SECRETARY OF LABOR,
Complainant,

v. OSHRC Docket No. 96-1258

CBI NA-CON, INC., : **EZ**
Respondent. :
:

APPEARANCES

Alex Mabry, Esq.
Office of the Solicitor
U. S. Department of Labor
Dallas, Texas
For Complainant

Melvin Hutson, Esq.
Thompson & Hutson
Greenville, South Carolina
For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

CBI Na-Con, Inc. (CBI), contests a citation alleging an other-than-serious violation of §1926.95(a).[1] The Secretary issued the citation on July 15, 1996, following an inspection of CBI's worksite for Liquid Carbonic Praxair in Geismar, Louisiana. Occupational Safety and Health Administration (OSHA) compliance officer Alexander Novas conducted the inspection on July 9, 1996. The Review Commission designated this case as an E-Z procedure pursuant to Commission Rule 203(a) on October 3, 1996. This case was heard on November 21, 1996.

The facts are not in dispute. The sole issue is whether the use of the phrase "shall be provided" in § 1926.95(a) requires the employer to provide its employees with welding gloves at no cost to the employees.

CBI, a subsidiary of Chicago Bridge & Iron Co., operated a construction site for Liquid Carbonic Praxair in Geismar, Louisiana (Tr. 82). On July 9, 1996, compliance officer Alexander

[1] Section 1926.95(a) provides:
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.

Novas inspected the site in response to a complaint filed by a union official who was not an employee of CBI (Tr. 6, 21). The union was engaged in organizing activity at the time the complaint was filed (Tr. 22, 98).

At the time of the inspection, CBI employed over 50 welders at the Geismar site. CBI required them to wear welding gloves while welding (Tr. 56). Most of the welders provided their own gloves (Tr. 61, 63). CBI provided welding gloves which were available for purchase at its site. It sells the gloves at cost to any employee who wishes to purchase them (Tr. 56). CBI makes two different styles available to the employees: one at $8.00 a pair, and another at $13.50 a pair (Tr. 57, 63-64).

It is CBI's policy to replace a pair of gloves free of charge if the gloves are damaged in some manner other than through regular wear and tear (Tr. 62). Otherwise, the welding gloves need to be replaced every 2 to 4 weeks (Tr. 69). If an employee needs a pair of gloves and does not have the money for it, the price of the pair of gloves is deducted from his pay (Tr. 81).

At the close of the Secretary's case-in-chief, CBI moved for a directed verdict. The court held the motion in abeyance (Tr. 51-52). A motion for directed verdict in a Review Commission proceeding is treated as a motion for involuntary dismissal under Federal Rule of Civil Procedure 41(b). *P & Z Co.*, 6 BNA OSHC 1189 (No. 76-431, 1977). The Secretary presented sufficient evidence to carry his case forward. Involuntary dismissal is inappropriate in this case.

The motion is hereby denied.

The Secretary and CBI agree that the two relevant cases on the issue of whether "provide"means "provide and pay for" are *The Budd Company*, 1 BNA OSHC 1548 (Nos. 199 & 215, 1974), *aff'd* 513 F.2d 201 (3rd Cir. 1975) and *Erie Coke Corporation*, 15 BNA OSHC 1561 (No. 88-611, 1992), *aff'd* 998 F.2d 134 (3rd Cir. 1993).

In *Budd*, the Review Commission addressed the issue of cost allocation of personal protective equipment under §1910.132(a), the general industry standard. The language of §§1910.132(a), (b), and (c) is identical to that of §1910.95 the standard at issue here.[2]

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[2] Sections 1910.132(a), (b), and (c) provides:

(continued...)

The Secretary cited Budd for a violation of §1910.132(a) for failing to provide employees with protective footwear. Originally Budd contested the citation. Later, Budd moved to withdraw its notice of contest if the administrative law judge held that the company was not required to pay for the footwear. The Secretary did not contend that Budd was required to pay for the footwear, but the union representing the employees did. The judge denied Budd's motion to withdraw its notice of contest.

The Review Commission found that the judge "erred in refusing to permit Respondent to withdraw its notice of contest . . . and finding, by implication, it must pay for the equipment." *Budd*, 1 BNA OSHC at 1550. The Commission held that §1910.132(a) could not be "[r]easonably interpreted" to require employers to provide or pay for personal protective equipment because such an interpretation was inconsistent with §1910.132(b):

> Subpart (b) imposes a duty on an employer to insure that employee provided equipment is adequate, is maintained properly, and is sanitary. Subpart (c) requires that all personal protective equipment be of safe design and construction. Since subpart (b) contemplates the use of employee provided equipment, it would be anomalous to read subpart (a) as requiring that the employer provide the equipment. Were we to so construe subpart (a), we would render subpart (b) meaningless or superfluous. By so doing we would act in contravention of well-settled principles of statutory construction.

Id. at 1549-1550.

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[2](...continued)
(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.
(b) Employee-owned equipment. Where employees provide their own protective equipment, the employer shall be responsible to assure its adequacy, including proper maintenance, and sanitation of such equipment.
(c) Design. All personal protective equipment shall be of safe design and construction for the work to be performed.

Regarding the allocation of the cost of personal protective equipment, the Review Commission stated that it was "a question to be resolved between employer and employee. In our judgment, it is an appropriate subject for collective bargaining." *Id.* at 1550.

In *Erie Coke Corp.*, the Review Commission addressed the issue of whether §1910.1029(h)(1)(ii) of the coke oven emissions standard requires employers to provide and pay for flame resistant gloves. Section 1910.1029(h)(1)(ii) provides:

> The employer shall provide and assure the use of appropriate protective clothing and equipment, such as but not limited to:
> . . .
> {ii} Flame resistant gloves[.]

In *Erie*, Erie sold flame resistant gloves at cost to its employees. The gloves prevented repeated skin contact with carcinogenic coke oven emissions and burn hazards from pieces of coke and the oven. The Secretary cited Erie because it failed to provide the gloves at no cost to the employees. The judge affirmed the citation.

The Review Commission affirmed the judge's decision after analyzing the reasonableness of the Secretary's interpretation of §1910.1029(h)(1)(ii), using the test set out in *Martin v. OSHRC (CF & I Steel Corp.)*, 111 S. Ct. 1171, 1178-1180 (1991). The Commission held that the Secretary's interpretation was reasonable because the Secretary had consistently interpreted the phrase "the employer shall provide" in §1910.1029(h)(1)(ii) to mean "the employer shall provide and pay for." The Commission noted that in 1979 the Secretary had issued OSHA Instruction STD 1-6.4 to OSHA's field staff . The Instruction specifically instructed the staff to cite employers for failure to pay for protective clothing required by §1910.1029.

The Commission also held that the Secretary's interpretation was consistent with the legislative history of the Act, citing several statements from members of Congress which specified that the precautions required by the Act should be borne by employers.

The Commission rejected Erie's reliance on *Budd*. The Commission distinguished *Budd* on four grounds:

(1) It was not the Secretary's interpretation of the standard that was at issue in *Budd.* "[I]n *Budd* it was not the Secretary, whose interpretation is usually afforded considerable weight,

but the *union* that maintained that employers are required to pay for the protective footwear." *Erie*, 15 BNA OSHC at 1566.

(2) Section 1910.132(a), the standard at issue in *Budd*, is worded in the passive voice ("shall be provided"), whereas §1910.1029(h)(1)(ii) states that the "employer shall provide." Section 1910.132(a) "does not specify who is to do the providing, only that it be accomplished." *Id*.

(3) Section 1910.132(a) is qualified by §1910.132(b) which contemplates the use of employee-owned equipment. "There is no corresponding provision in section 1910.1029(h) involving employee-owned equipment." *Id.*

(4) The Commission found that "[t]he safety shoes themselves are also distinguishable from the gloves at issue here because they were, in the Commission's words, 'uniquely personal and may be used by the employee when he is away from the job.' 1 BNA OSHC at 1550, n. 5." *Id*. In *Erie*, the Secretary maintained that "once the gloves have been used in the workplaces they have become contaminated and 'are no longer reasonably usable outside the workplace.'" *Id.*

The Review Commission also rejected Erie's contention that the question of who should pay for the gloves should be settled by collective bargaining. The Commission dismissed as *dicta* the language in *Budd* approving collective bargaining on the question of cost allocation of personal protective equipment. The Commission instead looked to other decisions which noted that Congress had intended to override safety provisions of collective bargaining agreements. *Id.* at 1567.

The Secretary contends that his interpretation of "provide" as meaning "provide and pay for" must be given deference under *CF & I Steel Corp.*, which holds that courts must defer to the Secretary's interpretation of his own regulations where that interpretation is reasonable. But *CF & I Steel Corp.* only comes into effect if the regulatory language at issue is ambiguous.

> In determining whether the language of a standard is ambiguous, we first look to its text and structure. When the statute speaks with clarity, in all but the most extraordinary circumstances, judicial inquiry is ended. . . Only if we can make no initial determination need we refer to contemporaneous legislative histories of the standard. If the question remains unsettled, we look to the reasonableness of the interpretation of the agency that administers the challenged standard.

General Motors Corp., Delco Chassis Division, 17 BNA OSHC 1217, 1218 (Nos. 91-2973, 91-3116, 91-3117, 1995).

In the present case, the use of the phrase "shall be provided" in §1926.95(a) is unambiguous. As noted in the previous section, the language of §1926.95 is identical to the language of §1910.132(a), (b), and (c). The Commission in *Erie* (which the Secretary cites in support of its case) explicated the difference between the passive "shall be provided" and the active "the employer shall provide." And, the Commission noted in *Erie*, §1910.132(b) expressly addresses employee-owned equipment. Section 1926.95(b) also addresses employee-owned equipment, which undermines the Secretary's argument that §1926.95(a) requires the employer to pay for welding gloves.

Without venturing outside the Act, the meaning of the §1926.95(a) is clear. It states that personal protective equipment "shall be provided." There is nothing in the standard that indicates that the equipment is to be provided at no cost to the employees. There are a number of standards, however, that do specify that the employer provide "at no cost" personal protective equipment.[3] The Secretary does not explain why some standards specify "at no cost" and others do not. The Secretary is attempting to create an additional requirement not found in the standard as written. The unambiguous reading would be that the standards that specify "at no cost" require employers to pay for the personal protective equipment, and the standards that do not specify do not require employers to pay for the equipment. The Commission determined in *Erie* that the phrase "the employer shall provide" means "provide and pay for." No such precedent exists for the phrase "shall be provided." Section 1926.95(a) does not require employers to provide personal protective equipment at no cost to employees.

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[3] Standards requiring employers to provide personal protective equipment "at no cost" include §§1910.1001(g)(2) and (h)(1), §§1910.1018(g)(1)(ii) and (h)(2), §§1910.1025(f)(1) and (g)(1), §§1910.1027(g)(1) and (i)(1), §§1910.1028(g)(2)(i) and (h), §1910.1030(d)(3)(i), §1910.1043(f)(1), §1910.1044(h)(2)(i), §§1910.1045(h)(2)(i) and (j), §§1910.1047(g)(2) and (g)(4), §§1910.1048(g)(1) and (h), §§1910.1050(h)(2) and (i)(1), §§1910.1051(h)(1) and (i), §1910.1450(i), §§1926.60(i)(2) and(j)(1), §§1926.62(f)(1) and (g)(1), §1926.1101(h)(2), and §§1926.1127(g)(1) and(i)(1).

The Secretary has failed to establish that CBI violated §1926.95(a). It is undisputed that CBI had welding gloves available for use by its welders. The fact that the gloves were provided at cost to the employees does not constitute a violation of the cited standard.

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

Based upon the foregoing decision, it is hereby ORDERED that:

The citation alleging a violation of §1926.95(a) is vacated, and no penalty is assessed.

PAUL L. BRADY
Judge

Date: January 30, 1997