United States of America

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. MONROE DRYWALL CONSTRUCTION, INC., Respondent.	OSHRC Docket No. 12-0379

APPEARANCES:

Amy S. Tryon, Attorney; Charles F. James, Counsel for Appellate Litigation; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Nathalie Monroe, President, Monroe Drywall Construction, Inc.; Panama City Beach, FL
For the Respondent

DECISION

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

Following an accident that resulted in a worker fatality, the Occupational Safety and Health Administration ("OSHA") inspected a worksite in Panama City, Florida. OSHA later issued one of the subcontractors working at the site, Monroe Drywall Construction ("MDC"), two citations alleging violations of the Occupational Safety and Health Act of 1970, 29 U.S.C.

§ 651, *et seq*. ("OSH Act"), and proposing a total penalty of $6,600.[1] Following a hearing, former Administrative Law Judge Stephen J. Simko, Jr., had vacated both citations, finding that the Secretary failed to prove that MDC was properly cited as the employer of the workers at issue. On review, the Commission reversed the judge's finding and remanded the case for him to address whether the Secretary met the other elements of his burden as to the alleged violations.

On remand, Judge Simko affirmed both citations and assessed a total penalty of $600 ($200 for Citation 1, Item 1b and $400 for Citation 1, Item 2). Both parties sought review of the judge's decision and the case was directed for review a second time solely on the penalty issue raised in the Secretary's Petition for Discretionary Review.

It is well-settled that the Commission "is the final arbiter of penalties…." *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1624, 1993-95 CCH OSHD ¶ 30,363, p. 41,884 (No. 88-1962, 1994); *Valdak Corp*., 17 BNA OSHC 1135, 1138, 1993-95 CCH OSHD ¶ 30,759, p. 42,742 (No. 93-0239, 1995) ("The [OSH Act] places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits"), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). In assessing a penalty, we give due consideration to the gravity of the violation, as well as the employer's size, good faith, and history of violations. OSH Act § 17(j), 29 U.S.C. § 666(j). Of these four factors, gravity is typically the most significant. *Orion Constr.*, 18 BNA OSHC 1867, 1868, 1999 CCH OSHD ¶ 31,396, p. 47,220 (No. 98-2401, 1999).

[1] Under Citation 1, Item 1a, which was later withdrawn, the Secretary alleged a serious violation of 29 C.F.R. § 1926.20(b)(1), for neither initiating nor maintaining a safety and health program. Under Citation 1, Item 1b, the Secretary alleged a serious violation of 29 C.F.R. § 1926.21(b)(2), for not instructing employees in the recognition and avoidance of unsafe conditions at the site. These two items were grouped for penalty purposes and a total penalty of $2,400 was proposed. Under Citation 1, Item 2, the Secretary alleged a serious violation of 29 C.F.R. § 1926.416(a)(3), for not inquiring about the status of exposed circuit wires or warning employees of the electric shock hazard. A penalty of $4,200 was proposed for this item. Finally, under Citation 2, Item 1, the Secretary alleged an other-than-serious violation of 29 C.F.R. § 1910.1200(e)(1), for not having a written hazard communication program. No penalty was proposed for this item and none is assessed.

In proposing the penalties for Items 1b and 2, the Secretary focused on the high gravity of the violations, which the compliance officer stated included the possibility of death. The Secretary gave MDC a penalty reduction for its small size, but did not reduce the penalty for good faith or history. The judge agreed with the Secretary that the gravity of the violations was high and that MDC's small size warranted a penalty reduction. But the judge further reduced the penalties based on his finding of good faith and lack of history, which the Secretary asserts was error.

We agree with the judge that the gravity of these serious violations is high. Item 1b was based on MDC's failure under § 1926.21(b)(2) to instruct its employees in the recognition and avoidance of unsafe conditions at the site and Item 2 was based on MDC's failure under § 1926.416(a)(3) to inquire about the status of exposed wires or warn its employees of the electric shock hazard. Indeed, the death that occurred underscores the potential for these violations to cause serious harm. *See Pressure Concrete Constr., Co.,* 15 BNA OSHC 2011, 2018, 1991-93 CCH OSHD ¶ 29,902, p. 40,813 (No. 90-2668, 1992) (characterizing failure to train violation under § 1926.21(b)(2) as serious when a worker was killed because it was "abundantly clear that the consequences of [the employer's] failure to instruct its employees could result in serious harm"); *Capform, Inc*., 19 BNA OSHC 1374, 1378, 2001 CCH OSHD ¶ 32,320, p. 49,478 (No. 99-0322, 2001) (characterizing failure to train violation under § 1926.21(b)(2) as serious and noting that the failure to provide sufficient instructions directly increased risks), *aff'd*, 34 F. App'x. 152 (5th Cir. 2002) (unpublished); *Sec'y of Labor v. CMC Elec., Inc*., 221 F.3d 861, 870 (6th Cir. 2000) (characterizing failure to inquire/warn violation under § 1926.416(a)(3) as serious). Similarly, we agree that MDC's small size warrants a penalty reduction.

We disagree, however, with the judge's determination that further reductions for good faith and history were appropriate. As to good faith, the judge focused on what he viewed as MDC's "good faith belief" that it did not have an employment relationship with the exposed workers. But we have never accorded any credit for an employer's subjective belief that the OSH Act did not apply when evaluating good faith for penalty purposes. Rather, the Commission focuses on a number of factors relating to the employer's actions, "including the employer's safety and health program and its commitment to assuring safe and healthful working conditions[,]" in determining whether an employer's overall efforts to comply with the OSH Act

and minimize any harm from the violations merit a penalty reduction. *Capform*, 19 BNA OSHC at 1378, 2001 CCH OSHD at p. 49,478 (*citing Nacirema Operating Co., Inc.*, 1 BNA OSHC 1001, 1002, 1971-73 CCH OSHD ¶ 15,032, p. 20,043 (No. 4, 1972)); *Elliot Constr. Corp*., 23 BNA OSHC 2110, 2119, 2009-12 CCH OSHD ¶ 33,231 p. 56,073 (No. 07-1578, 2012).

Here, we find MDC's approach to safety does not show good faith. *See Elliot*, 23 BNA OSHC at 2119, 2009-12 CCH OSHD at p. 56,073 (concluding that "significant failings" with respect to employee safety negated a penalty reduction for good faith). Although MDC's President, Nathalie Monroe, testified that the company had a safety program, the judge found that it lacked the written hazard communication program required by § 1910.1200(e)(1).[2] Moreover, Monroe admitted that MDC did not provide safety instructions or training to the employees installing drywall at the worksite. *See Capform*, 19 BNA OSHC at 1378, 2001 CCH OSHD at p. 49,478 (finding a reduction for good faith inappropriate when instructions were insufficient). On the record before us, it is apparent that any steps MDC may have taken with respect to workplace safety offered little protection to these employees. *See Jesco Inc.*, 24 BNA OSHC 1076, 1080 (No. 10-0265, 2013) (finding that steps taken to lessen the probability of harm were insufficient to warrant a credit for good faith). And the judge erred in giving MDC good faith credit for the Secretary's withdrawal of Item 1a. A withdrawal reduces the number of violations and may, as we find is the case here, merit a penalty reduction on that ground. *See So. Scrap Materials Co*., 23 BNA OSHC 1596, 1629, 2009-12 CCH OSHD ¶ 33,177, p. 55,382 (No. 94-3393, 2011) (assessing reduced penalty for affirmed item where Secretary withdrew the item with which it was grouped for penalty purposes). However, a withdrawal is not a measure of good faith.

Finally, the record contains no information about MDC's prior violation history. Under these circumstances, particularly when considered in conjunction with the high gravity of the violations and MDC's lack of good faith, we find that this factor warrants neither a reduction nor an increase in the penalties. *See Acme Energy Servs. d/b/a Big Dog Drilling*, 23 BNA OSHC

[2] We note that Monroe acknowledged that she did not provide evidence of MDC's safety program to OSHA and it was not offered into evidence at the hearing. Nor is there evidence that MDC made any improvements to its safety program after the inspection. *Cf. Compass Envtl. Inc*., 23 BNA OSHC 1132, 1136, 2009-12 CCH OSHD ¶ 33,071, p. 54,642 (No. 06-1036, 2010) (finding good faith for penalty purposes when employer demonstrated its intent to protect its employees and "had an extensive safety program"), *aff'd*, 663 F.3d 1164 (10th Cir. 2011).

2121, 2130, 2009-12 CCH OSHD ¶ 33,236, p. 56,131 (No. 08-0088, 2012) (applying no penalty reduction where good faith and evidence of prior history lacking), *appeal docketed*, No. 12-60810 (5th Cir. Oct. 15, 2012); *Orion*, 18 BNA OSHC at 1868, 1999 CCH OSHD at p. 47,220 (giving history little weight where evidence lacking). Accordingly, upon consideration of the statutory factors in light of the record before us, we find that a penalty of $2,100 for Citation 1, Item 1b, and $4,200 for Citation 1, Item 2, is appropriate here.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: September 30, 2013

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Secretary of Labor, Complainant, v. Monroe Drywall Construction, Inc. Respondent.	OSHRC Docket No. **12-0379** On Remand

Appearances:

Melanie Paul, Esquire, U. S. Department of Labor, Office of the Solicitor
Atlanta, Georgia
For Complainant

Jeremy Monroe and Nathalie Monroe, *pro se*, Monroe Drywall Construction, Inc.
Panama City Beach, Florida
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

This case is before me on remand from the Commission. A hearing was held in this matter in Panama City, Florida, on June 1, 2012. The procedural background of this case is contained in my initial decision dated November 20, 2012, and in the Commission's decision and remand dated April 19, 2013. In my decision, I found the Respondent was not the employer of three workers on Monroe Drywall Construction, Inc.'s (MDC) jobsite. Having determined MDC was not the employer of the workers, the citations were vacated. On review, the Commission held that these workers were employees of MDC. The case was remanded to consider whether the Secretary established the alleged violations of 29 CFR §§ 1926.21(b)(2), 1926.416(a)(3), and 1910.1200(e)(1). For the reasons that follow, the alleged violations are affirmed and total penalties of $600.00 are assessed.

Discussion

The Secretary has the burden of establishing the employer violated the cited standard.

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group, Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

It is undisputed that the standards are applicable. Respondent is engaged in the installation and finishing of drywall, a construction activity. All employers are required to develop, implement and maintain written hazard communication programs. Uncontroverted evidence also establishes employee exposure in that MDC employees worked in the vicinity of an electric shock hazard and used drywall joint compound, a respiratory irritant.

Remaining at issue are whether MDC failed to comply with the terms of the standards and whether Respondent had actual or constructive knowledge of the violative conditions.

Citation No. 1, Item 1b, Alleged Serious Violation of 29 CFR § 1926.21(b)(2)

In Citation No. 1, Item 1b, the Secretary alleges:

> 29 CFR § 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury:
>
> a. On or about September 27, 2011, employees installing drywall were not trained to recognize hazards specific to the multi-trade construction site to include, but not limited to electrical shock hazards.

The standard at 29 CFR § 1926.21(b)(2) provides:

> (2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

In a statement given to the Secretary's compliance officer during the investigation, one employee said Nathalie Monroe, MDC's president, provided a safety briefing for use of the scissor lift (Exh. C-3). Ms. Monroe testified she did not instruct employees to watch out for the electrical

conduit because everyone told her it was safe. In fact, bare wires extending from the bottom of the conduit were energized. Ms. Monroe, on cross-examination, testified she did not provide any training to each of Respondent's employees on the jobsite, claiming they did not work for MDC. The Secretary produced sufficient evidence to prove it is more likely than not that MDC did not instruct each employee in the recognition and avoidance of unsafe conditions including electrical shock hazards on the jobsite.

Respondent claims it did not have actual knowledge of an unsafe electrical shock condition of the conduit and wires in the area where its employees were working. Ms. Monroe was working on an elevated scissor lift next to the conduit one day before the incident in which an MDC employee touched an energized wire in the conduit. While Ms. Monroe may have thought the conduit was safe, she did not take steps to determine whether the bare wires extending from the bottom of the conduit were energized. On September 27, 2011, her employees worked on the floor stacking drywall next to the bare wires. MDC, through Ms. Monroe, its president, had constructive knowledge of the electrical hazard. Ms. Monroe worked adjacent to the conduit on September 26, 2011, and knew her employees worked in the immediate area of the electrical shock hazard.

The Secretary has established a violation of 29 CFR § 1926.21(b)(2). The violation was serious. Where employees are not instructed in the recognition and avoidance of unsafe conditions including electrical shock hazards, contact with such hazards could result in death or serious physical harm.

Citation No. 1, Item 2,
Alleged Serious Violation of 29 CFR § 1926.416(a)(3)

In Citation No. 1, Item 2, the Secretary alleges:

> 29 CFR § 1926.416(a)(3): Before work was begun, the employer did not ascertain by inquiry or direct observation, or by instruments, whether any part of an energized electric power circuit, exposed or concealed, was so located that performance of the work could bring any person, tool, or machine into physical or electrical contact with the electric power circuit:
>
> a. On or about September 27, 2011, the employer did not inquire about the status of the exposed parking lot lighting circuit wires or warn employees installing drywall material of the electric shock hazard.

The standard at 29 CFR § 1926.416(a)(3) provides:

> (3) Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments whether any part of an energized electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool, or machine into physical or electrical contact with the electric power circuit. The employer shall post and maintain proper warning signs where such a circuit exists. The employer shall advise employees of the location of such lines, the hazards involved, and the protective measures.

The Secretary's compliance officer testified only as to the nature of the charge as set forth in Citation No. 1, Item 2. He gave no factual testimony to support the alleged violation of the standard.

Nathalie Monroe, MDC's president, however, in her statement to the compliance officer, stated that the metal conduit ran down the wall, and she was on the scissor lift near the top of the wall and the conduit. She did not see the wire extending from the bottom of the conduit (Exh. C-15). She testified at trial she was told the conduit was safe. Ms. Monroe did not say who told her it was safe. There is no other evidence relating to whether MDC made any inquiry or observations before beginning work or during work concerning the location of the energized wires in the area where its employees worked. From the totality of the testimony and other evidence, the logical inference is that MDC made no inquiry, observation, or other test to determine whether an exposed energized electric power circuit was so located that an employee of MDC might physically contact it. Contact with shock energized lines can result in death or serious physical harm from electrical shock.

Respondent had constructive knowledge of the violative conditions. Ms. Monroe worked at the top of the electrical conduit on September 26, 2011, and her employees worked on the floor near the bottom of the conduit with exposed wires on September 27, 2011. MDC made no independent inquiry to determine if the power circuit was energized, creating a hazard of electrical shock to MDC employees.

The Secretary has established a serious violation of 29 CFR § 1926.416(a)(3).

Citation No. 2, Item 1,
Alleged Other-than-Serious Violation of 29 CFR § 1910.1200(e)(1)

In Citation No. 2, Item 1, the Secretary alleges:

> 29 CFR 1910.1200(e)(1): The employer did not develop, implement, and/or maintain at the workplace a written hazard communication program which describes how the criteria specified in 29 CFR 1910.1200(f), (g), and (h) will be met: (Construction Reference: 1926.59)
>
> a. On or about September 27, 2011, the employer did not develop, implement, or maintain a written Hazard Communication Program that included Material Safety Date Sheets and training for employees working with hazardous chemicals such as, but not limited to the following:
>
> Drywall joint compound - a respiratory irritant

The standard at 29 CFR § 1910.1200(e)(1) provides:

> (e) *Written hazard communication program*. (1) Employers shall develop, implement, and maintain at each work place, 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)

The Secretary's compliance officer, Jeffrey Lincoln, testified that MDC's employees were performing drywall finishing which includes the use of drywall joint compound. Mr. Lincoln testified that, when sanded, the compound particles become airborne. These particles are a respiratory irritant.

Mr. Lincoln testified regarding the requirements of the standard as follows:

> The products they're using have to be labeled properly. They have to have the company MSDS sheets for each proper chemical that's hazardous on the job site. They have to have a written hazard communication program that specifies how their overall program is run, who is responsible for it, and there has to be training for the materials that are being used so that they're trained to the MSDS sheets and the hazards that are listed on them.

(Tr. 72).

When questioned by the Court, Mr. Lincoln expanded his testimony relating what he found during his inspection:

> THE JUDGE: Let me ask you, what - - you said what the requirements of that standard are. What was done here?
>
> THE WITNESS: My indication at the job site, I asked Nathalie Monroe for her programs, to include safety program, hazard communication programs, and she said that she did not have programs, because it was just her and her husband in the company and they talked to each other about safety.

(Tr. 73).

Ms. Monroe testified that MDC had Material Safety Data Sheets (MSDS) for the drywall compound. While MDC may have maintained an MSDS for drywall compound at the jobsites, it did not provide it to OSHA when requested.

The Secretary's evidence establishes a violation of 29 CFR § 1910.1200(e)(1). Respondent did not develop or maintain a written hazard communication program for drywall compound, an eye irritant. This violation was properly classified as an other-than-serious violation. The violative conditions may result in irritation of the eyes, but would not likely result in death or serious physical harm.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U.S.C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical, Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007).

MDC employed five employees including the two owners. On the date of the incident that gave rise to the OSHA inspection, MDC had two employees on site stacking drywall. In proposing penalties for the violations alleged in Citation No. 1, Item 1b, the Secretary considered Respondent's size but gave no consideration to its good faith and history. No evidence was presented as to any previous inspections of this company. MDC has no prior OSHA citation history. While the Commission has rejected MDC's defense of no employment relationship with these workers, the company's owners exhibited good faith in this matter. Their actions were

consistent with a good faith belief MDC had no employees other than Nathalie and Jeffrey Monroe.

The Secretary's compliance officer considered the severity of the hazard for Citation No. 1, Item 1, to be high including death, but probability as lesser due to the small amount of work performed compared to the total job. The Secretary withdrew Item 1a at the hearing. That Item alleged that MDC did not initiate or maintain a safety and health program. The proposed penalty for Items 1a and 1b was $2,400.00.

Here the Secretary dropped a major portion of Item 1 and did not consider good faith and history of MDC. After considering all these factors, a penalty of $200.00 is assessed for the remaining Item 1b.

With regard to Citation No. 1, Item 2, the Secretary also considered Respondent's size but no consideration was given to MDC's history. Regarding good faith, the Secretary's proposed penalty was based in large part on the allegation in Item 1a that MDC did not initiate or maintain an adequate safety and health program. That item was withdrawn by the Secretary at the hearing. That withdrawn allegation cannot now serve as a basis for the Secretary's claim of lack of good faith. The failure to make sufficient inquiry as to whether an electric power circuit is energized can result in death or serious inquiry. This can cause a higher level of gravity of the violation.

After considering all factors including gravity, size, good faith, and history, a penalty of $400.00 is assessed for Citation No. 1, Item 2.

The Secretary proposed no penalty for Citation No. 2, Item 1, and none is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1a of Citation No. 1, alleging a serious violation of 29 CFR § 1926.20(b)(1), was withdrawn by the Secretary at the hearing. It is therefore vacated, and no penalty is assessed;

2. Item 1b of Citation No. 1, alleging a serious violation of 29 CFR § 1926.21(b)(2), is affirmed, and a penalty of $200.00 is assessed;

3. Item 2 of Citation No. 1, alleging a serious violation of 29 CFR § 1926.416(a)(3), is affirmed, and a penalty of $400.00 is assessed; and

4. Item 1 of Citation No. 2, alleging an other-than-serious violation of 29 CFR § 1910.1200(e)(1), is affirmed, and no penalty is assessed.

/s/
Stephen J. Simko, Jr.
Judge

Date: May 28, 2013
Atlanta, Georgia