



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,

v.

A. J. MCNULTY & COMPANY, INC.
Respondent.

OSHRC DOCKET
NO. 91-2596

**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 May 25, 1993. The decision of the Judge will become a final order of the Commission on June 24, 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 June 14, 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:

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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: May 25, 1993

DOCKET NO. 91-2596

NOTICE IS GIVEN TO THE FOLLOWING:

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of the sixth floor. It is undisputed that the ironworker was wearing a safety belt during the 12 minutes or so he was seen working on the beam; however, there is conflicting testimony as to whether the safety belt was tied off or attached to anything to prevent the worker from falling. After having proceeded to walk up the north stairway of the building and reaching the sixth floor where they spoke with McNulty's employees, the compliance officers devoted the remainder of the day investigating an accident which had previously occurred at the worksite involving another subcontractor.

Both Compliance officers returned to the construction site the following day, on May 9. Compliance officer Wilkes testified that as he entered the site at ground level, he noticed an electrical circuit breaker panel that was to be used for the temporary wiring during construction. Wilkes testified that he tested both the extension cords and the circuit breaker for the presence of a ground-fault circuit interrupter (GFCI) but the tests were negative (Tr. 54).

Among the hand power tools used by McNulty's ironworkers at the construction site was a shear wrench employed for bolting steel members. Compliance officer Wilkes observed that the span of outer insulation at the tool end of the power cord was detached and moveable, thus exposing the three wires inside the cord. The extent of the gap in the outer insulation was small (Tr. 31, 36-37, 125, Exh. C-3), and Wilkes acknowledged that not only was the outer layer of insulation made of heavy rubber, the cord itself was rubber insulated and the three wires inside the cord were insulated with plastic. Wilkes could not say how long the outer casing was detached from the cord (Tr. 122-25). Wilkes believed there was a potential hazard in that the three exposed wires were subject to excessive strain on use which could cause the wires to become worn, possibly causing a "short circuit" resulting in a fatal accident (Tr. 38-39). Wilkes also noted that the cord for the wrench had a two-prong plug; the third prong grounding connection was missing. Wilkes felt that the absence of the grounding prong presented a serious electrical hazard in the event of a short circuit (Tr. 50-52; Exh. C-4).

The north stairway was the only available means of reaching levels above the first floor. In the course of the OSHA inspection on May 9, Wilkes along with the other members of the inspection party were walking up the stairs when Wilkes cut his hand on the

handrail. Wilkes testified that the handrails were made of metal studding, the ends of which he described as “extremely sharp” (Tr. 60). This condition is the basis for charging McNulty with serious violation of the standard at 29 C.F.R. § 1926.1052(c)(10) which requires that ends of stairrail systems and handrails be constructed so as not to constitute a projection hazard. Wilkes believed that the handrails could have caused “severe lacerations” (Tr. 62). Christine Pawelczak, the OSHA compliance officer who assisted Wilkes during the two-day inspection of the site, testified that when the inspection party walked up the north stairway on May 9, she noticed that the condition of the handrails was just as she had observed it on the previous day, and that the laceration Wilkes sustained from the “projection” hazard was not “severe” or serious (Tr. 169, 174-75).

The north stairway was the subject of another charge listed in citation number 1 concerning the standard at 29 C.F.R. § 1926.1052(c)(12) which requires a guardrail system for unprotected sides and edges of stairway landings. The landing between the first and second floors was equipped with a top rail measuring 33 inches from the landing surface instead of 42 inches,² and the intermediate rail was not securely in place. One side of the landing between the fourth and fifth floors did not have a railing. The former condition presented a drop of a little more than 5 feet, and the latter 7 feet (Tr. 66-70, 137-40). Wilkes acknowledged that the contract manager had the primary responsibility to install and maintain both the handrails and the guardrails at the site; the citation items are based upon McNulty’s responsibility under the OSH Act to take reasonable steps to correct the conditions to which its employees are exposed (Tr. 63, 65, 71).

McNulty presented the testimony of its foreman, Dermott Clowe, who stated that the ironworker allegedly observed by the OSHA compliance officer to have been working on a perimeter beam without securing his safety belt, never had to be disciplined for breaking a

²29 C.F.R. § 1926.500(f)(1) sets forth the standard specifications for guardrails:

A standard railing shall consist of top rail, intermediate rail, toeboard, and posts, and shall have a vertical height of approximately 42 inches from upper surface of top rail to floor, platform, runway, or ramp level. The top rail shall be smooth-surfaced throughout the length of the railing. The intermediate rail shall be halfway between the top rail and the floor platform, runway, or ramp...

safety rule, and was always observed by him to be tied off when necessary. Clowe asserted that the compliance officer being at street level could not have seen whether the iron worker on the sixth floor had his safety belt tied off (Tr. 194).

With respect to the GFCI, Clowe stated that he had several GFCI s at the site and required their use even though he was informed by the construction manager that they were not needed because the electrical power box was equipped with a GFCI. Clowe stated further that during the job in question he had to replace GFCI s on several occasions because they were stolen by other trades (Tr. 205, 211-13). He testified that he inspected the power tools every morning. If a tool needed to be repaired, it would be sent to McNulty's own repair shop. When Clowe inspected the shear wrench on the morning of May 9, he stated that he saw no defects until the compliance officer made the discovery at about 1:00 p.m. on the same day (Tr. 187, 201). Clowe's testimony concerning the handrails and the stairway landings ran along the same vein: He saw no defects on either the handrails or the guardrails at the stairway landings and no one called his attention to such defects until they were mentioned by the OSHA compliance officer (Tr. 195-97).

McNulty also presented the testimony of its president, Lawrence Weiss, regarding its safety program. Weiss testified that all ironworkers are required to tie off while straddling a beam, but they must disengage and walk free while moving from point to point (Tr. 236-37). Weiss stated that four GFCI s were provided for the job in question despite the construction manager's notification that the control electrical panel box had ground fault protection. There is a standing policy to use GFCI s on all jobs and to replace them whenever they are missing (Tr. 229).

THE SAFETY BELT ISSUE

McNulty was originally cited for violating the fall protection standard at 29 C.F.R. § 1926.105(a):

Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffold, catch platforms, temporary floors, safety lines, or safety belts is impractical.

Shifting the focus from safety nets to personal protective equipment in the form of safety belts, the Secretary amended the complaint by adding the standard at § 1926.28(a):

The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations when there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

McNulty contends that the Secretary has failed to prove that the fall protection standards were violated, and that the flaw in the Secretary's case is reflected in the photograph taken by compliance officer Wilkes from ground level, just as the scene was observed by both compliance officers 70 feet below the ironworker (Exh. R-1). McNulty correctly points out that "it is impossible to discern from the photograph exactly what the employee is doing, or whether he is tied off." McNulty's brief at 6.

Although Wilkes appeared to be positive about his observations of the ironworker straddling the beam, such assurance was not shared by compliance officer Christine Pawelczak who answered the following questions of counsel on direct examination (Tr. 162-63):

Q. Did you make any observation as to whether he was wearing any fall protection?

A. You could see a safety belt. You couldn't see whether it was attached or not. When he stood up, you could see that there was no movement to detach and then he walked away.

Q. Did you observe him when he stood up and walked away?

A. Yes, I did.

Q. Where did he walk away to?

A. To the inner part of -- excuse me, the inner portion of the building, the decking.

Q. Approximately, how far did he have to go from the point at which he was straddling the beam to return to the steel decking?

A. Approximately 12 feet.

Pawelczak's testimony cannot be described as corroborating that of Wilkes. Moreover, we cannot tell whether the ironworker might have disengaged the safety belt before he stood

up and walked to the interior decking. It bears noting that the Secretary does not contend nor is there any basis for concluding that the fall protection standard required the iron worker to be tied off while he was walking on the beam to reach the interior decking.

Wilkes testified that shortly after observing the ironworker from ground level, he, along with the other members of the inspection party, walked up to the sixth floor where he encountered the ironworker. Wilkes stated that after introducing himself to the worker, he asked him why he wasn't tied off; Wilkes received no response. This episode prompts the Secretary to make the following argument:

Mr. Simmons' own silence and refusal to answer Mr. Wilkes' question why he had not tied off should be considered an adoptive admission. Given the opportunity either to deny that he had tied off or to affirmatively state that he had tied off, Mr. Simmons' silence, at the least, raises a strong inference that he had not tied off while bolting up.

Secretary's brief at 12.

Adoptive admission under the Federal Rules of Evidence is governed by Rule 801(d)(2)(B), which provides that a statement is not hearsay if offered against a party and is "a statement of which the party has manifested an adoption or belief in its truth." The Secretary mistakenly assumes that the ironworker may be regarded as a "party" for the purpose of the adoptive admission rule. In any event, the failure to respond to Wilkes's question is not sufficient to justify finding that the ironworker did in fact fail to tie off while in the process of bolting the steel beam. There is no evidence to indicate that the ironworker understood the compliance officer's question was in reference to the bolting procedure, and not the ironworker's movement from the beam to the interior of the structure. Moreover, it would not be unreasonable for a construction worker to remain silent when an OSHA compliance officer puts such a question to him during the course of a safety inspection.

The Secretary makes much of the fact that when the compliance officer questioned foreman Clowe as to why the ironworker had not been tied off, Clowe answered: "He was only bolting up." The Secretary argues that Clowe's statement demonstrates that he knew

what the ironworker was doing, was not surprised about the failure to tie off, and was not concerned about the conduct when it was brought to his attention. Secretary's brief at 12. The evidence belies such inferences. Wilkes's own testimony discloses that McNulty has a policy regarding the use of safety belts, and that the safety policy which prevailed at the worksite was commendable (Tr. 105-10). In this context, one may reasonably conclude that Clowe's remark was nothing more than a reflexive response, and an attempt to lessen the apparent seriousness of the compliance officer's accusatory question. Clowe immediately looked into the matter by questioning the ironworker and was satisfied that the safety belt policy had been followed by the ironworker during the bolting procedure (Tr. 190-92).

GROUND-FAULT CIRCUIT INTERRUPTER

Ground-fault protection by means of a GFCI is addressed by § 1926.404(b)(1)(ii), which reads in relevant part:

All 120-volt, single-phase, 15- and 20-ampere receptacle outlets on construction sites, which are not a part of the permanent wiring of the building or structure and which are in use by employees, shall have approved ground-fault circuit interrupters for personal protection....

McNulty presents two inconsistent arguments to the GFCI citation: First, McNulty contends that it "looked to" the construction manager to provide ground-fault protection at the site. Both Clowe and McNulty's president, Lawrence Weiss, testified that they were informed by the construction manager that the electrical panel box located at ground level, which was the source of power for all the temporary electrical wiring, was equipped with ground-fault protection, and that no GFCI was needed for the electrical wiring within the construction area (Tr. 204-05, 228). McNulty's brief at 11.

It should be noted that McNulty did not offer the construction manager's out-of-court statement as proof that the electric power panel was in fact protected with GFCI. Such evidence is justifiably objectionable as hearsay. Since it was not offered for a hearsay purpose, one would expect that the statement was offered instead to show that McNulty acted reasonably upon the information received from the construction manager. This leads us to McNulty's second argument: that despite assurances from the construction manager

that ground-fault protection was in place at the power source, and despite the fact that “McNulty had every reason to believe that the electrical hookup used by its employees was part of an assured grounding program,”³ McNulty “took additional steps to protect its employees” by “provid[ing] at least four ground-fault circuit interrupters to the Project.” McNulty’s brief at 11-12. McNulty claims that GFCIs were provided at the beginning of the construction project, their use was required and monitored, but they were stolen and had to be replaced from time to time. It is contended that when the compliance officers conducted their inspection, the GFCIs “apparently had been stolen.” McNulty’s brief at 12.

The testimony of Clowe and Weiss is not free from a considerable degree of improbability and points of incredibility. They both testified that they were each informed by a representative of the construction manager that ground-fault protection was installed in the power panel which provided ground-fault protection for the entire circuit, thus eliminating the need for each subcontractor to use its own GFCI. We are to believe that despite this reportedly existing ground-fault protection — a device which, if it had actually been present, would apparently have been the most efficient and economical way of providing the desired protection for all affected employees on the site — McNulty took considerable trouble to pursue a policy of using its own GFCIs even to the point of monitoring their use and of replacing them whenever they were discovered missing or stolen.

If we are to adopt their statements, we must also believe that despite McNulty’s monitoring program to assure its employees used GFCIs, apparently no one noticed that all four GFCIs reportedly sent to the worksite were missing until their absence was discovered by the OSHA compliance officers. To be worthy of credit, evidence must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe. In other words, credible testimony is that which meets the test of plausibility. *Indiana Metal Products v. N.L.R.B.*, 442 F.2d 46, 52 (7th

³McNulty’s counsel mistakenly refers to “assured grounding program.” The testimony of both Clowe and Weiss clearly refer to the use of GFCIs at the construction site, not an “assured equipment grounding conductor program,” the latter being the second of two alternative ways of protecting employees from the hazards of electrical shock under § 1926.404(b)(1).

Cir. 1971). That test has not been met with respect to the GFCI issue. McNulty's arguments grounded on the multi-employer defense has no merit.

McNulty was previously cited for violating the GFCI standard on October 10, 1989. That citation having become a final order (Tr. 57-58, 251-54), the elements of a repeat violation have been established. *Potlatch Corp.*, 7 BNA OSHC 1061, 1979, CCH OSHD ¶23,294 (No. 16183, 1979).

POWER TOOL

The shear wrench is the subject of two charges: failure to maintain the tool in a safe condition as required by § 1926.300(a), and failure to ground the tool as provided by § 1926.404 (f)(7)(iv)(c)(1). The Secretary contends that the small span of exterior insulation at the tool end of the power cord being detached and moveable, placed a strain on the inner wires of the cord which could have caused a short circuit, thereby energizing the tool's metal case and causing severe shock. Secretary's brief at 8.

McNulty contends that the minute detachment of the exterior insulation of the cord did not present a hazard as evidenced by the testimony of the compliance officer who acknowledged that the condition was merely "potentially hazardous" and that damage to the cord had to occur in such a manner as to expose live wires, a condition which did not exist in the instant case (Tr. 36-39, 122-24). McNulty's brief at 13-14.

Where, as here, the duty imposed by the standard is expressed in such general terms as "maintain[ing] [the tools] in a safe condition," the Secretary must prove, in the absence of a showing of actual knowledge, that the employer has constructive knowledge of the hazard. This test is met by the Secretary showing that a reasonably prudent person familiar with the circumstances of the industry would have protected against the hazard as asserted by the Secretary. Although not controlling, industry custom and practice are useful points of reference in establishing a standard of conduct. *Donovan v. General Motors Corp.*, 764 F.2d 32,37 (1st Cir. 1985).

The only evidence presented by the Secretary concerning the hazard stemming from the detached exterior insulation sleeve consisted of the testimony of compliance officer Wilkes. There is nothing in the record which informs us of Wilkes's personal knowledge of the facts that form a rational basis for his opinion that a detached sleeve could cause the

insulated inner wires to be exposed in the manner described. Nor are we informed of the standard of knowledge or experience common to construction industry as it relates to the cited condition of the power tool so as to warrant finding that McNulty had constructive knowledge of the “potential” shock hazard.

Another fatal flaw in the Secretary’s case is the fact that Wilkes could not say how long the exterior insulation sleeve had been detached from the base of the tool (Tr. 125). Whether the detachment existed a significant period of time before the OSHA inspection cannot be determined from the evidence presented, and no reasonable inference can be drawn that the detachment existed for such a length of time and under such circumstances that McNulty should have taken notice of the condition and taken steps to correct it.

The absence of the grounding pin on the plug to which the wrench was connected prompted the Secretary to cite McNulty for failure to comply with the grounding standard for cord-and plug-connected equipment. McNulty maintains that the wrench was designed for use with a two-prong plug equipped with a third insulated wire with a clip on the end for gripping metal beams or decking, a device which provided proper grounding. In its brief at 15, McNulty makes the following argument:

Clowe testified that this wrench was in proper working order on the morning of May 9, 1992. [sic] When Compliance Officer Wilkes pointed out the defect on the afternoon of May 9, 1992,[sic] Clowe immediately sent the wrench to McNulty’s shop for repair. Thus, there is no evidence by which to hold McNulty responsible for a simple equipment failure in the field, which was immediately corrected upon discovery.

This argument has no merit when placed within the context of Clowe’s explanation of what happened to the “third insulated wire” and clip attachment after his inspection of the equipment on the morning of May 9 (Tr. 201-02):

Q. And, during inspections that preceded May 9, 1991, did you observe any deficiencies in the wrench?

A. Not that morning, no. In the afternoon, 1:00, he [the compliance officer] found this shortage.

Q. Okay, with respect to this green ground wire on exhibit 3, was that attached to the cord on May 9?

A. No, it looks like someone had pulled it off that day or some time, but on all the rest of the guns, I checked the rest of the guns, but this particular morning that he [the ironworker] took this cord off, he must have gotten caught in the steel during the day, and he ripped it off or forced it off. It appears that he forced it off.

The compliance officer had previously testified that when he examined the tool and found it to be ungrounded, it was being used in that condition by one of McNulty's ironworkers, apparently the same employee referred to by Clowe (Tr. 50-51). Nothing in the evidence suggests that Clowe or anyone else having supervisory authority over McNulty's employees made any effort to upbraid or reprimand the ironworker who was using the ungrounded shear wrench while working on a beam on the seventh floor. The absence of the grounding wire and clip was readily observable by the ironworker who should have taken prompt action to correct what was an obviously serious violation of the safety standard.⁴

Through the testimony of Clowe and Weiss, McNulty attempts to make the case that it did everything it could have reasonably done to prevent the grounding standard violation. Such a claim inevitably raises the issue of unpreventable employee misconduct. This is an affirmative defense which calls for the employer to show that it has established workrules designed to prevent the violation, has adequately communicated those rules to its employees, has taken steps to discover violations, and has effectively enforced the rules when violations have been discovered. *Jensen Construction Co.*, 7 BNA OSHC 1477, 1479, 1979 CCH OSHD

⁴A "serious violation" is defined by 28 U.S.C. § 666(k) of the OSH Act:

A serious violation shall be deemed to exist in a place of employment if there is substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

¶23,664 (No. 76-1538, 1979). McNulty has failed to establish that it adequately trained and supervised its employees or that it effectively enforced its safety rule requiring grounding of its cord-and plug-connected equipment.

THE HANDRAIL AND STAIRWAY LANDING CONDITIONS

It is undisputed that the primary responsibility for erecting and maintaining the handrails and guardrails for the stairway landings rested with the project's construction manager. The Secretary maintains that McNulty failed to make reasonable efforts to have the conditions corrected, in accordance with the principle set forth in *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188, 1975-76 CCH OSHD ¶20,691 (No. 12775, 1976). Secretary's brief at 10.

The handrail standard which McNulty is alleged to have violated reads: "The ends of stairrail systems and handrails shall be constructed so as not to constitute a projection hazard." (Emphasis added.) § 1926.1052(c)(10). McNulty contends that "what constitutes a projection hazard is a subjective determination" which is susceptible to more than one rational point of view, particularly where no employee was injured by the handrail. McNulty's brief at 16-17.

Compliance officer Wilkes described the stairrail/handrail system as having been made of two metal studs, U channel in shape, nested and secured together to form a double strength railing (Tr. 59-60; Exh. C-5). While acknowledging that the photograph depicting the stairrail system did not disclose any projection hazard (Tr. 96-96), Wilkes was clear in describing the nature of the hazard: "Being metal, these things were quite sharp...to the extent that I myself received a cut and it bled"(Tr. 60).

The obvious main point of the cited standard is to protect against a "projection" hazard, which, in its ordinary sense, means a part that projects or juts out. For example, the stairway standard at § 1926.1052(a)(6) deals with the same problem, only in clearer language: "All parts of stairways shall be free of hazardous projections, such as protruding nails." Given the facts of this case, the appropriate standard for which McNulty may have been cited appears at § 1926.1052(c)(8):

Stairrail systems and handrails shall be so surfaced as to prevent injury to employees from

punctures or lacerations, and to prevent snagging of clothing.

The crucial question in this case is whether McNulty knew or with the exercise of reasonable diligence could have known of the presence of the laceration hazard, which is essentially the issue addressed by both parties during the hearing. Bearing in mind that the party responsible for erecting and maintaining the stairrail/handrail system was the construction manager, it is difficult to understand how McNulty could be charged with knowledge of the violation that is not readily perceptible to the sight, but would most likely be manifest to McNulty's employees only if they were to come into physical contact with the railing. It has not been shown that anyone employed by McNulty sustained any injury from or experienced any difficulty with the metal railing system that might have called attention to the problem which compliance officer Wilkes personally experienced.

The essential facts underlying the stairway landings violations are not disputed. McNulty contends that its employees had access to the cited areas only for the brief purposes of passing to and from their work stations, and that the workers were not exposed to any "substantial hazard" which McNulty did not create. It is argued that the fall hazard had only a negligible relationship to employee safety and should be characterized as *de minimis*. McNulty's brief at 18-19.

McNulty's arguments speak more to the penalties proposed by the Secretary than to the underlying violations. The guardrail defects included missing and detached railings, as well as a railing whose height was 9 inches short of the required 42 inches. All in all, they constitute violative conditions which have a direct and immediate relationship with worker safety although not of such a relationship that serious physical harm is a substantial probability. 29 U.S.C. § 666(k). Therefore, the violation is more appropriately classified as nonserious rather than serious, as alleged by the Secretary.

In summary, the Secretary has failed to prove that McNulty violated: the standards at §§ 1926.28(a) and 105(a) relating to safety belt protection; the standard at § 1926.300(a) relating to maintaining power tool in safe condition; the standard at § 1926.1052(c)(10) concerning the stairrail/handrail system's projection or laceration hazard.

The Secretary has proven the following violations:

