**United States of America**

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>MONROE DRYWALL CONSTRUCTION, INC.,<br>Respondent. | OSHRC Docket No. 12-0379 |

APPEARANCES:

Ronald J. Gottlieb, Attorney; Charles F. James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor for Occupational Safety & Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Nathalie Monroe, President, Monroe Drywall Construction, Inc.; Panama City Beach, FL
For the Respondent

## DECISION AND REMAND

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

Following a fatal accident, the Occupational Safety and Health Administration ("OSHA") inspected a worksite in Panama City, Florida. As a result of the inspection, OSHA issued Monroe Drywall Construction ("MDC") two citations under the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. §§ 651-678. In Citation 1, the Secretary alleges a serious violation of 29 C.F.R. § 1926.21(b)(2), for failing to instruct employees in the recognition and avoidance of unsafe conditions at the site, and a serious violation of 29 C.F.R. § 1926.416(a)(3), for failing to inquire about the status of exposed circuit wires or warn employees of an electric

shock hazard.[1] In Citation 2, the Secretary alleges an other-than-serious violation of 29 C.F.R. § 1910.1200(e)(1), for not having a written hazard communication program. After a hearing, Administrative Law Judge Stephen J. Simko, Jr., vacated both citations, finding that the Secretary failed to prove "the workers who were performing drywall work at the site were employees of MDC."

For the following reasons, we reverse the judge's decision and remand the matter for further proceedings consistent with this opinion.

**BACKGROUND**

The accident occurred at a worksite where a large retail store was being remodeled. The project's general contractor, The Hatch Group, retained several subcontractors, including GMB Construction Services ("GMB"), which it hired to complete the framing, drywall installation, and finishing. GMB, in turn, arranged for MDC to perform drywall work at the project. MDC admits that its President, Nathalie Monroe ("Monroe"), and Vice-President, Jeremy Monroe, worked at the site. Besides the Monroes, four other workers were at the site assisting with drywall work.[2] On September 27, 2011, one of these drywall workers was electrocuted when he contacted exposed wiring while clearing an area in which to stack drywall.

On review, the Secretary argues that the judge erred in finding that none of the four drywall workers were MDC employees. MDC, appearing *pro se* throughout these proceedings,

[1] The Secretary withdrew Item 1a of this citation, which alleged a serious violation of 29 C.F.R. § 1926.20(b)(1).

[2] In several instances during the proceedings, these four individuals were referred to by their ethnicity. We will refer to the workers either by name, where known, or by the nature of the work they performed, i.e. "drywall workers."

did not file a brief on review.[3] Before the judge, however, MDC argued that it did not employ the four drywall workers.[4]

**DISCUSSION**

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) the employer failed to comply; (3) employees had access to the violative condition; and (4) the employer knew or could have known of the violative condition. *See, e.g., Astra Pharmaceutical Prods., Inc.*, 9 BNA OSHC 2126, 2129, 1982 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). Here, the judge did not reach the elements of the violation because he concluded that the Secretary did not prove, as a threshold matter, that MDC employed the four drywall workers.[5] Specifically, he found that much of the Secretary's

[3] When a non-petitioning party does not respond to a briefing notice, the Commission may decide the case without the party's brief. 29 C.F.R. § 2200.93(d); *Well Solutions Inc.*, 15 BNA OSHC 1718, 1720 n.2, 1992 CCH OSHD ¶ 29,743, p. 40,418 (No. 89-1559, 1992). While a party is not required to file a brief, MDC did not respond to the briefing notice or to a subsequent letter from the Commission's Executive Secretary requesting that the company either: (1) provide a brief or letter setting forth its arguments, or (2) inform the Commission in writing that it did not intend to do so. The Commission's rules are intended to enable proceedings to progress efficiently while assuring fairness to all parties. *See e.g., Carolyn Manti d/b/a Manti Homes*, 16 BNA OSHC 1458, 1993 CCH OSHD ¶ 30,265, p. 41,683 (No. 92-2222, 1993). These rules are not inflexible, but there are limits to how liberally the Commission and its judges can interpret them to assist an employer appearing *pro se*. *Id.*; *Imageries*, 15 BNA OSHC 1545, 1547, 1992 CCH OSHD ¶ 29,639, p. 40,131 (No. 90-378, 1992) (noting that *pro se* litigants are not excused from following the Commission's procedural rules).

[4] We note that the judge took several steps throughout the proceedings to accommodate MDC's *pro se* status. *See e.g., Action Group, Inc.*, 14 BNA OSHC 1934, 1935, 1990 CCH OSHD ¶ 29,166, p. 39,018 (No. 88-2058, 1990) (recognizing that *pro se* litigants may require additional consideration). These efforts included: explaining the hearing process, asking if there were objections to the Secretary's evidence, facilitating the testimony of MDC's witnesses, and liberally construing a document as the company's Answer and then permitting its late filing, even though MDC did not serve the Secretary.

[5] Although the judge looked at the four drywall workers as a group in analyzing the employment question, the Secretary need only show that one worker employed by MDC had access to the violative condition. *See Tri-City Constr. Co.*, 7 BNA OSHC 2189, 2192, 1980 CCH OSHD ¶ 24,267, p. 29,549 (No. 76-4094, 1980) (finding exposure where employer stipulated that "at least one employee was exposed to the [cited] hazard").

evidence was either inadmissible hearsay or, in the alternative, outweighed by Monroe's testimony that MDC did not employ the four drywall workers.

We find that the judge failed to give appropriate weight to the Secretary's evidence of an employment relationship between MDC and three of the drywall workers, whom we find were employees of MDC.[6] This evidence includes: (1) the testimony of OSHA Compliance Officer ("CO"), Jeffrey Lincoln; (2) a signed statement from Thomas Grant, GMB's on-site supervisor; (3) deposition testimony from GMB's President, George Blanchette, and (4) two documents related to MDC's scope of work.[7] The CO interviewed two of the drywall workers, Cesar Torres and Genaro Angeles-Vincentes. Although Torres primarily speaks Spanish, he told the CO in English that Monroe hired him to work at the site. With the aid of a translator, Torres and Angeles-Vincentes confirmed that Monroe hired them, along with the decedent and one additional individual, to hang drywall at the site and that she directed their work. Torres also told the CO through the translator that he reported his hours, and those of the other drywall hangers, to Monroe, who paid all of them in cash.

In his decision, the judge determined that the drywall workers' statements did not constitute admissions of a party opponent under Fed. R. Evid. 801(d)(2), in effect finding they were inadmissible hearsay. He acknowledged, however, that MDC never objected to the statements as hearsay, though he noted that Monroe "appeared unaware" that MDC could make a hearsay-based objection. But when there is no objection, relevant out-of-court statements are admissible and entitled to their natural probative weight. *See MVM Contracting Corp*., 23 BNA OSHC 1164, 1166, 2010 CCH OSHD ¶ 33,073, p. 54,651 (No. 07-1350, 2010) (finding waiver

[6] The Secretary also asserts that MDC employed the fourth, unnamed drywall worker. As we have found an employment relationship between MDC and the three other drywall workers, we do not reach whether MDC also employed the fourth drywall worker.

[7] In addition, the Secretary offered evidence concerning the decedent's workers' compensation claim, after the judge admitted a document proffered by MDC titled "Amended Verified Petition for Attorney's Fees" (the "Petition"). We question whether the Petition, which related to the settlement of the workers' compensation claim, or the documents offered in response by the Secretary, are relevant to determining if MDC employed the decedent or any other workers under the OSH Act. Nonetheless, because the judge concluded that the evidence was not probative, we find it unnecessary to evaluate whether he erred in admitting it. *See Woolston Constr. Co., Inc*., 15 BNA OSHC 1114, 1119, 1991-1993 CCH OSHD ¶ 29,394, p. 39,569 (No. 88-1877, 1991) (finding no error when judge did not rely on witness's testimony), *aff'd without published opinion*, No. 91-1413, 1992 WL 117669 (D.C. Cir. May 22, 1992).

in the absence of a timely objection); *Power Fuels, Inc*., 14 BNA OSHC 2209, 2214, 1991 CCH OSHD ¶ 29,304, p. 39,347 (No. 85-166, 1991) (same); *George Harms Constr. Co. v. Chao*, 371 F.3d 156, 164-65 (3d Cir. 2004) (finding that hearsay evidence admitted without objection is to be considered and given its natural probative weight as if it were admissible in law); Fed. R. Evid. 103(a)(1), 401, 403. And by waiting to raise the issue *sua sponte* for the first time in his decision, the judge deprived the Secretary of an opportunity to introduce other evidence to show that the statements were not hearsay or that they were admissible under one of the exceptions to the rule. *See* Fed. R. Evid. 801, 803, 804, 807. Without any objections, the Secretary had no reason to present the declarants themselves or to otherwise establish the truth of what they asserted. *See* Fed. R. Evid. 103, 801, 804; *Regina Constr. Co*., 15 BNA OSHC 1044, 1048, 1991-1993 CCH OSHD ¶ 29,354, p. 39,467 (No. 87-1309, 1991) (noting that respondent could have called out-of-court declarants as witnesses); *George Harms*, 371 F.3d at 164-65 (same). Therefore, the judge erred in treating this evidence as inadmissible hearsay.

The judge ruled in the alternative that if the statements of Torres and Angeles-Vincentes were admissions of a party opponent and thus admissible under Fed. R. Evid. 801(d)(2), they still should not be given any weight because the Secretary "offered nothing" to show the translator's qualifications. This too was error. As an initial matter, not all of the statements made by Torres required a translator, so the statements he made in English to the CO fall outside of the judge's ruling. Moreover, MDC does not claim that the translator erroneously conveyed what Torres and Angeles-Vincentes said. *See* Fed. R. Evid. 103(a) (requiring parties to preserve claims of error). Indeed, Monroe actually corroborated key aspects of the translated statements by admitting that: (1) on the day of the accident, Torres told "everybody" he worked for her, (2) she knew Torres from working with him on a past project, and (3) Torres called her after the accident asking for money. Further, neither MDC nor the judge questioned the accuracy of the CO's recollection or his credibility. *Id*. In this situation, we find that having limited information about the translator's qualifications does not justify giving the statements he translated for Torres and Angeles-Vincentes no weight. *See United States v. Nazemian*, 948 F.2d 522, 528 (9th Cir. 1991) (finding interpretation reliable despite the lack of evidence regarding the interpreter's qualifications); *United States v. Alvarez*, 755 F.2d 830, 859-60 (11th Cir. 1985) (determining that because the interpreter was a language conduit the translation was not hearsay); *DCS Sanitation Mgmt. Inc. v. OSHRC*, 82 F.3d 812, 815-16 (8th Cir. 1996) (same).

With regard to Grant's written statement and Blanchette's deposition testimony, the judge gave this evidence no weight based on his finding that both were motivated to falsely claim that GMB did not itself employ any of the drywall workers in order to avoid liability. The judge instead credited Monroe's "adamant" testimony, even though he described her as "excitable" at the hearing. According to the judge, her "demeanor … was consistent with that of a person truthfully testifying and sensing that no one believes her protestations that these [drywall] workers were not MDC's employees."

The record, however, does not support the judge's weighing of this evidence. *See Beta Constr. Co.*, 16 BNA OSHC 1435, 1441-42, 1992 CCH OSHD ¶ 30,239, p. 41,649-50 (No. 91-102, 1993) (finding that credibility must be assessed in view of the whole record). Both Grant and Blanchette denied that GMB hired, employed, or paid any individual drywall workers. Blanchette asserted that GMB subcontracted all of the drywall hanging and finishing to MDC, and that Monroe admitted to him she employed the decedent and other drywall workers.[8] Grant also specified that Monroe employed Torres, the decedent, and two others.[9] In evaluating Grant's statement, we see no difference between his motivation and Monroe's—she too had an interest in avoiding liability. As for Blanchette, not only does MDC make no claim that he lied, there is less to impugn his testimony than there is to impugn Monroe's. At the time of his deposition, it was too late for the Secretary to issue GMB a citation under the OSH Act and the

[8] By neither attending nor responding to Blanchette's deposition, MDC waived any potential hearsay objections. *See Power Fuels,* 14 BNA OSHC at 2214, 1991 CCH OSHD at p. 39,347. Even if there had been a timely objection, Monroe's statements would be admissible as admissions of a party opponent under Fed. R. Evid. 801(d)(2). *See MVM Contracting*, 23 BNA OSHC at 1166, 2010 CCH OSHD at pp. 54,651-52.

[9] Although Grant did not testify at the hearing, the CO relayed their conversations and MDC, after being specifically asked by the judge, had no objection to the admission of Grant's signed, written statement. *See MVM Contracting*, 23 BNA OSHC at 1166, 2010 CCH OSHD at pp. 54,651-52. Notably, MDC disputes only the accuracy of Grant's statements about who employed the drywall workers, not the fact that he made them.

decedent's workers' compensation claim had been settled.[10] Thus, we find Grant's statement and Blanchette's testimony to be credible and persuasive evidence that MDC employed the drywall workers.

Our conclusion is further supported by two documents the Secretary submitted into evidence, both of which the judge erroneously characterized as "not help[ful]" to deciding the employment issue. The first is a letter from GMB to Monroe about the scope of work, and the second is MDC's "invoice" for the project. Granted, neither document speaks directly to whether MDC hired the decedent and other drywall workers. However, both are relevant in assessing the contrast between the statements of Grant and Blanchette, who both asserted that GMB hired MDC to do all the drywall work—including hanging and finishing—and Monroe's opposing testimony that MDC contracted to do only the finishing work. GMB's letter to Monroe requests the following work for a total cost of $5,500: "hang[,][11] tape, bed coat and finish coat for 338 boards[,] bed coat and skim coat all existing drywall that has already been taped[,] touch up remainder of existing." After working at the site for a few days, Monroe faxed GMB a document labeled "Contractors Invoice," seeking payment of $5,500 to "Hang - tape - finish" 338 boards, and finish 150 boards, which also specifies that it is "In accordance with our Agreement." Contrary to the judge, we find that these two documents corroborate Grant and Blanchette's statements that GMB subcontracted both the drywall hanging and finishing work to MDC, and that GMB therefore had no need to hire drywall workers itself for the project.

In sum, the judge's assessment of the Secretary's evidence is unsupported by the record as a whole. Therefore, his view of Monroe's credibility does not compel a different result than

[10] The judge also found Blanchette lacked credibility because he denied employing Grant even though he admitted that Grant was at the site to supervise GMB's subcontractors. We find that the judge gave this apparent contradiction undue weight. The record shows that the two men were friends and Blanchette viewed Grant's role as one of "helping him out" in exchange for room and board, as opposed to an employer/employee relationship. Blanchette's belief in this regard may have been legally incorrect but nonetheless held in good faith. This evidence, therefore, does not justify rejecting his testimony that GMB hired only MDC to hang and finish the drywall. *See Beta Constr.*, 16 BNA OSHC at 1441-42, 1993 CCH OSHD at pp. 41,649-50.

[11] Blanchette explained at his deposition that hanging and taping are two different activities, and that there was a missing comma after "hang" in his letter.

the one we reach here.[12] *See C. Kaufman, Inc*., 6 BNA OSHC 1295, 1298, 1977-1978 CCH OSHD ¶ 22,481, p. 27,099 (No. 14249, 1978) (stating that Commission will not defer to a credibility finding if it is not "made in light of the entire record" or if it is "materially distorted by an erroneous view of the legal issue."); *Metro Steel Constr. Co*., 18 BNA OSHC 1705, 1707, 1999 CCH OSHD ¶ 31,082, p. 46,667 (No. 96-1459, 1999) (finding judge's reliance on compliance officer's testimony was error when the record as a whole contradicted that testimony); *Brickfield Builders*, 17 BNA OSHC 1084, 1993-1995 CCH OSHD ¶ 30,696, p. 42600 (No. 93-2801, 1995) (same).

For these reasons, we find that the Secretary's evidence shows that MDC employed Torres, Angeles-Vincentes, and the decedent. Accordingly, we reverse the judge's decision and remand for him to consider whether the Secretary established the alleged violations by proving applicability of the cited standards, noncompliance, exposure to the violative conditions, and knowledge.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: April 19, 2013

[12] We note that the Commission is in the same position as the judge when assessing the credibility of Blanchette, Grant, and the drywall workers, none of whom testified at the hearing, and when reviewing the documentary evidence. *See Brickfield Builders Inc.*, 17 BNA OSHC 1084, 1993-1995 CCH OSHD ¶ 30,696, p. 42,600 (No. 93-2801, 1995) (rejecting judge's assessment of photographic evidence).

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| Secretary of Labor,<br>Complainant,<br>v.<br>Monroe Drywall Construction, Inc.<br>Respondent. | OSHRC Docket No. **12-0379**<br>On Remand |

Appearances:

Melanie Paul, Esquire, U. S. Department of Labor, Office of the Solicitor
Atlanta, Georgia
For Complainant

Jeremy Monroe and Nathalie Monroe, *pro se*, Monroe Drywall Construction, Inc.
Panama City Beach, Florida
For Respondent

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

## DECISION AND ORDER

This case is before me on remand from the Commission. A hearing was held in this matter in Panama City, Florida, on June 1, 2012. The procedural background of this case is contained in my initial decision dated November 20, 2012, and in the Commission's decision and remand dated April 19, 2013. In my decision, I found the Respondent was not the employer of three workers on Monroe Drywall Construction, Inc.'s (MDC) jobsite. Having determined MDC was not the employer of the workers, the citations were vacated. On review, the Commission held that these workers were employees of MDC. The case was remanded to consider whether the Secretary established the alleged violations of 29 CFR §§ 1926.21(b)(2), 1926.416(a)(3), and 1910.1200(e)(1). For the reasons that follow, the alleged violations are affirmed and total penalties of $600.00 are assessed.

## Discussion

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

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

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

It is undisputed that the standards are applicable. Respondent is engaged in the installation and finishing of drywall, a construction activity. All employers are required to develop, implement and maintain written hazard communication programs. Uncontroverted evidence also establishes employee exposure in that MDC employees worked in the vicinity of an electric shock hazard and used drywall joint compound, a respiratory irritant.

Remaining at issue are whether MDC failed to comply with the terms of the standards and whether Respondent had actual or constructive knowledge of the violative conditions.

### Citation No. 1, Item 1b, Alleged Serious Violation of 29 CFR § 1926.21(b)(2)

In Citation No. 1, Item 1b, the Secretary alleges:

> 29 CFR § 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury:
>
> a. On or about September 27, 2011, employees installing drywall were not trained to recognize hazards specific to the multi-trade construction site to include, but not limited to electrical shock hazards.

The standard at 29 CFR § 1926.21(b)(2) provides:

> (2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

In a statement given to the Secretary's compliance officer during the investigation, one employee said Nathalie Monroe, MDC's president, provided a safety briefing for use of the scissor lift (Exh. C-3). Ms. Monroe testified she did not instruct employees to watch out for the electrical

conduit because everyone told her it was safe. In fact, bare wires extending from the bottom of the conduit were energized. Ms. Monroe, on cross-examination, testified she did not provide any training to each of Respondent's employees on the jobsite, claiming they did not work for MDC. The Secretary produced sufficient evidence to prove it is more likely than not that MDC did not instruct each employee in the recognition and avoidance of unsafe conditions including electrical shock hazards on the jobsite.

Respondent claims it did not have actual knowledge of an unsafe electrical shock condition of the conduit and wires in the area where its employees were working. Ms. Monroe was working on an elevated scissor lift next to the conduit one day before the incident in which an MDC employee touched an energized wire in the conduit. While Ms. Monroe may have thought the conduit was safe, she did not take steps to determine whether the bare wires extending from the bottom of the conduit were energized. On September 27, 2011, her employees worked on the floor stacking drywall next to the bare wires. MDC, through Ms. Monroe, its president, had constructive knowledge of the electrical hazard. Ms. Monroe worked adjacent to the conduit on September 26, 2011, and knew her employees worked in the immediate area of the electrical shock hazard.

The Secretary has established a violation of 29 CFR § 1926.21(b)(2). The violation was serious. Where employees are not instructed in the recognition and avoidance of unsafe conditions including electrical shock hazards, contact with such hazards could result in death or serious physical harm.

**Citation No. 1, Item 2,**
**Alleged Serious Violation of 29 CFR § 1926.416(a)(3)**

In Citation No. 1, Item 2, the Secretary alleges:

> 29 CFR § 1926.416(a)(3): Before work was begun, the employer did not ascertain by inquiry or direct observation, or by instruments, whether any part of an energized electric power circuit, exposed or concealed, was so located that performance of the work could bring any person, tool, or machine into physical or electrical contact with the electric power circuit:
>
> a. On or about September 27, 2011, the employer did not inquire about the status of the exposed parking lot lighting circuit wires or warn employees installing drywall material of the electric shock hazard.

The standard at 29 CFR § 1926.416(a)(3) provides:

> (3) Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments whether any part of an energized electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool, or machine into physical or electrical contact with the electric power circuit. The employer shall post and maintain proper warning signs where such a circuit exists. The employer shall advise employees of the location of such lines, the hazards involved, and the protective measures.

The Secretary's compliance officer testified only as to the nature of the charge as set forth in Citation No. 1, Item 2. He gave no factual testimony to support the alleged violation of the standard.

Nathalie Monroe, MDC's president, however, in her statement to the compliance officer, stated that the metal conduit ran down the wall, and she was on the scissor lift near the top of the wall and the conduit. She did not see the wire extending from the bottom of the conduit (Exh. C-15). She testified at trial she was told the conduit was safe. Ms. Monroe did not say who told her it was safe. There is no other evidence relating to whether MDC made any inquiry or observations before beginning work or during work concerning the location of the energized wires in the area where its employees worked. From the totality of the testimony and other evidence, the logical inference is that MDC made no inquiry, observation, or other test to determine whether an exposed energized electric power circuit was so located that an employee of MDC might physically contact it. Contact with shock energized lines can result in death or serious physical harm from electrical shock.

Respondent had constructive knowledge of the violative conditions. Ms. Monroe worked at the top of the electrical conduit on September 26, 2011, and her employees worked on the floor near the bottom of the conduit with exposed wires on September 27, 2011. MDC made no independent inquiry to determine if the power circuit was energized, creating a hazard of electrical shock to MDC employees.

The Secretary has established a serious violation of 29 CFR § 1926.416(a)(3).

**Citation No. 2, Item 1,**
**Alleged Other-than-Serious Violation of 29 CFR § 1910.1200(e)(1)**

In Citation No. 2, Item 1, the Secretary alleges:

> 29 CFR 1910.1200(e)(1): The employer did not develop, implement, and/or maintain at the workplace a written hazard communication program which describes how the criteria specified in 29 CFR 1910.1200(f), (g), and (h) will be met: (Construction Reference: 1926.59)
>
> a. On or about September 27, 2011, the employer did not develop, implement, or maintain a written Hazard Communication Program that included Material Safety Date Sheets and training for employees working with hazardous chemicals such as, but not limited to the following:
>
> Drywall joint compound - a respiratory irritant

The standard at 29 CFR § 1910.1200(e)(1) provides:

> (e) *Written hazard communication program*. (1) Employers shall develop, implement, and maintain at each work place, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:
>
> > (i) A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas)

The Secretary's compliance officer, Jeffrey Lincoln, testified that MDC's employees were performing drywall finishing which includes the use of drywall joint compound. Mr. Lincoln testified that, when sanded, the compound particles become airborne. These particles are a respiratory irritant.

Mr. Lincoln testified regarding the requirements of the standard as follows:

> The products they're using have to be labeled properly. They have to have the company MSDS sheets for each proper chemical that's hazardous on the job site. They have to have a written hazard communication program that specifies how their overall program is run, who is responsible for it, and there has to be training for the materials that are being used so that they're trained to the MSDS sheets and the hazards that are listed on them.

(Tr. 72).

When questioned by the Court, Mr. Lincoln expanded his testimony relating what he found during his inspection:

> THE JUDGE: Let me ask you, what - - you said what the requirements of that standard are. What was done here?
>
> THE WITNESS: My indication at the job site, I asked Nathalie Monroe for her programs, to include safety program, hazard communication programs, and she said that she did not have programs, because it was just her and her husband in the company and they talked to each other about safety.

(Tr. 73).

Ms. Monroe testified that MDC had Material Safety Data Sheets (MSDS) for the drywall compound. While MDC may have maintained an MSDS for drywall compound at the jobsites, it did not provide it to OSHA when requested.

The Secretary's evidence establishes a violation of 29 CFR § 1910.1200(e)(1). Respondent did not develop or maintain a written hazard communication program for drywall compound, an eye irritant. This violation was properly classified as an other-than-serious violation. The violative conditions may result in irritation of the eyes, but would not likely result in death or serious physical harm.

**Penalty Determination**

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U.S.C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical, Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007).

MDC employed five employees including the two owners. On the date of the incident that gave rise to the OSHA inspection, MDC had two employees on site stacking drywall. In proposing penalties for the violations alleged in Citation No. 1, Item 1b, the Secretary considered Respondent's size but gave no consideration to its good faith and history. No evidence was presented as to any previous inspections of this company. MDC has no prior OSHA citation history. While the Commission has rejected MDC's defense of no employment relationship with these workers, the company's owners exhibited good faith in this matter. Their actions were

consistent with a good faith belief MDC had no employees other than Nathalie and Jeffrey Monroe.

The Secretary's compliance officer considered the severity of the hazard for Citation No. 1, Item 1, to be high including death, but probability as lesser due to the small amount of work performed compared to the total job. The Secretary withdrew Item 1a at the hearing. That Item alleged that MDC did not initiate or maintain a safety and health program. The proposed penalty for Items 1a and 1b was $2,400.00.

Here the Secretary dropped a major portion of Item 1 and did not consider good faith and history of MDC. After considering all these factors, a penalty of $200.00 is assessed for the remaining Item 1b.

With regard to Citation No. 1, Item 2, the Secretary also considered Respondent's size but no consideration was given to MDC's history. Regarding good faith, the Secretary's proposed penalty was based in large part on the allegation in Item 1a that MDC did not initiate or maintain an adequate safety and health program. That item was withdrawn by the Secretary at the hearing. That withdrawn allegation cannot now serve as a basis for the Secretary's claim of lack of good faith. The failure to make sufficient inquiry as to whether an electric power circuit is energized can result in death or serious inquiry. This can cause a higher level of gravity of the violation.

After considering all factors including gravity, size, good faith, and history, a penalty of $400.00 is assessed for Citation No. 1, Item 2.

The Secretary proposed no penalty for Citation No. 2, Item 1, and none 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) of the Federal Rules of Civil Procedure.

## ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1a of Citation No. 1, alleging a serious violation of 29 CFR § 1926.20(b)(1), was withdrawn by the Secretary at the hearing. It is therefore vacated, and no penalty is assessed;

2. Item 1b of Citation No. 1, alleging a serious violation of 29 CFR § 1926.21(b)(2), is affirmed, and a penalty of $200.00 is assessed;

3. Item 2 of Citation No. 1, alleging a serious violation of 29 CFR § 1926.416(a)(3), is affirmed, and a penalty of $400.00 is assessed; and

4. Item 1 of Citation No. 2, alleging an other-than-serious violation of 29 CFR § 1910.1200(e)(1), is affirmed, and no penalty is assessed.

/s/
Stephen J. Simko, Jr.
Judge

**Date: May 28, 2013**
**Atlanta, Georgia**