Secretary of Labor,	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. **98-1492**
	:	
White Electrical Construction	:	
Company,	:	
Respondent.	:	

Appearances:

Leslie John Rodriguez, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Charles H. Morgan, Esquire
Kevin M. Ingham, Esquire
Alston & Bird, L.L.P.
Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

White Electrical Construction Company (White) is engaged in electrical construction contracting. The Occupational Safety and Health Administration (OSHA) conducted an inspection and investigation of respondent's jobsite in Jacksonville, Florida, from March 16, 1998, through June 22, 1998. As a result of this inspection, respondent was issued two citations. Respondent filed a timely notice contesting the citations and proposed penalties. A hearing was held in Jacksonville, Florida, on February 4 and 5, 1999. At the hearing, respondent withdrew its notice of contest relating to Citation No. 1, item 4, and the proposed penalty of $1,750. The violation of 29 C.F.R. § 1926.501(b)(1) alleged in that item and the proposed penalty of $1,750 are affirmed. The violations alleged in Citation No. 1, items 1, 2 and 3, and Citation No. 2, item 1, as well as the penalties proposed for these items, remain at issue.

For the reasons that follow, Citation No. 1, item 1, is affirmed and a penalty of $3,500 is assessed; Citation No. 1, item 2, is affirmed and a penalty of $1,750 is assessed; Citation No. 1, item 3 -- the alleged violation of 29 C.F.R. § 1926.200(b)(1) is vacated; the violation of § 5(a)(1) of the Act is affirmed and a penalty of $3,500 is assessed; and Citation No. 2, item 1, is vacated.

Background

In 1998, White was hired to complete certain electrical work on the Jacksonville Automated Skyway Express (ASE), which is owned by the Jacksonville Transportation Authority (JTA). Although much of the electrical work on the ASE had been completed by electrical contractors other than respondent, White was hired by the general contractor, Bombardier, to complete a "punch list" of items yet to be completed. Respondent's work began on March 9, 1998.

The ASE is a public transportation system consisting of trains running on a single guide beam elevated approximately 24 feet above the ground. The remotely operated electric trains run quietly and cannot be easily heard, given surrounding traffic and background noise. The system consists of two lines, the Starter Line and the South Line. During the period March 9, 1998, through March 16, 1998, the Starter Line, or main line, was operational. Trains providing customer service regularly ran on this line. The South Line was not operational and still in the construction process. Respondent performed its work on the South Line. The South Line connected to the main, or Starter Line, through a switch called the "Y-Junction." The Y-Junction includes a "turnout beam" that can be activated to veer the trains from the Starter Line to the South Line, or vice-versa, when the system is in full operation. During the period March 9, 1998, through March 16, 1998, this turnout beam was locked and deactivated since the South Line was still under construction.

During the period March 9, 1998, through March 16, 1998, journeymen and apprentice electricians hired by White from the union hall worked on the ASE electrical and communication systems. These employees had no experience on the ASE. Tasks included field modifications, making repairs and corrections pursuant to a punch list, and performing various other tasks pursuant to verbal instructions from White's job foreman, James LeClare.

On March 16, 1998, several employees of White were working at the end of the inactive South Line near the Y-Junction. One employee, Daniel Schley, noticed another electrician, Grady Austin, in the area of the Y-Junction immediately adjacent to the active Starter Line. Schley yelled, without success, to warn Austin of the oncoming train. Austin was struck and killed by the quiet and rapidly moving train.

Discussion

The Secretary has the burden of proving the violation:

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (1) 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).

Citation No. 1, Item 1
Alleged Serious Violation of 29 C.F.R. § 1926.21(b)(2)

The Secretary in Citation No. 1, item 1, alleges that:

> The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:
>
> > On or about March 16, 1998, employees were not instructed in the recognition and avoidance of unsafe conditions, and the procedures needed to ensure that the trains have been shut down or deactivated prior to any work being done on tracks and equipment on the Jacksonville Automated Skyway express, including the starter line.

Section 1926.21(b)(2) provides:

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Respondent's employees were provided the employee handbook and jobsite rules which contain White's safety policies and procedures. Some received these when they started work during the week beginning on March 9, 1998. One employee received these on another job six months before the start of this job. The safety policies and procedures related to electrical hazards, excavations, fire protection, first aid, material handling and tools, welding and cutting, ladders and scaffolds, and hazard communication (Exhs. R-1, R-2, R-10 & R-11). Respondent's safety program, used as a management tool, contained more detailed information, but addressed the same hazards, policies and procedures. This program was not given to these

employees on this site. Nothing in the handbook, jobsite rules, or safety program addresses the recognition or avoidance of unsafe conditions on this or any jobsite where there are the unique hazards created by moving trains.

Employee testimony at the hearing is conflicting concerning the degree of instruction given onsite by White's supervisor, Jimmy LeClare, relating to the recognition and avoidance of unsafe conditions. These employees were onsite approximately one week. The daily and weekly meetings were primarily job-related discussions, and not safety instructional sessions. Only general verbal safety warnings were given. While employees generally knew not to work near the active track, they were never trained on how to avoid unsafe working conditions unique to construction work on the elevated rail line immediately adjacent to an active rail line.

Mr. LeClare, White's foreman, worked on this jobsite for Comstock Electrical as an electrician and foreman from August 1996 until January 1998. White hired LeClare as its foreman to complete change orders relating to work performed by its predecessor. While working with Comstock, Mr. LeClare worked in all areas of the Automated Skyway Express jobsite, including the Starter Line and South Line. He received training in procedures for coordination of work and movement of trains during the testing and commissioning of the rail transit system. He was, therefore, extremely familiar with the dynamics of this unusual and ever-changing worksite.

The standard requires, in part, that instructions be given to each employee in the recognition and avoidance of unsafe conditions. An employer has a continuing duty to instruct employees as work conditions change. Mr. LeClare told employees to be careful and not to go beyond the Y-Junction, the pivot point where the concrete barrier meets the metal section of the railway. These general verbal instructions are insufficient to adequately inform employees of the unique hazards on this site, and how to avoid specific unsafe conditions that arise when the main line is operational and when certain systems are tested.

White's foreman continued to give the same general instructions during tool box meetings even when he knew the work varied day-to-day. During this one-week period, a general contractor representative observed Mr. Schley and Mr. Austin, two White employees, on the elevated track about 100 feet from the Y-Junction. He warned them the section was "hot" or electrified and told them to get down. He and the two employees subsequently told Mr. LeClare of the incident. White's foreman, however, gave his employees no additional

instructions on recognizing or avoiding this or similar hazards. At the hearing, Mr. LeClare admitted that after that incident on Thursday, March 12, 1998, he had no discussions with these employees about the line beyond which they should not work.

Mr. LeClare testified that on March 16, 1998, two employees of the respondent were working 15 or 20 feet from the Y-Junction which joined the South Line under construction and the Starter Line where trains were in operation. He admitted there were no barricades, lookout employees, warning tapes, or danger signs to warn employees of the proximity of operating trains or restrict their entry into the immediate area of the active track. He further testified that White did not instruct employees on the operating rules of the JTA as to the movement of trains on the active track or regarding JTA's restrictions to access to the Y-Junction. He further stated that trains passed the Y-Junction more than three times in any nine-hour period, and White did not establish a system for on-track safety by providing its employees information about time intervals for trains running on the active track, including the area of the Y-Junction.

The Review Commission has consistently held that instructions must address matters specific to the worksite about which a reasonably prudent employer would have instructed its employees. *CMC Electric, Inv.*, 18 BNA OSHC 1737 at 1738, 1999 CCH OSHD ¶ 31,817, p. 46,743 (No. 96-169, 1999); *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2016, 1991-93 CCH OSHD ¶ 29,902, p. 40,810-11 (No. 90-2668, 1992). Respondent's verbal instructions were little more than general safety admonitions and insufficient to address the specific hazards on this unique jobsite. White had a continuing duty to reinstruct employees as changing conditions required. This reinstruction is not the equivalent of "enforcement of policy" discussed and rejected by the Review Commission in *Dravo Engineers and Constructors*, 11 BNA OSHC 2010, 1984-85 CCH OSHD ¶ 26,930 (No. 81-748, 1984). The term "instruction" must be read to include and require reinstruction as needed to give it substantive meaning. An employer subject to this standard may not give employees instructions at the beginning of the job and then abdicate its duty to change its instructions or reinstruct as changes in the working conditions occur. To merely restate prior general safety instructions in an ever-changing work environment is an abdication of an employer's responsibility under this standard. Effective reinstruction is also required when, as in this case, it is evident that employees do not understand either the nature of the hazard or the means to avoid it.

By requiring reinstruction, as needed, the standard is not rendered meaningless. An employer is, thus, not relieved of its obligation to instruct by making a general statement to employees about jobsite hazards and then relying on employee discretion and judgment to recognize and avoid specific and often subtle hazards. *See Superior Custom Cabinet Co.*, 18 BNA OSHC 1019, 1021 (No. 94-200, 1997), *aff'd,* 18 BNA OSHC 1513 (5th Cir. 1998).

The standard at 29 C.F.R. § 1926.21(b)(2) clearly applies. Through the actions of its foreman, Mr. LeClare, White failed to adequately and effectively instruct its employees in the recognition and avoidance of unsafe conditions at this jobsite. It knowingly allowed its employees to work in the vicinity of an active track without adequate instruction. As a result of respondent's failure to properly instruct, its employees had access to hazardous working conditions which could result in death or serious physical harm. On March 16, 1998, one employee was, in fact, struck and killed by a train on the Starter Line in the area of the Y-Junction.

The evidence clearly establishes that respondent violated 29 C.F.R. § 1926.21(b)(2). This violation was serious in that there is a substantial probability that death or serious physical harm could result from this condition.

Citation No. 1, Item 2
Alleged Serious Violation of 29 C.F.R. § 1926.50(e)

The Secretary in Citation No. 1, item 2, alleges that:

> Proper equipment for prompt transportation of injured person(s) to a physician or hospital or a communication system for contacting necessary ambulance service, was not provided:
>
> > On or about March 16, 1998, jobsite, at the Y Junction, at Bay and Broad Streets, employees were not provided with a communication device for contacting emergency services or the Jacksonville Automated Skyway Express control center in the event of an emergency.

Section 1926.50(e) provides:

> (e) Proper equipment for prompt transportation of the injured person to a physician or hospital, or a communication system for contacting necessary ambulance service, shall be provided.

It is clear that the standard is applicable. This is a construction site. Employees were working on a remote elevated rail line. It is undisputed that respondent provided no equipment for prompt transportation of an injured person to a physician or hospital. Employees working near the Y-Junction were several thousand feet from the San Marcos station which served as respondent's work staging area.

James LeClare, White's foreman, admitted at the hearing that on March 16, 1998, respondent did not provide employees working near the Y-Junction any radio or other method of communication so they could contact him at the San Marcos station. Respondent argues that employees had access to a telephone which was, in fact, used in response to the accident at the Y-Junction on March 16, 1998. This phone was a cellular phone that belonged to the injured employee. There is no evidence that prior to the incident, respondent gave this phone to the employee or even knew the employee had his own cell phone. White is not relieved of its responsibilities under this standard by arguing after-the-fact that the employee had his own phone.

Respondent also argues that these employees were not exposed to a hazard arising out of the cited condition. This standard presumes that emergency conditions may arise on construction sites. It allows employers to provide a means of prompt transportation or a means of communication. Since employees worked in a remote inaccessible location, respondent could not choose the transportation option. It failed to provide the alternative, a communication device. An emergency condition arose on March 16, 1998, when one of respondent's employees was struck by a moving train. Employees were clearly exposed to emergency conditions. Respondent failed to provide a prompt means of transportation or a communication device for these employees. White knew these employees were working in this remote area without such means of transportation or communication. Without these, death or serious physical harm could result from the delay in obtaining medical assistance in an emergency.

Respondent violated 29 C.F.R. § 1926.50(e). This violation is serious.

Citation No. 1, Item 3
Alleged Serious Violation of 29 C.F.R. § 1926.200(b)(1)
or, In the Alternative, § 5(a)(1) of the Act

The Secretary in Citation No. 1, item 3, alleges that:

29 CFR 1926.200(b)(1): Danger signs were not used where an immediate hazard existed:

> On or about March 16, 1998, between the Jefferson station and the Central station, at the Y Junction, there were no signs between the south line and the starter line, where barricades had been erected prior to March 5, 1998, which would have instructed employees of the dangers of entering the active train lines.

OR IN THE ALTERNATIVE

> Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to being struck by a moving train:
>
> On or about March 16, 1998, between the Jefferson station and the Central station, at the Y Junction, there were no barricades between the south line and

> the starter line, which would have prevented employees from being exposed to moving trains.
>
> Among other methods, one feasible and acceptable abatement method to correct this hazard would be to install barricades between the south line which was undergoing construction, and the starter line which had trains running on it.

Section 1926.200(b)(1) provides: "(b) *Danger signs*. (1) Danger signs (see Figure G-1) shall be used only where an immediate hazard exists."

The standard at 29 C.F.R. § 1926.200(b)(1) does not require the use of danger signs in any given situation, but limits the use of such signs to conditions only where an immediate hazard exists. This standard must be read within the context of 29 C.F.R. § 1926.200. Subsection (b)(1) relates to the use of danger signs. Subsection (c)(1) relates to the use of caution signs. Subsection (c)(1) provides: "(c) *Caution signs*. (1) Caution signs (see Figure G-1) shall be used only to warn against potential hazards or to caution against unsafe practices."

These standards cannot be interpreted to require red "danger" signs wherever immediate hazards exist and yellow "caution" signs wherever potential hazards exist, or to always be used to caution against all unsafe practices on a jobsite. To do so would lead to an unintended result. Signs would proliferate and lose their desired effectiveness due to overuse. The indiscriminate use of such warning signs would lead to employees ignoring all warning signs resulting in an overall decrease in jobsite safety.

A standard should be construed to give effect to the natural and plain meaning of its words. *Diamond Roofing v. OSHRC*, 528 F.2d 645 (5th Cir. 1976).

In that case, the Fifth Circuit further stated:

> If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express. *Brennan v. Occupational Safety and Health Review Commission*, 5 Cir., 1973, *supra; Meehan v. Macy*, 1968 129 U.S. App. D.C. 217, 392 F.2d 822; 4 Davis, Administrative Law Treatise § 30.12. *Cf. Cole v. Young*, 1956, 351 U.S. 536, 76 S.Ct. 861, 100 L.Ed. 1396 (ambiguity in Executive Order is fault of government and is resolved against it). We recognize that OSHA was enacted by Congress for the purpose stated by the respondents. Nonetheless, the Secretary as enforcer of the Act has the responsibility to state with ascertainable certainty what is meant by the standards he has promulgated.

This standard is not applicable where, as here, no sign was posted. The standard's clear

terms cannot be interpreted as a requirement to post a danger sign to warn employees of dangers in the area. Having determined that the standard does not apply, there is no need to discuss the other elements of the Secretary's burden. The alleged violation of 29 C.F.R. § 1926.200(b)(1) is vacated.

In the alternative to an alleged violation of 29 C.F.R. § 1926.200(b)(1), in Citation No. 1, item 3, the Secretary alleged that respondent violated § 5(a)(1) of the Act by failing to install barricades between the South Line and the Starter Line to prevent employees from being exposed to moving trains. To establish a violation of § 5(a)(1), the Secretary must show that: (1) a condition or activity in the employer's workplace presented a hazard to employees; (2) the cited employer or the employer's industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) feasible means existed to eliminate or materially reduce the hazard. *Waldon Health Care Center*, 16 BNA OSHC 1052, 1993 CCH OSHD ¶ 30,021, p. 41,151 (Nos. 89-2804 & 89-3097, 1993) (consolidated).

Work in the proximity to quiet rapidly moving trains presented a clear hazard to respondent's employees. Respondent's foreman, Mr. LeClare, testified that he recognized this condition as an obvious hazard. He gave employees general instructions about not going beyond the pivot point or Y-Junction of the main line and the South Line, but he allowed employees to work 15 to 20 feet from that point. Mr. LeClare worked on this jobsite for White for one month and its predecessor, Comstock, for eighteen months before the fatal incident on March 16, 1998. He was familiar with the operation of the elevated trains, worked as an electrician and foreman throughout this jobsite, and received training on the general contractor's procedures for work and coordination of train movement during testing and commissioning (T and C) of the transit system. On previous occasions, he saw barricades erected by the general contractor on the South Line. While the barricades were in place, Mr. LeClare and his crew were working on both sides of the barricades performing electrical installation on the South Line and work on the Starter Line under T and C control. During his testimony, Mr. LeClare could not recall when the barricades were taken down, but he understood that the reason for their removal was that the general contractor was moving its recovery vehicle.

The location and nature of the work changed daily during the period March 9, 1998, through March 16, 1998. Employees moved up and down a 3,000- to 4,000-foot section of the

South Line from the San Marcos Station to the Y-Junction. Employees worked on this job for approximately one week as close as 15 to 20 feet from the Y-Junction with only general safety instructions. Respondent stipulated at hearing there were no barricades, warning tapes, signs or other means to alert employees. Such means and devices would have alerted these individuals that they were approaching a very dangerous area of silently moving trains only a few feet from their work. Respondent argued that there were definite boundaries of track where employees were allowed to work. The area was not marked or blocked off in any manner. When employees are engaged in their skilled electrical work, their attention must be focused on the work at hand. Often employees are not fully aware of their immediate surroundings or the fact that they have inadvertently wandered into a hazardous area. Respondent's definite boundaries were mental fences or barriers. These might serve to reduce the probability of intentional entry into the hazardous area of the Y-Junction, but they do nothing to prevent accidental entry. *See Tobacco River Lumber Company*, 3 BNA OSHC 1059 at 1064, 1974-75 CCH OSHD ¶ 19,565 at p. 23,357 (No. 1694, 1975). A physical limitation is needed at this location to prevent intentional, inadvertent or accidental entry into the area of silent moving trains. It is essential for an employer to take all actions necessary to protect its workers from reasonably foreseeable hazards. Here a barricade would have been a feasible method to prevent employees from entering this obviously hazardous area of the worksite. Barricades were previously used on this site to restrict entry by workers into the dangerous location. Respondent offered no evidence to even suggest erection of barricades would not be feasible. Certainly, the erection of a barricade in this area is technologically and economically capable of being done. *See National Realty & Construction Co. v. OSHRC*, 489 F.2d 1257 at 1268 (D.C. Cir. 1973). The Secretary has shown that barricades would have eliminated or materially reduced the hazard of being struck by moving trains. The hazard is serious. Respondent's employees had access to the hazard and could die or be seriously injured if struck by a moving train. A White employee died on March 16, 1998, when struck by one of these trains at the Y-Junction.

I find that respondent violated § 5(a)(1) of the Act by failing to assure barricades were in place to protect its employees from the hazard of being struck by moving trains. This was a serious hazard that was likely to cause death or serious physical harm. It was actually recognized by respondent. Barricades were a feasible means to eliminate or materially reduce the hazard.

Citation No. 2, Item 1
Alleged "Other" Violation of 29 C.F.R. § 1926.20(b)(1)

The Secretary in Citation No. 2, item 1, alleges that:

A safety and health program was not initiated and maintained to provide compliance with the general safety and health provisions of the standard:

a. At the worksite, a safety and health program had not been initiated and maintained which addressed the following basic elements:

1. Program Reviewed Annually.

a. Adequate commitment of resources.
b. Safety rules and procedures incorporated into site operations.

2. Assignment of Responsibility

a. Employees adherence to safety rules.

3. Identification and Control of Hazards.

a. Action taken to address hazards.

4. First Aid and Medical Assistance

a. Emergency procedures and training, where necessary.

Section 1926.20(b)(1) provides:

(b) *Accident prevention responsibilities*. (1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

Complainant alleged in Citation No. 2, item 1, that respondent's safety and health program did not address four specific basic elements: annual program review, assignment of responsibility, identification and control of hazards, and first aid and medical assistance.

At the hearing, however, Mr. Wilk, the OSHA compliance officer, gave only general nonspecific testimony as to alleged deficiencies of respondent's safety program. He stated conclusions that the safety program did not address the work environment or types of resources; that the tool box meetings discussed work to be done, along with some safety discussions; and

that there was not much enforcement of the safety program. No specific factual testimony was produced by the Secretary to support these broad conclusions or to address the specific deficiencies. Mere allegations in a citation are totally insufficient to establish deficiencies in respondent's program. A review of White's safety program indicates a general approach to safety. I cannot conclude, however, that respondent violated 29 C.F.R. § 1926.20(b)(1) based on this review and the evidentiary record as it relates to this item. Citation No. 2, item 1, is vacated.

Penalties

Under § 17(j) of the Act, in determining the appropriate penalty, the Commission must give due consideration to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations.

Respondent employs approximately 200 employees, but had only 8 workers on this site. The violations found in Citation No. 1 were of high severity which could result in death or serious physical harm. I find that respondent did not exhibit good faith when all elements of the three violations are considered, that is, general safety instructions, no means of communication on a remote site, and no barricades to prevent entry into a hazardous area. No evidence was presented by the Secretary relating to a history of prior violations. Upon due consideration of these factors, a penalty of $3,500 is appropriate for item 1 of Citation No. 1; a penalty of $1,750 is appropriate for item 2 of Citation No. 1; and a penalty of $3,500 is appropriate for item 3 of Citation No. 1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED:

1. Citation No. 1, item 1, is affirmed as a serious violation and a penalty of $3,500 is assessed.

2. Citation No. 1, item 2, is affirmed as a serious violation and a penalty of $1,750 is assessed.

3. Citation No. 1, item 3: The alleged violation of 29 C.F.R. § 1926.200(b)(1) is vacated. The violation of § 5(a)(1) of the Act is affirmed as a serious violation and a penalty of $3,500 is assessed.

4. Citation No. 1, item 4, is affirmed as a serious violation and a penalty of $1,750 is assessed.

5. Citation No. 2, item 1, is vacated.

STEPHEN J. SIMKO, JR.
Judge