UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR Complainant, v. SHELLY AND SANDS, INC., Respondent.	OSHRC DOCKET NO. 92-1699

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 July 19, 1993. The decision of the Judge will become a final order of the Commission on August 18, 1993 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 9, 1993 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
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: July 19, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-1699

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,	
Complainant,	
v.	Docket No. 92-1699
SHELLY AND SANDS, INC.,	
Respondent.	

Appearances:

Sandra B. Kramer, Esquire
Office of the Solicitor
U.S. Department of Labor
For Complainant

Roger L. Sabo, Esquire
Shottenstein, Zox & Dunn
Columbus, Ohio
For Respondent

Before: Administrative Law Judge Michael H. Schoenfeld

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

In January of 1992 a compliance officer of the Occupational Safety and Health Administration conducted an investigation regarding a fatality which had occurred on a worksite of Shelly and Sands, Inc., ("Respondent") in October of 1991. As a result of this investigation, two citations, one (Citation No. 1) alleging two serious violations (Items 1 and 2) and one (Citation No. 2) alleging one other than serious violation were issued to

Respondent. Penalties of $5,000 for each of the three alleged violations were proposed by the Secretary. Respondent timely contested the citations.

Following the filing of a complaint and answer and pursuant to a notice of hearing, the case came on to be heard on March 16, 1992, in Columbus, Ohio. No affected employees sought to assert party status. Both parties have filed post-hearing briefs.

Jurisdiction

Complainant alleges and Respondent does not deny that it is an employer engaged in general contracting specializing in asphalt paving and repaving (Complaint ¶ II, Answer ¶ 3). It is undisputed that at the time of the alleged violations Respondent was engaged in repaving a section of a county road near Senecaville, Ohio. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent in an employer within the meaning of § 3(5) of the Act.[1] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

At the hearing the parties entered into a settlement effectively resolving Citation No. 1, Item 2 and Citation No. 2, Item 1.[2] The sole remaining item in contest is Citation No. 1, Item 1, alleging a failure to comply with the Construction Safety Standard at 29 C.F.R. § 1926.20(b)(1) which provides;

§ 1926.20 General safety and health provisions.

* * *

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[1] Title 29 U.S.C. § 652(5).

[2] The Secretary vacated Citation No. 1, Item 2. Respondent withdrew its notice of contest as to Citation No. 2, Item 1 upon the Secretary's reduction of the penalty proposed to $500 (Tr. 5).

> (b) *Accident prevention responsibility.* (1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.[3]

The basic facts are undisputed. On the day of the fatal accident Respondent was repaving a county road. While operating a finish roller, Ms. Erhlenbach, contrary to accepted safe practices, drove her roller into a deep area of asphalt which had not yet sufficiently cooled even though the area had been identified as a deep area by other members of the crew. As the roller slid over the edge of the berm, Ms. Erhlenbach either jumped or was thrown into an adjacent ditch. She died from injuries received due to the roller landing on her.

The Secretary's only witness, the compliance officer, testified that he issued the citation based upon the belief that Respondent should have had a "site specific" safety program. He explained that Respondent

> ...needed a site specific accident prevention program where it would address the hazards that they would encounter at that particular job site.
>
> Q. And what specifically should, in your view, Respondent have done in relation to this job site ?

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[3] The citation described the alleged violation as follows;

> a. Shelly and Sands, Inc., during asphalt paving on County Road 74, North of Senecaville, Ohio. Prior to assigning roller duties to employee roller compactor operators, the employer did not establish an adequate site specific accident prevention plan that covered safe job operating procedures, hazard identification, or appropriate compactor equipment for operating personnel when working on sloped roads without berms that are immediately adjacent to roadside ditches or holes. Because of the lack of this site specific accident prevention plan covering safe job operating procedures, hazard identification before assigning employees roller duties, employee operators were subjected to critical hazards of sliding, tipping, and rolling over at slopped roads that was without berm and immediately adjacent to roadside ditches.

> A. Well, first of all, there should have been an inspection of the area before the employees were allowed to conduct the work that they were to do to make a determination as to what hazards existed at that job site.

(Tr. 19). He identified the "specific hazards" at this job site as

> ...the fact that the edge of the road or the berm was adjacent to a ditch. And there was possibilities of the equipment going over the edge of the ditch causing an accident, which it did.

(Tr. 20).

Several witnesses provided background as to the nature of Ms. Erhlenbach's training and experience. A full time employee of Respondent since 1989, she completed her union apprenticeship in 1985. Her apprenticeship program ran over a period of four years (six thousand hours of training.) Various safety training, including roller operations was included. When she was first assigned to one of Respondent's crews she received finish roller operating training under an operator with over 25 years of experience. She was specifically trained in the conditions of working alongside berms (Tr. 87-90). She was familiar with the procedures to be used when rolling such "deep spots," having encountered them numerous times previously (Tr. 131). There is some indication in the record that at times she operated the roller in a standing position which other operators felt was less safe than operating from a seated position. Respondent had no policy or rule regarding operating the roller from a standing position. The compliance officer identified Complainant's exhibits 1 and 2 as written safety materials given to him by Respondent during the investigation.

The Secretary argues (Brief, p. 5) that Respondent violated the standard in that "[r]ules were not developed or enforced for the safe operation of the tandem rollers." Noting that the deceased failed to wait for the first run of asphalt to cool completely before starting her run, the Secretary notes that "[n]o specific rules were established on this procedure." The Secretary also argues that Respondent failed "to have in place methods of discovering whether violations occur and enforcement of the rules if violations are discovered." The Secretary summarized that "because Respondent's employees were experienced and highly trained by the Operating Engineers, they were left on their own to

safely operate their equipment, with no specific rules or enforcement."[4]

Respondent argues that its only obligation under the cited standard is to "demonstrate how it will comply with Part 1926." Respondent reasons that since Part 1926 does not deal with roller operations and no violation of any other specific standard in Part 1926 has been alleged or even suggested, it cannot be found in violation of 1926.20(b)(1). Respondent further argues that its safety program was not inadequate. Respondent claims that an adequate safety program need not cover every potential hazard in writing. It is sufficient, it argues, that the employees had been trained how to deal with the very condition which arose in this case. The deceased had received specific training in those conditions and had successfully encountered them numerous times before. It accurately points out that the compliance officer was totally mistaken in his belief as to the extent of the training and job experience the deceased had. He also incorrectly assumed that the work site had not been inspected by a supervisor before work began. Respondent also notes that included in its regular safety activities are weekly tool box meetings, annual safety meetings for foremen and the presentation of safety awards to employees and foremen.[5]

The Commission has held that the cited standard is not impermissibly vague and that it requires employers to have a safety program "incorporating all duties of which the Company was aware and covering all of the Company's employees." *R. & R. Builders, Inc.*, 15 BNA OSHC 1383, 1388 (No. 88-282, 1991) (citations omitted) ("*R. & R.*"). See also, *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2206 (No.87-2059, 1993). For the standard to survive a vagueness attack, the Commission held that the standard required that an employer have in place an adequate safety program for protecting employees from 1) hazards covered by other standards in Part 1926 and 2) from hazards, the existence of which and the means of abating, were both known to the employer. In *R. & R.*, in determining whether there was

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[4] Complainant apparently abandoned the compliance officer's theory that no adequate inspection of the work area to determine possible hazards existing at the job site was made before work commenced. This allegation, contained in Citation No. 1, Item 2, was withdrawn. See, footnote 2, supra.

[5] Respondent correctly acknowledged that it would be unsuccessful in maintaining that the cited standard is unenforceably vague (Resp. Brief, n. 3. at p. 6).

a violation, the Commission reviewed the evidence as to whether the respondent taught its employees what situations were hazardous and what to do about them, whether disciplinary action was available against employees who failed to comply with safety rules and whether regular safety meetings were held.

In the context of whether there was a demonstrated failure to comply with this standard it should be noted that it is the Secretary's burden of proof to show by a preponderance of the evidence that the safety program was inadequate.[6] The Secretary points to no requirement that a safety program's adequacy is to be tested solely by what written materials it has. Yet, the compliance officer would seem to require that every single possible operating instruction be contained in a written document.

The evidence shows that the hazards encountered at this particular work site (such as paving on inclines, and operating rollers on roads with narrow berms, near ditches and in areas of possible deeper asphalt) were virtually the same as on numerous other county roads which Respondent (and in particular this crew and the deceased herself) had previously worked. There is also unrefuted evidence that the deceased had received training in these particular hazards. It is reasonable for an employer to rely on the training an employee received as part of an extensive apprenticeship program and the training an employee received on the job under the supervision of highly experienced personnel. Given the fact that the hazards encountered were not unique to the particular work site, that the foreman had reviewed the site to check for possible hazards prior to the work commencing and the fact that the deceased had received training both from her union and from her employer in the recognition of those hazards and their avoidance, I cannot find that Respondent violated the cited standard.

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[6] In general, to prove a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) non-compliance with the terms of the standard, (3) employee exposure or access to the hazard created by the non-compliance, and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the condition. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand* 13 BNA OSHC 2147 (1989).

Complainant's perceived inadequacies in Respondent's safety program do not withstand scrutiny. The use of written materials prepared by someone other than the particular employer, in this case the safety committee of the Ohio Contractor's Association (Exhibit C-1), does not, by itself, mean that the materials are inadequate. Respondent had a short booklet (Exhibit C-2) containing basic safety rules which is required to be read and signed not only by new employees as they begin employment, but also had to be signed annually by all employees. Despite the compliance officer's repeated claim that Respondent had no "site specific" accident prevention program he could point to no hazards at the site as to which employees had received no warning or training. Under these circumstances, the citation is vacated.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was not in violation of the standard at 29 C.F.R. § 1926.20(b)(1) as alleged in Citation No. 1, Item 1.

ORDER

Item 1 of Citation No. 1 issued to Respondent on April 28, 1992, is VACATED.

MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: JUL 16 1993
Washington, D.C.