United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. HWS CONSULTING GROUP INC., and its successors, Respondent.	OSHRC DOCKET NO. 04-1219

APPEARANCES:

For the Complainant:
Kim Prichard Flores, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:
John C. Hewitt, Esq., Cline, Williams, Wright, Johnson & Oldfather, LLP, Omaha, Nebraska

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, HWS Consulting Group, Inc. (HWS), performed inspection and survey work at a roadmilling and resurfacing project on Minne Lusa Boulevard in Omaha, Nebraska. HWS contracted with the City of Omaha, the owner of the road, to provide construction observation and asphalt and soils testing for the road construction project. The general contractor was Swain Construction, and its subcontractor was Western Engineering Company (Tr. 83-85). Both Swain and Western Engineering were engaged in a business affecting commerce, *i.e.*, construction. *See Clarence M. Jones d/b/a C. Jones Company,* 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983). Because HWS provided essential services on the construction site, HWS likewise affected commerce. Accordingly, HWS is an employer in a business affecting commerce, it is subject to the requirements of the Act. *Brennan v. OSHRC,* 492 F.2d 1027 (2d Cir. 1974).

On April 21, 2004, Craig Lamb, an HWS employee, suffered fatal injuries on HWS' Minne Lusa work site when he was struck by one of Western Engineering Company's dump trucks. Following the accident, the Occupational Safety and Health Administration (OSHA) conducted an inspection at the site. As a result, HWS was issued a citation alleging violation of §1926.95(a) of the Act. By filing a timely notice of contest HWS brought this proceeding before the Occupational Safety and Health Review Commission (Commission). Prior to the hearing Complainant moved to amend the citation to allege, in the alternative, a violation of §5(a)(1) of the Act. Complainant's motion was granted. On March 9, 2005, a hearing was held on this matter in Omaha, Nebraska. The parties have submitted briefs on the issues and this matter is ready for disposition.

FACTS

Marilyn Franklin, who resides near the Minnie Lusa work site (Tr. 8), testified that, while walking her dogs on April 21, 2004, she saw a man, Craig Lamb, go out into the street behind a construction truck that was backing up on Minne Lusa Boulevard near the intersection of Minne Lusa and Read Street (Tr. 9, 18-19). Lamb was not wearing any type of reflective clothing (Tr. 11). Lamb squatted down, facing the truck, which was backing towards him (Tr. 10). Ms. Franklin heard a thud, and saw the truck start forward; Lamb was lying in the street (Tr. 10). Franklin ran to the truck and alerted the driver, who went for help (Tr. 11).

The driver of the dump truck told Steve Jordan, the OSHA Compliance Officer (CO), that she was being directed back by the operator of the milling machine at the time of the accident (Tr. 49). She was watching in her mirrors as she backed up, and her backup alarm was working (Tr. 49-50). There was no spotter behind the dump truck (Tr. 49).

Jordan testified that the Minnie Lusa site was not barricaded, and was open to local traffic (Tr. 64-65). According to Jordan, an employee working on a public street without a reflective vest could be struck by a private vehicle, or by a piece of construction equipment (Tr. 31).

Jeff Sockel, a professional engineer and project manager for HWS, told CO Jordan that, at the time of the accident, Lamb was measuring the crown of the milled road to assure that water would drain off properly (Tr. 32, 85-86). Sockel told Jordan that he himself always wore a reflective vest on the site (Tr. 33, 65). However, Sockel testified at the hearing that it was not the general practice within the construction industry to wear reflective clothing (Tr. 87). Nonetheless, CO Jordan noted that Western Engineering employees wore reflective clothing on the day of the OSHA inspection (Tr. 51, 80).

Alleged Violation of §1926.95(a)

Serious citation 1, item 1 alleges:

CFR 1926.95(a):

Jobsite located at Minnie Lusa Blvd, Omaha, NE 68112 (Between Read and Vane Streets). Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, was not used. On April 21, 2004, an employee did not wear reflective safety vest at a job site where there was a road milling/resurfacing project and there was employee exposure to vehicular traffic. The employee suffered fatal injuries after being struck by a dump truck on the recently milled road.

Discussion

First of all, this judge notes that this proceeding is not intended to determine the cause of the accident which initiated the April 2004 inspection. Nothing in the evidence establishes that the accident was caused by Mr. Lamb's failure to wear a reflective safety vest, or that his use of such a vest would have prevented the accident. However, such a showing is not necessary to prove a violation of the Act. To establish a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.,* 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

Applicability of the Construction Standards

As a threshold matter, HWS argues that it was not engaged in construction at the Minne Lusa site and that its activities were not governed by the construction standards at Part 1926.

CO Jordan testified that he considered HWS to be a "general industry" employer (Tr. 58, 71). Jordan recommended citation under the general industry standard. The agency, however, reversed the CO and issued the citation under the construction standards. The CO did not know why HWS was cited under the construction standards (Tr. 58, 72). However, under cross-examination, he testified that he mistakenly believed that HWS was the general contractor on the site, and that Western Engineering, which was performing construction work , was HWS' subcontractor (Tr. 77-78).

Section 1910.12(b) states that construction refers to work for construction, alteration, and/or repair, including painting and decorating. The Commission has held that the construction standards do not apply to a non-trade employer who is responsible solely for the performance of inspection services at a construction worksite. *Foit-Albert Associates,* 17 BNA OSHC 1975, 1997 CCH OSHD ¶31,299 (No. 92-654, 1997); *Simpson, Gumpertz & Heger, Inc. (SGH),* 15 BNA OSHC 1851, 1991-93 CCH OSHD ¶29,828 (No. 89-1300, 1992), *aff'd,* 3 F.3d 1 (1st Cir. 1993). In *SGH* the Commission specifically rejected the

Secretary's contention that design and engineering professionals are subject to the construction standards merely because of their involvement with a construction project. *Id.* Thus, although HWS' work was an "integral and necessary part of the road construction," as the Secretary alleges at page 6 of her Posthearing Brief, because HWS performed no actual physical trade labor, it was not itself engaged in construction. Section 1926.95(a) is, therefore, inapplicable here.

This is not to suggest that non-construction workers working on a construction site need not wear reflective clothing where they are exposed to hazards posed by moving roadway traffic or construction equipment. Employers falling under the General Industry standard are subject §1910.132, which is identical to §1926.95[1], and to the provisions of the General Duty Clause, at §5(a)(1) of the Act. As noted above, the Secretary alleged violation of §5(a)(1) in the alternative.

Alleged Violation of §5(a)(1)

In a motion filed after the citation was issued, Complainant alleged, in the alternative, a violation of the General Duty Clause at §5(a)(1) of the Act. That motion articulated the alternative violation as follows:

> The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that: Employees were exposed to hazard of being struck by vehicular traffic.
>
> On April 21, 2004, an employee did not wear reflective safety vest at a job site where there was a road milling/resurfacing project and there was employee exposure to vehicular traffic. The employee suffered fatal injuries after being struck by a dump truck on the recently milled road.
>
> Feasible means of abatement may include but are not limited to the following:
>
> 1. Protective equipment, including reflective safety vest or similar personal protective equipment shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards.
> 2. A disciplinary policy shall be developed and implemented requiring employees to use said personal protective equipment.
> 3. An inspection policy shall be developed and implemented to verify compliance with personal protective equipment use.

[1] §1910.132(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.

Discussion

In order to prove a violation of section 5(a)(1) of the Act, the Secretary must show that: (1) a condition or activity in the workplace presented a hazard to an employee, (2) the hazard was recognized, (3) the hazard was likely to cause death or serious physical harm, and (4) a feasible means existed to eliminate or materially reduce the hazard. The evidence must show that the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1991-93 CCH OSHD ¶29,617 (Nos. 86-360, 86-469, 1992).

The Secretary failed to introduce evidence exclusively relevant to §5(a)(1) at the hearing, and completely failed to address the General Duty Clause in her brief. This judge has no recourse but to consider the alternative pleading abandoned. Nonetheless this judge notes that the evidence in this record is insufficient to establish a 5(a)(1) violation for the reasons set forth below.

A recognized hazard may be a practice, procedure or condition under the employer's control that is known to be hazardous either constructively, *i.e.*, by the industry in general, or actually, by the cited employer in particular. *Pelron Corporation*, 12 BNA OSHC 1833, 1986 CCH OSHD ¶27,605 (No. 82-388, 1986).

Actual. Complainant introduced evidence that another HWS employee, Jeff Sockel, always wore a reflective vest. However, the Secretary failed to demonstrate that HWS was aware that Sockel possessed a vest, or explain how Sockel's possibly idiosyncratic use of a reflective vest demonstrates that HWS recognized that an employee's failure to wear such a vest on this job site constituted a hazard.

Industry. The Commission has held that advisory standards may establish industry recognition. *Coleco Industries, Inc.*, 14 BNA OSHC 1961, 1991 CCH OSHD ¶29,200 (No. 84-546, 1991). In her brief, during her discussion of §1926.95, the Secretary refers to the U.S. Department of Transportation Federal Highway Administration's Manual on Uniform Traffic Control Devices for Streets and Highways (the MUTCD), which was submitted as an attachment to Respondent's brief in objection to Complainant's motion to amend. The MUTCD, in relevant part, states that:

> TTC [temporary traffic control] zones present temporary and constantly changing conditions that are unexpected by the road user. This creates an even higher degree of vulnerability for workers on or near the roadway.
>
> * * *
>
> Worker Safety Apparel–all workers exposed to the risks of moving roadway traffic or construction equipment should wear high-visibility safety apparel meeting the requirements of ISEA "American National Standard for High-Visibility Safety Apparel" (see Section 1A.11), or equivalent revisions, and labeled as ANSI 107-199 standard performance for Class 1, 2, or 3 risk exposure. A competent person designated by the employer to be responsible for the worker safety plan within the activity area of the job site should make the selection of the appropriate class of garment.

Complainant, however, did not introduce the MUTCD, nor did it present any expert testimony establishing that the MUTCD was relevant outside of temporary traffic control zones, or was applicable to non-trade employees working inside a highway construction zone. Neither are these issues addressed in her brief.

Given the state of this record, this judge has no choice but to vacate the citation in this matter.

ORDER

1. Citation 1, item 1, alleging violation of 29 CFR §1926.95(a) is VACATED.

2. The alternative pleading, alleging violation of §5(a)(1) is VACATED.

/s/

James H. Barkley
Judge, OSHRC

Dated: May 16, 2005