrived on the site, Sparks was working to repair a broken-down lift (not the one in which Morales worked) (Tr. 285).

Alan Jackson

Foreman Jackson was on site at the time of Stuck’s inspection. He did not observe Morales in the lift without his body harness (Tr. 325). Jackson testified that at the time of Stuck’s inspection, there was no reason for Morales to be in the lift 18 to 20 feet in the air (Tr. 342): “We were finished with the bridge. There was no reason to go back up there.”

1. Did TIC comply with the terms of the standard?

The only evidence presented by the Secretary in support of her charge that Morales was working from a lift 18 to 20 feet in the air without being tied off is the testimony of Stuck. She presents no photographic evidence. Despite Stuck’s claim that Sparks acknowledged Morales’s harness was across the street, no witness statement, notes, or contemporaneous report was adduced to support his claim. The accuracy of Stuck’s observation from a moving car at some distance that an employee elevated at least 18 feet in the air was not tied off is open to question. The angle and the height of the basket would seemingly work against certainty on this issue. Yet, TIC offered no evidence that Stuck was unable to see whether or not Morales was tied off from his positions on the highway. Morales’s testimony regarding whether he was tied off was confusing and evasive. He testified he wore his harness in the aerial lift earlier that day while sandblasting. He had only just taken off his harness and cover-alls when another employee asked him to move the aerial lift (in its lowered position). His testimony focused on that latter time, and did not otherwise address the period when Stuck observed him 20 minutes earlier. Sparks, while denying he said anything regarding Morales’s harness, came across as defensive and uncooperative.

The Secretary has the burden of proving each element of her case by a preponderance of the evidence. On the element of noncompliance, she has done so.

2. Employer Knowledge

The Secretary has failed to establish TIC had actual knowledge that Morales was not tied off in the lift. Jackson and Sparks both testified they were unaware Morales was working from the lift without his harness. For proof of actual knowledge, the Secretary relies on Stuck’s testimony that

Sparks acknowledged Morales's harness was across the street. A review of Stuck's testimony on this issue shows Stuck and Sparks may have misunderstood each other.

At the time Stuck interviewed Sparks, 20 minutes had elapsed since Stuck first saw Morales in the lift. Morales testified he had exited the lift, taken off his coveralls, and begun cleaning up. He then re-entered the lift to move it off one of the tarps, as requested by his co-workers (Tr. 30, 31). Sparks testified that when he arrived at the worksite, shortly after 7:00 a.m., the TIC crew members were done with their shift and were in the process of moving the equipment off the highway. Sparks's attention was trained on the broken-down aerial lift and the repairman sent to fix it (Tr. 286-287). The shift was late, and the pace of activity was frenetic. Crew members were carrying equipment across the highway during this time.

When Stuck asked Sparks where Morales's harness was, Sparks answered "Across the street." He knew Morales was done with his shift and the storage trailer was located in the laydown area where the employees took the tools and equipment after they were done. Stuck may have intended his question to mean, "Why wasn't Morales wearing his harness when he was elevated 18 feet in the aerial lift 20 minutes ago?" but Sparks could have interpreted his question to mean, "Where is the harness now that Morales's shift is over?" Stuck's testimony is generally worded and vague regarding the time about which he is questioning Sparks (Tr. 68-69):

Stuck: I asked Mr. Sparks why he didn't have on his harness, and I was told that the harness was in a storage trailer on the other side of the road. . . . We went into some detail about the need for the harness and lanyard, and I asked him why he didn't have it on, and he said it was across the road.

Q. You asked him why he didn't have it on?

Stuck: I'm sorry, I should be more clear. I asked Mr. Sparks why the man in the aerial lift didn't have it on.

Q. What did Mr. Sparks reply?

Stuck: He replied that it was across the road in a laydown area; in that area.

Stuck did not ask Sparks why Morales did not have on the harness at the time he was in the lift. His question could be interpreted as doubting that TIC had any fall protection on the site. Sparks's answer could be interpreted as assuring Stuck that TIC does use fall protection, and that it

is in the storage trailer if he wants to check. Such an interpretation was reasonable. The conversation recounted by Stuck does not establish actual knowledge on Sparks's part that Morales was in the lift without his harness.

The Secretary also failed to establish constructive knowledge. To prove constructive knowledge, the Secretary must show that the employer could have discovered the violative condition with the exercise of reasonable diligence. "Whether an employer was reasonably diligent involves a consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Donohue Indus., Inc.*, 20 BNA OSHC 1346, 1349 (No. 99-0191).

TIC had a work rule requiring employees working in lifts to tie off 100% of the time. This rule was communicated in orientation training, refresher training, and weekly toolbox talks (Exh. R-1; Tr. 364, 366-367). Several of the crew members, including Morales, spoke Spanish as a first language. Both Morales and Jackson testified that if one of the Hispanic workers had trouble understanding any communications, Jackson explained it to him in Spanish, in which he is fluent (Tr. 320). TIC implements a progressive disciplinary system, and disciplines employees when they violate company safety rules (Exhs. R-6).

TIC demonstrated it exercises reasonable diligence in discovering and correcting the specific safety hazard. The Secretary failed to establish TIC had constructive knowledge of Morales's violative conduct. Item 4 is vacated.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, its history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

TIC employs approximately 100 workers (Tr. 134). The company had received citations for serious violations of the Act within the three years prior to the instant inspection (Tr. 134). No evidence was adduced to show less than good faith.

The gravity of the violation is high (being struck by a car on a highway will likely result in death). It is determined the appropriate penalty is \$3,000.00.

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, alleging a violation of § 5(a)(1), is vacated and no penalty is assessed;
2. Item 2, alleging a violation of § 1926.95(a), is vacated. The alternative allegation of a violation of § 5(a)(1) is affirmed and a penalty of \$ 3,000.00 is assessed;
3. Item 3 is withdrawn by the Secretary; and
4. Item 4, alleging a violation of § 1926.453(b)(2)(v) is vacated.

/s/ _____
NANCY J. SPIES
Judge

Date: December 11, 2006