UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. FRANKLIN E. SKEPTON CONTRACTOR, amended to SKEPTON CONTRACTING INC., Respondent.	DOCKET NO. 97-0208 E-Z TRIAL

Appearances: For Complainant: Joseph T. Crawford, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, PA.; For Respondent: Joseph F. Leeson, Jr., Esq., Lesson, Lesson & Lesson, Bethlehem, PA.

Before: Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to Section 10(c) the Occupational Safety and Health Act of 1979 (29 U.S.C. §651, *et seq.*)("the Act"). Respondent, Franklin E. Skepton Contractor, amended to Skepton Contracting Inc., at all times relevant to this action maintained at a workplace at the Pocono Mountain Middle School, Swiftwater, PA., where it was engaged in general contracting work. (*See discussion infra,* with regard to amendment). Construction work affects interstate commerce because it is in a class of activity that as a whole affects commerce. Additionally, there is an interstate market in construction materials and services. *Atlanta Forming Company, Inc.*, 11 BNA OSHC 1667, 1668 (No. 80-6925, 1983). The record reveals that in its capacity as general contractor, Respondent employed employees at the subject worksite. Accordingly, Respondent is an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Act, 29 U.S.C.§ 652(5), and is subject to the requirements of the Act.

On November 21, 1996 through January 3, 1997, OSHA Compliance Officers David Martin and James Jury ("CO Martin" and "CO Jury") conducted a general schedule construction inspection of the subject worksite.[1] The worksite had appeared within a inspection site report known as a Dodge Report, which is complied by the University of Tennessee pursuant to a contract with OSHA. The procedure for selecting worksites is based upon rational and neutral criteria (Tr. 10, 62-63, 65,

[1] CO Martin was only accompanied by CO James Jury on the first day of the inspection (Tr. 36-37). Two inspectors were assigned to this inspection because an anticipatory warrant had been prepared on this inspection because of the past history of warrants and this employer (Tr. 16).

72-73, Exh R-1).[2] The Dodge Report identified Respondent as the general contractor on the subject worksite, which involved the construction of a middle school (Tr. 72). Upon arrival at the worksite, the compliance officers went to the office trailer identified as Respondent's and held an opening conference with Mr. Harry Bears, who had identified himself as Respondent's superintendent (Tr. 17-18).[3] Mr. Beers acknowledged that he had control over the subcontractors on the worksite (Tr. 105). After the opening conference, CO Martin and CO Jury accompanied by Mr. Beers started to walk through the worksite to observe any possible hazards (Tr. 21-22). As a result of this inspection, on January 14, 1997, Respondent was issued one citation containing five items alleging serious violations with a proposed total penalty in the amount of $2,100.00. By timely Notice of Contest, Respondent brought this proceeding before the Review Commission. On May 8, 1997, the undersigned granted Complainant's Motion to Amend Citation 1, Item 1a [§1926.100(a)], to allege in the alternative a repeat violation. A hearing was held before the undersigned on May 15, 1997. Prior to the taking of testimony, counsel for Complainant withdrew Citation 1, Items 2a and 2b. Accordingly, the remaining issues involve Citation 1, Items 1a and 1b, and Item 3.

During the course of the hearing, Respondent alleged that the firm working at the subject worksite was Skepton Construction Inc., and not Franklin E. Skepton, General Contractor. Counsel for Complainant has moved to amended the caption of this matter to reflect this name change (Tr. 158; Complainant's Post-Trial Brief, p. 5). The undersigned finds that a review of the record reveals that Respondent has not in any manner been prejudiced by this error. Upon OSHA's arrival at t he subject worksite, Respondent's superintendent, Harry Beers, identified himself as an employee of Franklin Skepton Contractor and he fully cooperated during the course of the inspection (Tr. 17-20). Additionally, Franklin E. Skepton testified that he was President of Skepton Construction, Inc. (Tr. 134-135). Accordingly, pursuant to Federal Rule of Civil Procedure 15(b), the captioned is amended to reflect the name Skepton Construction, Inc.

SECRETARY'S BURDEN OF PROOF

> The Secretary has the burden of proving his case by a preponderance of the evidence. In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (the employer either knew or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

DISCUSSION

Citation 1, Item 1a: Alleged Violation of 29 CFR §1926.100(a)

The standard sets forth:

> **Head Protection**
>
> (a) Employees working in areas where there is a possible danger of head

---

[2] "Tr." refers to the hearing transcript.

[3] Mr. Franklin E. Skepton testified that there were six prime contractors on the worksite, and his company, Skepton Construction Inc. had the general trades contract (Tr. 112).

> injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

The Secretary's Citation sets forth:

> (a) Pocono Mountain Middle School: A worker in an area where there was a danger of head injury from impact or falling or flying objects was not protected by a protective helmet.

The undersigned finds that the standard is applicable because respondent was engaged in construction. CO Martin testified that he issued this violation based upon an observation he made of Mr. Beers on December 17, 1996[4]. He testified that Mr. Beers was just stepped a few steps outside the office trailer when a piece of construction equipment, a backhoe drove past him on a passageway in front of the job trailer (Tr. 24, 77). The backhoe was within three to six feet from him as it drove past (Tr. 94). Mr. Beers, who was on his way to the area where the steel erection was actually taking place, did not have on a hard hat (Tr. 24). CO Martin testified that construction work had occurred in the area on prior days, however, on the day he observed this condition the actual steel erection was across the road "maybe 50 to 60 feet away" from Mr. Beers (Tr.24-25, Exh.R-2).[5] At the time of the observation, the backhoe was not in operation and the front scoop was close to the ground, about a foot or two from the ground, and the back-digger was in a retracted position (Tr. 79-80). CO Martin testified that the hazard presented was that Mr. Beers could have been struck in the head by some part of the backhoe as it went past him (Tr. 31, 95). He further testified that because someone was riding in the front bucket, if that person had fallen out of the bucket as it passed Mr. Beers, the driver of the backhoe would have had to swerve the backhoe in order to avoid hitting the fallen individual. During the course of the swerve, the backhoe would extend out of the area of forward travel and the person, Mr. Beers could have been struck on the side (Tr. 81-82).[6] He also stated that he was concerned that Mr. Beers could be struck in the head as the backhoe went pass him (Tr. 95). CO Jury further testified that in the event that the backhoe portion of the machine were to strike an individual on the side of the head, a hard hat would provide head protection (Tr. 149). He also stated that if the backhoe struck the upper portion of an individual's body and knocked said individual to the ground, a hard hat would also offer some protection (Tr. 150).

A review of the standard reveals that it requires hardhats to guard against impact as well as falling objects. Furthermore, Review Commission precedent has established that this standard by its express language applies whenever employees are exposed to a possible danger of head injury. Thus,

---

[4] The undersigned notes that CO Martin testified that upon his arrival at the worksite he observed unspecified workers on the worksite working without hardhats (Tr. 22). However, counsel for Complainant informed the undersigned that this violation refers to only to the activity of Mr. Beers (Tr. 40).

[5] Mr. Skepton testified that the actual construction site was 125 feet from the trailer. (Tr. 117, 125).

[6] CO Martin further testified that sometimes debris on the backhoe and if the backhoe swerves the debris can be thrown off. He acknowledged that he did not see anything, such as debris, that could have fallen onto Mr. Beers from above (Tr. 83).

the standard requires proof of an access to zone of danger rather than actual exposure test. *Adams Steel Erection, Inc.*, 766 F.2d 804, 12 BNA OSHC 1393, 1398 (3d. Cir., 1985). In *RGM Construction Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995), the Review Commission reviewed the element of employee exposure and zone of danger.

> The Secretary may prove employee exposure to a hazard by showing that during the course of their assigned duties, their personal comfort activities on the job, or their normal ingress-egress to and from their assigned workplaces, employees have been in a zone of danger or that it is reasonably predictable that they will be a zone of danger. *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1521 (No. 90-2866, 1993); *Armour Food Co.*, 14 BNA OSHC 1817, 1824 (No. 86-247, 1990). The zone of danger is determined by the hazard presented by the violative condition and is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent. *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976).

A review of the aforementioned testimony establishes by a preponderance of the evidence that Mr. Beers' had access to a zone where there was a possible danger of head injury from impact that a hardhat would have guarded against. In light of the fact that Mr. Beers and CO Martin were accessing the worksite from the subject road, it is apparent that this road was one in which employees utilized and equipment was transported. Furthermore, Mr. Beers was on his way to the inspection site where it was reasonably predictable that he would be in the zone of danger (Tr. 151). The testimony of the compliance officers also established exposure to the hazard of a head injury as he described the possible occurrence of swerving of the backhoe and the resulting side impact. Accordingly, the undersigned finds that the record establishes noncompliance with the cited standard and employee exposure.

"Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corporation*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). See also *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962 (No. 82-928, 1986)(the actual or constructive knowledge of an employer's foreman can be imputed to the employer). In the instant matter, prior to going on the inspection Mr. Beers took no measures to ensure that he would not be exposed to the hazards the cited standard was promulgated to prevent. This is evidence which indicates a lack of reasonable diligence to anticipate and prevent the occurrence of hazards to which he and employees may have been exposed. Accordingly, the undersigned finds knowledge on the part of the Respondent.

A violation is "repeated" if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *D.M. Sabia Co.*, 90 F. 3d 854, 17 BNA OSHC 1680 (1996), citing *Potlach Corp.*, 7 BNA OSHC 1061(No. 16183, 1979). Complainant introduced evidence at the hearing which reflected that Respondent was cited for a violation of 29 C.F.R.§1926.100(a) on August 6, 1993. This citation was affirmed in a Review Commission decision which became a final order of the Review Commission on March 13, 1995. The Third Circuit denied Respondent's Petition for Review of said order on December 20, 1995. *See* Exhs. C-1, C-3 and C-4. Accordingly, the instant violation was appropriately classified

as repeated. The subject violation was also appropriately classified as serious because as previously discussed it was possible that an accident could occur wherein serious injury or death could be expected.

The undersigned finds that based upon the testimony introduced at trial, the gravity of the instant violation shows that the severity of the expected injury was severe, and because there was only one employee exposed to the violation the probability of the occurrence of an accident was low. The record reveals that the employer had 40 employees. In light of the fact that this is a repeat violation the only adjustment factor which should be applied to the penalty is for size. The undersigned finds that a penalty in the amount of $1,400.00 would be appropriate and will produce the necessary deterrent effect.

Citation 1, Item 1b: Alleged Violation of 29 CFR §1926.102(a)(1)

The standard sets forth:

> **Eye and face protection**
>
> (a) *General.* (1) Employees shall be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents.

The Secretary's Citation sets forth:

> (a) Pocono Mountain Middle School: A worker using a saw where there was a danger of eye injury was not protected by safety glasses.

The instant standard requires that employees be "provided" with eye and face protection when machines or operations present hazards of eye or face injury. During CO Martin's walkaround, he observed an employee operating a circular saw to cut a two by four piece of wood on the ground floor area of the school. The employee was not using eye protection at the time of this observation (Tr. 43). CO Martin testified that the chips flying off the blade could have struck the employee in the eye (Tr. 43). CO Martin testified that when he brought this to the attention of Mr. Beers, he stated that he had issued eye protection to the workers. Mr. Beers interrupted the worker and reprimanded the employee and told to go and get his eye protection (Tr.43- 44).[7] The worker indicated that his glasses were in his lunch box at another location on the worksite. A coworker offered to give him his glasses, however Mr. Beers told the employee not to use another worker's glasses (Tr. 103-104). The worker left and a short time later he returned with a pair of safety glasses (Tr. 44).

The Review Commission has considered a number of cases where the Secretary has argued that "provide" means "require use of". In the matter of *Contractors Welding of Wester New York Inc.*, 15 BNA OSHC 1249, *appeal dismissed and remanded* 15 BNA OSHC 1874 (No. 88-1847, 1992), the Review Commission ruled that an employer's failure to require employees to wear available life vests did not constitute a violation of §1926.106(a), because the term "provide" in that standard could not reasonably be interpreted as including a use requirement. The Review Commission reviewed several of its previous decisions as well as several court of appeal decisions where the Secretary had argued that the word "provided" meant "require the use of". The Review Commission concluded that in these cases the word "provide" was not ambiguous and that it was commonly understood to mean "furnish" or "make available". Although, the case was subsequently

---

[7] During Mr. Skepton's testimony he stated that his company issues hardhats and safety glasses to its employees (Tr. 136).

settled, the Commissioners reiterated their position in the settlement order, stating that their analysis of the issue still constituted valid precedent. 15 BNA OSHC 1876.

In view of Review Commission precedent and the evidence presented in this case, the undersigned finds that the Respondent did supply eye protection and vacates said violation.

Citation 1 Item 1, Item 3: Alleged Violation of 29 CFR §1926.153(h)(5)

The standard sets forth:

> **Liquefied petroleum gas (LP-Gas)**
>
> (h) *Containers and equipment used inside of buildings or structures.*(5) Valves on containers having water capacity greater than 50 pounds (nominal 20 pounds LP-Gas capacity) shall be protected from damage while in use or storage.

The Secretary's Citation sets forth:

> (a) Pocono Mountain Middle School: The valve on an LP-gas container having a water capacity greater than 50 pounds was not protected from damage while in use or storage.

The undersigned finds that the standard is applicable because respondent was engaged in construction. CO Martin testified that he issued this violation because he observed a container containing liquid petroleum gas (LP gas) on the ground floor area that did not have protective valve cap which would protect the tank from liberating gas in the event it was struck (Tr. 49; 106, 108; Exh. C-2 at 0102)[8]. The LP gas was being used as fuel for a heater in the area and is flammable. He testified that because the valve was not protected, it could have been knocked off or damaged by some of the material employees carried or by small loaders operating in the area. The hazard associated with this condition is one of an explosion and/or fire. Once the valve was broken the LP gas which is highly flammable, could escape and create an ignition source in the area where there was electrical equipment in operation (Tr. 51, 107-108). CO Martin testified that Mr. Beers identified the worker in the vicinity of the LP gas container as his worker, i.e., this is the area where the employee cutting wood without eye protection had been observed (Tr. 54). Mr. Skepton testified that the tanks were part of a shipment of tanks from a local bottled gas company to be used for temporary heat. When the tanks arrived some of the caps did not fit (Tr. 121). Mr. Skepton believed that because the tank had been tied to a column it presented no hazard.

The undersigned finds that the condition of the cited gas container establishes noncompliance with the cited standard and because of its location it was subject to being struck. The employees in the area were exposed to the hazard of an explosion and/or fire. The undersigned further finds that in light of the fact that there was a second tank on site which had the proper cap on it and Mr. Beers found a cap for a third tank and attempted to install it onto the tank, if the employer had exercised reasonable diligence the presence of the violative condition could have known (Tr. 106, 107, Exh, C-2:0046-0105). Thus, the employer had knowledge of the violation. The violation was properly classified as serious because in the event of an explosion or fire death or serious physical harm could be expected.

The penalty for this violation was appropriately assessed at $700.00. The gravity of the violation showed that the severity of injury expected was high and the probability of the occurrence

---

[8] CO Martin testified that he observed more than on container without a cap in the area, however he only cited one in his citation (Tr. 52-53).

of an accident was low because of the low number of exposed employees. This penalty also reflects adjustments for good faith (written safety policy on site) and size (Tr. 48, 55). The undersigned finds that although the employer's history reveals a prior final order, *supra*, the proposed penalty of $700.00 will produce the necessary deterrent effect.

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

Citation 1, Item 1a , alleging a repeat violation of §1926.100(a) is AFFIRMED with a penalty of $1,400.00.
Citation 1, Item 1b is VACATED,
Citation 1, Item 3 alleging a serious violation of §1926.153 (h)(5) is AFFIRMED with a penalty of $700.00.

Covette Rooney
Judge, OSHRC

Dated:

Washington, D.C.