UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, D.C. 20036-3457

Secretary of Labor,	)	
	)	
Complainant,	)	
	)	
v.	)	OSHRC Docket No. 09-1646
	)	
Burch Construction, Inc.,	)	
	)	
Respondent.	)	
	)	

APPEARANCES:

For the Complainant:

Luis A. Garcia, Esq.
U. S. Department of Labor
Office of the Solicitor
350 South Figueroa Street, Suite 370
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For the Respondent:

Robert P. Stricker, Esq.
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Before: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

Background

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. (2009) (the Act). On August 26, 2009, the Occupational Safety and Health Administration (OSHA) conducted an inspection of a Burch Construction, Inc. (Respondent) work site in San Diego, California. As a result of that inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent alleging one other-than-serious violation of the Act with no

proposed penalty. (Tr. 10-11, 43-44, 52; C-1). Respondent filed a timely *Notice of Contest*.[1] A one-day hearing was conducted on May 19, 2010 at San Diego, California. (Tr. 7). The parties submitted post-trial and reply briefs in support of their respective positions.

Cited Standard

The cited standard provides:

> 29 C.F.R. § 1926.95(a) (2009): Criteria for personal protective equipment. (a) Application. Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

Complainant alleged in Citation 1, Item 1 that:

> 29 C.F.R. § 1926.95(a): Protective equipment including personal protective equipment for eyes, face, head and extremities, was not being used. (a) In the bathroom area, eye protection was not used while applying joint compound overhead.

(C-1, at p. 105).

Stipulations

Prior to trial, the parties agreed upon and submitted the following factual stipulations:

1. OSHA inspection number 313593790 (Inspection) at MCAS Miramar Youth Center Project (Inspection Site) occurred on August 26, 2009 (Inspection Date).

2. The general contractor at the Inspection Site was Soltek Pacific Construction (Soltek).

3. Respondent at the time of the Inspection was a subcontractor of Soltek performing drywall and stucco work at the Inspection Site.

4. The Inspection was conducted by OSHA Inspector Mooney.

5. The worker at the Inspection Site who is the subject of Inspection's Citation 1 Item [1]

[1] *See* admission in *Answer*, at p. 3.

(Citation) is Rodney Pimentel (Pimentel).

6. At the time of the Inspection, Mike Hall was a supervisor for the Respondent.

7. Mike Hall was at the Inspection site at the time of the incident.

(Joint Prehearing Submission, April 23, 2010, at pp. 20-21; Tr. 23-25)(The above stipulations are referred to individually as SF Nos. 1-7).

Jurisdiction

Based on the parties' stipulations and the trial record, I find that Respondent, at all relevant times, was engaged in a business affecting commerce and was an employer within the meaning of Sections 3(3) and 3(5) of the Act.[2] I also find that jurisdiction of this proceeding is conferred upon the Commission by Section 10(c) of the Act. I conclude, therefore, that the Commission has jurisdiction over the parties and subject matter in this case.

Secretary's Burden of Proof

To establish a *prima facie* violation of the Act, the Secretary must prove by a preponderance of the evidence that: (1) the cited standard applied to the condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharma. Prod., Inc.,* 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd,* 683 F.2d 69 (1st Cir. 1982).[3]

Relevant Testimony

Five witnesses testified at trial: Daniel Mooney, OSHA Compliance Safety and Health

[2] *See* admission in *Answer,* at p. 2.

[3] Preponderance of the evidence is defined as "that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by the proponent are more probably true than false." *Ultimate Distrib. Systems, Inc.*, 10 OSHC 1568, 1570 (No. 79-1269, 1982)(internal citations omitted).

Officer (CSHO); Greg Rogers, Respondent's Safety and Health Manager (both during the Secretary's case-in-chief and during rebuttal); Pamela Jean Mark, Soltek's Corporate Safety Manager; Rodney Alexander Pimentel, drywall finisher and framer employed by Respondent; and Michael Keith Hall (Foreman Hall), Respondent's on-site Supervisor. (SF Nos. 4-6; Tr. 21, 49, 89-90, 97, 110, 138-40, 177). Based on their testimony, the parties' stipulations, and the evidentiary exhibits admitted into the record, the court makes the following factual findings.

On August 26, 2009, OSHA conducted a programmed inspection of a construction project at the Marine Corps Air Station (MCAS) in San Diego, California. (SF No. 1; Tr. 25, 28; C-3). The project consisted of building a new MCAS Miramar Youth Center. The project cost $6.75 million, encompassed 18,000 square feet, and was on one level. The project was about 70 percent completed at the time of the inspection. (C-3, at p. 110). CSHO Daniel Mooney was assigned to conduct the inspection.[4] (SF No. 4; Tr. 25). After checking in with Naval Facilities Engineering Command (NFEC), he contacted representatives from Soltek, the general (or prime) contractor for the construction project. (SF No. 2; Tr. 28; C-3, at p. 110). A group of on-site general contractor and subcontractor representatives, including Foreman Hall, and others were assembled to accompany CSHO Mooney during his walkaround inspection of the project. (SF No. 4; Tr. 28-30). Ms. Pamela Mark, Soltek's Corporate Safety Manager, was also part of the group that accompanied CSHO Mooney, "off and on during the inspection." (SF Nos. 6-7; Tr. 29-30, 58-59, 78, 97, 99, 150; C-6, at p. 118).

At the time of the inspection, Mr. Pimentel was working in a bathroom area at the end of a hallway. (Tr. 142, 149). He was applying joint compound to the metal around windows, doors

[4] CSHO Mooney is an OSHA Compliance officer with over thirty years of work experience and training. (Tr. 22; C-13).

and corners. (Tr. 142-43). CSHO Mooney testified that when he looked, at about 11:30 a.m., from an adjoining room, he observed Mr. Pimentel applying a wet, muddy substance using a trowel or a knife to a bathroom side wall directly in front of him, at a position slightly above his head, while not wearing any eye protection.[5] (Tr. 27-28, 31-33, 40, 46, 53-54, 60, 63, 79-80, 83; C-7, at p. 120). Foreman Hall stated that CSHO Mooney told him that Mr. Pimentel was "working overhead without his glasses on."[6] (Tr. 151-52, 165). Foreman Hall agreed with CSHO Mooney that Mr. Pimentel should be wearing his eye wear. (Tr. 33, 83). Both Ms. Mark and Foreman Hall agreed that Mr. Pimentel was not wearing safety glasses at the time. Ms. Mark did not observe Mr. Pimentel applying compound with his hands extended overhead.[7] (Tr. 102-04, 107, 174-75, 186). Foreman Hall gave conflicting testimony as to whether Mr. Pimentel was applying compound overhead. In one instance, he testified that Mr. Pimentel "was finished applying overhead." Later, he stated he agreed with Respondent's counsel that he was not

[5] When he saw Mr. Pimentel applying a substance while not wearing safety glasses on August 26, 2009, CSHO Moody made a handwritten entry onto an OSHA 1B Worksheet that stated: "Contact/Eye protection was not used when applying joint compound overhead. Note: Employee put glasses on." (Tr. 26-28, 84-85; C-7, at p. 120). On September 11, 2009, relying on C-7, CSHO Moody prepared a typed OSHA 1B Inspection Narrative that stated: "In the bathroom area, eye protection was not used while applying joint compound overhead." (Tr. 26-27, 43; C-3, at p. 113). On the same day, CSHO Moody also prepared a typed OSHA 1B Worksheet, again relying on C-7, that stated: "29 CFR 1926.95(a): Protective equipment including personal protective equipment for eyes, face, head and extremities, was not being used. In the bathroom area, eye protection was not used while applying joint compound overhead." (Tr. 26-27, 43; C-5, at p. 116, C-7). The Worksheet also stated:

> 20. Instance Description – Describe the following:
>
> a) Hazards-Operation/Condition-Accident: Contact
> b) Equipment: In the bathroom area, eye protection was not used while applying joint compound overhead.
> c) Location: Bathroom
> d) Injury/Illness: Irritation
> e) Measurements: None

(C-5, at p. 116).

[6] Foreman Hall testified that he did not say anything disagreeing with CSHO Mooney's statement that Mr. Pimentel was working overhead without his glasses on because "It's not good to argue." (Tr. 152, 166). Foreman Hall did not tell CSHO Mooney that Mr. Pimentel was not working over his head. (Tr. 166).

[7] Ms. Mark testified that she was talking to Mr. Russ Beir, a NFEC safety official, while walking three to four feet behind CSHO Mooney and that he saw Mr. Pimentel before she did. (Tr. 99, 102, 151).

working overhead. (Tr. 175, 186). The court credits CSHO Mooney's testimony that Mr. Pimentel was applying the substance on the wall above head level.[8]

Foreman Hall immediately instructed Mr. Pimentel to put his safety glasses on. (Tr. 33, 83, 120). Mr. Pimentel then walked out of the room, retrieved his safety glasses and put them on. (Tr. 33-35, 64, 83). By the time CSHO Mooney turned on his camera to take a photograph of Mr. Pimentel, he was no longer applying the substance higher than head level and was wearing his safety glasses. (Tr. 33-34; C-8). CSHO Mooney then asked to see the warning label on the box for the substance being applied by Mr. Pimentel. (Tr. 31, 38, 68, 75, 80, 83). In response, Foreman Hall showed CSHO Mooney a box of SHEETROCK ® Brand All Purpose Joint Compound (All Purpose Joint Compound), on which a warning label read, in pertinent part, "Prolonged and repeated exposure to respirable mica or talc may cause lung disease. Wear appropriate eye protection. If eye contact occurs, flush thoroughly with water for 15 minutes."[9] (Tr. 31, 38-39, 65-66; C-9 through C-10). CSHO Mooney took photographs of the product package and its warning label.[10] Foreman Hall held the package up so CSHO Mooney could take the picture. Foreman Hall never told CSHO Mooney that the package was not for the compound that Mr. Pimentel was using. (Tr. 38-41, 153, 168-70; C-9 through C-10). The USG Material Safety Data Sheet (MSDS) for the All Purpose Joint Compound states under "Exposure Control/Personal Protection" that for "Eye/Face – Wear eye protection, safety glasses or goggles,

[8] The Court finds Mr. Pimentel's testimony that he "never" worked with compound over his head to be too broad sweeping an assertion and not to be credible. (Tr. 118, 127-28). He later admitted that he applied wet joint compound over his head while wearing protective eyewear "[b]ecause it's the safe thing to do" while working for Respondent. (Tr. 133-34).

[9] Foreman Hall admitted that he assisted CSHO Mooney in getting the package. (Tr. 156, 168).

[10] CSHO Mooney considered the All Purpose Joint Compound to be the hazard that Mr. Pimentel was exposed because if it got into his eye it could cause eye irritation. (Tr. 44-45, 63, 79-80, 88). Mr. Pimentel admitted that he wore protective eyewear when applying compound over his head to provide protection from compound falling into his eyes. (Tr. 135). Foreman Hall also admitted that, even when not sanding, employees are at risk of

to avoid possible eye contact." (Tr. 45, 80-81; C-12, at p. 128).[11]

Although Respondent admitted in its response to interrogatories that Mr. Pimentel was using All Purpose Joint Compound at the time, Respondent now argues that he was actually using a different substance called USG SHEETROCK ® Brand Topping Joint Compound Ready Mixed (Topping Joint Compound).[12] (Tr. 46, 69-70, 92-93, 118, 120, 154-55, 161, 175-76; C-16, at pp. 160-61, R-EE, R-GG at pp. 353-56). Regardless of which product was being used at the time, both substances had warning labels which recommended the use of eye protection to avoid eye irritation.[13] (Tr. 66, 70, 155; C-9 through C-10, C-12, R-EE). Foreman Hall testified that he saw no difference in the two compounds' warning labels. (Tr. 155). Any splatter, particles, or dust which might have entered Mr. Pimentel's eye could have caused irritation. (Tr. 44-45; C-9 through C-10, R-EE). CSHO Mooney acknowledged, however, that there was no potential for any serious eye injury. (Tr. 44).

Mr. Pimentel had received training regarding the use of eye protection on Respondent's job sites and had reviewed the MSDS information for both All Purpose Joint Compound and Topping Joint Compound (together joint compound). (Tr. 117, 144). Mr. Pimentel testified that

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compound material dropping into their eyes when working overhead without safety goggles. (Tr. 178).

[11] It was CSHO Mooney's understanding that the MSDS for the All Purpose Joint Compound indicated that eye protection should be used if there was a possibility of exposure regardless of dust or the condition of the compound. (Tr. 81; C-12).

[12] The USG MSDS for the Topping Joint Compound states in Section 8 Exposure Controls/Personal Protection:

> OTHER PERSONAL PROTECTION EQUIPMENT:
> Eye/Face – Wear eye protection (safety glasses or goggles) to avoid particulate irritation of the eye.

(Tr. 82; R-EE, at p. 347).

[13] The USG MSDS for the Topping Joint Compound states in Section 3 Hazard Identification:

> POTENTIAL HEALTH EFFECTS
> ACUTE:
> Eyes: [d]irect contact can cause mechanical irritation of eyes.

he has applied compound over his head in the past, but wears his safety glasses when he does so to prevent any of the substance from falling into his eyes. (Tr. 133-35). Foreman Hall acknowledged that when applying wet Topping Joint Compound overhead, there is a risk of some of the substance falling into the eyes. (Tr. 178).

Discussion

It was undisputed that Mr. Pimentel was not wearing his safety glasses when CSHO Mooney first observed him. (Tr. 129, 173-74).[14] The Court finds that Mr. Pimentel failed to wear his safety glasses while applying compound in the bathroom area for approximately one hour, from about 10:30 a.m. through 11:30 a.m., August 26, 2009.[15] (Tr. 28, 30, 55-56, 101, 149). The Court further finds that Foreman Hall had ample time and opportunity to have known that Mr. Pimentel was not wearing his safety glasses during this time through the exercise of reasonable diligence. Based on Respondent's interrogatory responses and CSHO Mooney's testimony, the Court finds that Mr. Pimentel was applying either All Purpose Joint Compound or Topping Joint Compound at eye level and higher at the time of the inspection.[16] The Court also concludes that applying wet All Purpose Joint Compound or Topping Joint Compound directly in

(Tr. 87-88; R-EE, at pp. 344-45).

[14] Mr. Pimentel admitted that he was not wearing safety glasses when he was observed by CSHO Mooney. (Tr. 129; C-15, at p. 152, C-16, at p. 161). He also admitted that he did not wear safety glasses prior to CSHO Mooney's observation from the time he resumed working after walking 40 to 50 feet to a person who might have needed language interpretation assistance. (Tr. 120, 149).

[15] During that time, CSHO Mooney spoke with a roofer for "quite some time." (Tr. 101). Foreman Hall estimated that CSHO Mooney spoke with the roofer for about 20 to 30 minutes. (Tr. 55-56). Thereafter, CSHO Mooney spoke with another site supervisor. (Tr. 101). Following that conversation, CSHO Mooney entered the area where Mr. Pimentel was applying compound. *See Major Construction Corp.*, 20 BNA OSHC 2109, 2111 (No. 99-0943)(constructive knowledge not established without evidence indicating how long the violative condition existed).

[16] Respondent acknowledged in its interrogatory responses that Mr. Pimentel was applying All Purpose Joint Compound at the time of CSHO Mooney's inspection. (C-15, at p. 152, C-16, at p. 161). *See ELCA Enter., Inc. v. Sisco Equip. Rental & Sales, Inc*., 53 F.3d 186, 190 (8th Cir. 1995)("For litigation to function efficiently, parties must provide clear and accurate response to discovery requests. Parties are 'entitled to accept answers to previous interrogatories as true….'", citing to *Averbach v. Rival Mfg. Co.*, 879 F.2d 1196, 1201 (3d Cir. 1989).

front of the face, or slightly above the head, presents the possibility that particles or splatters of the substance will enter the eye. Such a consequence is foreseeable. The cited standard requires eye protection when a work process creates a situation which is "capable of causing injury or impairment in the function of any part of the body through ... physical contact."[17] Mr. Pimentel was required to wear eye protection when working with either the All Purpose Joint Compound or Topper Joint Compound at the time of the inspection.[18] Either joint compound is a hazardous substance which, according to the manufacturer's MSDS, should be applied while wearing eye protection.[19] Both Foreman Hall and Mr. Pimentel recognized that applying either joint compound without protective eye wear was a hazard that could lead to eye irritation. (Tr. 130-35, 178). The cited standard applies to the condition and its terms were violated. The record also clearly establishes that Mr. Pimentel was the employee exposed to the violative condition. *See Fabricated Metal Prods. Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997).

In order to prevail, the Secretary needs to show that Respondent knew, or should have known, that Mr. Pimentel was not wearing his safety glasses when applying joint compound in the bathroom area.[20] The Court finds that Respondent had constructive knowledge of the violative condition. Respondent's constructive knowledge is based on the fact that Mr. Pimentel was continuously working in plain view, with his supervisor nearby, without wearing safety glasses for about one hour. *Kokosing Constr. Co., Inc.*, 17 BNA OSHC 1869 (No. 92-2596, 1996). The

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[17] If the joint compound comes in contact with an eye, the eye must be flushed with water for fifteen minutes and if irritation persists, a physician must be called. (C-12, at p. 131, R-EE, at p. 345).

[18] Reasonableness is the applicable legal standard for when an employer should require the use of appropriate safety equipment by its employees. *Ray Evers Welding Co. v. OSHRC*, 625 F.2d 726, 731 (6th Cir. 1980). The Court finds that it was reasonable for Mr. Pimentel to wear eye protection when working with either joint compound at the time of the inspection.

[19] The warning labels and MSDS information do not distinguish between applying joint compound wet or dry, or above or below eye level. (C-9 through C-10, C-12, R-EE, R-GG).

[20] *See Prestressed Sys., Inc.*, 9 BNA OSHC 1864, 1868 (No. 16147, 1981).

court agrees with Complainant that, with the exercise of reasonable diligence, Foreman Hall could have readily observed Mr. Pimentel applying either the All Purpose Joint Compound or Topping Joint Compound at eye level and higher while not using safety glasses.[21] (*Complainant's Brief*, pp. 12-13). Foreman Hall assigned Mr. Pimentel to apply the drywall compound in the bathroom area. Both were working on the same floor of a one level building.[22] Foreman Hall was only about 40 to 50 feet away from Mr. Pimentel when he was not wearing his eye glasses. (Tr. 120, 149). A supervisor's constructive knowledge of a hazardous condition is imputable to his employer.[23] CSHO Mooney readily observed Mr. Pimentel not wearing safety glasses. (*Kokosing Constr. Co., Inc.,* 17 BNA OSHC at 1871). Respondent failed to adequately supervise Mr. Pimentel applying compound in the bathroom area. It also failed to provide Mr. Pimentel with specific instructions on how to safely perform the task wearing protective eye wear. It also failed to formulate and implement adequate training and work rules necessary to ensure that Mr. Pimentel could safely apply compound. *See Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1054-55 (No. 86-1087, 1991). Accordingly, Complainant established the necessary elements for a *prima facie* violation of the cited standard.

Affirmative Defense

Respondent asserts that Mr. Pimentel's failure to wear safety glasses was the result of unpreventable employee misconduct.[24] In order to establish this affirmative defense, an employer

[21] *See Capform Inc.*, 16 BNA OSHC 2040, 2045 (No. 91-1613, 1994)(violation "readily apparent" to supervisor working on same level as employee).
[22] *See Danis-Shook Joint Venture XXV v. Sec'y of Labor*, 319 F.3d 805, 812 (6th Cir., 2003)(with reasonable diligence, company could have known of the presence of the hazardous condition).
[23] *See Caterpillar, Inc*., 17 BNA OSHC 1731, 1732 (No. 93-0373, 1996), *aff'd*, 122 F.3d 437 (7th Cir. 1997).
[24] In addition to asserting its unforeseeable employee misconduct affirmative defense, Respondent identified the following defenses to the citation in its post-hearing brief: 1) Mr. Pimentel was not applying compound overhead, 2) Mr. Pimentel was not exposed to an injury or impairment, and 3) Respondent lacked knowledge that Mr.

is required to prove that it: (1) established work rules designed to prevent the violation, (2) adequately communicated those rules to its employees, (3) took steps to discover violations of the rules, and (4) effectively enforced the rules when violations were discovered. *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997). Respondent bears the burden of proving an affirmative defense. *Siebel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218 (No. 88-0821, 1991). Respondent's position on the requirement to wear safety glasses was unclear. It argued on one hand that Mr. Pimentel was not required to wear safety glasses because he was not working above his head and was working with a wet substance which posed no risk of an eye injury. At other points in the record, Respondent argued that its policy required employees to wear eye protection at all times. Foreman Hall described an eye protection training session that Mr. Pimentel attended, which seemed to require the use of safety glasses only when using screw guns to install drywall. (Tr. 144-45). This inconsistency creates doubt as to whether there were clearly established work rules on the use of safety glasses, or that the rules were adequately communicated to Respondent's employees.[25] An employer's work rules "must be clear enough to eliminate employee exposure to the hazard covered by the standard" and "must be designed to prevent the cited violation." *Beta Constr.* Co, 16 BNA OSHC 1435, 1444 (No. 91-102, 1993), citing to *Foster-Wheeler Constructors, Inc.* 16 BNA OSHC 1344, 1349 (No. 89-2871, 1993) and *Gary Concrete Prods., Inc.*, 15 BNA OSHC at 1056). Respondent did not have a sufficiently specific policy that addressed the hazard of having wet joint compound coming into contact with

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Pimentel was improperly applying compound and that he had been trained to use safety glasses at all times. (Respondent's post-hearing brief, at pp. 2, 9-11). Each of these defenses is without merit for the reasons stated herein. Additionally, all other defenses raised by Respondent in its answer are found to be abandoned by Respondent and lack merit. (*Answer*, at pp. 3-4). *See Dole Packaged Food Co. et al.*, 1989 WL 223471, at * 4 (Nos. 88-0665 and 88-2672, 1989).

[25] Respondent had no safety manual regarding the use of protective eye wear when working with hazardous materials such as joint compound. (Tr. 185-89).

an employee's eye when applying compound. (*Id.*, at 1055)("training … too general in nature to have effectively taught [employee] to be aware of how to prevent the violation of the standard….").[26]

Furthermore, there was no evidence that Foreman Hall, or any other Respondent's manager, visited Mr. Pimentel's work area to ensure that he was complying with Respondent's safety policies. An employer must take reasonable steps to monitor employee compliance with safety requirements.[27] *L.E. Myers Co.*, 16 BNA OSHC 1037, 1042 (No. 90-945, 1993). Respondent did not sufficiently monitor Mr. Pimentel in this regard on August 26, 2009. Under these circumstances, it was foreseeable to Respondent that Mr. Pimentel might not wear his safety glasses when applying wet joint compound in the bathroom area. A more diligent supervisor would have taken sufficient steps to discover the violation before CSHO Mooney's inspection. Respondent failed to meet its burden of establishing the elements necessary to prove unpreventable employee misconduct. *Brock v. L.E. Meyers Co.*, 818 F.2d 1270, 1276-77 (6th Cir. 1987).

Penalty

In calculating the appropriate penalty for a violation, Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. § 666(j)(2009). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions

[26] *See S&G Packaging Co.*, 19 BNA OSHC 1503, 1509 (No. 98-1107, 2001)(inadequate work rules defeats unpreventable employee misconduct defense).

[27] *See* 29 C.F.R. § 1926.28 (2009)(general employer duty to ensure its employees wear appropriate personal

taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, (No. 87-2059, 1993). OSHA did not propose a monetary penalty for Citation 1, Item 1 because there was no risk of serious injury. Nonetheless, applying joint compound without using eye protection has an adverse effect on the safety and health of employees. [28] I see no reason, based on this record, to exercise my discretion to alter that conclusion in this case.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found and appear in the decision above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1, Item 1 is AFFIRMED as an other-than-serious violation of the Act with no monetary penalty assessed.

/s/
HONORABLE DENNIS L. PHILLIPS
U.S. OSHRC Judge

Date: 11/29/10
Washington, D.C.

protection equipment).

[28] *See Ryder Truck Lines, Inc. v. Brennan* , 497 F.2d 230, 233 (5th Cir. 1974)("Avoidance of minor injuries, as well as major ones, was intended to be within the purview of this liberal Act.").