COMMONWEALTH OF LABOR
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 2511-94

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

DONALD D. PAGE AND ASSOCIATES — RESPONDENT

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DECISION AND ORDER
OF THIS REVIEW COMMISSION

We call this case for review on our own motion by our authority contained in section 47 (3) of our rules of procedure (ROP)[1] since both parties petitioned this commission for review under ROP 48 (1). DPA replied to labor's petition for discretionary review; the secretary of labor then filed its motion to amend citation to which Donald D. Page and Associates (DPA) responded.

This commission is a creature of KRS 338.071 (4) which charges us with the duty to hear and rule on appeals from citations. Our hearing officers submit their recommended orders to us (ROP 47) which we may accept or reject as we see fit.

Respondent Donald D. Page (DPA) is in the construction business in Western Kentucky. Transcript of the evidence (TE) 8. It apparently does construction work with regular customers in the Calvert City area. TE 116. DPA often performs fabrication work accomplished at its own permanent site. This fabricated work is

[1] Enacted as section 47 (3), 803 KAR 50:010.

then taken to construction sites (a DPA customer) where it is installed or rigged.

Respondent DPA wants to be inspected under the construction standards (29 CFR 1926[2]) for all its work at various construction sites and the office-fabrication facility as well. This case arose out of a complaint inspection (KRS 338.121 (1)) at DPA's painting job for Atochem. The health inspector (industrial hygienist) inspected the painting work at Atochem and the office-fabrication facility as well. Following the inspection which took place from October 29, 1993 to January 13, 1994 (health inspections generally take longer to complete than safety which can often be concluded in one day), numerous citations were issued to the company, all from the general industry standards (29 CFR 1910[3]).

In his recommended order hearing officer Grant Winston[4] sustained all the general industry based citations at the fabrication facility and threw out the 1910 citations based on DPA work at Atochem because the work there was construction which should have been cited under 1926.

Labor then filed a petition for discretionary review (PDR) for the citations which were dismissed while DPA filed a PDR for all

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[2] 29 CFR 1926 is adopted in Kentucky by 803 KAR 2:400 through 425E.

[3] 29 CFR 1910 is adopted in Kentucky by 803 KAR 2:300 through 320E.

[4] Former hearing officer James Womack conducted the trial but his contract expired before he could prepare a recommended order. This commission then appointed Grant Winston to make a recommended order to this commission. KRS 338.081 (1).

citations upheld by the hearing officer. We will discuss each citation in turn. But first we must take up an unusual procedural step taken by the secretary of labor after the AG's recommended order was written.

After the hearing officer issued his recommended order, the secretary of labor filed a motion to amend citation 1, item 8, which was written under the 1910 standard. CR 15.02. Complainant secretary, in essence, wants the citation (dismissed by the hearing officer) rewritten under 1926.

Our hearing officer dismissed item 8 because it was applied to the painting (contractor work) DPA performed at Atochem. While on that painting job, a DPA worker smelled a strong odor which might have been hydrofluoric acid (HF) but this was never proven. TE 67-68. DPA employee Surett worked near an HF acid-containing structure at Atochem. TE 29. HF acid is very toxic. TE 48. As a gas it can quickly cause permanent lung damage or death as well as very serious chemical burns. TE 48 and 49.

When the DPA employee smelled the pungent odor, his supervisor, driving up to check on his progress, found him with his shirt pulled over his head. The supervisor and employee left the area to return with masks to recover their tools so they could leave the premises. The secretary of labor (charged with enforcing the act, KRS chapter 338) cited DPA for not training its employees about hazardous chemicals at the workplace, specifically HF acid and HF gas. But labor cited DPA under the general industry standard (1910.1200 (h)) instead of the construction industry

standard (1926.59 (h)); the two standards, it turns out, are virtually identical. The only difference between the two is 1910.1200 (h) has some additional language inserted which is merely redundant.[5] Given that the two standards are interchangeable, it would be very difficult for DPA, having tried a case under 1910.1200 (h), to object successfully to a motion to amend to 1926.59 (h).

Anyway, the secretary of labor moved this commission for leave to amend the citation on hazard communications to read 1926.59 (h) rather than 1910.1200 (h) as issued. Kentucky's rules of civil procedure (made applicable to Kentucky OSHA cases through the commission's rules of procedure) make it possible for a party to amend the complaint (or citation in an administrative law case). ROP 4 (2). Under CR 15.02, a party may move to amend its citation to conform to the evidence testified to at trial. Pleadings may even be amended (with leave of this commission) after administrative hearings since cases before the commission are not final until this commission either exercises its right to review and issues a decision or declines to review the recommended order. KRS 338.071 (4), ROP 47 (3) and KRS 338.091.

Parties may do this when the issue raised in the amended

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[5] Here are the differences between 1926.59 (h) and 1910.1200 (h). The underlined words are found in 1910 but not 1926. Otherwise, the two passages are the same.

"Employers shall provide employees with <u>effective</u> information and training on hazardous chemicals in their work area at the time of their initial assignment and whenever a new <u>physical or health</u> hazard <u>the employees have not previously been trained about</u> is introduced into their work area."

pleading (here citation) was tried with express or implied consent. This means the other party must allow the issue to be tried or circumstances exist that permit this commission to find consent.

In this case, the respondent tried to get out of the 1910.1200 (h) hazard communications standard by arguing Atochem should have trained DPA's employee under 1910.1200 (e) (2) and (3).[6] TE 62-63 and DPA's brief to hearing officer, p. 14. By arguing that it be treated as a contractor, DPA has given its implied consent under the law to a citation amended to read 1926.59 (h). DPA response to labor's motion to amend, p. 5. This is especially so since the two standards are virtually the same.

To avoid the amendment of the citation, DPA should have argued it would be prejudiced in some way by the amendment of the citation to 1926.59 (h) but it has not argued prejudice. Nucor Corp. v. General Electric Co., Ky., 812 S.W.2d 136, 146 (1991). To show prejudice in these circumstances, DPA would have to argue it was not prepared to defend against the construction hazcom standard. It would be difficult for respondent DPA to claim prejudice in this case since it argued at the hearing that as a "construction" company its employees should have been trained on the hazards of HF by Atochem. TE 62-63. That is the same defense DPA would have

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[6] 1910.1200 (e) (3) says a contractor (DPA) may rely upon an existing hazard communications program at a multi-employer workplace - so far so good. But the testimony in this case is that DPA's employee did not watch the Atochem film specifically addressing the hazards of HF. TE 97. Thus the "requirements" under 1910.1200 (e) were not met. DPA was responsible under 1910.1200 (e) (3) to make sure the Atochem safety program covered all hazards to be encountered and failed to do this.

employed if cited under the 1926.59 (h) construction standard.

We find DPA impliedly consented to a 1926 based citation because of the similarity of the standard language, the facts of the case and the defense strategy. Thus DPA has, really, no defense to either the motion to amend or the citation rewritten under 1926.

DPA's lawyer argued that Atochem was responsible for training DPA's employee about the hazards of HF gas. But the law says DPA is primarily responsible for the safety (training included) of its own employees. 1926.59 (a). This is precisely the same defense DPA would have argued if originally cited under 1926.

We conclude DPA, by its own conduct at trial, impliedly consented to being charged under the 1926 standard. Nucor. At trial DPA tried (but failed) to prove Atochem should have trained the DPA employee on the hazards of HF acid or gas since Atochem knew more about HF. This situation is akin to a subcontractor (DPA did some painting for Atochem) arguing the general contractor was more experienced in the job hazards and had the duty to protect all employees including DPA's painter.

The rule in Anning-Johnson/Grossman[7], suggests DPA will not be excused from the citation where Atochem had possession of the HF hazard since DPA can take some action (the Grossman case says

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[7] Anning-Johnson Company and Workinger Electric, Inc. v OSHRC and Brennan, Secretary of Labor, 516 F.2d 1081 (7th cir. 1975), CCH OSHD 19,684 and Grossman Steel & Aluminum Corp., CCH OSHD 20,691. We cite federal cases when they are helpful to our analysis. But as a state program we are not obliged to follow these cases as precedent.

"reasonable steps") to protect its employees. Grossman at 24,791.

Under the circumstances, the information and training required by 1926.59 (h) would be the "reasonable steps" contemplated by Grossman except for the fact that DPA took no steps. Although the foreman removed painter Surett (the man with his shirt over his head) from the premises, any benefits derived from the information and training would have taken place prior to exposure. So removal of the employee from the HF area is no defense. Section 1926.59 (h) requires information and training be provided to employees with exposure potential before that exposure commences. In this case Surett would likely have received training on the hazards of HF and its location at Atochem and been advised to take his respirator to an HF area.

Nucor says the test whether a defendant would be prejudiced by the amended pleading is whether the defendant had a fair opportunity to defend against the amended charges and whether the defendant could have offered any additional evidence at trial to the amended pleading (citation).

DPA did all it could do to defend against the hazard communications standard whether cited under 1910 or 1926. DPA tried to get the compliance officer to say the DPA employee saw an Atochem employee film on the hazards of HF gas. The compliance officer testified the DPA employee did not see the Atochem HF film. TE 97. Then the DPA lawyer at trial tried to get the CO to say Atochem had a duty to train DPA's painting employee on the hazards of HF. This the CO would not say either. TE 62. He said instead

DPA has the responsibility to train its own employees on the hazards of HF acid. TE 62, 65-67. That is a fact in this case and the law as well.

DPA, in its PDR, argued Atochem should have known of its own hazards and so informed DPA and then provided training. Atochem had an HF hazards film which employee Surett did not see. While Atochem bears some responsibility under 1910.119 (process safety management of chemical companies) for explaining to construction companies about the peculiar hazards at their chemical plants, DPA bears primary responsibility for the safety of its own employees. 1926.59 (h) and KRS 338.031 (1) (b). In any event, 1910.119 was not cited - either against DPA or Atochem.

DPA tried to shift the blame to Atochem for the failure to train on the hazards of HF. It failed to do this. We conclude DPA could not have done any more at trial if it had been cited under 1926.59 (h) originally.

DPA argued the motion to amend came too late in the process. But CR 15.02 is quite specific that amendment can come after trial. In any event, it's the review commission, not the hearing officer, that makes the final factual decision in contested OSHA cases. KRS 338.071 (4).[8] Trial took place on November 15, 1994 under Jim Womack and the recommended order by the AG was not written until October 18, 1995. That is slightly less than one year. But neither the secretary of labor nor DPA caused the delay. Delay

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[8] Our trial process, if you will, does not end until the review commission either rules or allows a hearing office's decision to stand.

here between hearing and recommended order is not prejudicial since both parties had ample opportunity to brief the case.

Nucor, supra, compels us to hold the motion to amend the citation is proper. We, therefore, order citation 1, item 8 amended to read 1926.59 (h).

As to the citation items themselves, DPA's primary argument is that they are a construction company subject only to 1926, not 1910. We agree DPA is a construction company when it sends people out to jobs. But at the permanent office and permanent fabrication facility, 1910 governs DPA.

Brock v. Cardinal Industries and OSHRC, 828 F.2d 373, 378 (6th cir. 1987), CCH OSHD 28,032, says a fabrication shop is part of a construction job if dedicated solely to that one construction job. CCH at p. 36,828. If (as is the case here) a fabrication shop does work for construction jobs in general and stays put in one location, then it is governed under 1910. That is what our hearing officer concluded and we agree.

Thus, we now take up each individual citation and the parties's arguments.

Citation 1, item 1 (1910.106 (d) (5) (iii)), storage of flammable liquids in an office. DPA incorrectly argues it should be cited under 1926. We agree with our hearing officer's decision to affirm this citation. Cardinal Industries.

Citation 1, item 2. This was not contested and stands affirmed.

Citation 1, item 3a and 3b (1910.134 (b) (3) and (e) (5) (i)),

respirator training and instruction. Here the company was cited under 1910 for the painting work at Atochem (construction work). Our hearing officer dismissed this citation because it should have been cited under 1926. Labor did not move to amend this citation to 1926.

On review to this commission, the secretary of labor urges us to reverse the hearing officer's decision to dismiss these items because, as he argues, 1910.134 (b) (3) (the cited standard) is applicable to construction. The secretary arrives at this conclusion by citing us to page 2 of Exhibit A attached to his PDR; the secretary says the language in the rectangular box makes 1910.134 (b) (3) "applicable" to construction. To us, the language identified in the upper left corner of Exhibit A, page 2 is an editorial comment completely separated from the standards by the box. There is no language within the box to suggest this "comment" was adopted into law - either by regulation or decision and labor cites us to none. Further, there is no such editorial comment in our 1993 CCH edition of Kentucky construction standards. Regulations must be adopted or deleted while editorial comments just come and go. Labor's argument is without merit.

We sustain the hearing officer's decision to dismiss citation 3a and 3b for not being brought under 1926. Cardinal Industries.

Citation 1, item 4. This was not contested and stands affirmed.

Citation 1, item 5 (1910.224 (b)). The abrasive blasting (sand blasting) nozzle had no support as required by regulations.

This was cited under 1910 at the fabrication shop and we affirm the citation and the hearing officer's decision. Cardinal Industries.

Citation 1, item 6 (1910.1030 (c) (1) (ii) (A), (B) and (C)), bloodborne pathogens (BBP) program. Here the plan was deficient. DPA had a plan which was admitted into evidence at the trial. It said DPA employees could potentially be exposed to the hazards of bloodborne pathogens. DPA also had employees trained in first aid.

Now DPA argued at trial and later that it only complied with the compliance officer's request for a list of first aid trained employees and in no way offered them up as designated first aid providers. But DPA's BBP program said "bodily fluids...may be encountered..."[9] The question is whether that is sufficient (along with first aid trained employees) to trigger the bloodborne pathogens program. Complainant's exhibit 5 is a set of procedures DPA employees follow when they "...have the potential to come into contact with bodily fluids in the course of the performance of their jobs..." Page 2 of complainant's exhibit 5. According to this document, DPA employees may encounter blood and other bodily fluids whether they are trained in first aid or not. As the statutory definition of a serious violation puts it:

> ...a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result... KRS 338.991 (11) (emphasis added)

Where DPA employees "...have the potential to come into contact with bodily fluids in the course of the performance of their

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[9] Secretary's exhibit 5, p. 2.

jobs...," then the "could" requirement for a serious violation in Kentucky is satisfied. KRS 338.991 (11) and Usery v. Hermitage Concrete Pipe Company and OSHRC, 584 F.2d 127, 131 (CA 6 1978), CCH OSHD 22,983 at p. 27,787. In effect DPA's BBP manual admits to the possibility its employees could come into contact with human blood during the course of their employment. Complainant's exhibit 5, page 2. We commend DPA for taking such a position. After all, when an employer is able to foresee employee exposure, he is better able to plan for it. That is exactly the regulatory purposes behind 1910.1030.

In the case at bar, DPA has a bloodborne pathogens program (deficient in some parts) which admits "bodily fluids may be encountered." The language in the BBP program, together with employees trained in first aid, permit this commission to affirm the BBP citations which alleged DPA's program had:

1. no employee exposure determination,

2. no communication about the hazards of BBPs and no record keeping and

3. no methods for evaluating exposure incidents.

We therefore affirm citation 1, items 6a, b and c and the recommended order.

Citation 1, item 7 (1910.1030 (g) (2) (i)), no BBP training. We affirm item 7 as well for the reasons given above.

Citation 1, item 8 (1910.1200 (h) amended by this review commission to 1926.59 (h)), hazard communication at the Atochem painting job. Since we approved the secretary of labor's motion to

amend the citation to 1926, the issue is whether DPA had a duty to inform its painting worker at Atochem about the potential hazards of HF gas. Although Atochem under 1910.119 has a duty to warn contractors about hazards on the job where contractor employees are working,[10] the contractors themselves have the duty to their own employees to do the same. 1926.59 (h). We find neither DPA nor Atochem trained employee Surett on the hazards of HF. TE 48. We further find that Mr. Surett did work in an Atochem in an area where HF was stored. TE 48.

Testimony at the hearing indicated that DPA works in the Calvert City area where it does construction work for a number of companies on a regular basis, including Atochem. With "reasonable diligence" DPA could have become aware of the HF hazards, or any chemical hazards, at Atochem. KRS 338.991 (11) and 1926.59 (h). All they had to do was ask. The compliance officer testified exposure to HF or HF gas would cause burns or inhalation injuries of a serious nature and we so find. TE 48-49 and standard 1926.59 (h). We affirm item 8 on hazard communications.

Under our duties prescribed by KRS 338.991 (6), we have examined the proposed penalties, finding no error.

We affirm citation 1, item 1 with a penalty of $1,100. We affirm citation 1, item 5 with a penalty of $1,100. We affirm citation 1, item 6 with a penalty of $1,375. We affirm citation 1, item 7 with a penalty of $1,375. We affirm citation 1, item 8 with

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[10] Had labor (the enforcer of KRS chapter 338) in its judgment cited Atochem under 1910.119 in this case, DPA under 1910.119 (b) (3) still would be charged with training its own employees.

a penalty of $1,100.

We dismiss citation 1, items 3a and 3b.

Citation 1, items 2 and 4 and citation 2 were not contested and thus became a final order of this commission. KRS 338.141 (1).

We affirm the hearing officer's recommended order to the extent it is consistent with this decision.

If abatement has not already been accomplished by respondent, we order it to do so within 30 days.

It is so ordered.

Entered March 5, 1996.

George R. Wagoner
Chairman

Charles E. Yates
Member

Donald A. Butler
Member

Copy of the foregoing Order has been served upon the following parties in the manner indicated:

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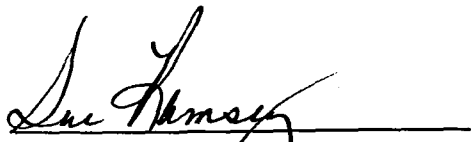
This 6th day of March, 1996.



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