UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. D & A CONSTRUCTION, Respondent.	OSHRC DOCKET NO. 12-0577

Appearances:

Leon Pasker, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California
For Complainant

Noeh Cruz, Project Engineer/Safety Officer, D & A Construction, Saipan, MP
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

I. Procedural History

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.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a D&A Construction ("Respondent") worksite in Saipan, Commonwealth of the Northern Mariana Islands ("CNMI"), on October 25, 2011. As a result of the inspection, OSHA issued a Citation and Notification of Penalty ("Citation") to Respondent alleging two violations of the Act. Respondent timely contested the Citation, and a trial was held on November 8, 2012 in Saipan. Complainant filed a post-trial brief.

II. Jurisdiction

In its Answer to the Complaint, Respondent admitted that the Act applies and the Commission has jurisdiction over this proceeding pursuant to § 10(c) of the Act, 29 U.S.C. §

659(c). Further, Respondent also admitted that, at all times relevant to this matter, it was an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

III. Facts

On October 25, 2011, Compliance Safety and Health Officer ("CSHO") Anthony Sholing arrived at CNMI Airport at approximately 8:15 a.m. to conduct a programmed inspection of Respondent. (Tr. 32–33). Respondent was in the process of concluding renovations to the immigration area and had been working for approximately an hour. (Tr. 33, 55). Specifically, Respondent's employees were doing touch-up painting in the fire sprinkler room as a part of a set of punch list items that were to be completed before the project was turned over to the Government for inspection. (Tr. 41, Ex. C-5). This was confirmed by Respondent's employee, Ricardo Amog, and Respondent's supervisor, Edward Navarro. (Tr. 41). Respondent argued that its employees were not painting at the time of the inspection; however, CSHO Sholing observed Amog with red paint on both his hardhat and clothing. (Tr. 68, Ex. C-6).

During the course of his inspection, CSHO Sholing observed that Respondent was using Sherwin Williams Industrial Enamel red safety paint, product number B-54-E-39. (Tr. 62, Ex. C-10). The paint container's warning label indicated that it caused hazards to the skin. (Tr. 44, 57). In light of this observation, CSHO Sholing asked whether Respondent provided suitable facilities for washing off the paint. (Tr. 44). Respondent's quality control supervisor, Manny Valaga, directed CSHO Sholing to the newly renovated restroom area. (Tr. 44). The restroom had functional washing facilities; however, there was no soap in the soap dispenser. (Tr. 47, Ex. C-9). Valaga informed CSHO Sholing that the general contractor, Triple L Construction, had previously provided portable restrooms and hand-washing facilities; however, the temporary facilities had been removed because only the punch list items remained and the on-site restroom

renovation had been completed. (Tr. 44–45, 52, 63, Ex. C-15).

Because the paint container indicated that it caused a hazard to the skin, CSHO Sholing also asked to see a copy of the Material Safety Data Sheet ("MSDS"). (Tr. 57). Valaga took out a binder containing MSDS sheets; however, he could not find the specific MSDS for the Sherwin Williams paint. (Tr. 58). There was some indication that the MSDS may have been on site at one point in time and was later removed by a representative of Triple L Construction. (Tr. 71, Ex. C-15). That said, the MSDS that Respondent provided to Complainant in discovery was not the MSDS for the Sherwin Williams paint that was observed at the worksite. (Tr. 76, C-10, C-15).

In light of the foregoing, Complainant issued a Citation to Respondent alleging one serious and one other-than-serious violation of the Act. Those violations are discussed below.

IV. Conclusions of Law

A. Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 C.F.R. 1926.51(f)(3): Hand soap or similar cleansing agents was [sic] not provided.
>
> At the CNMI International Airport restroom, near the Immigration area, hand soap or similar cleansing agents was [sic] not provided for employees who handle and/or use Sherwin Williams Industrial Enamel Paint thereby, exposing employees to hazardous chemicals that may potentially result in skin irritation.

The cited standard provides:

> Lavatories shall be made available in all places of employment. The requirements of this subdivision do not apply to mobile crews or to normally unattended work locations if employees working at these locations have transportation readily available to nearby washing facilities which meet the other requirements of this paragraph.
> ….
> (iii) Hand soap or similar cleansing agents shall be provided.

29 C.F.R. § 1926.51(f)(3)(iii).

To establish a *prima facie* violation of the Act, Complainant must prove by a preponderance of the evidence that: (1) the standard applies to the cited 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. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶ 29,254 (No. 85-0531, 1991).

By its terms, the standard requires that lavatories and washing facilities shall be made available in all places of employment or, in the case of mobile crews, that transportation be made available to employees to nearby washing facilities that meet the requirements of the standard. Respondent's employees were engaged in work at the CNMI Airport, which constituted their temporary place of employment. Accordingly, the Court finds that the standard applies. The Court does not find, however, that the terms of the standard were violated or that Respondent knew or could have known of the violative condition.

First, there was no indication that the bathroom identified by the CSHO was the only available washing facility at the CNMI Airport. The standard merely requires that lavatories and washing facilities be made available to employees. There is no requirement that they be located within a specified distance—mobile crews merely need to have transportation readily available to take them to nearby washing facilities. *See* 29 C.F.R. § 1926.51(f)(3). There is no question that the restroom closest to the worksite did not have soap in the dispenser; however, Complainant failed to prove there were no facilities in the CNMI Airport that fulfilled the requirements of the standard.

Alternatively, the Court also finds that Complainant failed to establish that Respondent knew or should have known of the violative condition. Prior to the day of the inspection, the general contractor, Triple L Construction, provided temporary washing facilities at the worksite.

Once the major renovations had been completed, the temporary washing facilities were removed, and Respondent relied upon the permanent facilities in the newly renovated immigration area. Complainant failed to prove that Respondent exerted control over the airport restroom or that it was responsible for ensuring that the soap dispensers were properly filled. At the time of the inspection, Respondent had been working for approximately one hour and likely did not need to utilize the washing facilities by the time of the CSHO's arrival. The Court finds that it would be reasonable for Respondent to assume that the CNMI Airport staff would handle the stocking of soap and hand towels in its own restroom.[1] Complainant did not introduce any evidence to suggest that Respondent knew or should have known that the soap dispenser in that particular bathroom was empty.

In light of the foregoing, the Court finds that Complainant did not establish its *prima facie* case. Accordingly, Citation 1, Item 1 shall be VACATED.

B. <u>Citation 1, Item 2</u>

Complainant alleged an other-than-serious violation of the Act in Citation 1, Item 2 as follows:

> 29 C.F.R. 1910.1200(g)(8): The employer did not maintain copies of the required material safety data sheets for each hazardous chemical in the workplace: (Construction Reference 1926.59)
>
> Outside the CNMI International Airport rest room, near the Immigration area, a painter was applying Sherwin Williams Industrial Enamel Paint onto the surface of a metallic pipe. At the time of the inspection, a Material Safety Data Sheet was not available for Sherwin Williams Industrial Enamel Paint.

The cited standard provides:

> The employer shall maintain in the workplace copies of the required safety

1. Hand towels are required by subsection (iv) of the same standard. *See* 29 C.F.R. § 1926.51(f)(3)(iv). Presumably the restroom facilities had been stocked with hand towels, else Respondent would likely have been cited for their absence as well. To the extent that hand towels were available, it would also be reasonable for Respondent to assume that all other lavatory accoutrements were available as well.

> data sheets for each hazardous chemical, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s).

29 C.F.R. § 1910.1200(g)(8).

CSHO Sholing observed that the can of Sherwin Williams Industrial Enamel Paint being used by Respondent contained a warning label indicating that it presented hazards to the skin. When he asked whether Respondent had a copy of the MSDS for that paint, Respondent did not have a copy of the appropriate MSDS at the worksite. Accordingly, the Court finds that the standard applies and was violated.

Complainant also established exposure to the hazard. The Secretary may show employee access through either actual employee exposure, or by showing that "while in the course of their assigned working duties . . . [employees] will be, are, or have been in a zone of danger." *See Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976). CSHO Sholing observed red paint splattered on the hardhat and clothing of Amog, who had stated that he had been painting the pipes in the fire sprinkler room. Further, Respondent knew or should have known that it did not have the appropriate MSDS for the Sherwin Williams Industrial Enamel paint. To establish employer knowledge, an employer does not have to possess knowledge that a condition violated the Act, just knowledge that the condition existed. *Shaw Construction, Inc*., 6 BNA OSHC 1341. The Sherwin Williams paint can was located in plain view and was being used at the time of the inspection. Respondent's quality control supervisor, Manny Valaga, was responsible for maintaining the MSDS sheets for the worksite, and he failed to have the proper MSDS for the Sherwin Williams Industrial Enamel Paint. *See A.P. O'Horo Co.*, 14 BNA OSHC 2004 (No. 85-369, 1991) (actual or constructive knowledge of a foreman is imputable to the employer).

In light of the foregoing, the Court finds that Complainant established a violation of 29 C.F.R. 1910.1200(g)(8). Accordingly, Citation 1, Item 2 shall be AFFIRMED as an other-than-

serious violation of the Act.

V. PENALTY

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission 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. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

Complainant did not assess a penalty for Citation 1, Item 2. Based on the record, the Court agrees with the assessment of Complainant.

ORDER

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. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 and its associated penalty are hereby VACATED.
2. Citation 1, Item 2 is AFFIRMED as an other-than-serious violation of the Act and no penalty is assessed.

Date: February 19, 2013
Denver, Colorado

/s/
Patrick B. Augustine
Judge, OSHRC