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

**SECRETARY OF LABOR,**

**Complainant,**

**v.**

**ACADEMY ROOFING CORP.,**

**Respondent.**

**OSHRC DOCKET NO. 13-0531**

Appearances:

Robin Ackerman, Attorney
U.S. Department of Labor, Office of the Solicitor,
John F. Kennedy Federal Building, Room E-375
Government Center
Boston, MA 02203
For the Complainant.

Paul J. Katz, Attorney
749 Heath Street
Brookline, MA 02467
For the Respondent.

Before: Carol A. Baumerich
Administrative Law Judge

## DECISION AND ORDER

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"). As a result of an inspection of Academy Roofing Inc.'s ("Academy" or "Respondent") worksite in Concord, Massachusetts, the Secretary issued to

Respondent a citation alleging a single serious violation of the fire extinguisher standard at 29 C.F.R. §1926.150(a)(2). The citation was amended in the complaint, without objection, to allege a violation of 29 C.F.R. §1926.150(c)(1)(vi). The Secretary proposed a penalty of $1,200 for the violation. For the reasons stated herein, the citation and proposed penalty are vacated.

*FACTS*

On February 1, 2013 Respondent was working on the roof of a multistory construction site at 200 McGregor Street in Concord, Massachusetts. Academy was one of the seven to ten contractors on the site. (Tr. 20, 28). The general contractor was Harvey Construction. (Tr. 19-20).

When the Academy crew arrived at the site, the roof had ice buildup. Academy employees began drying the roof with a propane torch. (Tr. 25, 30). At approximately 7:40 a.m., a small fire broke out when a rag caught on fire. (Tr. 105). The fire extinguisher on the roof needed to be recharged. Therefore, Academy foreman Jesse Hache went to his truck and retrieved an extinguisher, which he used to put out the fire. (Tr. 105). As a result, that extinguisher also needed to be recharged and was now unusable. (Tr. 106, 114). Respondent had no other fire extinguishers available at the site. (Tr. 25, 106-107, Ex. C-5). Because they no longer had a fire extinguisher, foreman Hache removed the propane torch from the site and placed it in the truck. (Tr. 115). Thereafter, employees used a heat gun[1] to mold a piece on the roof curb. (Tr. 23, 62, Ex. C-4, Ex. R-3).

Compliance Safety and Health Officer (CSHO) Joe LaRose arrived at the jobsite at approximately 9:15 a.m. that morning to conduct a programmed inspection. (Tr. 19). The CSHO inspected the sites of each of the contractors on the site, including Academy. (Tr. 48).

[1] Unlike a propane torch, which emits fire, a heat gun only blows hot air. It is similar in operation to a hair dryer and blows hot air at a temperature ranging from 65-1200 degrees Fahrenheit. (Tr. 64).

During his inspection of Respondent, the CSHO saw two 5-gallon containers of a highly flammable cleaner and one 5-gallon container of a highly flammable roof adhesive. (Tr. 22, 96-98, 113, 142, 158 Exs. C-2, C-3)[2]. To see the safety warnings on the sides of the container, the CSHO tipped them on their side. The CSHO testified that each container felt more than half full. (Tr. 22-23, 148-149). To the contrary, foreman Hache testified that, in total, the combined containers held three to three and a half gallons of product. (Tr. 113).

There were other extinguishers at the jobsite. The CSHO observed extinguishers on the lower levels, throughout the site, where the plumbers were working. In his opinion, those extinguishers were not within 50 feet of the Academy employees working on the roof. (Tr. 145). A hatch at the worksite provided access to the lower level by using a ladder. In addition, foreman Hache testified that Harvey Construction maintains two-three extinguishers on each floor in designated areas. (Tr. 130, 133-134). He estimated that the closest extinguisher was no more than 30-32 feet from the Academy site. (Tr. 156-157). The CSHO testified that he did not see those extinguishers, but admitted that he wasn't looking for them. (Tr. 151).

As a result of the inspection, Academy was issued one citation alleging a serious violation of 29 C.F.R. §1926.150(a)(2)[3] for failing to maintain fire extinguishers on the roof. The Secretary proposed a $1,200 penalty for the violation. Following Respondent's timely filing

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[2] The CSHO testified that there were four containers of product in use: two containers of cleaner and two containers of adhesive. (Tr. 22). To support his conclusion, he relied on photographic exhibit C-2. However, the exhibit does not show four containers identifiable as either cleaner or adhesive. Foreman Hache, on the other hand, testified with certainty and clarity that only three containers of product were in use. (Tr. 96-98, 113, 142, 158). Moreover, in his brief, the Secretary apparently concedes that there were only three containers of product in use, where it notes, but does not dispute, Academy's assertion that there were only three containers of flammable product in use. (SOL Opening Brief at p. 4). Indeed, while in his brief, the Secretary makes several mentions of the two containers of cleaner, nowhere does he specifically state that there were also two containers of adhesive. (e.g. SOL Opening Brief at pp. 2-3). Finally, as set forth *infra,* the parties stipulated that there were two 5-gallon containers of cleaner in use. (Stipulations (e) and (l). Although the stipulations also mention that adhesive was also on the roof, nowhere do they indicate the number of containers. (Stipulations (h) and (i). Accordingly, I credit the testimony of foreman Hache, and find that there were a total of three containers of product in use at the time of the inspection.

[3] The standard states:

> Access to all available firefighting equipment shall be maintained at all times.

of its notice of contest, the Secretary filed a complaint which amended the citation to allege a violation of 29 C.F.R. §1926.150(c)(1)(vi). That standard provides that:

> A fire extinguisher, rated not less than 10B, shall be provided within 50 feet of wherever more than 5 gallons of flammable or combustible liquids or 5 pounds of flammable gas are being used on the jobsite. This requirement does not apply to the integral fuel tanks of motor vehicles.

Respondent did not object to the amendment. (Tr. 4).

Before the hearing, the parties filed the following stipulations, as amended at the hearing:

a. OSHA Compliance Officer Joseph LaRose inspected, *inter alia*, Respondent's Worksite on February 1, 2013 (the "Inspection").

b. The Inspection included roofing work performed by Respondent on a new building, located at 200 McGregor Street in Manchester, New Hampshire ("the Worksite").

c. Respondent's employees, Brian Michaud, Jamie Hughes, and Foreman Jesse Hache, performed work on the roof on February 1, 2013.

d. No more than two fire extinguishers were present on the roof at any time on February 1, 2013.

e. To prepare the Worksite on February 1, 2013, Respondent's employees first transported and set up equipment and materials on the roof, including two five-gallon containers of "Weathered Membrane Cleaner" each of which displayed a label describing the fluid as "highly flammable"; a fire extinguisher was brought to the specific area in which the work was to be performed by Respondent's Foreman.

f. At approximately 8:00 am on February 1, 2013, a fire occurred at the Worksite when a rag caught on fire, requiring the use of the fire extinguisher that had been brought to the specific work area.

g. After the fire on February 1, 2013, both fire extinguishers at the Worksite were exhausted, with needle gauges pointing to "RECHARGE."

h. At the time of the Inspection, Respondent's employees were using rags to clean the rubber membrane layer that covered the roof surface. The rags had Weathered Membrane Cleaner on them.

i. At the time of the Inspection, Respondent's employees were also using a rag to apply "Sure-Weld Bonding Adhesive," a flammable adhesive agent, to

unconnected joints of the rubber membrane layer that covered the roof surface, and bonded the joint pieces together using a heat gun.

j. Compliance Officer Joe LaRose began the Inspection at the Worksite on February 1, 2013 at approximately 10:00 a.m. Accompanying him on the roof were Respondent's Foreman, Jesse Hache, Superintendent of Prime Contractor Harvey Construction, Michael Halliday, and Rich Levinus, Consultant for Contractors Risk Management.

k. Between the time of the fire and the time of the Inspection on February 1, 2013, Respondent did not replace or refill the fire extinguishers at the Worksite.

l. At the time that Compliance Officer Joseph LaRose began the Inspection on February 1, 2013, two five-gallon containers of Weathered Membrane Cleaner were present and in use at the worksite.

m. Foreman Jesse Hache told Compliance Officer Joseph La Rose, during the Inspection, that the fire extinguishers at the Worksite were empty because it had been necessary to use them to extinguish the fire that had occurred when a rag ignited earlier in the day on February 1, 2013.

n. After the fire, Respondent's employees poured Weathered Membrane Cleaner from the five-gallon containers onto rags.

o. On February 20, 2013, Complainant issued a Citation (the "Citation") and Notification of Penalty resulting from the Inspection, alleging a violation of 29 CFR 1926.150(a)(2).

p. On May 20, 2013, Complainant issued a Complaint in which it amended the Citation to allege a violation of 29 CFR 1926.150(c)(1)(vi) rather than 29 CFR 1926.150(a)(2).

(Exhibit J-1)

A hearing was held in Boston, Massachusetts on December 6, 2013. Both parties have filed briefs and reply briefs[4] and this matter is ready for decision.

*Jurisdiction*

In its Answer Respondent admitted that it is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act. Respondent also admitted that

[44] In its reply brief, Academy makes several factual assertions for which there is no evidence in the record. For example Respondent asserts that it has a "no smoking rule." It also asserts that the containers of flammable liquids were lined with rubber to prevent a spark. Because these assertions are not supported by the record, they will not be considered or play any part in this decision.

jurisdiction in this matter is conferred upon the Commission by Section 10(c) of the Act. Therefore, I find that Respondent was an employer within the meaning of sections 3(3) and 3(5) of the Act and that the Commission has jurisdiction of the parties and subject matter of this proceeding.

*Applicable Law*

To establish a violation of an OSHA standard, the Secretary must establish that: (1) the standard applies to the facts, (2) the employer failed to comply with the terms of that standard, (3) employees had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violation (i.e. the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition). *Atlantic Battery Co.,* 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

*Discussion*

It is undisputed that Respondent is engaged in construction work and that the cited standard applied to its worksite. The original standard, 29 C.F.R. §1926.150(a)(2), presumes that a fire hazard exists at construction sites and mandates that fire extinguishers be "available." As noted, *supra,* the evidence establishes that fire extinguishers were available at various locations at the construction site. Where the employer is using more than 5-gallons of combustible fluids there is a substantially heightened hazard of fire. In such situations, the amended standard, 29 C.F.R. §1926.150(c)(1)(vi), requires that a fire extinguisher be available within 50 feet of the site. Therefore, to establish a violation of the amended standard, the burden is on the Secretary to establish, by a preponderance of the evidence, that (1) the employer had at

least 5-gallons of flammable liquid in use, and (2) that there was no fire extinguisher within 50 feet of the jobsite.

The evidence establishes that two 5-gallon containers of the "Weathered Membrane Cleaner" ("Cleaner") and one 5-gallon container of Sure-Weld Bonding Adhesive ("Adhesive") were in use at the time of the inspection. (Tr. 92, 112-113, 142, Stipulations (e), (i) and (l)). Two full 5-gallons of the adhesive were used only as a weight to secure some objects that were glued earlier. These two containers were not open and were not in use. (Tr. 138-139). The CSHO testified that, when he tipped[5] the containers to read the labels, they felt "fairly full" and determined that each was more than half full. Therefore, he concluded that more than five gallons of flammable product was in use. (Tr. 22-23, 42, 148-149). He drew his conclusion based on his handling of the containers, his knowledge of 5-gallon containers, and his 20 years of experience. (Tr. 42, 150).

Foreman Hache testified that each container of Cleaner and Adhesive contained less than a gallon of product. (Tr. 112-113). He testified that, as part of his routine morning inspection of the site, he checked to determine how much product was left by opening the cap and actually looking into each container. (Tr. 112). To look into the containers, he would pull the spout, unscrew the cap, and look inside. (Tr. 112). He testified that he could see clearly into the containers through the openings .which he estimated to be approximately the size of a Dixie Cup, or one and a half inches wide. (Tr. 126, 127). Hache testified that he has to determine the amount of product at the site because it is necessary to have sufficient quantity to do the job.

[5] Respondent disputes whether the CSHO tipped the cans. It argues that foreman Hache testified that he was with the CSHO during the entire inspection and never saw him tip the cans. (Tr. 120, 154). On this matter, I credit the testimony of the CSHO and find that he tipped the cans. Much was happening during the inspection. That Hache could not recollect the CSHO's tipping of the cans does not mean it did not occur. Determining the nature of the content of the containers was a necessary part of the CSHO's inspection. To do so, he had to read the labels. It is natural to tip a can to make the label more visible.

(Tr. 132). He asserted that he has followed this procedure every morning for 17 years. (Tr. 132). Hache estimated that, in total, there was about three to three and a half gallons of product. (Tr. 113). He also testified that the CSHO never brought the quantity of product to his attention. He asserted that, if the CSHO had done so, he would have told him that there absolutely was not a total of five gallons of product in use. (Tr. 116).

The record contains no indication that, during the inspection, CSHO LaRose was concerned about or considered the amount of product in use at the site. When he tipped the cans, he was not trying to determine the quantity of product, but attempting to read the warning labels. (Tr. 23, 42). The amount of product in the containers was not his focus. He made no comment or inquiry regarding the amount of product in the containers. (Tr. 115-116). No concern about the quantity of product was mentioned during the closing conference. (Tr. 70-71 120). Nowhere in his notes is there any mention regarding the amount of flammable product in use by Respondent. (Tr. 48, 57, Ex. R-2, pp. 2-3). Rather, his concern involved the originally cited standard which requires only "[a]ccess to all available firefighting equipment shall be maintained at all times[6]." Indeed, there is no evidence in the record to suggest that the CSHO even considered the quantity of the products in the containers until after the citation was amended.

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[6] Unlike the standard in the amended citation, the originally cited standard requires only that a fire extinguisher be available at the site. As discussed*, supra,* the evidence establishes that fire extinguishers were available on lower levels. In his brief, the Secretary disputes whether extinguishers were available. He argues that in the Joint Stipulation, paragraphs (g), (k), and (m), the parties agreed that there was no working fire extinguishers at the worksite. I do not agree. It is unclear whether, when referring to the term "worksite" in the Joint Stipulation the parties had a meeting of the minds over whether the term "worksite" referred to the entire building or just the roof. For example, Joint Stipulation paragraph b states: "The Inspection included roofing work performed by Respondent on a new building, located at 200 McGregor Street in Manchester, New Hampshire ("the Worksite")." Not only was the stipulation vague, but, as interpreted by the Secretary, was contrary to the substantial evidence. CSHO LaRose clearly testified that he observed fire extinguishers throughout the worksite. (Tr. 145). "[T]he trial court has not only the right but the duty to relieve a party from a pretrial stipulation where necessary to avoid manifest injustice and adjudications based on the [supporting] theory, or where there is substantial evidence contrary to the stipulation." *Rathborne Land Co., L.L.C. v. Ascent Energy, Inc.,* 610 F.3d 249, 262-263 (5th Cir. 2010) citing *Coastal States Mktg., Inc. v. Hunt,* 694 F.2d 1358, 1369 (5th Cir.1983); *H.B. Zachry Co. v. U.S.,* 344 F.2d. 352, 357 (Ct. Cl., 1965). Accordingly, I find that substantial evidence establishes that fire extinguishers were available at the site.

The inspection took place on February 1, 2013. The citation was issued nearly three weeks later, on February 20, 2013. Respondent's notice of contest was filed on March 18, 2013. The Complaint, where the Secretary amended the citation, was not filed until May 20, 2013. The CSHO testified that he had no input in the decision to amend the citation (Tr. 36) and did not learn that the citation was amended until he learned that the matter was in contest. (Tr. 68). The record does not reveal when the CSHO learned that the matter was in contest. It is likely that the CSHO did not learn of the amendment until the complaint was filed, three and a half months after the inspection. However, at a minimum, it was some time after the notice of contest was filed, over one and a half months after the inspection.

When he learned that the citation had been amended, the CSHO, for the first time, had to consider the quantity of product that was in each container. With no notes to refresh his recollection, the CSHO had to reach back into his memory to recall the quantity of product in use at the time of the inspection. When pressed for any documentation that the containers contained at least five gallons of product, he insisted that the documentation was in the photographs which showed only that the capacity of the containers was 5-gallons and his memory of the feel of the containers when tipped which, before the amendment, he never considered. (Tr. 67, Ex. C-3). Also, there were two identical cans of cleaner at the site. If, as he testified, the CSHO tipped the containers only to read the label, there was no reason for him to tip both containers of cleaner. This evidence demonstrates that the CSHO's memory was inherently imprecise and unreliable[7].

On the other hand, foreman Hache was responsible for the work. His job required him to pay attention to details of the site, including the amount of product on the job. Rather than

[7] With the CSHO having no input in the decision to amend and the CSHO's notes making no mention of the quantity of product in the containers, one must question the basis for the decision to amend. The only logical explanation is that the Secretary looked only at the capacity of the cans and concluded, without any supporting evidence, that the stated capacity represented the actual contends of the containers.

merely tipping the containers to read the labels, he actually opened the containers and looked inside for the express purpose of determining the quantity of fluid inside each. His recollection of the amount of product in use was not something he was asked to recall, out of the blue, months after the event, not having paid any attention to it until the citation was amended. Rather, determining the amount of product on the site was an important part of his daily routine.

Having observed the witnesses and considering the totality of the evidence and the circumstances surrounding the inspection, I credit the testimony of foreman Hache[8] and find that the Secretary failed to establish, by a preponderance of the evidence, that Respondent had at least five gallons of flammable product in use at the time of the inspection[9].

*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.

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[8] In his opening brief, the Secretary assails the credibility of foreman Hache. First, the Secretary asserts that because there were two unopened and unused containers of adhesive on the site, there was no reason for Hache to assess the quantity of adhesive in the opened container. This, the Secretary argues, demonstrates that Hache's testimony was a post-hoc explanation to support Respondent's position that the containers were almost empty. (SOL Opening Brief at 5). The Secretary also asserts that Hache's testimony was inherently contradictory and, therefore, unreliable. He points to Hache's direct testimony that using the heat gun in conjunction with use of the cleaner and adhesive did not create a fire hazard. (Tr. 110). On cross-examination, however, Hache agreed that, given the low flash points of the products, any little spark could cause combustion and that he would keep a fire extinguisher available when using a heat gun with flammable liquids. (Tr. 127-128)(SOL Opening Brief at 7).

I fail to find anything cited by the Secretary that renders Hache's testimony noncredible. That there were two full five gallon containers of unused product was not a reason for the foreman not to assess the amount of product in the opened container. To the contrary, before opening a sealed container, it makes perfect sense to first determine how much product remains in the opened container. Also, I fail to find his testimony regarding the nature of the hazard to be necessarily contradictory. Hache might have sincerely believed that merely using the heat gun on the products would not cause a fire. The question on cross-examination added the element of a "spark" which certainly could change the equation. Moreover, it must be recalled that there was a fire started in the rags just before the inspection. The record fails to definitively state the cause of that fire. However, it underscores that hazards exist when flammable products are used, even when, under normal operating circumstances, there may not be a fire hazard. Under these circumstances, any prudent employer would maintain fire extinguishers at the site. Indeed, the standard originally cited, 29 C.F.R. §1926.150(a)(2), presumes that a fire hazard exists at construction sites and mandates that fire extinguishers be "available."

[9] Finding that the Secretary failed to establish that 5-gallons or more of combustible fluids were in use, it is not necessary to address whether the fire extinguishers located throughout the site were within 50 feet of the roof worksite.

*Conclusion and Order*

Having failed to establish by a preponderance of the evidence that Respondent had five gallons or more of flammable liquid in use at the time of the inspection, I find that the Secretary failed to establish a violation of 29 C.F.R. §1926.150(c)(1)(vi).

Accordingly, it is ORDERED that citation 1, item 1 alleging a serious violation of 29 C.F.R. §1926.150(c)(1)(vi) and the proposed penalty are VACATED.

**So Ordered.** .

/s/
Carol A. Baumerich
Judge, OSHRC

Dated: September 15, 2014