

SECRETARY OF LABOR,

Complainant,

v.

ADVANTA USA, INC., (formerly known as
Garst Seed Company),

Respondent.

OSHRC DOCKET NO. 02-0082

APPEARANCES:

For the Complainant:

Ruben R. Chapa, Esq., Suzanne F. Dunne, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois

For the Respondent:

Daniel Bukovac, Esq., Lori O'Keefe Locke, Esq., Stinson, Morrison, Hecker, LLP, Kansas City, Missouri

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Advanta USA, Inc. (Advanta), at all times relevant to this action maintained a place of business, *i.e.*, a number of fields, near Fithian, Illinois, where its employees were engaged in detasseling seed corn. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act (Exh. J-1, ¶2, ¶6, ¶8).

On August 1, 2001, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Advanta's Fithian work sites. As a result of that inspection, Advanta was issued one "repeat" and two "other than serious" citations alleging violations of §1928.110, *et seq.*, of the Act together with proposed penalties. By filing a timely notice of contest Advanta brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On August 21, 2002 a hearing was held in Kansas City, Missouri. At the hearing, Complainant moved to amend the "repeat" characterization, charging all three alleged violations as "other than serious" (Tr. 8). Complainant further moved to reduce the proposed penalty accordingly (Tr. 9). Finally, Complainant moved to amend the citation to allege that the cited violations took place between July 9 and July 27, 2001 (Tr. 10). All motions were granted (Tr. 10). The parties have submitted briefs on the issues, as amended, and this matter is ready for disposition.

Alleged Violations

Citation 1, item 1 alleges:

29 CFR 1928.110(c)(1)(iii): Single-use drinking cups or fountains were not provided for dispensing of potable water to employees engaged in hand-labor operations in the field.

The cited standard provides:

(c) *Requirements.* Agricultural employers shall provide. . . (1) *Potable drinking water....*
(iii) The water shall be dispensed in single-use drinking cups or by fountains. The use of common drink cups or dippers is prohibited.

Facts

Complainant submits the deposition testimony of two of Advanta's contract hand-laborers, Victoria Vasquez (Exh. J-2), and Florestela Vasquez (Exh. J-3), in support of its allegations.

Florestela Vasquez stated that her crew supervisor, Pedro Guillen, provided potable drinking water in the field (Exh. J-1, ¶12; J-3, p. 52). According to Ms. Vasquez, single-use cups were provided with the water during the first day they worked Advanta's fields. The workers threw out the paper cups after using them (Exh. J-3, p. 53-54). During the second day, however, Guillen told the employees that he was running out of cups, and asked them to save the cups for reuse (Exh. J-3, p. 55). Ms. Vasquez stated that they replaced the cups by the water cooler. The cups were not marked in any way; Vasquez did not know whether she was using a cup that had been previously used by someone else (Exh. J-3, p. 55). Vasquez testified that the workers began carrying their own canteens or jugs for water after the second day (Exh. J-3, p. 56).

Victoria Vasquez testified that water was dispensed from water coolers in the field (Exh. J-2, p. 27). Victoria Vasquez stated that while they were detasseling the first field there were throw away Dixie cups available for everyone to drink from; by the time the workers got to the second field, she testified, she would have to share with her family members or other people there (Exh. J-2, p. 28). According to Ms. Vazquez, Pedro Guillen told them to save their cups every day because he did not have enough to go around. Vasquez stated that she put her cup back by the cooler, or would put it in her pocket (Exh. J-2, p. 29, 50).

Respondent did not call Mr. Guillen; however, the parties stipulated that were Mr. Guillen to testify, he would say that he always had single-use cups with him in his truck for the use of the crew. Guillen would deny that he ever told field workers to save or reuse single use cups (Exh. J-1, ¶12). Tom Mathis, Advanta's regional production manager, testified that he oversaw the detasseling operations on Advanta's seed corn fields during the relevant time periods (Tr. 95). Mathis stated that he is responsible for providing single-use cups to Advanta's contract field supervisors, including Pedro Guillen (Tr. 102-03).

Mathis admitted that he never instructed crew leaders to be sure to have an adequate supply of single-use cups on hand (Tr. 103, 157). Mathis did not know whether the field supervisors ever ran out of cups, because he never asked them. Mathis further admitted that, to his knowledge, no one from Advanta ever took any affirmative steps to assure that the field workers had an adequate supply of single-use cups (Tr. 157, 159).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

Advanta stipulates to the applicability of the Field Sanitation Standard at 19 CFR §1928.110 *et. seq.* (Exh. J-1, ¶5). The testimony of Florestela and Victoria Vasquez establish that Advanta's supervisory personnel failed to provide single-use cups to dispense potable water to employees engaged in hand-labor operations in their fields. The testimony of Complainant's witnesses was under oath; both witnesses were cross-examined by Respondent's counsel. Each woman confirmed the testimony of the other; their testimony was unchanged under cross-examination. The sworn testimony of Complainant's witnesses is credited over counsels' statement of what Mr. Guillen would have said if he were to testify. Because Advanta took no steps to ensure its crew leaders followed the cited regulation or to discover violations of the regulation, its constructive knowledge of the violation is established. *See, e.g. Dun Par Engd. Form Co.*, 12 BNA OSHC 1962, 1986-87 CCH OSHD ¶27,651 (No. 82-928, 1986). The violation is established.

Penalty

In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972). The factors to be considered when determining gravity include: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981). Fred Wrightam, an employee of the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division (Tr. 28), testified that there were 23 field laborers in Pedro Guillen's crew, and that each employee was exposed to a hazard as a result of Guillen's failure to provide single-use drinking cups (Tr.

63; Exh. J-3, p. 44). Mr. Wrightam testified that it was not likely that the violation would lead to serious injury or death (Tr. 64). However, Wrightam stated, if, as a result of the cup shortage, employees did not drink adequate amounts of fluid, they could develop urinary tract infections (Tr. 64). In addition, Complainant states, employees re-using single use cups could transmit microbiological diseases, citing the preamble to the Final Rule at 29 CFR Part 1928, 52 Fed. Reg. 16050, 16087 (1987).

Advanta is a large employer, with 694 full time employees (Exh. J-1, ¶10). Respondent has received two other OSHA citations within the past five years (Exh. J-1, ¶11). Taking into account the number of employees exposed to the cited condition, and Advanta's complete failure to educate or supervise its field bosses, the proposed penalty of \$2,100.00 is deemed appropriate, and will be assessed.

Citation 1, item 2 alleges:

29 CFR 1928.110(c)(2)(iii): Toilet and handwashing facility for use by employees engaged in hand-labor operations were not located within a 1/4 mile walk of each hand-laborer's place of work in the field.

The cited standard provides:

(iii) Toilet and handwashing facilities shall be accessibly located and in close proximity to each other. The facilities shall be located within a one-quarter-mile walk of each hand laborer's place of work in the field.

(iv) Where due to terrain it is not feasible to locate facilities as required above, the facilities shall be located at the point of closest vehicular access.

Facts

Tom Mathis testified that he personally placed the toilets in the subject fields, MU35, MU45, MU75, MU105, and MU125 (Tr. 99, 103, 115, 123, 128, 135; Exh. R-1, R-2, R-3, R-5, R-6). Some of the portable toilets were transported on trailers; the bulk of the toilets, however, were on wooden runners, and were placed in the back of a two-wheel drive pick-up truck to move them (Tr. 99-100, 166-67). Mathis testified that Advanta ensured one portable toilet was provided for each 20 field workers (Tr. 100). The toilets were placed wherever Mathis could find vehicular access (Tr. 100). Specifically:

MU35. Mathis testified that Pedro Guillen's crew pulled the tassels from the corn in the north section of MU 35, where the field measured 6/10 of a mile from east to west (Tr. 113; Exh. J-1, ¶4). Mathis stated that portable toilets were placed on the east side of the field where a permanent grass road allowed vehicular access. Toilets were also placed on the west side of MU35 where there was a hard road running north and south (Tr. 105-07). According to Mathis, there was no access on the north or south side of the field. On the north a field planted with beans abutted MU35. On the south, abandoned railroad tracks prevented vehicular traffic (Tr. 107-08).

MU45. Mathis testified that this field is bordered on the east side by a permanent chip and oil road (Tr. 116). All the portable toilets were placed on the east side of the field. According to Mathis, the north side of the field was inaccessible because the grass road on that side belonged to “the people in the town.” Another of Advanta’s fields bordered the south end of MU45, a bean field abutted MU45 on the west (Tr. 116-19). The fields to the south and west were separated from MU45 by 30 inches, the rows within MU45 were also separated by 30 inches (Tr. 116, 119). Pedro Guillen’s crew worked somewhere in the center of MU45, where the rows ran east to west in one-half mile rows (Tr. 123; Exh. J-1, ¶4).

MU75. The rows in MU75 run east to west and are approximately a half a mile long (Tr. 124). Portable toilets were placed on the east side of MU75 on an access road between the field and a ditch (Tr. 124; Exh. J-1, ¶4). Mathis testified that there was no access on the north, south or west sides of the field because other crops were planted in adjacent fields; the roots of which were 30 inches from the roots of the crops in MU75 (Tr. 124-25).

MU105. The rows in MU105 run north and south and are between 3/4 and a mile long (Tr. 128). Portable toilets were placed on the north end of the field where there was an oil and chip road, and on the south side where there was a grass shoulder strip (Tr. 128-29). According to Mathis, the east side of the field abutted other crops; on the west side an uncultivated 66-foot “filter strip” ran along a ditch (Tr. 129, 131). Mathis testified that this year he was able to transport two toilets down the filter strip to the grass shoulder on the south (Tr. 130). In the past, Mathis stated, it was too wet to drive down the filter strip (Tr. 130, 132). Pedro Guillen’s crew started detasseling in the mile long rows, moving to the east where the length of the rows tapered off (Tr. 134).

MU125. MU125 is bordered on the east by a road and grass area belonging to the town of Fithian (Tr. 136). An oil and chip road runs along the north side (Tr. 136). Crops are located on the west side of the field, and there is no vehicular access (Tr. 136). Abandoned railroad tracks prevent vehicular access to the south end of the field (Tr. 137). The rows in MU125 run north and south and are a little less than half a mile long (Tr. 137-38). Toilets were placed on the north side of the field (Tr. 138). A single toilet was placed at the southeast corner where there was a 400-500 foot access road (Tr. 139, 143; Exh. R-6, R-29). Pedro Guillen’s crew worked the west side of MU125 (Tr. 142). Mathis knew, from the time the field was planted, that the detasseling crew would be more than a quarter mile from a portable toilet while they worked (Tr. 148).

Discussion

Advanta does not contest Complaint’s allegations that: 1) it failed to provide toilet and handwashing facilities within a quarter of a mile of its field hands’ place of work (Tr. 47), or 2) its

management knew that field hands would be working more than a quarter mile from the nearest toilet facility during detasseling operations (Tr. 148, 196). Advanta maintains, however, that it was infeasible to locate the required facilities any closer because of the area's terrain. Advanta argues that it complied with subparagraph (iv), which states that "[w]here due to terrain it is not feasible to locate facilities as required above, the facilities shall be located at the point of closest vehicular access." _____

Feasibility

Facts

According to Tom Mathis and Byron Thada, Advanta's site manager (Tr. 175), the portable toilets would not be moved through the cultivated part of any field because the cultivated soil was too loose to drive on, and most of the time it was too muddy from irrigation (Tr. 100, 149, 152, 163, 168, 177-78, 185). Mathis admitted, however, that he never attempted to drive into any of the fields in question (Tr. 169-70). John Eldin, Advanta's director of operations (Tr. 203), admitted that it would be possible to access the fields if they were dry (Tr. 214).

Even if it was possible to drive through the subject fields, Advanta maintains, pulling a portable toilet through the male rows of corn on the edges of the fields would destroy the field's "isolation," and so is infeasible (Tr. 152, 198). Byron Thada testified that Advanta gets its best fertilization results by repeating a pattern of planting four female rows separated by a single male row (Tr. 179). In addition, Mathis testified, male rows are frequently planted on the edges of the field to increase the chances of pollination, and to isolate the female corn from cross-contamination from rogue pollen (Tr. 95-96). Thada testified that dragging a portable toilet through the corn field would disrupt the distribution of the plants and reduce maximum pollination of the crop, in addition to affecting seed purity (Tr. 179-80; 182-83). Thada testified that he knew of no means of getting a portable toilet into a field without cutting or knocking down the plants growing there (Tr. 190, *see*, Edlin's testimony, Tr. 217).

Finally, both Thada and John Edlin testified that Advanta could not destroy crops which belong, not to Advanta, but to the farmers Advanta pays to grow the corn for them (Tr. 201, 208).

Mathis and Thada both argued that there was nothing they could do to comply with the regulations (Tr. 148-49, 196). Thada and Edlin testified that other seed growers operate in the same way Advanta does (Tr. 197, 208). Advanta did not apply for a variance from OSHA (Tr. 155-56, 212).

Subparagraph (c)(2)(iv) exception. When a standard contains an exception to its general requirement, the burden of proving that the exception applies lies with the party claiming the benefit of the exception. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1991-93 CCH OSHD ¶30,059 (No. 89-2883, 89-3444, 1993). Exemptions to the sweep of remedial legislation must be narrowly construed and limited to effect

only the remedy intended. *Pennsuco Cement and Aggregates, Inc.*, 8 BNA OSHC 1379 (No. 15462, 1980). The preamble to the Field Sanitation standards at 29 CFR 1928, *et seq.*, states that:

OSHA recognizes that there are some fields, located for example, on steep mountain sides, river deltas or wetlands and the like, into or on which portable facilities cannot be placed. . . . In addition, there may be rare occasions when the facilities temporarily cannot be placed or located in ordinary level fields as, for example, following unusually heavy rains that make the ground too soggy to support the vehicles that transport the facilities. 52 Fed. Reg. 16050, 16087 (1987).

Advanta takes the position that in its fields the ground is *always* too soft or too muddy to support the vehicles that transport its portable facilities. This position is not supported by the evidence. The cited fields are not located on a river delta or wetland. Advanta did not show that unusually heavy rains affected the cited fields during the relevant period. Tom Mathis explained that Advanta used machinery in the seed corn fields at least twice during the growing season (Tr. 164). According to Mathis, the top of the stalks were nipped off (Tr. 164). The leaves stop growing where the stalk is nipped, while the tassel continues to grow up through the top. A second machine, a puller, was then run through the field to pull the exposed tassels¹ from the corn (Tr. 165). The fields at issue were all machine detasseled before the hand laborers entered the fields (Tr. 97). According to Mathis, there was only one day during the detasseling season that the fields were too muddy to run high clearance four-wheel drive pulling machines through the fields (Tr. 146; *See also*, testimony of Byron Thada, Tr. 178). Moreover, John Eldon admitted that tractors could access the field when it was wet (Tr. 218).

The evidence establishes that various vehicles exist, *i.e.*, four-wheel drive trucks and tractors, which could have been used to transport the required facilities into the subject fields. Thus the conditions of the exemption are not met. In any event, it is clear from the language of the preamble that the exemption under paragraph (c)(2)(iv) is meant to apply to extreme terrain, and not to loose and/or muddy soil conditions in flat farm fields deliberately created by growers, *i.e.*, through irrigation and/or cultivation of the soil, intended to facilitate greater crop yields. This judge cannot accept Advanta's argument that the drafters of the exemption at ¶(c)(2)(iv) intended to create a blanket exemption for conditions growers regularly create in their fields. Such an interpretation would eviscerate the standard. Advanta failed to carry its burden to show that it was exempted from the operation of §1928.110(c)(2)(iii). The cited violation of that standard is, thus, established.

¹ The puller catches only 50 to 60 percent of the tassels, necessitating the use of hand labor to pull the remaining silk (Tr. 165).

Infeasibility as an affirmative defense. To establish the affirmative defense of infeasibility, an employer must show that 1) the means of compliance prescribed by the applicable standard would have been infeasible, in that a) its implementation would have been technologically or economically infeasible, or b) necessary work operations would have been technologically or economically infeasible after its implementation. The employer must also show that there are no feasible alternative means of protecting its workers from the hazard addressed by the standard. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1994 CCH OSHD ¶30,485 (No. 91-1167, 1994).

Advanta failed to establish that compliance with the applicable standard was technologically infeasible. It is clear that Advanta determined, in advance, *not* to place portable toilets in its fields, and made no attempt to investigate the means of doing so, such as using high clearance four-wheel drive vehicles to transport toilet facilities.

It is clear from the record that Advanta's real objection to compliance with the standard is economic. In order to comply with the cited standard, some corn stalks would be destroyed in order to provide access for vehicles to transport sanitary facilities into their fields.²

In considering claims that compliance was economically infeasible, the Commission considers whether the employer had "demonstrated that the costs were unreasonable in light of the protection afforded and [had] shown what effect, if any, those costs would have on the business as a whole." *Dun-Par Engd. Form Co.*, 12 BNA OSHC 1962, 1966, 1986-87 CCH OSHD P 27,651, p.36,033 (No. 82-928, 1986). *See also; State Sheet Metal Co.*, 16 BNA OSHC 1155, 1161, 1993-1995 CCH OSHD P 30,042, p.41,227 (No. 90-1620, 1993) (consolidated cases) (evidence of increased costs alone is insufficient to establish "severe adverse economic impact"); *Peterson Bros. Steel Erec. Co.*, 16 BNA OSHC 1196, 1203, 1993-95 CCH OSHD ¶30, 052, p.41,303 (No. 90-2304, 1993), *aff'd*, 26 F.3d 573 (5th Cir. 1994) (Commission must look at the effect that compliance would have on the company's "financial position as a whole" to determine whether the company would be "adversely affected"). Advanta's evidence suggests that abatement would result in additional costs to Advanta. However, the record is devoid of evidence on the effect these costs would have on Advanta's profits or the company's ability to recoup, absorb or pass

² Advanta's arguments regarding isolation and purity are without merit. The problems of cross-pollination appear to have been overstated in that, 1) isolation rows are not consistently planted on all sides of the cited fields (See; Exh. R-1, R-5), and 2) fertilization is achieved when the pollen from the male stalks is trapped by the sticky silk tassel (Tr. 180), which occurs before the field hands enter the corn fields to detassel the corn. By the time the workers enter the field, the corn has already been fertilized. Further fertilization is not possible after the corn is detasselled. Cross-contamination is not a serious issue at the point the laborers enter the field.

along the expenses it would incur. Advanta failed to establish that compliance with the Act was economically infeasible, and the cited violation is established.³

Penalty

Twenty-three hand laborers were exposed to the cited violation (Tr. 56). According to Tom Mathis, it takes approximately 45 to 50 minutes to detassel a ½-mile row of corn (Tr. 97). In a typical field with ½-mile long rows, where portable toilets were located on only one side of the field, laborers would be further than a quarter of a mile from a sanitary facility for about 20 to 25 minutes of the round trip. Complainant notes that when laborers have to retain urine in their bladders for extended periods, they are more prone to contract urinary tract infections. 52 Fed. Reg. 16050, 16059 (1987). However, Mr. Wrightam admitted that the unavailability of sanitary facilities in this case was unlikely to result in serious ailment or permanent injury (Tr. 57).

The record shows that Advanta did attempt to comply with the regulation to the extent that portable toilets could be placed without disturbing corn plants. Given the low gravity of the cited violation, and Advanta's partial abatement of the hazard addressed by the cited standard, a penalty of \$1,000.00 is appropriate for this violation.

Citation 1, item 3 alleges:

29 CFR 1928.110(c)(3)(iii): Handwashing facilities provided for employees engaged in hand-labor operations in the field were not refilled with potable water as necessary to ensure an adequate supply.

The cited standard provides:

Handwashing facilities shall be refilled with potable water as necessary to ensure an adequate supply and shall be maintained in a clean and sanitary condition.

Facts

Florestela Vasquez testified that there was no water in the handwashing facilities (J-3, p. 21, 57). Victoria Vasquez did not have any first-hand knowledge of the cited condition (J-2, p. 60), and testified only that she saw people washing their hands with drinking water (J-2, Tr. 64) Mathis testified that he checked the portable toilets every morning to make sure they were useable, and had a supply of toilet paper, hand towels, soap and water (Tr. 101, 143, 160). Mathis could not recall the reservoir in the wash stations ever being completely empty (Tr. 144). In fact, Mathis stated, the reservoirs were usually fairly full. He did not believe that the handwashing stations were ever used (Tr. 160).

³ This judge notes that Advanta's objections to the application of the cited field sanitation standards to its seed corn operations would best be addressed by OSHA in a request for a permanent variance.

