

**UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR,

Complainant,

v.

BERGELECTRIC CORP.,

Respondent.

DOCKET NO. 20-1493

Appearances:

Norman Garcia, Esq., U.S. Department of Labor, Office of the Solicitor, San Francisco, California  
For Complainant

Jason Mills, Esq., Morgan, Lewis & Bockius, LLP, Los Angeles, California  
For Respondent

Before: Administrative Law Judge Brian A. Duncan

**DECISION AND ORDER**

**Procedural History**

Respondent was engaged in electrical work related to the construction of a hotel/convention center at the Wild Horse Pass Casino, on the Gila River Indian Reservation in Chandler, Arizona. (Tr. 41; Ex. C-2). On September 11, 2020, OSHA Compliance Safety and Health Officer (“CSHO”) Patricia Downs conducted an inspection of the worksite. (Tr. 40). During her inspection, she learned that one of Respondent’s foreman, Sabahodin Dudic, was purportedly too close to wet cement while it was being poured, without having an adequate eyewash station nearby. (Tr. 69-70; Ex. C-10). CSHO Downs subsequently recommended, and Complainant issued, one serious violation of the Act with a proposed penalty of \$5,571.00.

*Citation and Notification of Penalty.* Respondent timely submitted its notice of contest, bringing the matter before the Commission.

A trial was conducted in Phoenix, Arizona on October 5, 2021. Three witnesses testified at trial: (1) CSHO Patricia Downs; (2) Zachery Barnett, OSHA Area Director for the Phoenix office; and (3) Sabahodin Dudic, Respondent's foreman. Both parties timely submitted post-trial briefs for the Court's consideration.

### **Jurisdiction & Stipulations**

The parties stipulated that the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act and that, at all times relevant to this proceeding, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). [Tr. 11-12 (Stipulations No. 1A-1F), 173]. *See Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). The parties also stipulated to other factual and legal matters (primarily document authentication), which were entered into the record. [Tr. 11-12 (Stipulations No. 1G-2G)].

### **Factual Background**

The Wild Horse Pass Casino hotel/convention center construction project involved numerous contractors. (Tr. 128; Exs. C-2, C-3). As stated earlier, Respondent was responsible for the installation of electrical systems. (Tr. 41, 55). During her walkaround of the construction site, CSHO Downs contacted Respondent's Foreman Dudic and asked about an area where trenches and open holes had been filled with cement over electrical conduit. (Tr. 55-56; Ex. C-5). Respondent did not actually pour the cement; that was performed by a separate contractor, whom Respondent did not control or direct. (Tr. 134). Although CSHO Downs did not observe any cement being poured during her onsite inspection, she learned that Foreman Dudic closely watched

the cement being poured over the conduit to make sure that it was not damaged or disturbed as a result. (Tr. 134, 136-137, 141). She testified originally that her “impression” from their conversation was that Foreman Dudic stood “directly adjacent” to the trench, as close as three feet to the wet cement as it was being poured over the conduit. (Tr. 57, 136, 141, 144, 161; Ex. C-10, p. 2). Her conversation with Foreman Dudic lasted less than 5 minutes. (Tr. 138). However, CSHO Downs never asked Foreman Dudic specifically where he stood in relation to the cement pours; how far away from the cement he was; nor did she take any measurements of the trenches, or speak with anyone from the cement contractor. (Tr. 134, 139, 146, 148-149, 164). She did learn that Foreman Dudic and his crew wore safety glasses at all times during “pour watch” duties. (Tr. 117, 145, 159-160).

Despite not asking for, or obtaining, specific information on Foreman Dudic’s distance from the cement while it was being poured, CSHO Downs concluded that he was close enough that an adequate eyewash station needed to be located in the area in case of cement splashing into his eye(s). (Tr. 113-114). Therefore, CSHO Downs asked Respondent, and the general contractor in charge of Respondent, to show her what type of eyewash equipment was nearby. (Tr. 58-59, 114).

Respondent quickly produced a 6-ounce bottle of saline, which CSHO Downs indicated was not sufficient. (Tr. 59). Next, Respondent and the general contractor located two larger bottles of saline solution in a locked trailer, which CSHO Downs indicated was still not sufficient. (Tr. 82, 85, 87, 102, 105, 108). A reference was also later made to an actual eyewash station inside the casino, which was never located, a green water hose in the actual trench area (depicted in investigative photographs), and a nearby red-water-hose-supplied drinking station. (Tr. 59, 82, 89, 153-154, 170-171; Ex. C-4).

When asked how many feet an employee needs to be from wet cement being poured to present a hazard necessitating an eyewash station, CSHO Downs responded: “I don’t know honestly. I’m sorry.” (Tr. 169). She also testified that she was not aware of OSHA or ANSI promulgating any such threshold distance. (Tr. 152-153,167-168). She gave her personal opinion on a safe distance: “For me personally, 10 feet...I don’t know OSHA’s official standpoint.” (Tr. 167-170).

Foreman Dudic testified that he did have a conversation with CSHO Downs about watching cement pours over electrical conduit in trenches the day before her inspection, but denies ever saying anything about standing right next to the pour. (Tr. 192). He never stated any kind of distance, nor did she ask for one. (Tr. 215). Foreman Dudic testified that there was no need to stand right next to the cement as its being poured. (Tr. 195-196). He, and other members of his crew, typically stand about 20-30 feet away so they can make sure that the cement pour does not move or otherwise damage their installed conduit. (Tr. 197-198, 201; Ex. C-5). The activity can be “easily seen” from that distance. (Tr. 207). Neither he, nor any of his crew, was ever closer than 20 feet from the cement being poured over the conduit. (Tr. 201).

### **Discussion**

#### **Citation 1, Item 1**

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

29 CFR §1926.50(g): When employees were exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body were not provided within the work area for immediate emergency use:

a) CONVENTION CENTER: Employees onsite worked with corrosive materials including Portland cement and there was no emergency eyewash, capable of flushing the eyes for 15 minutes, available onsite.

*Citation and Notification of Penalty* at 6. An initial reference to “PVC cement” in the *Citation* was withdrawn by agreement at trial. (Tr. 30-31).

The cited standard states:

*Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.*

*29 CFR §1926.50(g).*

To establish a violation of an OSHA standard, Complainant must prove, by a preponderance of the evidence, that: (1) the cited standard applied to the facts; (2) the employer failed to comply with the terms of the cited standard; (3) employees were exposed or had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violative condition (*i.e.*, the employer knew, or with the exercise of reasonable diligence could have known). *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994).

Based upon this record, the Court finds that Complainant failed to establish the application of the cited standard; a violation of the cited standard; or employee exposure to a violative condition. The record clearly establishes that the CSHO did not specifically determine the distance Foreman Dudic stood from the trench as the contractor poured cement over the conduit. She did not observe any concrete being poured. She never asked him for the specific distance he stood in relation to the concrete pour. He never gave her a specific distance. She acknowledged during her trial testimony that she simply inferred from their conversation that he was too close – speculating that Foreman Dudic came within 3 feet of the wet cement. The Court credits Foreman Dudic’s specific, uncontroverted testimony that he and his crew watched cement pours from 20-30 feet away, as opposed to the CSHO’s inference/impression. The only reasonably reliable evidence introduced into the record established that Foreman Dudic was never closer than 20 feet from the cement as it was being poured over the conduit – all while wearing safety glasses. Even CSHO Downs acknowledged that such a distance was not sufficient, under OSHA’s, ANSI’s, or her personal distance threshold, to constitute a hazard necessitating an eyewash station/equipment.

Therefore, the cited standard did not apply because there is insufficient evidence that *the eyes or body of any person may be exposed to injurious corrosive materials* as required by the regulation. Similarly, and based on the same facts, there was no violation of the cited standard. And lastly, there was insufficient evidence to conclude that Foreman Dudic, even if the standard applied and was violated, was ever close enough to the wet cement while it was being poured to constitute employee exposure to a violative condition. *See P.J. Spillane Company*, 24 BNA OSHC 1253 (No. 11-0380, 2012); *See also Kiewit Power Constructors, Co.*, 2018 WL 4861361, *reversed by Kiewit Power Constructors v. Secretary of Labor*, 959 F.3d 381 (D.C. Cir. 2020).

**Order**

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is VACATED.

Date: March 28, 2022  
Denver, Colorado

/s/  
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**Judge Brian A. Duncan**  
U.S. Occupational Safety and Health Review Commission