UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant v. Benise-Dowling, Inc., Respondent.	OSHRC Docket No. **10-0449**

Appearances:

Jeremy K. Fisher, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

D. Charles Fulcher, Esquire, Edwin Marger, LLC, Jasper, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Benise-Dowling applies powder coating to metal parts at its facility in Decatur, Georgia. The company contests two citations issued by the Secretary on February 12, 2010. The Secretary issued the citations on the recommendation of Occupational Safety and Health Administration (OSHA) compliance officer Wayne Mattox. Mattox conducted an inspection of Benise-Dowling's facility on September 24, 2009, following up on a June 2008 OSHA inspection conducted by compliance officer Sharon Ford.

Item 1 of Citation No. 1 alleges a serious violation of 29. C.F.R. § 1910.303(b)(7)(iv), for exposing employees to hazards created by a damaged outlet box. The Secretary proposes a penalty of $ 1,500.00 for this item. The Secretary initially alleged, but later withdrew, a serious violation of 29 C.F.R. § 1910.305(b)(1)(iii) as Item 2 of Citation No. 1 (Tr. 4).

Item 1 of Citation No. 2 originally alleged a repeat violation of 29 C. F.R. § 1910.107(h)(12), for failing to provide an automatic fire extinguishing system in a powder coating booth. The Secretary subsequently moved to amend the classification from repeat to serious. The motion was granted (Tr. 79). The Secretary initially proposed a penalty of $ 8,400.00 for this item, but reduced it to $ 4,200.00 after the item was reclassified as serious.

Item 2 of Citation No. 2 alleges a repeat violation of 29 C.F.R. § 1910.151(c), for failing to provide a functional eyewash and safety shower for immediate emergency use. The Secretary proposes a penalty of $ 3,000.00 for Item 2.

Items 3a and 3b of Citation No. 2 allege repeat violations of §§ 1910.1000(a) and (e), respectively, for exposing employees to airborne dust in quantities exceeding the Permissible Exposure Limit, and for failing to implement feasible administrative or engineering controls to achieve compliance with the Permissible Exposure Limit. The Secretary proposes a combined penalty of $ 2,400.00 for Items 3a and 3b.

The court held a hearing in this matter on July 27 and 28, 2010, in Atlanta, Georgia. The parties stipulated jurisdiction and coverage (Tr. 5). Each party has filed a post-hearing brief.

Benise-Dowling argues the Secretary failed to prove the violations cited in Item 1 of Citation No. 1, and Items, 2, 3a, and 3b of Citation No. 2. Benise-Dowling concedes it was in violation of the standard cited in Item 1 of Citation No. 2, but argues the item should be vacated because the company lacked fair notice the Secretary planned to enforce the cited standard.

For the reasons discussed below, Item 1 of Citation No. 1 and Items 3a and 3b of Citation No. 2, are vacated. Items 1 and 2 of Citation No. 2, are affirmed, and a total penalty of $ 2,500.00 is assessed.

Background

Sometime in the late 1990s, Benise-Dowling was formed as a powder coating business, whose facility is located on Snapfinger Road in Decatur, Georgia. Powder coating results in a finish that is more durable than conventional paint. Customers who order powder coating manufacture metal items generally used outdoors, such as sidewalk grates and Caterpillar vehicles (Tr. 274).

In order to apply the coating, Benise-Dowling's employees operate powder guns in electrostatic spray booths. The powder guns impart a positive electric charge to the powder, which

adheres to the negatively charged metal part. The metal part is then heated to cure the paint. The process of spraying the powder guns creates airborne dust[1] (Tr. 18, 263).

2008 Inspection

On June 12, 2008, OSHA compliance officer Sharon Ford began an inspection of the Benise-Dowling facility based on an employee complaint. Ford held an opening conference with co-owner Tony Benise, and then conducted a walk-around inspection (Tr. 17). Ford found numerous safety violations in the facility.

Ford observed employees wearing respirators when operating the powder guns. She returned on June 26, 2008, to conduct air sampling of two employees for exposure to airborne dust. Section 1910.1000(c) establishes a limit of 15 mg/m³ for nuisance dust. The results of the samples Ford took showed one employee was exposed to an 8-hour Time Weighted Average (TWA) of 47 mg/m³ of dust, and the other employee was exposed to an 8-hour TWA of 48 mg/m³ of dust (Exh. C-3).

Based upon Ford's inspection, the Secretary issued two citations to Benise-Dowling on November 14, 2008, charging the company with more than twenty OSHA violations. Later that month, the Secretary and Benise-Dowling entered into an informal settlement agreement (Ex. C-5).

Shortly after Ford began her inspection on June 12, 2008, Benise-Dowling hired Kenneth Howe as its new production manager. Howe quickly assumed responsibility for the company's safety program. Ford met with Howe, and was impressed with his expertise in the industry and his commitment to safety. Ford stated she found Howe "very knowledgeable in the powder coating operation, and he was there to start working on making sure everything was okay in that area [of safety], and he was very knowledgeable about what was going on" (Tr. 38).

---

[1] Section 1910.1000 of Subpart Z (Toxic and Hazardous Substances) regulates "Air contaminants." Tables Z-1 and Z-2 of that section list limits for specific chemical substances. Table Z-3 lists limits for "Mineral Dusts," including "Inert or Nuisance Dust." A footnote to "Inert or Nuisance Dust" explains, "All inert or nuisance dusts, whether mineral, inorganic, or organic, not listed specifically by substance name are covered by this limit, which is the same as the Particulates Not Otherwise Regulated (PNOR) limit in Table Z-1."

When testing for air contaminants, the compliance officers classified the airborne powder as (PNOR). In this proceeding, the parties and witnesses used the terms "powder" and "dust" interchangeably for PNOR.

Benise-Dowling began to make immediate changes in its operation in response to the OSHA citations. The company acted on Ford's recommendation to work with representatives from the Georgia Tech Safety and Health Consultant Program, who came to the facility to conduct air and noise monitoring (Tr. 32). Benise-Dowling removed two of the three spray booths in its facility, and installed a 4-year old Nordson spray booth (referred to at the hearing as "the new booth") (Tr. 213). Howe implemented a new safety program, using monthly, weekly, and daily checklists (Tr. 218).

2009 Inspection

Compliance officer Wayne Mattox was assigned to follow up on Ford's 2008 inspection at the Benise-Dowling facility. Mattox arrived at the facility on September 24, 2009, and met with Benise and Howe, and conducted a walk-around inspection. Mattox returned on October 7 and conducted air sampling on two of the powder gun operators. Mattox came back a final time on December 3, 2009, and held a closing conference with Benise-Dowling (Tr. 60-61, 93, 125). Based upon Mattox's inspection, the Secretary issued the instant citations.

Citation No. 1

The Secretary has the burden of proving the violation 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 (*i.e.,* 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).

Item 1: Alleged Serious Violation of § 1910.303(b)(7)(iv)

The Secretary alleges Benise-Dowling's employees were "exposed to the hazard of electrical shock and/or electrocution from a damaged outlet box on the side next to the new powder coating booth."

Section 1910.303(b)(7)(iv) provides:

> (7) Electric equipment shall be installed in a neat and workmanlike manner.
> . . .
> (iv) There shall be no damaged parts that may adversely affect safe operation or mechanical strength of the equipment, such as parts that are broken, bent, cut, or deteriorated by corrosion, chemical action, or overheating.

Applicabiltiy of the Standard

Section 1910.399 defines "equipment" as a "general term including material, fittings, devices, appliances, fixtures, apparatus, and the like, used as a part of, or in connection with, an electrical installation." The outlet box at issue was energized. The spray gun control box for the new spray booth was plugged into the outlet box (Tr. 243-244). Section 1910.303(b)(7) applies to the cited outlet box.

Compliance with Terms of the Standard

On September 24, 2009, as Mattox conducted his walk-around inspection, accompanied by Howe, he observed a 110 electrical outlet box with a damaged cover. The energized outlet box was mounted 18 to 24 inches above the floor on a column located to the right of the new spray booth (Exh. C-6; Tr. 62-63, 65). The cover of the outlet box was bent outwards, leaving a gap between it and an interior cover (gasket). The gasket was also separated slightly from the box. The outlet box was covered with dust (Tr. 156). Mattox did not measure the gap, but estimated at the hearing that it was approximately ½ inch (Tr. 154, 183). Mattox observed employees walking within 3 feet of the outlet box (Tr. 66).

The cover of the outlet box was bent, in contravention of the explicit terms of the cited standard. The Secretary has established Benise-Dowling failed to comply with § 1910.303(b)(7).

Employee Exposure

The citation states the damaged outlet box cover exposes employees to "the hazard of electric shock or electrocution." Mattox posited this exposure could result because "employees might inadvertently put their fingers into the box when they're trying to plug in equipment" (Tr. 64-65). Howe testified the spray gun control box is permanently plugged into the outlet box; Benise-Dowling does not use the outlet box for any other electrical equipment (Tr. 306).

Howe stated he replaced the outlet box after the Secretary had issued the 2008 citations following Ford's inspection. He testified that, after installing the outlet box, he used electrical tape to "wrap around the screws, the wiring connections to the plug-in, and then I fastened the plug-in to the box. . . . And then put the gasket and the cover on" (Tr. 308).

Mattox's concern that an employee could inadvertently stick his finger into the gap between the outlet cover and the outlet box is speculative. Although it was possible for an employee to stick his finger in the gap, it would had to have been an intentional act on the part of the employee that could not be reasonably anticipated by Benise-Dowling. The risk of such a deliberate act is too remote to support a finding of employee exposure to an electrical shock.

The Secretary has established, however, a risk of employee exposure to a fire hazard. Although the Secretary mentioned only the hazard of electric shock, and not fire, in her alleged violation description for Item 1, the cited standard contemplates fire hazards caused by parts "deteriorated by. . . overheating."

At the hearing, Mattox stated that dust could enter the outlet box through the gap created by the damaged cover. The dust could coat the wires inside the outlet box, causing them to overheat and catch fire (Tr. 65). The severity of the fire would likely be exacerbated by the amount of dust in the air. As Howe acknowledged, "powder is dangerous when it is in the airborne state," because it is highly flammable (Tr. 203). The feed hopper, into which employees regularly add powder, is located close to the outlet. Howe conceded, "[T]here is some dust that's generated there" (Tr. 237). The photograph Mattox took of the outlet box on September 24, 2009, clearly shows a thick coating of powder on the top of the outlet box, as well as on the electrical cord connected to it, and on the floor (Exh. C-6).

The Material Safety Data Sheet (MSDS) for the silver powder used in the facility states, "Dust mixtures in air may be flammable" (Exh. C-19). Under "Spill, Leak, and Disposal Procedures" the MSDS provides, "Remove all sources of ignition. Vacuum or sweep up spilled material" (Exh. C-19). The Secretary has established employees in Benise-Dowling's facility were exposed to the potential hazard of fire, caused by overheated wires.

Knowledge

The Secretary does not argue that Howe had actual knowledge of the damaged outlet box cover. Howe conducted his regular Monday safety walk-around on September 21, 2009, three days before Mattox arrived on September 24. At that time he did not observe that the cover on the outlet box was damaged. There is no evidence establishing when the damage to the cover occurred. Howe told Mattox that it must have occurred in the "last day or two" prior to Mattox's inspection. The outlet box was not in plain view. It is located at knee level on the back side of the new spray booth, approximately 3 to 4 feet from the wall (Tr. 65, 159).

Howe testified he was chagrined when Mattox drew his attention to the cover. "The cover was bent, yes sir. I was actually embarrassed when Wayne showed that to me. . . .because we had worked so hard to get things right, and as soon as Mr. Wayne Mattox walks in, he discovers an electrical problem that we had worked so hard to fix" (Tr. 236).

The Secretary contends Howe had constructive knowledge of the damaged cover. With the exercise of reasonable diligence, the Secretary argues, Howe would have detected the damaged cover and abated it. "Whether an employer was reasonably diligent involves a consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Donohue Indus., Inc.*, 20 BNA OSHC 1346, 1349 (No. 99-0191).

Benise-Dowling hired Howe while the company was in the midst of the 2008 OSHA inspection. Howe immediately took steps to abate the violations cited by the Secretary. He conferred with Ford and acted upon her recommendations. One of the hazards she found was dust collecting in different areas of the plant, including inside electrical equipment. In response, Howe replaced all the electrical outlets with covered outlet boxes (Tr. 233). Howe also implemented a written housekeeping procedure, and assigned the daily task to two employees. The procedure "describes what we have to do at the end of the shift to clean the booth back up, including all flat surfaces in and around the immediate area of the booth" (Tr. 234-235).

Howe testified he is in the Benise-Dowling facility 12 hours a day, walking throughout all areas. On Mondays, he conducts a walk-through specifically focused on "safety type stuff" (Tr. 215).

The maintenance man has a "weekly or daily checklist," and a monthly checklist that is "more directed towards the safety side of it, more the equipment, preventative maintenance side of it" (Tr. 218-219). Howe stated that on his weekly safety inspections, "I just walk around, looking at all the things that I know we need to watch out that Ms. Ford had pointed out and that we got in trouble with, and I'm trying to find others that we need to watch, things out in the middle of the aisle way, fire exits blocked, you know, just everything" (Tr. 219). Howe had no reason to check specifically on the condition of the cited outlet box, since it was a dedicated outlet for the spray gun box for the new spray booth.

The Secretary has failed to establish Howe or any other supervisor at Benise-Dowling had constructive knowledge of the damaged cover. Howe implemented new safety rules and procedures to deal with the accumulations of dust in the workplace. He replaced all of the electrical outlets and took extra steps to seal the electrical equipment against dust. Howe conducted regular safety inspections, and assigned other employees daily and weekly checklists. The record establishes that Benise-Dowling, through the efforts of Howe, exercised reasonable diligence to discover unsafe conditions. Item 1 is vacated.

Citation No. 2

Item 1: Alleged Serious Violation of § 1910.107(h)(12)

The Secretary alleges Benise-Dowling's employees "were exposed to the hazard of burns from flash fires in the new Nordson powder coating booth because it did not have an automatic fire extinguishing system."

Section 1910.07(h)(12) provides:

> All areas used for spraying, including the interior of the booth, shall be protected by automatic sprinklers where this protection is available. Where this protection is not available, other approved automatic extinguishing equipment shall be provided.

Applicabiltiy of the Standard

Section 1910.107 addresses "Spray finishing using flammable and combustible materials." Paragraph (h) of the standard addresses "Fixed electrostatic apparatus." Benise-Dowling admits it uses electrostatic spraying equipment in its new booth (Exh. C-22, Answer 4). The standard applies to the new Nordson powder coating booth.

Compliance with Terms of the Standard

Benise-Dowling admits the new Nordson booth was not equipped with either automatic sprinklers or other automatic extinguishing equipment at the time of Mattox's inspection (The older booth was equipped with an automatic sprinkler system.) (Exh. C-22, Answers 7 and 8; Benise-Dowling's Brief, p. 16). Benise-Dowling installed an automatic sprinkler system on the new booth after receiving the instant citation (Tr. 245).

The Secretary has established Benise-Dowling failed to comply with the terms of the standard.

Employee Exposure

Benise-Dowling operates the new booth two days in a work week. On those days, one employee at a time sprays in the booth, for a period of 30 minutes. After 30 minutes, that employee stops and another employee takes over for 30 minutes. On most days, Benise-Dowling has three employees who rotate 30-minute sessions in the new booth. If one of the employees is out, Benise-Dowling proceeds using a two person rotation (Tr. 255-258).

The employees working in the new booth were exposed to hazards from fire. Using the spray gun generates a great deal of airborne powder, which is flammable (Exh. C-19, Tr. 203). An automatic sprinkler system is designed to turn on if fire is detected. Without the sprinkler system or other automatic extinguishing equipment in place, employees working in the booth are exposed to death or serious physical injury from burns. The Secretary has established employees working in the new booth were exposed to a fire hazard.

Knowledge

Benise-Dowling had actual knowledge the new Nordson booth lacked an automatic sprinkler system. The company installed the new booth after Ford's 2008 inspection. Howe was involved in selecting the powder booth. Its older booth is equipped with an automatic sprinkler system (Tr. 21-213).

The Secretary has established Benise-Dowling committed a serious violation of § 1910.107(h)(12).

Fair Notice

Benise-Dowling concedes the Nordson booth was not in compliance with the cited standard. The company argues, however, that it is not liable for the violation because it was denied fair notice regarding the issue of the automatic sprinkler system. Benise-Dowling claims that, during the 2008 inspection, OSHA led Howe to believe an automatic sprinkler system was not required on the Nordson booth. It contends "[d]ue process requires OSHA to give Benise-Dowling fair notice that OSHA has changed its earlier position, and to afford reasonable time for abatement before issuing a citation" (Benise-Dowling's brief, p. 17).

Benise-Dowling cites *Trinity Marine v. OSHRC,* 275 F.3d 423, 430 (5th Cir. 2001), in support of its argument it was denied fair notice: "Where a company has been informed by an OSHA inspector that its procedures or processes are safe and satisfactory, the company has a valid fair notice complaint if cited for the same procedures in a later inspection."

The record does not establish an OSHA inspector told Benise-Dowling that its procedures or processes were safe and satisfactory–on the contrary, Ford pointed out numerous safety violations throughout the facility. Ford never told Benise-Dowling automatic sprinkler systems were not required in spray booths. Ford testified:

> I can't tell you that I told them to have an automatic sprinkler system, but I thought when we talked about the hazards that were going on and they said they were going to purchase a new booth, which they said they were going to do, that it was going to include all that. . . . I felt Mr. Howe was very knowledgeable about what was going on.

(Tr. 38). Howe conceded Ford did not discuss automatic sprinkler systems with him (Tr. 335).

Benise-Dowling's claim that it lacked fair notice is based on information it purportedly received from Terry Wilkins. According to Howe, Ford brought Wilkins in during the inspection because she regarded him as "the expert on dust"[2] (Tr. 249). Howe stated:

> When [Ford] brought in Terry Wilkins, I believe is his name, the dust expert from OSHA, Terry, Sharon and I were coming out of the powder room where the old booth is at, and Terry was explaining to me about the different types of cartridge collectors, the open versus the closed, and why the open cartridges needed a sprinkler

[2] Wilkins did not testify at the hearing. The Secretary's counsel identified Wilkins as an OSHA engineer (Tr. 329).

> system, and the closed system was different. They would have an explosion relief roof, and it had to be vented through the ceiling, and that did not need that.

(Tr. 329).

Howe testified the new Nordson booth has a closed cartridge system and is equipped with an explosion relief roof. Based on the discussion Howe had with Wilkins, Howe assumed the new booth did not need an automatic sprinkler system. Howe stated, "I had two OSHA people, one telling me I needed an extinguisher[3] and the other telling me if it's a closed collector, I don't need a sprinkler system; just the open face one" (Tr. 330).

Benise-Dowling's fair notice argument is rejected. The Nordson booth cited here was not installed until after the time of Ford and Wilkins's visit. Wilkins did not give his approval to an existing spray booth. Because Wilkins did not testify, it is impossible to determine the accuracy of Howe's recollection of the discussion regarding automatic sprinkler systems. It is not clear if Wilkins was speaking theoretically, or giving his personal opinion, or if Howe simply misunderstood him. Regardless of the context, however, there is no evidence Wilkins viewed the Nordson booth after it was installed and approved it. Section 1910.107(h)(12) is unambiguous: "All areas used for spraying, including the interior of the booth, shall be protected by automatic sprinklers where this protection is available. Where this protection is not available, other approved automatic extinguishing equipment shall be provided." No exceptions are made for closed cartridge systems. Wilkins had no authority to waive the clear, unambiguous requirements of the standard. Benise-Dowling did not lack fair notice that OSHA intended to enforce the clearly stated requirements of § 1910.107(h)(12).

Item 1 of Citation No. 2 is affirmed as serious. A fire could cause death or serious injury to employees.

Item 2: Alleged Repeat Violation of § 1910.151(c)

---

[3] Following Ford's 2008 inspection, the Secretary cited Benise-Dowling for a violation of § 1910.157(d)(1), for failing to have portable fire extinguishers available in the facility. Ford explained the portable fire extinguishers were to be used for fires outside the booths (Tr. 37). The requirement for portable fire extinguishers in areas outside the booths is separate from the requirement for automatic sprinkler systems inside the booths.

The citation alleges, "The eyewash/safety shower next to the wash tunnel was not available for immediate emergency use because the handle to the eyewash was turned off. Employees are exposed to the hazard of chemical burns to the eyes."

Section 1910.151(c) provides:

> Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

Applicability of the Standard

Benise-Dowling admits that its use of corrosive materials, including nitric acid and phosphoric acid, requires the availability of an eyewash and safety shower (Exh. C-22, Answers 12 and 13).

Compliance with Terms of the Standard

After the 2008 inspection, Benise-Dowling installed an eyewash and safety shower (Exh. C-9). When Mattox and Howe observed it on September 24, 2009, the water supply was shut off and the pilot handle that activates the eyewash would not engage. Mattox stated, "There's a chain that goes from the foot treadle up to another eyewash area and it's also not on there" (Tr. 82). Benise-Dowling does not dispute the eyewash was nonfunctional the day of Mattox's inspection. The Secretary has established the company failed to comply with § 1910.151(c).

Employee Exposure

Benise-Dowling contends the Secretary failed to prove employee exposure to an injurious corrosive material that would require the use of the eyewash. The corrosive material in question is an acid solution, Houghto-Prep ZP, used to clean the metal parts before the powder coating is applied. The MSDS for the Houghto-Prep ZP warns the solution may cause "permanent damage" to eyes, "chemical burns," or blistering to skin, and "severe irritation or corrosive burns of mouth, throat, and digestive tract." The first aid measures recommended for eye contact and skin contact, respectively, are "FLUSH IMMEDIATELY WITH WATER FOR 15 MINUTES," and "FLUSH WITH LARGE AMOUNTS OF WATER" (Exh. C-24).

The acid is kept in a 335-gallon container (tote), approximately 30 feet from the eye wash (Tr. 265-266). A new tote is delivered approximately once a month. Howe described the delivery procedure: "We take a pallet jack and moved it back to the area, unscrew the big cap on the top of

it, take the automatic feed hoses that are in the empty one, pull them off and put them over into the other tote" (Tr. 265). Howe stated that, since he began working for Benise-Dowling in 2008, he is the only employee who changes out the tote every month (Tr. 265).

Benise-Dowling argues the Secretary failed to show that Howe changed out the tote while the eyewash was nonfunctional. Howe does not record the dates he changes out the tote, and could not recall the last time he changed the tote before Mattox's September 24 inspection (Tr. 302). Benise-Dowling quotes from a June 1, 2009, Standard Interpretation Letter from OSHA, regarding its eyewash requirement when working with closed containers of corrosive materials. OSHA states, "If hazardous materials are present at the worksite in such a way that exposure could not occur (for example, in sealed containers that will not be opened, or caustic materials in building piping), then an eyewash or emergency shower will not be necessary" (Benise-Dowling's brief, p. 21).

The Standard Interpretation Letter does not support Benise-Dowling's argument. In that letter, OSHA was addressing a company that "produces concentrated products that are packaged in sealed dispensing containers" (Benise-Dowling's brief, p. 21). Here, Howe had previously unscrewed the cap on the tote and inserted the automatic feed hoses into it. This is not a "sealed container that will not be opened." Benise-Dowling's use of the acid solution does not present the situation addressed in the letter, where the company produced the sealed containers that were to be delivered to customers. Benise-Dowling is the customer receiving the sealed container, which it promptly unseals. Once the tote is opened, the requirement for the availability of the eyewash is triggered.

Howe himself was exposed to the acid solution, and he testified he could not rule out the possibility the acid solution could spill to an accidental puncture of the container (Tr. 286-286). The fact the probability of exposure to the acid solution was slight is irrelevant to whether exposure exists. "The proper inquiry is the probability that the resulting harm will be death or serious physical harm." *Automatic Sprinkler Corporation of America,* 8 BNA OSHC 1384, 1390 (No. 76-5089, 1980).

The Secretary has established employee exposure.

Knowledge

The Secretary argues Benise-Dowling had actual knowledge the eyewash was nonfunctional. Mattox testified he "understood from Mr. Howe that he had shut [the water] off. . . . I understood

that he didn't want the eyewash leaking on the floor or anything" (Tr. 82-83). Mattox stated Howe told him the eyewash water had been turned off "about a week" the day of the inspection (Tr. 83).

Howe denied he had known the water was shut off. He stated he first learned the water was shut off and the handle was broken when he accompanied Mattox on his walk-around inspection. Howe characterized this discovery as "another embarrassing moment" (Tr. 266).

Howe stated that two or three weeks before Mattox's inspection, he observed the eyewash was not functioning properly. Howe shut off the water, put a new nut and washer on the handle, hooked the chain up, and turned the water back on. After this repair, Howe did not observe the eyewash in a nonfunctioning state again, until the day of Mattox's inspection. No one reported the eyewash needed repair (Tr. 300-301). Howe testified that James Holly was the maintenance man for the facility. Holly left the company on Monday, September 21, 2009. Mattox arrived on September 24, 2009. Howe did not assign Holly to repair the eyewash, and he does not know if Holly was the one who turned off the water (Tr. 267).

The court credits Howe's testimony that he did not shut the water off and that he did not know the eyewash was not functioning prior to Mattox's inspection. Ford spoke highly of Howe's qualifications and cooperative efforts to improve safety at Benise-Dowling. At the hearing, Howe testified in a forthright and convincing manner, and he was candid regarding the company's deficiencies. He twice stated he was embarrassed by unsafe conditions pointed out by Mattox. The record establishes Howe demonstrated a strong commitment to safety, and that he promptly abated any unsafe conditions brought to his attention. His performance is all the more commendable because Howe was not hired as a safety official–Howe assumed those responsibilities when he saw leadership was needed in this area. Mattox may have confused Howe's description of his previous repair to the eyewash (including shutting off the water) with events that occurred just prior to his inspection. The Secretary has not established actual knowledge.

Constructive knowledge, however, is established. When Ford inspected the facility in 2008, Benise-Dowling did not have an eyewash and safety shower on the premises. The Secretary cited the company for this failure. Under Howe's supervision, Benise-Dowling installed an eyewash and safety shower.

Reasonable diligence on Howe's part required him to ensure the eyewash and safety shower were in working condition. Howe's constructive knowledge of this item is distinguished from his lack of constructive knowledge of the damaged outlet box cover cited in Item 1 of Citation No. 1. The damaged outlet box was one of many outlet boxes in the facility. Because it was used solely as a connection for the spray gun box for the new booth, Howe did not have a heightened expectation that it might be damaged. The eyewash, however, is the only one in the facility, and its sole function is for emergency first aid. Howe was on notice that the eyewash had been damaged just two or three weeks before, and he had repaired it himself. Ford had pointed out the danger of not having an eyewash in the facility. Ensuring the eyewash is in good repair should be a priority among his safety checklist items. The eyewash's damaged condition was in plain view and did not require a close inspection to detect it was not functioning.

The Secretary has established Benise-Dowling committed a violation of § 1910.151(c).

Repeat Classification

The Secretary cited the violation of § 1910.151(c) as a repeat violation. Under § 17(a) of the Occupational Safety Act of 1970 (Act), the Secretary establishes a repeat violation if, at the time of the alleged repeat violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.,* 7 BNA OSHC 1589, 1594 (No. 91-1807, 1994).

The Secretary properly classified the violation of § 1910.151(c) as a repeat violation. The Secretary issued a citation to Benise-Dowling on November 14, 2008 (Item 13 of Citation No. 1) for failing to have an eyewash and safety shower. The parties entered into an informal settlement agreement in which Benise-Dowling accepted this item with a reduction in penalty (Exh. C-5). The citation for § 1910.151(c) became a final order of the Commission. The two violations are substantially similar: Benise-Dowling installed the eyewash and safety shower that is the subject of the instant citation in order to abate the 2008 violation.

Item 2 of Citation No. 2 is affirmed as a repeat violation.

Items 3a and 3b: Alleged Repeat Violations of §§ 1910.1000(a)(2) and (e)

Items 3a and 3b of the citation allege:

(Item 3a): Employees were exposed to particulates not otherwise regulated (dust) listed in Table Z-1, in excess of 15 mg/m³ (milligrams per cubic meter of air) as an 8-hour Time WeightedAverage concentration[.]

(*Item 3b)*: Feasible administrative or engineering controls were not determined and implemented to achieve compliance with the limits prescribed in 29 CFR 1910.1000(a) through (d):

(a) A powder coating operator was exposed to dust at a level of 21 mg/m³, 1.4 times the permissible exposure limit (PEL) which was established to prevent lung irritation and damage. The operator was powder coating parts. Sampling was conducted on 10/09/09[4] for 445 minutes. All unsampled time less than 480 minutes is assumed to be zero exposure.

(b) A powder coating operator was exposed to dust at a level of 29 mg/m³, 1.9 times the PEL. The operator was powder coating parts. Sampling was conducted on 10/09/09 for 445 minutes. All unsampled time less than 480 minutes is assumed to be zero exposure.

Sections 1910.1000(a)(2) provides:

An employee's exposure to any substance in Table Z-1, the exposure limit of which is not preceded by a "C," shall not exceed the 8-hour Time Weighted Average (TWA) given for that substance in any 8-hour work shift of a 40-hour work week.

Table Z-1 establishes the PEL for PNOR as 15 mg/m³ as an 8-hour TWA.

Section 1910.1000(e) provides:

To achieve compliance with paragraphs (a) through (d) of this section, administrative or engineering controls must first be determined and implemented whenever feasible. When such controls are not feasible to achieve full compliance, protective equipment or any other protective measures shall be used to keep the exposure of employees to air contaminants within the limits prescribed in this section. Any equipment and/or technical measures used for this purpose must be approved for each particular use by a competent industrial hygienist or other technically qualified person. Whenever respirators are used, their use shall comply with 1910.134.

---

[4]This date, given in instances (a) and (b) if Items 3a and 3b, appears to be an error. The Air Sampling Worksheets that Mattox submitted for both employees listed October 7, 2009, as the sampling date, and October 9, 2009, as the date the samples were shipped for analysis (Exhs. C-15 and C-17).

Applicability of the Standard

Section 1910.1000 applies to "Air contaminants," and it places limits on the exposure of employees to airborne substances. The MSDS for RHB-7561, one of the powder coatings used by Benise-Dowling, states PNOR makes up 61% of the material (Exh. C-19). Howe conceded that respirable dust was a hazard a the Benise-Dowling facility (Tr. 211). Sections 1910.1000(a)(2) and (e) apply to the cited conditions.

Compliance with Terms of the Standard

On October 7, 2009, Mattox conducted air sampling of employees Daryl Dixon and Patrick Smith as they worked a full shift in the new Nordson spray booth (Tr. 61). Three employees usually rotate work inside the Nordson booth during one shift. On October 7, however, the third employee (in Howe's words) "[d]idn't show; no show, no call" (Tr. 257). Mattox sampled the two employees for a total of 445 minutes at a flow rate of 2.0 liters per minute, with the remainder of the 480 minutes calculated as zero exposure (Tr. 100). Mattox sampled the employees from 12:15 p.m. until 7:40 p.m. (Tr. 102). After the test, Mattox sealed the filters and shipped them to OSHA's Salt Lake City Technical Center (SLTC) (Tr. 100).

The SLTC analyzed the samples and sent the results to Mattox. Dixon's test sample showed a dust weight of 27.8450, which produced an overexposure of 29 mg/m^3 (Exh. C-16). Smith's test sample showed a weight of 20.4100, which produced an overexposure of 21 mg/m^3 (Exh. C-18). Both employees were well above the PEL of 15 mg/m^3.

Benise-Dowling argues these sampling results cannot be used as evidence of a violation of the cited standards for two reasons: (1) the sampling did not occur under "normal working conditions," as required by the Occupational Safety and Health Field Operation Manual (FOM), and (2) the data SLTC used to analyze the two samples differed from the data supplied by Mattox. The SLTC's results are, therefore, unreliable.

Benise-Dowling's first argument is easily disposed of. The second argument is more substantial.

The FOM

Benise-Dowling quotes the following from the FOM (4-10):

> [I]n order to support a classification of serious, a determination must be made that exposure(s) at the sampled level could lead to illness. Thus, CSHOs must document all evidence demonstrating that the sampled exposure(s) is representative of employee exposure(s) under normal working conditions, including identifying and recording the frequency and duration of employee exposure(s).

Benise-Dowling contends that having two employees rotate sessions in the Nordson booth, rather than three, does not represent normal working conditions. The company faults Mattox for sampling on a day when employees were exposed to airborne dust for a longer duration than was routine.

First, it is well-established that the FOM only provides internal guidelines for OSHA personnel. It confers no rights on employers and the Commission is not bound by it. *Mautz & Oren,* 16 BNA OSHC 1006, 1009-1010 (No. 89-1366, 1993). Secondly, contrary to Benise-Dowling's contention, Mattox did conduct sampling under "normal working conditions." Although Benise-Dowling generally schedules three employees to work the same shift in the Nordson booth, the record establishes that it is the company's common practice to proceed with only two employees if the third employee is not available. Howe testified that occasionally employees did not show up for work. Howe was asked if Benise-Dowling used a two person rotation if the third employee was absent. Howe responded, "[Y]es, prior to Mr. Mattox coming in" (Tr. 258).

Using a two man rotation may not have been the company's daily normal working conditions, but it was not a unique or unprecedented situation. Mattox's air sampling results cannot be invalidated on these grounds.

The SLTC's Analysis

The issue of the SLTC's analysis of the sampling results is more problematic. Mattox submitted an Air Sampling Worksheet to the SLTC for each employee tested. He tested both employees for 445 minutes, as reflected on the worksheets (Exhs. C-15 and C-17). For some reason, the SLTC "corrected" these numbers to show 335 minutes for Dixon and 275 minutes for Smith (Exhs. C-16 and C-18). Mattox speculated the SLTC may have misread the "time on/off" entries to interpret testing as beginning at 7:40 a.m. instead of ending at 7:40 p.m. (Tr. 113). The SLTC also

"corrected" the volume in liters for Dixon and Smith from 890 liters to 670 and 550 liters, respectively (Exhs. C-15 through C-18).

The Secretary argues the changed data does not affect the test results. She contends, "[T]he number of minutes used by SLTC in its calculations is ultimately irrelevant to the actual determination of overexposures due to the equation used by OSHA to determine exposure levels" (Secretary's Brief, p. 34). Mattox supplied the "formula for exposure level," which the Secretary asserts the SLTC used to calculate its results (Exh. ALJ-1). The Secretary provides a detailed explanation in her brief why it is the weight of the sample, and not the number of minutes sampled, that determines the amount of exposure (Secretary's Brief, pp. 33-38).

The court is reluctant to disregard OSHA's sampling results showing Dixon and Smith were overexposed to dust. Previous air sampling (once by OSHA in 2008, and once by Georgia Tech) had shown elevated levels of dust to which employees were exposed. Howe acknowledged that respirable dust created a hazard in the facility. Dixon and Smith's potential overexposure to dust presents a more immediate health risk to them than either a damaged outlet cover or a nonfunctioning eyewash, with far-ranging consequences.

The court cannot, however, credit the sample results of the SLTC. Mattox sent his worksheets and the samples to the SLTC, and received the results sometime later. Although he speculated as to what the SLTC did with them, he has no personal knowledge of what actually occurred. No one from the SLTC testified, and its reports were not certified. Mattox did not speak with anyone from the SLTC (Tr. 135-136). There is no evidence the SLTC used the formula Mattox provided at the hearing and the Secretary uses in her brief. No explanation is given for the "corrections" to Mattox's numbers.

The court cannot overlook the discrepancies between the numbers Mattox submitted and the numbers the SLTC used. Accordingly, the court vacates Item 3a. Item 3b is also vacated because, absent a showing of overexposure, the employer is not required to implement engineering and administrative controls.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

At the time of Mattox's inspection, Benise-Dowling employed approximately 75 employees (Tr. 217). The company had a history of previous violations, stemming from the 2008 OSHA inspection. The court gives considerable weight to the good faith Benise-Dowling demonstrated in this proceeding. Ken Howe has shown himself to be committed to safety. He responds quickly to abate unsafe conditions. He has implemented safety programs to improve the safety and health of employees in the facility.

Item 1 of Citation No. 2 (§ 1910.107(h)(12): The gravity of this violation is moderately high. Employees were exposed to fire hazards while operating spray guns in the Nordson booth. Mitigating factors are (1) the Nordson booth was equipped with a spark detector system that automatically shut down the power to the booth in the event of sparking, and (2) Benise-Dowling had portable fire extinguishers in the area. A penalty of $ 1,000.00 is assessed.

Item 2 of Citation No. 2 (§ 1910.151(c)): The gravity of this violation is moderate. Employees were exposed to the hazard of eye and skin contact with an acid solution. Exposure to this hazard was minimal; generally one employee worked with the acid solution once a month. A penalty of $ 1,500.00 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 1 of Citation No. 1, alleging a serious violation of § 1910.303(b)(7)(iv), is vacated, and no penalty is assessed;

2. Item 2 of Citation No. 1, alleging a serious violation of § 1910.305(b)(1)(iii), is withdrawn by the Secretary;

3. Item 1 of Citation No. 2, alleging a serious violation of §1910.107(h)(12), is affirmed, and a penalty of $ 1,000.00 is assessed;

4. Item 2 of Citation No. 2, alleging a repeat violation of § 1910.151(c), is affirmed, and a penalty of $ 1,500.00 is assessed; and

5. Items 3a and 3b, alleging repeat violations of §§ 1910.1000(a)(2) and (e), are vacated, and no penalty is assessed.

\s\ Ken S. Welsch

_____

KEN S. WELSCH
Judge

Date: February 18, 2011