United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Phone: (202) 606-5400
Fax: (202) 606-5050

SECRETARY OF LABOR Complainant, v. SUNSHINE GUARDRAIL SERVICE Respondent.	OSHRC DOCKET NO. 96-0631

NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on September 26, 1996. The decision of the Judge will become a final order of the Commission on October 28, 1996 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before October 16, 1996 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: September 26, 1996

DOCKET NO. 96-0631

NOTICE IS GIVEN TO THE FOLLOWING:

Jaylynn Fortney
Regional Solicitor, U.S. DOL
1371 Peachtree St., N.E., Room 339
Atlanta, GA 30367

Alan B. Whitaker, Jr., Esquire
Adorno & Zeder
Suite 500
888 Sotheast 3rd Avenue
Fort Lauderdale, FL 33316

Ken S. Welsch
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309 3119

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United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 Peachtree Street, N.E., Suite 240
Atlanta, Georgia 30309-3119

Phone: (404) 347-4197

Fax: (404) 347-0113

SECRETARY OF LABOR, Complainant, v. SUNSHINE GUARDRAIL SERVICES, Respondent.	OSHRC Docket No. 96-631 **(E-Z)**

APPEARANCES:

Frances Schleicher, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Alan B. Whitaker, Esquire
Adorno and Zeder
Fort Lauderdale, Florida
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Sunshine Guardrail Service (Sunshine), a small corporation, is engaged in the installation of guardrails, signs, fences, and handrails along highways and in municipalities since 1978 (Tr. 65, 86). On November 22, 1995, the Occupational Safety and Health Administration (OSHA) conducted a fatality investigation of Sunshine's worksite on the Florida Turnpike near Miami, Florida. As a result of the investigation, OSHA issued a serious citation to Sunshine on April 19, 1996. OSHA alleges that Sunshine failed to post traffic signs at the worksite in violation of § 1926.200(g)(1). The Secretary proposes a penalty of $1,000 for the alleged violation. Sunshine timely contested the citation.

On June 12, 1996, the case was designated for E-Z trial pursuant to Commission Rule 200-211, 29 C.F.R. §§ 2200.200-211. E-Z trial is a program designed by the Review Commission to provide simplified proceedings for resolving contests expeditiously. On July 5, 1996, the E-Z trial prehearing conference order was entered which set forth the parties' agreed facts and statement of issues. On July 17, 1996, Sunshine amended the list of issues to allege the multi-employer worksite defense (Tr. 4).

The E-Z trial hearing was held on August 14, 1996, in Fort Lauderdale, Florida. Sunshine agrees that it is an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Occupational Safety and Health Act (Act) (Prehearing Conference Order).

The Accident

During November 1995, N.S. Marine contracted with the Florida Department of Transportation (DOT) to update guardrail installations along a ten-mile section of the Florida Turnpike south of Okeechobee Road near Miami, Florida (Tr. 66). Sunshine subcontracted to provide the labor and equipment for the removal and installation of guardrails which meet current standards (Tr. 65-66). N. S. Marine, under the subcontract, was responsible for providing maintenance of traffic (MOT) signs and devices necessary for Sunshine to work along the turnpike (Tr. 68). The MOT included the posting of appropriate traffic signs warning motorists of construction worksites (Tr. 84).

Prior to November 22, 1995, Sunshine worked along the turnpike for approximately two weeks without incident (Tr. 68). During this period, there was apparently no problem with N. S. Marine providing the appropriate MOT signs and devices (Tr. 27, 40, 68, 91).

On November 21, 1995, Sunshine met with N.S. Marine to discuss the next day's work. The DOT requested that the work avoid causing any more road congestion than necessary because of the Thanksgiving holiday (Tr. 69). It was to be a short workday. All work was to be completed by 12 noon and was not to block any traffic lanes (Tr. 69, 79).

The job for November 22, 1995, was to replace three guardrail support posts at a location near the Okeechobee bridge (Tr. 70, 86). The posts were to be replaced because they had been installed improperly[1] (Tr. 70). The job was anticipated to take less than a hour (Tr. 56, 91). The support posts were located in the median along the southbound side of the turnpike (Exh. C-1; Tr. 85). There were four southbound lanes with a posted speed limit of 65 m.p.h. (Tr. 23, 79, 85). According to the compliance officer, the median was 47 feet wide, and the section of guardrail measured 21 inches high by 366 feet long. It was located 9 feet from the nearest traffic lane (Exh. C-1; Tr. 19-20). It was adjacent to the area which motorists use for emergencies as designated by the yellow line (Exh. C-1). The amount of traffic on the turnpike was described as a normal rush hour (Tr. 80).

To replace the posts, a crew of five Sunshine employees under the supervision of Alfred Green, foreman/field supervisor, arrived at a bridge near the worksite at 8:30 a.m (Tr. 96, 102, 105). Their equipment included a backhoe, a truck and trailer to transport the backhoe, a post pounding machine, and a pickup truck (Tr. 66). After locating the DOT engineer, Green was informed that N. S. Marine had returned to Orlando and had not installed any MOT signage and devices (Tr. 91-92). Green testified that the DOT engineer told him to proceed in replacing the posts as quickly as possible and to stay behind the guardrail (Tr. 92). Work on the posts started around 9:30 a.m. (Tr. 96, 103).

Before replacing the posts, the crew placed ten to twelve orange road cones in front of the guardrail which they happened to have on their trucks. The cones were 3 feet high (Tr. 95). Also, the employees wore safety vests, worked inside the guardrail area, and turned on the trucks' yellow flashing lights (Tr. 93; also see Prehearing Conference Order). There were no traffic signs posted (Tr. 23, 33, 100). With the DOT engineer present, the crew began replacing the three support posts. The railings were unbolted, and the old support posts were removed (Tr. 79, 97). While installing the new posts, a three-car accident occurred some distance north of the worksite (Tr. 24, 48, 94).

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When originally pounded into the ground, the tops of the posts became distressed (Tr. 70).

It was around 10:30 a.m. A Lexus LS 400 lost control, crossed the guardrail and fatally struck two employees (Tr. 87, 103). The car was described as traveling 80 to 100 miles per hour (Tr. 24, 48).

OSHA Compliance Officer Diaz arrived at the site at 1:55 p.m. and initiated an accident investigation. The serious citation alleging a violation of § 1926.200(g)(1) for failing to post legible traffic signs was issued on April 19, 1996 (Tr. 10, 25, 32).

Discussion

To prove a violation of a safety standard such as § 1926.200(g)(1), the Secretary of Labor must prove by a preponderance of the evidence that (1) the cited standard applied; (2) there was noncompliance with the terms of the standard; (3) there was employee exposure or access to the hazard created by the noncompliance; and (4) the employer knew or with the exercise of reasonable diligence could have known of the condition. *Kasper Electroplating Corp.,* 16 BNA OSHC 1517, 1521, 1993 CCH OSHD ¶ 30,303 (No. 90-2866, 1993).

I. Alleged Violation of § 1926.200(g)(1)

Section 1926.200(g)(1) provides that "construction areas shall be posted with legible traffic signs at points of hazard." OSHA alleges that:

> On or about November 22, 1995, employer did not post legible traffic signs while conducting work on the side of the road exposing employees to the hazard of being struck by moving traffic.

There is no dispute, and the record supports a finding, that the replacement of guardrail support posts constitutes a " construction area" within the meaning of the standard. As described by Cheek, Sunshine's president, the work involved updating the guardrail system to meet current standards using specialized equipment such as a backhoe and a post pounding machine (Tr. 65-66). The definition of "construction" includes work for "alteration and /or repair." See definition at § 1926.32(g). Also, the record establishes that working within 10 feet of four lanes of turnpike traffic traveling 65 miles per hour is a "point of hazard" within § 1926.200(g)(1). There were five employees exposed (Tr. 171). The guardrail provided them little protection because the work involved unbolting the railing and replacing the support posts.

Further, Sunshine does not dispute that there were no traffic signs or that such signs should have been posted. Cheek acknowledged that traffic signs should have been posted (Tr. 81). Green, the field supervisor, agreed (Tr. 98-99). The purpose of such traffic signs was to warn motorists of the construction work along the highway (Tr. 23). A "sign" is defined by the Secretary as "the warnings of hazard, temporarily or permanently affixed or placed, at locations where hazards exist." See § 1926.203(b). Cheek testified that, based on similar work done prior to the accident, he would have expected four traffic signs posted on either side of the road announcing "Construction Ahead." The signs would have been placed at 1,500 and 1,000-foot intervals from the worksite (Tr. 84). Thus, noncompliance with § 1926.200(g)(1) and employee exposure are established.

Also, as an element of his burden of proof, the Secretary must show that Sunshine knew or should have known of violative condition which in this case was failure to post traffic signs. *Bland Constr. Co.,* 15 BNA OSHC 1031, 1032, 1991-93 CCH OSHD ¶ 29,325, p. 39,392 (No. 87-992, 1991). On the day of the accident, Green was Sunshine's designated supervisor of the crew (Tr. 71, 82-83). He was responsible for their safety and health (Tr. 96, 98). Upon arrival at the site, Green testified he was informed that traffic signs were not posted. Also, he knew that traffic signs were needed (Tr. 91-92, 99). Green's knowledge as a supervisor is imputed to Sunshine. *A. P. O'Horo Co.*, 14 BNA OSHC 2004, 2007, 1991 CCH OSHD ¶ 29,223 (No. 85-369, 1991) (employee who has been delegated authority over other employees is considered a supervisor whose actual or constructive knowledge of violative conditions can be imputed to the employer). An employer is chargeable with knowledge of conditions which are known to its supervisory personnel. *A.L. Baumgartner Constr., Inc.*, 16 BNA OSHC 1995, 1998, 2000, 1994 CCH OSHD ¶ 30,554 (No. 92-1022, 1994).

Therefore, having established employer knowledge, the Secretary has shown a violation of § 1926.200(g)(1). In fact, during closing statements, Sunshine conceded it may have technically violated the standard (Tr. 115). However, Sunshine asserts the multi-employer worksite defense (Tr. 115).

II. Multi-Employer Worksite Defense

Sunshine asserts that under the precedent of the *Anning-Johnson/Grossman* rule,[2] it established the multi-employer worksite defense. The defense requires an employer, who did not create or control the violative condition, to establish that alternative protective measures were used or were unavailable. The burden of establishing each element of the defense rests with Sunshine. Specifically, to prove the multi-employer worksite defense, Sunshine must prove by a preponderance of the evidence that (1) it did not create the hazardous condition; (2) it did not control the violative condition such that it could have realistically abated the condition in the manner required by the standard; and (3) it took reasonable alternative steps to protect its employees or, with the exercise of reasonable diligence, was not aware that the violative condition was hazardous. *Capform, Inc.*, 16 BNA OSHC 2040, 2041, 1994 CCH OSHD ¶ 30,589, p. 42,355-56 (No 91-1613, 1994).

A. Create and Control of the Hazard.

N.S. Marine, as general contractor, was responsible for the placement of all MOT devices and signs, including the traffic signs required by § 1926.200(g)(1). By not placing the traffic signs on November 22, N.S. Marine created the violative condition. Therefore, Sunshine did not create the hazardous condition.

Also, Sunshine asserts it did not control the worksite. The Florida DOT contract provides that "all work shall be done to the satisfaction of the engineer" (Tr. 74). The contract further required that "the contractor shall at all times have on the work site as his agent a competent superintendent . . . who shall receive the instructions from the engineer" (Tr. 75). According to Cheek, the DOT engineer has the authority to direct the work, accept or reject work, and order people off the worksite (Tr. 76). It was the engineer who told Green that the crew could work behind the guardrail and that traffic signs were not needed (Tr. 92). Cheek testified he expected his employees to follow the directions of the engineer and, if not, they could be fired (Tr. 78). Thus, Sunshine argues that the DOT controlled the worksite condition.

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[2] *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1975-76 CCH OSHD ¶ 20,690 (No. 3694, 1976); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1975-76 CCH OSHD ¶ 20,691 (No. 12775, 1976).

However, the record does not show that Sunshine lacked control. The DOT may have control over the completed work and the operation of the turnpike. However, there is no evidence that the DOT engineer assumed control over the safety of Sunshine's employees or work conditions. Cheek acknowledged that the contract provided that "any subcontractor shall not require any laborer employed in the performance of this contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his or her health or safety" (Tr. 82). It is well settled that an employer may not contract away its statutory responsibilities under the Act which include the safety of its own employees and compliance with the standard. *Baker Tank Co./Altech, A Div. Of Justiss Oil Co.,* 17 BNA OSHC 1177, 1180 (No. 90-1786S, 1995). There is no evidence that the engineer required the work to be done that day or prohibited the posting of traffic signs. According to Green, the DOT engineer merely told him the following:

> And, he told me that we're working behind the guardrail; that we wouldn't really need MOT. Not that we didn't need it, but he said he felt that we could get behind the guardrail and do it. (Tr. 92)

The engineer's statement does not show he was ordering the work without the signs. Neither the DOT contract nor Sunshine's subcontract was made part of the record. Also, the DOT engineer did not testify. There was no showing that Sunshine could not have enforced the posting of traffic signs as required by its subcontract. *See Central of Georgia Railroad v. OSHRC,* 576 F.2d 620, 624 (5th Cir. 1978).

Therefore, the record fails to establish that Sunshine lacked control over the worksite. Both Green and Cheek, Sunshine's president, testified traffic signs were necessary at the site. However, Sunshine continued the work without requiring the posting of the necessary signs.

B. Sunshine's Alternative Measures

As another element of the multi-employer worksite defense, Sunshine must also show that it took reasonable alternative steps to protect employees. Reasonable measures may fall short of full compliance with the standard because "what is realistic depends upon a balance of the hazard involved with considerations of efficiency, economy, and equity." *Hayden Electric Servs.,* 4 BNA OSHC 1494, 1495, 1976-77 CCH OSHD ¶ 20,939, p. 25,149 (No. 4034, 1976). The efforts must

be realistic, effective and reasonable. The focus is on what is reasonable, not what is possible. *See Electric Smith Inc. v. Secretary of Labor,* 666 F.2d 1267, 1273-74 (9th Cir. 1982). The employer's conduct must be viewed in its totality and in terms of "whether a reasonable employer would have done more" under the circumstances. *Capform, Inc.*, 16 BNA OSHC at 2042. This must be decided on a case-by-case basis.

Sunshine asserts that its reasonable measures to protect employees included having employees working inside the guardrail, wearing safety vests, placing orange road cones in front of the guardrails, and turning on the trucks' yellow flashing lights. Also, Sunshine notes that the work was expected to take less than a hour to complete (Tr. 91).

However, these measures were at the immediate area of the worksite and not displayed to give motorists advance warning of the work. As described by the compliance officer and Cheek, the purpose of traffic signs in this case was to warn motorists in advance of the construction work being performed. Cheek testified there should have been four signs warning motorists of "Construction Ahead" placed at 1,500 foot and 1,000-foot intervals from the worksite (Tr. 84). Green acknowledged the cones were not a substitute for traffic signs (Tr. 98). None of the measures taken by Sunshine were shown to provide advance warning to motorists.

Also, the record fails to show that Sunshine complained, objected, or attempted to delay the work until traffic signs were posted. A complaint to the DOT engineer should have been Sunshine's initial reaction. Green knew the signs should have been posted but merely accepted the engineer's statement that they could work behind the guardrail without posting the signs (Tr. 92). There is no evidence that Green objected or even questioned the engineer's statement. The railing would not protect employees because it was unbolted and the posts were being replaced. There is no showing that the engineer ordered the work to be done at that time or threatened action if not completed. The court concludes that a reasonable employer would have, at the minimum, complained and requested that the contract with N.S. Marine be enforced. Contractors have an obligation at the very least to request the employer that does have control to provide the protection. *See Simpson, Gumpertz & Heger Inc.*, 15 BNA OSHC 1851, 1859, 1991-93 CCH OSHD ¶ 29,828, p. 40,672 (No. 89-1300, 1992); *Lewis & Lambert Metal Contractors, Inc.*, 12 BNA OSHC 1026, 1030, 1884-85 CCH OSHD ¶ 27,073, p. 34,899 (No. 80-5295S, 1984).

Alternatively, Sunshine failed to show it could not have delayed the work until it obtained the signs from its own offices. Sunshine has been in the guardrail construction business since 1978 and presumably has the necessary signs. In its closing statement, Sunshine noted it did not bring its MOT because N.S. Marine should have placed it (Tr. 116). There is no evidence that Green requested delaying the work until the signs were obtained.

Also, some measures such as safety vests and turning on the truck's yellow flashing lights may be the normal practice even if the traffic signs had been posted. If such measures were normally taken, regardless of the lack of posted traffic signs, they would not be considered alternative measures. Thus, it is concluded that Sunshine's efforts did not constitute reasonable alternative protective measures. Balancing the degree of hazard with the measures taken, Sunshine failed to exercise reasonable care and diligence to protect its employees.

Accordingly, the multi-employer defense is not established.

III. *Serious Classification*

If a violation is found, Sunshine argues that the violation is not serious. In determining whether a violation is serious under § 17(k) of the Act, "the issue is not whether an accident is likely to occur; it is rather, whether the result would likely be death or serious harm if an accident should occur." *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155,2157, 1989 CCH OSHD ¶ 28,501, p. 37,772 (No. 87-1238, 1989).

As noted, the purpose of posting traffic signs in this case was to warn motorists of construction work being done along the turnpike. The failure to post the signs made an accident possible. If an accident did occur, the most likely consequence would be death or serious physical harm. However, in this case, there is no evidence that the automobile accident on November 22, 1995, would have been prevented by posting traffic signs or was caused by the failure to post them. Regardless, the employer's duty to comply with a standard is not dependent on whether a failure to comply has or has not been the cause of injuries. The Act may be violated even though no injuries have occurred, and even though a particular instance of noncompliance was not the cause of the injuries. *Concrete Construction Corp.,* 4 BNA OSHC 1133, 1135, 1975-76 CCH OSHD ¶ 20,610, p. 24,664 (No. 2490, 1976).

Accordingly, a serious violation of § 1926.200(g)(1) is established.

IV. Penalty

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, 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. The gravity of the violation is the principal factor to be considered.

OSHA proposed a $1,000 penalty on the basis of giving Sunshine maximum credit for size, no credit for history and good faith, and a finding that the gravity of the violation was high. The court agrees that proper credit for size was given in that Sunshine is a small employer with eleven employees (Tr. 28). Also, history was properly considered in that Sunshine received a serious citation in 1994 (Tr. 29, 33, 49). However, the court finds no evidence to support the lack of credit for good faith. Sunshine appeared fully cooperative during the inspection. The compliance officer acknowledged that Sunshine's safety training program was above average and that it had other safety programs as well (Tr. 39). Further, Sunshine made an attempt to reduce the hazard to employees. Therefore, a 20 percent credit for good faith is appropriate.

Also, the court finds the degree of gravity to be moderate. The job was to take less than an hour to complete. The employees were working off the side of the highway and inside the guardrail area. They were not exposed to direct traffic. The employees were wearing safety vests; orange cones were placed outside the guardrail; and the trucks displayed yellow warning lights. The accident in all likelihood would have occurred even if the signs had been posted.

Accordingly, the court finds a penalty of $500 reasonable.

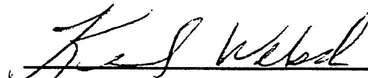
FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a), Federal Rule of Civil Procedure.

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

Item 1 of Citation No. 1, alleging a serious violation of § 1926.200(g)(1), is affirmed and a penalty of $500 is assessed.



KEN S. WELSCH
Judge

Date: September 19, 1996