UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET NW
4TH FLOOR
WASHINGTON, DC 20006-1246

FAX
COM (202) 634-4008
FTS (202) 634-4008

SECRETARY OF LABOR
Complainant,
v.
ACCU-RITE MACHINE COMPANY
Respondent.

OSHRC DOCKET
NO. 91-2560

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 January 7, 1993. The decision of the Judge will become a final order of the Commission on February 8, 1993 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 January 27, 1993 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
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: January 7, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-2560

NOTICE IS GIVEN TO THE FOLLOWING:

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

Ms. Bobbye D. Spears
Regional Solicitor
Office of the Solicitor, U.S. DOL
Suite 339
1371 Peachtree Street, N.E.
Atlanta, GA 30309

Mr. Charles Merritt
Chief Engineer
Accu-Rite Machine Company
16 Murrow Road
Post Office Box 126
Blythe, GA 30805 0126

Edwin G. Salyers
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309 3119

00110105970:04

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

PHONE:
COM (404) 347-4197
FTS (404) 347-4197

FAX:
COM (404) 347-0113
FTS (404) 347-0113

SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket No.: 91-2560
ACCU-RITE MACHINE CO., Respondent.	:	

Appearances:

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

Mr. Charles R. Merritt
Chief Engineer
Accu-Rite Machine Co.
Blythe, Georgia
For Respondent

Before: Administrative Law Judge Edwin G. Salyers

DECISION AND ORDER

The Respondent, Accu-Rite Machine Co., operates an industrial machine shop in Blythe, Georgia. On the morning of May 26, 1991, Respondent was engaged at the facilities of Ringier America,[1] located in Evans, Georgia, in removing an aftercooler unit and replacing it with a unit that had been repaired by Respondent (Tr. 39-40). This work occurred over the Memorial Day weekend while Ringier was shut down and had only a skeleton crew on the premises (Tr. 56-57).

[1] Ringier America operates a printing plant and produces magazines and newspaper flyers.

On the day in question, four employees of Respondent (Paul Case, David Long, Greg Yoko and Greg Goetz) were at the Ringier facility engaged in the removal of bolts that secured the flanges of the old aftercooler. Since these bolts could not be removed with hand tools, Respondent's employees were using a welding torch to cut them loose. During this cutting operation, some hot slag fell to the floor below and started a small fire by igniting grease spots which had accumulated underneath a blower motor coupling. This fire was extinguished and Respondent's employees placed a rubber mat over the coupling to prevent a recurrence of this situation (Tr. 59). Later, after additional cutting was performed, an explosion occurred, resulting in the injury of six persons.[2]

As a result of the accident, the Secretary of Labor initiated an inspection of the circumstances under the provisions of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651., *et seq.*) and Respondent[3] was issued a serious citation containing the following items:

> 1
> 29 C.F.R. § 1910.252(a)(1)(ii): When the object to be welded or cut could not be moved and all the fire hazards could not be removed, guards were not used to confine the heat, sparks, and slag to protect the immovable fire hazards:
>
> > (a) 4301 Evans-to-Locks Road, Evans, Georgia - Solvent Recovery System Hot slag from cutting process fell under the #5 Blower resulting in a small grease fire on or about 5-26-91.
>
> 2
> 29 C.F.R. § 1910.252(a)(2)(xiv)(D): The employer did not ensure that the supervisor secured authorization for cutting or welding operations from the designated management representative:
>
> > (a) 4301 Evans-to-Locks Road, Evans, Georgia - Solvent Recovery System Authorization for cutting operation was not obtained by the supervisor on or about 5-26-91.

---

[2] The cause of the explosion is the subject of litigation between some of the injured employees and Ringier. The Secretary's counsel represented to the court during the hearing that the violations alleged in the citation were not based upon the accident. No direct evidence of the cause of the explosion was presented at the hearing, and these circumstances are not considered relevant to a determination of the issues before this court (Tr. 65-69).

[3] Ringier was also cited for alleged infractions of the Act. However, the substance of these charges is not revealed in the record, nor is this circumstance considered relevant to the issues presented in the case at bar.

3
29 C.F.R. § 1910.252(b)(1)(i): A welder or helpers working on platforms, scaffolds, or runways were not protected against falling:

(a) 4301 Evans-to-Locks Road, Evans, Georgia - Solvent Recovery System Employees working on Aftercooler #5 were not protected against falling on or about 5-26-91.

The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for injury and/or illness.

4a
29 C.F.R. § 1910.1200(e)(1): Employer had not developed or implemented a written hazard communication program which at least describes how the criteria in 29 C.F.R. § 1910.1200(f), (g) and (h) will be met:

(a) 4301 Evans-to-Locks Road, Evans, Georgia - A written hazard communication program was not developed and implemented for employees exposed to hazardous materials such as, but not limited to, oxygen and acetylene on or about 5-26-91.

4b
29 C.F.R. § 1910.1200(g)(1): Employer did not have a material safety data sheet for each hazardous chemical which is used in the workplace:

(a) 4301 Evans-to-Locks Road, Evans, Georgia - A material safety data sheet (MSDS) was not maintained for hazardous materials such as, but not limited to, oxygen and acetylene on or about 5-26-91.

4c
29 C.F.R. § 1920.1200(h): Employees were not provided information and training as specified in 29 C.F.R. § 1920.1200(h)(1) and (2) on hazardous chemicals in their work area at the time of their initial assignment and whenever a new hazard is introduced into their work area:

(a) 4301 Evans-to-Locks Road, Evans, Georgia - Information and training was not provided as required in the hazard communication standard on or about 5-26-91.

Following the issuance of the Secretary's citation, Respondent filed a timely notice of contest. The Secretary then filed a formal complaint setting forth the factual allegations upon which the citation was based. Respondent did not, however, file a formal reply setting forth its answer to the Secretary's allegations or raising any affirmative defenses. In view of

this situation, the jurisdictional allegations of the complaint are deemed admitted and, under normal circumstances, Respondent would be precluded from raising any affirmative defenses at the hearing. The court notes, however, that this small employer has been represented throughout these proceedings by its owner, Charles R. Merritt, acting *pro se*, who indicated to the court at the outset of the hearing that he had no familiarity with legal procedures and could not afford the services of a lawyer. With the indulgence of the Secretary's counsel and in the interest of providing Respondent a full and fair hearing, this court relaxed the rules and permitted Respondent to raise all matters it considered essential to properly present its case (Tr. 8).

Serious Citation No. 1, Item 1

This item charges Respondent with a violation of 29 C.F.R. § 1920.252(a)(1)(ii)[4] for its alleged failure to guard a fire hazard (grease spots) from contact with heat, sparks and slag while performing a cutting operation in the vicinity of blower #5.

It is undisputed in the evidence that on the day in question, Respondent's employees were engaged in cutting bolts above blower #5 at the Ringier facility. They were working above the blower (about 20 to 25 feet) using an oxygen/acetylene torch, which generated sparks and hot slag that fell directly to the floor below. Grease spots had accumulated underneath couplings contained on the blower and presented a potential for fire in the event the sparks and slag made contact with the grease. In fact, a small grease fire occurred while Respondent's employees were engaged in the cutting operation and was immediately extinguished. The grease spots were then covered with a rubber mat to shield the grease from exposure to the falling sparks and slag (Tr. 15-18).

At the hearing, Respondent did not dispute the factual allegations which form the basis for the charge. Merritt testified Respondent's employees made a cursory inspection of the area where the cutting was to be performed without detecting the grease spots (Tr. 31, 32). Respondent maintains these spots were visible only by "getting down on our hands

---

[4] 29 C.F.R. § 1910.252(a)(1)(ii) provides: If the object to be welded or cut cannot be moved and if all the fire hazards cannot be removed, then guards shall be used to confine the heat, sparks, and slag, and to protect the immovable fire hazards.

and knees and look[ing] in every nook and cranny" (Tr. 33). This assertion was contradicted in the testimony of Troy Pinson, a boiler operator employed by Ringier at the site, who testified the spots were visible to someone standing on the ground below the cutting operation and were readily apparent if they were "looked for" (Tr. 56, 60).

In essence, Respondent's sole defense to this charge is that it lacked knowledge of the cited condition. The Review Commission has made it clear that knowledge is an essential element which must be established by the Secretary in every case. This element is satisfied, however, upon a showing that the requisite knowledge could have been ascertained through the exercise of "reasonable diligence." *Tampa Shipyards, Inc.,* 15 BNA OSHC 1533, 1992 CCH OSHD ¶ 29,617 (No. 86-360, 1992).

In the case at bar, the evidence supports a conclusion that the existence of the grease spots was readily ascertainable upon Respondent's exercise of reasonable diligence. The cited standard, reasonably construed, places an obligation upon an employer who plans to engage in welding or cutting operations to inspect the immediate area for potential fire hazards and, in the event such hazards are found, to guard these areas against contact with sparks and slag. Respondent did not comply with the mandate of the standard, and this item will be affirmed.

Serious Citation No. 1, Item 2

In this item, Respondent is charged with an infraction of 29 C.F.R. § 1910.252(a)(2)(xiv)(D) for its alleged failure to secure authorization to perform cutting and welding operations from the designated management representative of the facility owner (Ringier). The purpose of this standard is not an exercise in bureaucratic red tape, but is a measure designed to insure that the area where the cutting or welding is to occur has been inspected for fire hazards not only by the welder but also by the owner of the facility prior to the commencement of these operations[5] (Tr. 44-47).

[5] A sample cutting/welding permit used by Ringer was received in evidence as Exhibit C-3. This permit contains a check-off list for completion by both the welder and the facility representative to insure that all measures have been taken to guarantee a safe operation.

Respondent does not dispute the need for obtaining such a permit prior to commencing welding and/or cutting operations. Indeed, Respondent had obtained these permits in the past and was aware that Ringier required their issuance before cutting and/or welding was performed (Tr. 41-45, Exh. C-2). Respondent concedes it did not obtain a permit (authorization) from Ringier personnel on the day in question, but argues that this occurrence should be excused because of the unusual circumstances which existed at the time.

As previously noted, the work performed by Respondent occurred during a holiday weekend when Ringier's regular superintendent, Kelvin Jones, was not at the facility (Tr. 73, 74). Julius Reginald Hilliard, one of Ringier's boiler operators, had the responsibility for overseeing Respondent's operations on the day in question (Tr. 72, 73), and was asked for a permit at some point by one of Respondent's employees but was unable to comply with this request since he did not know where the permits were "stored" (Tr. 75). Hilliard explained that he had issued permits in the past but had to "go through channels" and obtain the permit from the office secretary or one of the supervisors (Tr. 76). Since Hilliard was the only management representative present at the facility when the permit was requested and did not know where the forms were located, he was unable to comply with the request; although he further testified he would have issued the permit if the forms had been available (Tr. 76, 77).

The disputed issue between the parties concerns the question of when the request was made. The Secretary maintains that the request for a permit was not made until after the cutting work was in progress. This contention is supported by the testimony of Hilliard, who first testified that the request was not made until after the cutting began and the small grease fire occurred (Tr. 74). On cross-examination, he recounted this statement and testified the request may have been made before the fire (Tr. 84), but was unequivocal that he had seen some cutting in progress before receiving a request for a permit (Tr. 89).

At the hearing, Respondent produced no witnesses to counter Hilliard's testimony, but attempted to introduce a deposition of Paul Case, Respondent's supervisor at the jobsite on the day in question, which had been taken in connection with a pending case involving civil litigation. Since that case did not involve the same parties or subject matter and the

Secretary had no opportunity to cross-examine the deponent, Respondent's tender of the deposition into evidence was denied (Tr. 80, 81, 86). However, the court agreed to keep the record open for a period of thirty days to afford Respondent the opportunity to take the deposition of Case for submission to the court (Tr. 116, 138). Since the hearing, the court has received no direct communication from Respondent, but is advised by counsel for the Secretary that no deposition was scheduled.[6]

As the record now stands, this court finds as a fact that cutting operations were performed by Respondent's employees both before and after a request was made upon Ringier's representative to issue a permit. Since this work was performed in the absence of a permit, the cited standard was breached.

Serious Citation No. 1, Item 3

This item charges Respondent with a violation of 29 C.F.R. § 1910.252(b)(1)(i)[7] for its failure to provide fall protection to its employees working at elevations up to 20 feet above ground level. Respondent conceded at the hearing that its employees performing the

---

[6] It appears in the Secretary's brief (p. 3) that the parties (at the court's request) attempted to stipulate the sum and substance of Case's testimony and did reach an oral agreement which contained the following language:

> David Long, Greg Goetz, Greg Yoho (who were the other three Accu-Rite employees working on the project at Ringier's facility), and I arrived at the Ringier plant at approximately 6:45 a.m. on May 26, 1991. Prior to beginning to remove the bolts from the after-cooler unit, I asked Ringier employee Reggie Hillyard for a "hot work" (or cutting) permit. Hillyard told me that he did not know where such permits were located, and that because there was no one from Ringier available to sign it, a permit was not necessary.

This stipulation was forwarded to Respondent for execution but was not returned. By order dated August 14, 1992, the record in this case was closed (Exh. J-10). Since Respondent did not schedule Case's deposition or execute and return the stipulation containing the language recited above, the decision in this case will be determined solely on the basis of the record developed at the hearing.

[7] The cited standard provides:

> A welder or helper working on platforms, scaffolds, or runways shall be protected against falling. This may be accomplished by the use of railings, safety belts, life lines, or some other equally effective safeguards.

cutting operation were working from an unguarded platform at a height of 20 feet without any type of fall protection (Tr. 22-24). The Secretary has, therefore, established a *prima facie* case that Respondent violated the cited standard.

As a defense, Respondent raises the contention that using safety belts attached to lanyards to protect its employees from falls would be either infeasible or constitute a greater hazard under the circumstances which existed at the time. This is based upon Respondent's speculation that "had these employees [been] tethered, it would have hampered their ability to do the job. And if two of those employees had been tethered, they would have been dead by now, because they were exploded up into the air and had fallen down. They would have roasted like a hot dog" (Tr. 23). Except for the foregoing self-serving statement, Respondent offered no additional evidence in support of its claim that tethering the employees would interfere with the performance of their work or that providing the required protection would place the employees at greater risk, even though the court advised Respondent that it had the burden of proof on this affirmative defense (Tr. 24). When further questioned by the court concerning Respondent's position on this matter, Merritt offered only the suggestion that to tether employees would have prevented them from performing "their work effectively and efficiently" (Tr. 117) and that the use of such a method was not "practical" (Tr. 119). This view is in contrast with the testimony of Troy Pinson, who confirmed that Ringier employees who worked in these same areas on a regular basis wore safety belts and lanyards without any difficulty (Tr. 58), and that it was feasible to tie off to pipes and braces in the vicinity (Tr. 59). In short, Respondent has failed to carry its burden of proof to sustain either the infeasibility or greater hazard defense. *See Seibel Modern Manufacturing and Welding Co.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442 (No. 88-821, 1991).

Serious Citation No. 1, Item 4

This item charges Respondent with a failure to comply with 29 C.F.R. § 1910.1200(e)(1), (g)(1), and (h) for its failure to develop and maintain a written hazard

communication program, to maintain material safety data sheets (MSDSs) and to provide the required training.

At the hearing, Merritt conceded that Respondent had not developed a written hazard communication program (Tr. 25), nor did it maintain the required MSDSs for oxygen or acetylene[8] (Tr. 26). Respondent also conceded it did not provide specific training concerning hazardous substances used on the job, since it employed experienced workers who were already familiar with the nature of the chemicals utilized in Respondent's operations (Tr. 27, 28). On cross-examination, Merritt admitted, however, that one of Respondent's employees (Greg Goetz) working at the site on the day in question had just been employed that day and was given no training concerning hazardous chemicals in use at the jobsite (Tr. 54). Section 1910.1200(h) requires an employer "to provide employees with information and training on hazardous chemicals in their work area *at the time of their initial assignment, and whenver a new hazard is introduced*" (emphasis added). *See American Dental Centers*, 14 BNA OSHC 1710, 1990 CCH OSHD ¶ 28,967 (Nos. 89-1369 & 89-1857, 1990).

Respondent offered no viable defense to the charges raised in Serious Citation No. 1, Item 4, and this item will be affirmed.

Penalties

The Secretary proposed a penalty of $1,500 for each of the four items set forth in the serious citation issued in this case. It appears in the record that compliance officer Susan J. Sikes, who conducted the inspection and recommended the penalties, gave full consideration to the factors specified in Section 17(j) of the Act (*i.e.*, size of employer, gravity, good faith and history) and gave Respondent appropriate reductions for its small size and history (Tr. 103). No reduction was allowed for good faith because of the severity of

[8] The evidence also reflects an absence of MSDSs for toluene and lactol spirits, two hazardous substances in use at the jobsite in question (Tr. 101, 102).

the hazard. Upon due consideration, this court concludes the proposed penalties are appropriate and will, therefore, be assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing will constitute the findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.

ORDER

It is hereby ORDERED:

(1) Serious Citation No. 1, Items 1-4, are affirmed.

(2) A total penalty of $6,000 is hereby assessed.

/s/ Edwin G. Salyers
EDWIN G. SALYERS
Judge

Date: December 17, 1992