United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Joel Patterson Air Conditioning Recycling,

Respondent.

OSHRC Docket No. **02-0051**

EZ

Appearances:

Ann G. Paschall, Esq., Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia
For Complainant

Mr. Joel C. Patterson, Owner, Joel Patterson Air Conditioning Recycling, Fort Myers, Florida,
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Joel Patterson Air Conditioning Recycling (JPACR) purchases and breaks down used air conditioners in order to recover and sell the tin, copper, aluminum, and brass to scrap yards. JPACR operates out of a warehouse in Fort Myers, Florida (Tr. 14). On December 14, 2001, the Secretary issued two citations to JPACR following a complaint and an inspection initiated by Occupational Safety and Health Administration (OSHA) compliance officer (CO) David Wood on August 24, 2001.

Citation No. 1 contains thirteen items and subitems alleging the following serious violations:

Item	Standard (29 C.F.R.)	Alleged Violation
1	§ 1910.22(b)(1)	Failure to keep aisles or passageways clear where mechanical handling equipment was used
2	§ 1910.28(a)(1)	Failure to furnish ladders or scaffolds for employees engaged in work that could not be done safely from the ground
3	§ 1910.37(f)(1)	Failure to locate exits so they were readily accessible at all times

Item	Standard (29 C.F.R.)	Alleged Violation
4	§ 1910.133(a)	Failure to ensure employees used appropriate eye or face protection
5a	§ 1910.178(l)(1)(i)	Failure to ensure each powered industrial truck operator was competent to operate a powered industrial truck safely
5b	§ 1910.178(l)(6)	Failure to certify that each powered industrial truck operator had been trained and evaluated as required
6	§ 1910.178(q)(1)	Failure to remove from service power-operated industrial truck in need of repair
7	§ 1910.215(a)(4)	Failure to equip grinding machinery with work rests to support offhand grinding work
8	§ 1910.242(a)	Failure to keep hand and powered tools in safe condition
9	§ 1910.253(b)(2)(ii)	Failure to secure stored oxygen cylinders
10a	§ 1910.1200(e)(1)	Failure to develop and implement a written hazard communication program
10b	§ 1910.1200(g)(1)	Failure to have a material safety data sheet (MSDS) for each hazardous chemical used by employees
10c	§ 1910.1200(h)	Failure to train employees on hazardous chemicals

The Secretary proposed a penalty of $600.00 for each item in Citation No. 1.

Citation No. 2 contains nine items alleging the following other-than-serious violations:

Item	Standard (29 C.F.R.)	Alleged Violation
1	§ 1910.95(d)(1)	Failure to develop and implement a representative monitoring program for noise levels.
2	§ 1910.141(c)(1)(iii)	Failure to ensure that the sewage disposal method did not endanger the health of employees
3	§ 1910.141(c)(2)(i)	Failure to ensure each toilet occupied a separate compartment with a door and walls or partitions between fixtures

Item	Standard (29 C.F.R.)	Alleged Violation
4	§ 1910.141(d)(2)(ii)[1]	Failure to provide hot and cold or tepid running water in lavatory
5	§ 1910.141(d)(2)(iv)[2]	Failure to provide individual hand towels, warm air blowers, or continuous cloth toweling in lavatory
6	§ 1910.141(d)(1)	Failure to maintain washing facilities in a sanitary condition
7	§ 1910.157(e)(3)	Failure to annually inspect portable fire extinguishers
8	§ 1910.157(g)(1)	Failure to provide an educational program for all employees
9	§ 1910.252(a)(1)(i)	Failure to take all movable fire hazards in vicinity of welding to a safe place

The Secretary proposed no penalties for the items in Citation No. 2.

This case was designated as an E-Z proceeding pursuant to Commission Rule 200, *et. seq.* A hearing was held in this matter on April 19, 2002, in Fort Myers, Florida. JPACR was represented *pro se* by its owner Joel C. Patterson. The parties stipulated jurisdiction and coverage. They filed post-hearing written statements of their positions.

JPACR's main argument is that it has no employees, and thus is not an employer as defined by the Occupational Safety and Health Act of 1970 (Act). JPACR claims that the workers who cut up the air conditioners at its warehouse were subcontractors. With regard to Citation No. 1, item 7, JPACR contends that, if the workers are determined to be its employees, any alleged violation of § 1910.215(a)(4) was the result of unpreventable employee misconduct.

For the reasons discussed below, it is determined that the workers present in JPACR's warehouse were employees of JPACR within the meaning of the Act. Based upon the record, item 1 of Citation No. 1 is vacated, and the remaining items are affirmed.

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[1] The alleged violation is amended *sua sponte* from § 1910.141(c)(2)(ii), which does not exist, to reflect the violation alleged. This appears to be a typographical error which does not prejudice JPACR.

[2] The alleged violation is amended *sua sponte* from § 1910.141(c)(2)(iv), which does not exist, to reflect the violation alleged. This appears to be a typographical error which does not prejudice JPACR.

Background

JPACR is a sole proprietorship owned by Joel C. Patterson, who has operated the business for approximately 13 years. JPACR purchases used commercial and residential air conditioners from approximately 300 customers. Patterson spends most of the work day picking up used air conditioners and delivering them to a warehouse on Idlewild Street in Fort Myers, Florida.

At the time of the OSHA inspection, approximately five men worked at JPACR's warehouse breaking down the used air conditioners. Each of the workers signed a "Sub Contractor Agreement" which provides (Exh. C-1; emphasis in original):

> I, ______________________, SS# ____-____-_______ DoB _________; hereby acknowledge by signing this form that I have been hired as a sub-contractor laborer by Joel C. Patterson A/C Recycling. I am aware that I am responsible for providing myself with workman's comp. I am aware that I am responsible for keeping tract (sic) of all my wages and the filing of them as required by law. I understand the (sic) Joel C. Patterson A/C Recycling is allowing me full use of his shop and tools in order for me to provide my services. In the event I should drive any of his vehicles, I will provide a Valid Drivers License. I do not hold Joel C. Patterson A/C Recycling responsible for any losses I might acquire during my business dealings with him.
>
> _________________________
>
> Signature of sub contractor

Patterson paid the workers' wages at the end of each day in cash. Patterson guaranteed each worker a minimum of $75.00 per day. Workers received from 6% to 10% of the daily proceeds, depending upon the worker (Tr. 17-20, 22, 35-37).

The workers perform all of the cutting and torching operations inside JPACR's 6,000 square foot warehouse or in a small open yard behind the warehouse (Tr. 28, 144). JPACR owns two forklifts and one bobcat used by workers to move the air conditioners and equipment around the warehouse. The torches, air chisels, and sawzalls used by the workers were either owned by the workers, left behind by previous workers, or purchased by Patterson. JPACR makes available, at no cost to the workers, gloves, eye protection, and hearing protection (Tr. 22-23).

Up until approximately 3 weeks prior to the April 19, 2002, hearing in this matter, Daniel Myers worked at JPACR's warehouse. Myers was responsible for "80% of the selling and almost 100% of the managing as far as the other subcontractors were concerned" (Tr. 139). Myers oversaw

the supplies and "what the needs were of the subcontractors." After a disagreement with Patterson, Myers "resigned" (Tr. 31).

JPACR is regulated by the Federal, state, and county Environmental Protection Agencies (EPA) because of the freon present in the air conditioning units (Tr. 32). OSHA CO David Wood received a referral from an EPA criminal investigator regarding possible OSHA violations at the warehouse. Wood arrived at JPACR's warehouse on August 24, 2001, and began an inspection (Tr. 51). As a result of Wood's inspection, the Secretary issued the citations that gave rise to the present case.

Was JPACR an Employer under the Act?

Joel Patterson testified that JPACR has never employed a single employee, and thus is not an employer under § 3(6) of the Act. Patterson explained why he does not consider the workers at the warehouse to be JPACR's employees (Tr. 134):

> Because I take nothing out of their money. I take no percentage of their money, I provide no coverage for their insurance, I provide only a limited amount of material for them to use like oxygen and acetylene.
>
> The building I provide is for the material that I deliver. It's not particularly for the subcontractors. And I'm paying for the rent on that building, that's true, but that doesn't mean that I'm an employer.

Only an employer may be cited for a violation of the Act, although a minimum of one employee is sufficient to invoke coverage under the Act. To be held responsible under the Act, the alleged employer must exercise control over the workers, which includes economic factors as well as the means and methods by which work is performed. *Vergona Crane Co.*, 15 BNA OSHC 1782 (No. 88-1745, 1992).

The Review Commission uses an "economic realities test" in determining whether an employment relationship exists. Among the factors considered relevant are:

1. Who do the workers consider their employer?

2. Who pays the workers' wages?

3. Who has the responsibility to control the workers?

4. Does the alleged employer have the power to control the workers?

5. Does the alleged employer have the power to fire, hire, or modify the employment condition of the workers?

6. Does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight?

7. How are the workers' wages established?

Loomis Cabinet Co., 15 BNA OSHA 1635, 1637 (No. 88-2012, 1992) *aff'd.* 20 F.3d 938 (9th Cir. 1994). This test emphasizes the substance over the form of the employment relationship. The central inquiry "is the question of whether the alleged employer controls the workplace." *Id*. at p. 1638.

1. Who do the workers consider their employer?

Workers Dan Myers and Julio Lopez both told Wood that they believed JPACR was their employer (Tr. 52)[3]. Although all of the workers were required to sign the "Sub Contractor Agreement" before working in the warehouse, Patterson admitted that most of the workers could not read or speak English, and Patterson does not read or speak Spanish, their native language (Tr. 151). There is no evidence that the workers were in business for themselves or performed similar work for other employers.

2. Who pays the workers' wages?

Patterson paid the workers' wages every day in cash (Tr. 17).

3. Who has the responsibility to control the workers? and
4. Does the alleged employer have the power to control the workers?

For the most part, Patterson was not at the warehouse during the workday. When Myers was working at the warehouse, Patterson stated, he "kind of tried to supervise them, but he has the same problem I do. He doesn't speak Spanish and they don't speak English" (Tr. 140).

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[3] Statements by employees made during the course of their employment are not hearsay, and are given weight pursuant to Rule 801(d)(2), Federal Rules of Evidence.

5. Does the alleged employer have the power to fire, hire, or modify the employment condition of the workers?

Patterson testified that new workers were usually friends or relatives recommended by the workers who were already at JPACR. Patterson stated, "I try and find out what their qualifications are. If they haven't been cutting, and they are put on as a subcontractor to cut, then I won't have anything to do with them" (Tr. 20). As for firing a worker, Patterson testified, "I can terminate his agreement if the other subcontractors ask me to," and added that he could terminate a worker if he discharged freon into the atmosphere or was discovered doing drugs on the job (Tr. 20, 139). JPACR, through Patterson, has the power to hire and fire the workers.

6. Does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight?

The sole criterion for a worker's ability to increase his income is productivity. Patterson stated that JPACR has "a policy that if they [the workers] are not producing three or four times what they're getting in percentage, there's really no reason to have them there because it pulls the whole team down, and that's really what it is; it's a team" (Tr. 140). The workers can only make more money by processing the scrap metal more quickly (Tr. 45). The work performed for JPACR was not shown to require unique skills.

7. How are the workers' wages established?

Patterson established the $75.00 daily minimum, and he sets the percentage to be paid to each worker (Tr. 17-19).

In addition to the above-mentioned factors, the record also establishes that JPACR, through Patterson, contacts customers, schedules and performs pickups of air conditioning units, sells the recovered scrap metal, and performs the accounting and administrative services (Tr. 17, 27-28). JPACR owns most of the equipment used at the warehouse (Tr. 22-23). The workers do not risk loss of income for a slow day; they are guaranteed a daily minimum of $75.00. The workers provide only their physical labor, using skills they learned on the job (Tr. 41). The workers are dependent on JPACR to supply the used air conditioners to break down.

Based upon the record, it is determined that the workers at JPACR's warehouse at the time of the OSHA inspection were JPACR's employees. JPACR not only controlled the manner and

means of accomplishing the work, but it also controlled the workers. JPACR hired and fired workers, set their pay and controlled their hours by opening and closing the warehouse. *See Don Davis*, 19 BNA OSHC 1477, 1481-1482 (No. 96-1378, 2001). JPACR's argument that the workers are subcontractors for whom JPACR has no responsibility under the Act is rejected.

Citation No. 1

The Secretary has the burden of proving her case by a preponderance of the evidence.

> 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., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The main focus of JPACR's case at the hearing was the issue of its employment relationship with the workers. Patterson devoted minimal time or effort to addressing the merits of the alleged violations. Nevertheless, JPACR contests all of the alleged violations.

Item 1: Alleged Serious Violation of § 1910.22(b)(1)

The Secretary alleged that JPACR committed a serious violation of § 1910.22(b)(1), which provides:

> Where mechanical handling equipment is used, sufficient safe clearances shall be allowed for aisles, at loading docks, through doorways and wherever turns or passage must be made. Aisles and passageways shall be kept clear and in good repairs, with no obstruction across or in aisles that could create a hazard.

The citation alleges that the aisles and passageways, both inside and outside the facility, were cluttered by air conditioning units.

The Secretary adduced copies of eight photographs taken by Wood during his inspection (Exhs. C-2 through C-9; Tr. 56). Wood described what he observed (Tr. 57): "There's cutting cables, there's metal all over the floors, equipment, lawn mowers; just all kinds of scrap metal. There [weren't] too many areas that could be safely walked in without having a falling or tripping problem." Exhibits C-2 through C-9 show that areas of the warehouse are extensively cluttered.

At the hearing, Wood characterized the clutter as "a falling or tripping problem." In her post-hearing brief, the Secretary also refers to the clutter as a tripping problem. However, the standard addresses hazards created by cluttered aisles and passageways "[w]here mechanical handling equipment is used." The standard does not seek to prevent tripping hazards; it addresses hazards created when mechanical handling equipment, such as JPACR's forklifts or bobcat, is operated in obstructed aisles and passageways. The Secretary presented no evidence that the employees operated the forklifts or bobcat in the areas shown in Exhibits C-2 through C-9. No violation is found.

Item 1 is vacated.

Item 2: Alleged Serious Violation of § 1910.28(a)(1)

Section 1910.28(a)(1) provides:

> Scaffolds shall be furnished and erected in accordance with this standard for persons engaged in work that cannot be done safely from the ground or from solid construction, except that ladders used for such work shall conform to § 1910.25 and § 1910.26.

The citation alleges that employees working on top of an air conditioning unit using cutting torches to dismantle the unit were exposed to fall hazards.

Wood observed three employees standing on an air conditioning unit as they cut it. He measured the fall distance from the top of the unit to the ground and found it to be 52 inches. The employees did not use ladders and there was no scaffolding around the unit (Exhs. C-10 through C-13; Tr. 61-63, 117-118). Ladders were available for use on the site (Tr. 62).

The danger of falling was exacerbated by the fact that the employees working on top of the air conditioning unit were using torches to actually break down the unit. The ground around the unit was littered with debris and jagged pieces of metal. Wood testified that a fall could result in "[n]asty cuts and broken bones" (Tr. 61, 63).

The Secretary has established a serious violation of § 1910.28(a)(1).

Item 3: Alleged Serious Violation of § 1910.37(f)(1)

Section 1910.37(f)(1) provides:

> Exits shall be so located and exit access shall be so arranged that exits are readily accessible at all times. Where exits are not immediately accessible from an open floor area, safe and continuous passageways, aisles, or corridors leading directly to every exit and so arranged as to provide convenient access for each occupant to at least two

exits by separate ways of travel, except as a single exit or limited dead ends are permitted by other provisions of this subpart, shall be maintained.

The citation alleges that an exit was found to be blocked by a gas cylinder and a ladder.

Wood observed a standard door located on the south side of the production area marked "Exit." A larger "Exit" sign was located above the door. The door was blocked by a gas cylinder and a ladder (Exhs. C-14, C-15, C-17; Tr. 65). Exhibit C-17 shows that a few feet away from the door in question, there was an open bay door. Upon cross-examination Wood stated that JPACR's warehouse had three bay doors that were open every time he visited the site (Tr. 102). Patterson illustrated his defense by asking Wood, "If you were in a building that caught fire or had an explosion, would you run out through an open door 14 feet high and 8 feet wide, or would you go through a closed exit door?" (Tr. 102).

The standard does not make exceptions allowing marked exits to be blocked if other exits are available. There was no evidence that the bay doors were always open during work hours. Presumably the bay doors were closed at night. An emergency situation could arise at the beginning or ending of the work day when employees were still present, before the bay doors were opened or after they were closed. Wood also testified that the bay doors were often blocked by materials (Tr. 66). A blocked exit could delay or prevent an employee from leaving the building in the event of an emergency.

The Secretary has established a serious violation of § 1910.37(f)(1).

Item 4: Alleged Serious Violation of § 1910.133(a)

Section 1910.133(a) provides:

> The employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation.

The citation alleges that employees were wearing sunglasses while cutting aluminum and copper metal with a torch, and while grinding metal.

Wood observed and photographed employees using torches while wearing sunglasses for eye protection (Exhs. C-18, C-19, C-20; Tr. 67). Wood examined the sunglasses and determined they did not meet the requirements set out in § 1910.133(a)(5). That section lists the minimum protective

shade for "Filter Lenses for Protection Against Radiant Energy" to be used during oxygen cutting as 3 to 5, depending upon the plate thickness (Tr. 69, 120).

Patterson testified that he provides protective goggles for the workers "and they will not use them" (Tr. 141). Patterson conceded that he was aware that the workers did not like to wear the safety goggles JPACR provided because "the next day you see them lying on the bench, and they've got their regular sunglasses on again" (Tr. 142).

The cited standard requires that the employer "ensure that each affected employee uses appropriate eye or face protection." The employer's duty does not end once it provides the eye protection. Without appropriate eye protection, the employees were exposed to radiation injuries to their eyes (Tr. 67).

The Secretary has established a serious violation of § 1910.133(a)(1).

Items 5a & 5b: Alleged Serious Violations of §§ 1910.178(l)(1)(i) & (1)(6)

The Secretary alleged that JPACR committed serious violations of § 1910.178(l)(1)(i) and § 1910.178(l)(6), which provide:

Section 1910.178(l)(1)(i) provides:

> The employer shall ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (l).

Section 1910.178(l)(6) provides:

> The employer shall certify that each operator has been trained and evaluated as required by this paragraph (l). The certification shall include the name of the operator, the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation.

JPACR had two forklifts and one bobcat at its warehouse that were operated by the employees. Wood established through employee interviews that JPACR had provided no training on the safe operation of powered industrial trucks. JPACR provided no written certification of the safety training and evaluation required by the standard (Tr. 69-72). JPACR does not dispute Wood's testimony.

Wood stated that untrained employees risked death or serious physical harm to themselves and others (Tr. 71).

Serious violations of § 1910.178(l)(1)(i) and § 1910.178(l)(6) are established.

Item 6: Alleged Serious Violation of § 1910.178(q)(1)

Section 1910.178(q)(1) provides:

> Any power-operated industrial truck not in safe operating condition shall be removed from service. All repairs shall be made by authorized personnel.

The citation alleges that neither of the forklifts had operational horns, and that one of the forklifts had dangling ignition wires.

On August 24, 2001, the first day of Wood's inspection, Wood asked Myers to sound the horns on each of the two forklifts. The horns were not operational (Tr. 73-74). Wood also photographed ignition wires dangling from the Allis Chalmers forklift (Exhs. C-21, C-22; Tr. 74-75).

Patterson concedes that the ignition switch on the Allis Chalmers forklift was faulty, but he argues that the Secretary failed to prove that the forklifts' horns were not operational. Myers is apparently disabled in some unspecified way, and Patterson speculated that he did not have the strength to press down hard enough to operate the horns (Tr. 148-149). Patterson stated at the hearing that sometime in December 2001, after he received the citations, he called Seiko. Seiko is a forklift service and repair company. Rob Mead of Seiko came out and determined that the horn of the Komatsu forklift was operational. Patterson testified that Mead "charged $45.00 for the service call to show me that the horn worked" (Tr. 148). When asked if Mead determined whether the horn on the Allis Chalmers forklift worked, Patterson stated, "the other forklift has been down and is still down. It had some other problems, and we took it out of service. I have no idea whether it works or not. But the switch was faulty, and it was repaired" (Tr. 148-149).

Weighing Patterson's testimony regarding the horn on the Allis Chalmers forklift against that of Wood, it is determined that the Secretary did not establish that it was more likely than not that the horn was not operational the day of Wood's inspection. However, the Secretary has established that the ignition switch on the Allis Chalmers forklift was faulty, and that the horn on the Komatsu forklift was not operational. The dangling ignition wires exposed employees to the hazard of a fire or explosion in the event the wires sparked near a flammable substance (Tr. 75). The faulty horn on the Komatsu forklift exposed employees working within the vicinity of the forklift to the hazard of being crushed if the operator needed to sound a warning for employees to move out of the way.

The Secretary has established a serious violation of § 1910.178(q)(1).

Item 7: Alleged Serious Violation of § 1910.215(a)(4)

The Secretary alleges that JPACR committed a serious violation of § 1910.215(a)(4), which provides:

> On offhand grinding machines, work rests shall be used to support the work. They shall be of rigid construction and designed to be adjustable to compensate for wheel wear. Work rests shall be kept adjusted closely to the wheel with a maximum opening of one-eighth inch to prevent the work from being jammed between the wheel and the rest, which may cause wheel breakage. The work rest shall be securely clamped after each adjustment. The adjustment shall not be made with the wheel in motion.

JPACR had a heavy duty abrasive grinder located in its shop area. It is undisputed that there was no work rest on the grinder (Exh. C-23). A work rest "is a piece of the heavy duty abrasive grinder which allows the person to put their material on to hold it steady so it doesn't sway off, which could possibly cause the wheel to shatter" (Tr. 77). Wood interviewed one employee regarding the grinder, who told him that it was seldom used (Tr. 124-125).

Patterson testified that the grinder was "a piece of junk, and somebody was curious enough to plug it in to see if it worked" (Tr. 146). It is JPACR's contention that the grinder was bolted to the wall, so it could not be removed from service, but that no one was supposed to use it.

The test for determining employee exposure is whether it is reasonably predictable that employees would be in the zone of danger created by the noncomplying condition. *Kokosing Construction Co.,* 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996). The abrasive grinder was operational and available for use. JPACR's employees were exposed to the hazardous condition.

JPACR argues that any violation of § 1910.215(a)(4) was the result of unpreventable employee misconduct. This defense is rejected. To prove unpreventable employee misconduct, the employer must show that (1) it has established work rules designed to prevent the violation, (2) it has adequately communicated the rules to its employees, (3) it has taken steps to discover violations, and (4) it has effectively enforced the rules when violations have been discovered. *Nooter Construction Co.*, 16 BNA OSHA 1572, 1578 (No. 91-0237, 1994).

JPACR has failed to establish any one of the four required elements. Patterson speculates that an employee plugged in the grinder out of curiosity to see if it worked. JPACR presented no

evidence that it had a work rule prohibiting employees from plugging in equipment. Furthermore, the standard at issue requires work rests on the grinder. Even if JPACR had a work rule prohibiting employees from plugging in equipment, it would not address the hazard of operating a grinder without a work rest.

The Secretary has established a serious violation of 1910.215(a)(4).

Item 8: Alleged Serious Violation of § 1910.242(a)

Section 1910.242(a) provides:

> General requirements. Each employer shall be responsible for the safe condition of tools and equipment used by employees, including tools and equipment which may be furnished by employees.

The citation alleges that in the outside yard employees were "using a portable powered hand reciprocating saw (Sawzall) having a cord with exposed wiring and very bad splicing on or about 10-11-01." Exhibits C-24, C-25, and C-26 show the exposed wiring and splicing. The employees used the Sawzall to cut the air conditioning units. Wood observed an employee getting ready to use the Sawzall. Wood stopped the employee from using it, because the exposed wiring created the potential hazard of an electrical shock (Tr. 78-79).

The Secretary has established a serious violation of § 1910.242(a).

Item 9: Alleged Serious Violation of § 1910.253(b)(2)(ii)

Section 1910.253(b)(2)(ii) provides:

> Inside of buildings, cylinders shall be stored in a well-protected, well-ventilated, dry location, at least 20 feet (6.1 m) from highly combustible materials such as oil or excelsior. Cylinders should be stored in definitely assigned places away from elevators, stairs, or gangways. Assigned storage spaces shall be located where cylinders will not be knocked over or damaged by passing or falling objects, or subject to tampering by unauthorized persons. Cylinders shall not be kept in unventilated enclosures such as lockers and cupboards.

Exhibits C-27 and C-28 show the same unsecured oxygen cylinder located inside the warehouse. Exhibit C-29 shows another unsecured oxygen cylinder located inside the warehouse. Exhibit C-30 shows three unsecured oxygen cylinders located outside (Tr. 80-81).

Wood testified that the hazard presented by unsecured cylinders is "[i]n the event they are knocked over by personnel or equipment, if this valve ever comes off, because of the pressure inside that, it becomes a missile and it could hit someone" (Tr. 81).

JPACR contends that the cylinders were empty. Wood did not determine whether or not the cylinders were empty (Tr. 126). The standard does not differentiate between full or empty cylinders. An unsecured cylinder violates the cited standard.

Section 1910.253(b)(2)(ii) specifically applies to the "[i]nside of buildings." The Secretary cited JPACR for three unsecured cylinders that were located in the yard, and not inside of a building. No violation is found with regard to those three cylinders. A serious violation is found with regard to the cylinder shown in Exhibits C-27 and C-28, and the cylinder shown in Exhibit C-29.

Items 10a, 10b, and 10c:
Alleged Serious Violations of §§ 1910.1200(e)(1), (g)(1), and (h)

The Secretary alleges that JPACR committed serious violations of three sections of the Hazard Communication Standard. Section 1910.1200(e)(1) provides:

> Employers shall develop, implement, and maintain at each workplace, 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); and,
> (ii) The methods the employer will use to inform employees of the hazards of non-routine tasks (for example, the cleaning of reactor vessels), and the hazards associated with chemicals contained in unlabeled pipes in their work areas.

Section 1910.1200(g)(1) provides:

> Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet in the workplace for each hazardous chemical which they use.

Section 1910.1200(h) provides, in part:

> Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area.

JPACR's employees were exposed to hazardous chemicals, including gasoline, propane, petroleum distillates, and copper and aluminum fumes. It is undisputed that JPACR did not have a written hazard communication program or MSDSs for the hazardous chemicals to which its employees were exposed. It is also undisputed that JPACR provided its employees with no hazardous communication training (Tr. 82-84). Failing to comply with the cited sections of the hazard communication standard exposes employees to all of the hazards caused by overexposure to the hazardous chemicals on site. Without a written program, or MSDSs, or training, employees will not know what safety precautions to take when working with a specific hazardous chemical, or what emergency measures to take in the event of an injury or condition caused by a hazardous chemical.

The Secretary has established serious violations of § 1910.1200(e)(1), (g)(1), and (h).

Citation No. 2

Item 1: Alleged "Other" Violation of § 1910.95(d)(1)

The Secretary alleges that JPACR committed an "other" violation of § 1910.95(d)(1), which provides:

> When information indicates that any employee's exposure may equal or exceed an 8-hour time-weighted average of 85 decibels, the employer shall develop and implement a monitoring program.

Wood observed an employee using an air chisel. Wood took sound level readings with results over 100 decibels. The employee was not wearing hearing protection. It is undisputed that JPACR had neither developed nor implemented a noise monitoring program (Tr. 85-86).

The Secretary has established an "other" violation.

Item 2: Alleged "Other" Violation of § 1910.141(c)(1)(iii)

Section 1910.141(c)(1)(iii) provides:

> The sewage disposal method shall not endanger the health of employees.

Wood inspected the employees' restroom and discovered it to be "just plain filthy" (Tr. 88). Exhibits C-31 and C-32 bear out Wood's assessment. Next to the toilet, Wood noted a large cardboard box filled to the top with used toilet paper (Tr. 86). Patterson explained to Wood that most of the employees are from Guatemala where, apparently, it is not the custom to flush toilet paper due to drainage problems (Tr. 130). This in no way constitutes a defense to this item. An open cardboard container filled to the top with used toilet paper presents an obvious health hazard. A violation of § 1910.141(c)(1)(iii) is established.

Items 3, 4, 5, and 6:
Alleged "Other Violations of §§ 1910.141(c)(2)(i),(d)(2)(ii), (d)(2)(iv), and (d)(1)

Section 1910.141(c)(2)(i) provides:

> Each water closet shall occupy a separate compartment with a door and walls or partitions between fixtures sufficiently high to assure privacy.

Section 1910.141(d)(2)(ii) provides:

> Each lavatory shall be provided with hot and cold running water, or tepid running water.

Section 1910.141(d)(2)(iv) provides:

> Individual hand towels or sections thereof, of cloth or paper, warm air blowers or clean individual sections of continuous cloth toweling, convenient to the lavatories, shall be provided.

Section 1910.141(d)(1) provides:

> Washing facilities shall be maintained in a sanitary condition.

It is undisputed that there was no door to the restroom; that the faucets were not operational and there was no running water in the restroom; that there were no hand towels, air blowers, or any other means for employees to dry their hands in the restroom; and that the restroom was not maintained in a sanitary condition (Exhs. C-31 and C-32, Tr. 87-88). Items 3 through 6 are affirmed.

Item 7: Alleged "Other" Violation of § 1910.157(e)(3)

Section 1910.157(e)(3) provides:

> The employer shall assure that portable fire extinguishers are subjected to an annual maintenance check. Stored pressure extinguishers do not require an internal examination. The employer shall record the annual maintenance date and retain this record for one year after the last entry or the life of the shell, whichever is less. The record shall be available to the Assistant Secretary upon request.

Wood inspected a portable fire extinguisher at the warehouse. Its tag indicated that it had last been checked in October 1999, almost 2 years prior to Wood's inspection (Tr. 89).

A violation of § 1910.157(e)(3) is established.

Item 8: Alleged "Other" Violation of § 1910.157(g)(1)

Section 1910.157(g)(1) provides:

> Where the employer has provided portable fire extinguishers for employee use in the workplace, the employer shall also provide an educational program to familiarize employees with the general principles of fire extinguisher use and the hazards involved with incipient stage fire fighting.

Wood interviewed the employees and learned that they had not received training in the use of fire extinguishers. Small fires occurred frequently at the warehouse due to the use of the torches. Wood observed an employee dousing a fire using a cup of water during his inspection (Exh. C-34; Tr. 90).

Patterson argued that since the employees were able to put out the fires, they did not need to be trained (Tr. 95). The standard, however, requires employees to be trained in "the general principles of fire extinguisher use." It is undisputed that JPACR failed to do this.

Item 8 is affirmed.

Item 9: Alleged "Other" Violation of § 1910.252(a)(1)(i)

Section 1910.252(a)(1)(i) provides:

> If the object to be welded or cut cannot readily be moved, all movable fire hazards in the vicinity shall be taken to a safe place.

Wood observed another small fire break out in the yard. An employee used a water hose to extinguish the fire (Exh. C-33). The fire resulted when sparks from a torch ignited combustible material that JPACR failed to remove from the vicinity (Tr. 91-92).

Item 9 is affirmed.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

JPACR employed approximately five employees at the time of the OSHA inspection (Tr. 29). The Secretary presented no evidence of prior OSHA inspections. JPACR is not entitled to a consideration for good faith because it failed to have a written safety program, and provided no safety training to its employees. The gravity of the violations was moderate.

Based upon these considerations, it is determined that under Citation No. 1, the appropriate penalty for each item and grouped item (5a and 5b and 10a, 10b, and 10c) is $500.00, with the exception of item 9. Three of the five cylinders which the Secretary cited in item 9 were not covered by the cited standard. A penalty of $100.00 is deemed appropriate for item 9.

No penalty is assessed for any of the items in Citation No. 2.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

It is hereby ORDERED that the items of the two citations be disposed of as follows:

Citation No. 1

Item	Standard (29 C.F.R.)	Disposition	Penalty
1	§ 1910.22(b)(1)	Vacated	-0-
2	§ 1910.28(a)(1)	Affirmed	$500.00
3	§ 1910.37(f)(1)	Affirmed	$500.00
4	§ 1910.133(a)	Affirmed	$500.00
5a	§ 1910.178(l)(1)(i)	Affirmed }	$500.00
5b	§ 1910.178(l)(6)	Affirmed }	
6	§ 1910.178(q)(1)	Affirmed	$500.00
7	§ 1910.215(a)(4)	Affirmed	$500.00

Item	Standard (29 C.F.R.)	Disposition	Penalty
8	§ 1910.242(a)	Affirmed	$500.00
9	§ 1910.253(b)(2)(ii)	Affirmed	$100.00
10a	§ 1910.1200(e)(1)	Affirmed }	
10b	§ 1910.1200(g)(1)	Affirmed }	$500.00
10c	§ 1910.1200(h)	Affirmed }	
	TOTAL PENALTY		**$4,100.00**

Citation No. 2

Item	Standard (29 C.F.R.)	Disposition	Penalty
1	§ 1910.95(d)(1)	Affirmed	-0-
2	§ 1910.141(c)(1)(iii)	Affirmed	-0-
3	§ 1910.141(c)(2)(i)	Affirmed	-0-
4	§ 1910.141(d)(2)(ii)	Affirmed	-0-
5	§ 1910.141(d)(2)(iv)	Affirmed	-0-
6	§ 1910.141(d)(1)	Affirmed	-0-
7	§ 1910.157(e)(3)	Affirmed	-0-
8	§ 1910.157(g)(1)	Affirmed	-0-
9	§ 1910.252(a)(1)(i)	Affirmed	-0-

/s/
KEN S. WELSCH
Judge

Date: May 22, 2002