UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
GREGORY & COOK, INC.
Respondent.

OSHRC DOCKET
NO. 92-1891

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 October 28, 1993. The decision of the Judge will become a final order of the Commission on November 29, 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 November 17, 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
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Review Commission
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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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.

Date: October 28, 1993

Ray H. Darling, Jr.
Executive Secretary

CB-

DOCKET NO. 92-1891

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,
Complainant,

v.

GREGORY & COOK, INC.,
Respondent.

OSHRC Docket No. 92-1891

APPEARANCES:

For the Complainant:
Alan M. Raznick, Esq., Office of the Solicitor, U.S. Department of Labor,
San Francisco, California

For the Respondent:
John K. Allcorn, Safety Director, Gregory & Cook, Inc., Houston, Texas

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, Gregory & Cook, Inc. (Gregory) at all times relevant to this action, maintained a place of business off Highway 264, St. Michaels, Arizona, where it was engaged in the construction of an interstate pipeline. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On January 16 and January 22, 1992 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Gregory's St. Michaels worksite (Tr. 56-57). As a result of the inspection, Gregory was issued a "serious" citation containing alleged violations of §§1926.51(c)(2) and 1926.300(b)(1) and (b)(2) together with proposed penalties pursuant to the Act. By filing a timely notice of contest Respondent brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On June 11, 1993, a hearing was held in Phoenix, Arizona, on the contested violations. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violation of §1926.51(c)(2)

Serious citation 1, item 1 alleges:

29 CFR 1926.51(c)(2): Under temporary field conditions, provisions were not made to assure that not less than one toilet facility was available:

a. Location: Jobsite - Pipeline, St. Michaels, AZ
No toilet facilities were provided on the pipeline.

The cited standard provides:

(c) *Toilets at construction jobsites*. . . . (2) Under temporary field conditions, provisions shall be made to assure not less than one toilet facility is available. . . .

The uncontradicted testimony of J.B. Warren, Gregory's welding supervisor, establishes that there were three portable toilets available along the approximately three mile jobsite (Tr. 171, 175). Gregory was not, therefore, in violation of the cited standard. In addition, even were the location of each crew considered a separate jobsite, Gregory has shown that it is exempted from the standard's operation. Subsection (4) provides that:

(4) The requirements of this paragraph (c) for sanitation facilities shall not apply to mobile crews having transportation readily available to nearby toilet facilities.

The evidence establishes that the pipeline crews were mobile, moving two to three miles a day along the pipeline (Tr. 162, 177), and that they had transportation readily available with which they could reach toilet facilities provided by Gregory (Tr. 172).

Citation 1, item 1 will be vacated.

Alleged Violation of §1926.300(b)(1)

Serious citation 1, item 2 alleges:

29 CFR 1926.300(b)(1): Power operated tools, designed to accommodate guards, were not equipped with such guards when in use.

a. Location: Jobsite - Pipeline, St. Michaels, AZ
Employee had been using the Black and Decker hand held grinders without a guard.

The cited standard provides:

(b) *Guarding.* (1) When power operated tools are designed to accommodate guards, they shall be equipped with such guards when in use.

Gregory admits that the Black & Decker grinders are designed to accommodate a guard, but were not guarded while grinding the welding bead on pipe joints (Tr. 23, 35-39; Exh. C-1). Gregory, however, raises the affirmative defenses of "greater hazard," and "economic infeasibility."

Greater Hazard

In order to establish the affirmative defense of a greater hazard, the employer must show that 1) the hazards of compliance are greater than the hazards of non-compliance; 2) alternative means of protection are unavailable; and 3) an application for a variance would be inappropriate. *See Walker Towing Corp.*, 14 BNA OSHC 2072, 2078, 1991 CCH OSHD ¶29,239, p. 39,161 (No. 87-1359, 1991).

Gregory admits that it did not apply for a variance even though it was aware of the guarding requirements of the standard, and knew its employees' operation of the Black & Decker grinder was in violation of the standard (Tr. 149). Gregory maintains it did not realize that Federal OSHA had jurisdiction over Navaho lands, where the pipeline was being laid, and so relied on representations made by the Arizona OSHA office in determining that application for a variance would have been futile (Tr. 200, 204).

The representations of the Arizona OSHA office regarding its variance procedures are not binding on Federal OSHA. Moreover, Gregory's ignorance as to the agency responsible for safety and health regulations pertinent to its operations cannot excuse its

failure to seek competent advice. The Commission has held that "employers [have] a duty to inquire into the requirements of the law." *Peterson Brothers Erection Company*, 16 BNA OSHC 1196, 1200, 1993 CCH OSHD §30,052 (No. 90-2304, 1993). Reasonable inquiry would have disclosed Federal OSHA's jurisdiction over Indian lands.

Application of a variance is appropriate where, as here, the employer's noncompliance with a standard is routine. Gregory's use of its grinders without guards was not isolated, but was standard procedure. Gregory's evidence of an alleged greater hazard should in the first instance have been considered by OSHA and its experts.

Because Gregory did not establish that it would have been inappropriate to apply for a variance, its greater hazard defense must fail; no discussion of the other two elements is necessary.

Infeasibility

Gregory did not raise the defense of infeasibility prior to trial. The issue, however, was tried and briefed by both parties, and the pleadings are hereby amended to include the defense, pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, made applicable to Commission proceedings by 29 CFR §2200.2(b). *See, Carlstrom Brothers Construction*, 6 BNA OSHC 2101, 1978 CCH OSHD ¶23,155 (No. 13502, 1978); *McWilliams Forge Company, Inc.,* 11 BNA OSHC 2128, 1984 CCH OSHD ¶26,979 (No. 80-5868, 1984).

Gregory has not shown that compliance with the standard is impossible, i.e. that the guard provided for the grinder cannot be used for its intended purpose of protecting the operator from flying sparks and debris while grinding the pipe joint's bead. Gregory's expert, William Saffell, stated that the guard could be repositioned on the grinder's housing as the operator changed position so that, except when the operator was grinding the very bottom of the pipe, the guard would be between the operator and the point of work (Tr. 105-111, 126-27).

Gregory maintains that repositioning the guards is, however, economically infeasible. Warren testified that repositioning the guard would slow production by approximately 20% (Tr. 137-38, 158). Ronnie Wise, a vice president with Gregory, testified that adjusting the guard would take four hours a day and would result in a 40%

increase in crew costs (Tr. 163-64). Wise argued that Gregory would lose business to its competitors, who do not use grinder guards (Tr. 166).

It is insufficient that Gregory's competition does not use grinder guards. The Commission has held that employers cannot avoid abatement by relying on industry custom and practice alone. *Seibel Modern Mfg. & Welding Corp*, 15 BNA OSHC 1218, 1228, 1991 CCH OSHD ¶29,442, p. 39,685 (No. 88-821, 1991). Moreover, the testimony of both Warren and Wise is nothing more than conclusory speculation unsupported by field trials. That testimony is both implausible and contradictory.

Even were adjusting the grinder guard to add 20 to 40% additional time to that operation, it is implausible that it would add 20 to 40% to the entire project. Grinding represents only a small fraction of the total project, which includes trenching, transporting the pipe to remote locations, welding, pipe placement and backfilling. It is clear from the significant variation in the figures given by the two witnesses, that Gregory does not know with reasonable certainty what effect requiring use of a grinder guard would have on the company's operations.

Finally, having observed the demeanor of respondent's witnesses, specifically their apparent willingness to embrace implausible conclusions with little consideration while testifying, their testimony is due little weight.

Gregory has not made out the affirmative defense of economic infeasibility.

Penalty

The Secretary has proposed a penalty of $2,500.00.

Gregory is a medium to large company, with 300 to 375 employees.

The gravity of the violation is moderately severe and was properly classified as "serious." Improper use of a grinding wheel may result in breakage and serious injury (Tr. 43; Exh. C-3). Should the unguarded grinding wheel shatter, the shards could hit the operator at up to 160 mph, causing anything from minor cuts to death (Tr. 32-33).

Gregory has no history of OSHA violations in the region within the past four years (Tr. 8). No evidence of bad faith was adduced at hearing, rather Gregory evinced concern for employee safety, meeting with Arizona's OSHA office, and providing safety glasses and face shields to grinder operators (Tr. 140, 166).

Taking into consideration the relevant factors, the undersigned finds that the proposed penalty is appropriate. A penalty of $2,500.00 will be assessed.

Alleged Violation of §1926.300(b)(2)

Serious citation 1, item 3 alleges:

29 CFR 1926.300(b)(2): Moving parts of equipment exposed to contact by employees or which otherwise created a hazard, were not guarded:

> a. Location: Jobsite - The CRC-EVANS bending machine was not provided with a guard around the belts and fly wheel. Employees could come in contact with moving parts.

The cited standard provides:

> (2) Belts, gears, shafts, pulleys, sprockets, spindles, drums, flywheels, chains, or other reciprocating, rotating or moving parts of equipment shall be guarded if such parts are exposed to contact by employees or otherwise create a hazard. Guarding shall meet the requirements as set forth in American National Standards Institute, B15.1-1953 (R1958), Safety Code for Mechanical Power-Transmission Apparatus.

Compliance Officer Ramos' uncontroverted testimony establishes that on January 16, 1992 the bending machine operator walked within 6 to 8 inches of the machine's moving unguarded flywheel (Tr. 59, 83), and that Gregory had knowledge of the condition (Tr. 61). The flywheel had been provided with a guard which had been removed (Tr. 58, 86). Secretary has demonstrated the existence of a violation by a preponderance of the evidence.

Penalty

A penalty of $1,500.00 is proposed. The gravity of the violation is moderate. Ramos stated that an employee's hand could be seriously abraded or amputated on contact with the flywheel (Tr. 60, 90). Taking the gravity and other relevant factors discussed above into consideration, the penalty of $1,500.00 is deemed appropriate.

Findings of Fact and Conclusions of Law

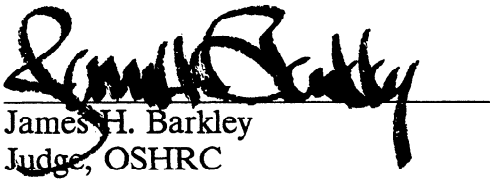
All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

1. Serious citation 1, item 1, alleging violation of §1926.51(c)(2) is VACATED.

2. Serious citation 1, item 2, alleging violation of §1926.300(b)(1) is AFFIRMED and a penalty of $2,500.00 is ASSESSED.

3. Serious citation 1, item 3, alleging violation of §1926.300(b)(2) is AFFIRMED and a penalty of $1,500.00 is ASSESSED.



James H. Barkley
Judge, OSHRC

Dated: October 22, 1993