Secretary of Labor,
Complainant,

v. OSHRC Docket No. **00-1357 (EZ)**

Beverly Enterprises - Alabama, Inc.,
Respondent.

Appearances:

Marsha L. Semon, Esq.
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

Gregory S. Narsh, Esq.
Pepper Hamilton, LLP
Harrisburg, Pennsylvania
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Beverly Enterprises – Alabama, Inc. d/b/a Beverly Healthcare Eastern Shore (Beverly), is a multi-facility health care corporation providing for long-term care for residents. On June 13 - 14, 2000, Occupational Safety and Health Administration (OSHA) Compliance Officer Michael Curry conducted a programmed inspection of Beverly's Fairhope, Alabama facility. As a result of this inspection, the Secretary issued Beverly three citations on June 29, 2000.

Beverly and OSHA informally settled Citation No. 1. Beverly timely contested Citation Nos. 2 and 3. Prior to the hearing, the Secretary withdrew Citation No. 3.

The case was designated for E-Z trial procedures under § 2200.200, *et seq.* On November 1, 2000, a hearing was held in Mobile, Alabama, on the remaining item, the alleged repeat violation of § 1910.303(f). The Secretary asserts that Beverly failed to label the circuits in a breaker panel box located in the maintenance building. Beverly denies that the failure to label violated § 1910.303(f), but asserts that if a violation is found, it must be classified as nonserious rather than repeat. Beverly also contends that OSHA acted in contradiction of its Field Inspection Reference Manual (FIRM) when it relied on a citation from a geographically remote facility for a repeated classification.

For the reasons that follow, item 1 is affirmed as a low gravity repeat violation.

BACKGROUND

Beverly operates a 130-bed nursing home in Fairhope, Alabama. Its facility has three buildings: the main building and two smaller buildings. The maintenance shop, which is one of the smaller buildings, measures approximately 12 feet by 24 feet (Tr. 65). The shop houses general maintenance materials and tools, some hazardous materials (such as paint), storage lockers, a work bench, and a desk (Tr. 67, 86). It serves as the work space for Kelly Davis, who has been the maintenance supervisor for Beverly for the past six years (Tr. 60). Kelly is responsible for maintenance and the day-to-day operations of the physical plant. At the time of the inspection, Davis had an assistant working with him (Tr. 70).

Davis accompanied Curry during the inspection of the maintenance shop. Curry testified that the door to the shop was not locked when they entered (Tr. 16). Curry inspected the circuit breaker panel box located by the left-hand door of the shop and found that the circuit breakers were not labeled (Exhs. C-1, C-2, Tr. 16). The breaker panel box controlled only the electricity for the maintenance shop. The shop used electricity for lights, heating and air-conditioning, and to power equipment, such as drills, saws, and sanders (Tr. 20, 69). Davis repaired furniture, small appliances, plumbing fixtures and performed other general maintenance in the shop (Tr. 83). When Curry pointed out that there were no labels by the circuit breakers in the panel box, Davis immediately labeled them (Tr. 20).

DISCUSSION

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

Alleged Repeat Violation of § 1910.303(f)

The Secretary asserts that Beverly violated the requirements of the second sentence of § 1910.303(f). The standard provides (emphasis added):

> *Identification of disconnecting means and circuits.* Each disconnecting means required by this subpart for motors and appliances shall be legibly marked to indicate its purpose, unless located and arranged so the purpose is evidence. Each service, feeder, and branch

> circuit, at its disconnecting means or overcurrent device, shall be legibly marked to indicate its purpose, unless located and arranged so the purpose is evident. These markings shall be of sufficient durability to withstand the environment involved.

The purpose of the circuit breakers was not obvious from their location on the panel box. Davis testified that although the circuit breakers were not labeled, he personally knew which breakers controlled which circuits (Tr. 70). Personal knowledge is not a substitute for the written identification required to facilitate quick and correct disconnects in the event of an emergency or if a repair must be made. Davis was not the only employee who might have to disconnect an electrical circuit at the panel box. At the time of the inspection, both Davis and his assistant worked in the shop and had access to the panel (Tr. 21, 70). Davis described a time when he took a sabbatical. Others may have come into the shop or been made responsible for repairing the equipment. Finally, the only person who knew which breakers went to which circuits may have been the one injured and the one in need of an immediate disconnect from the electricity. The purpose of the circuit breakers should have been immediately evident through labeling or location, and they were not.

It is not significant that there was an additional disconnecting means at the primary feeder in the main facility about 30 feet from the shop (Tr. 81). The quickest and closest location to cut the power to anything in the shop was the shop breaker panel (Tr. 83-84). To avoid confusion and mistake the standard requires that all, not merely one, of the disconnecting means for electrical current be labeled. The fact that the circuits were unlabeled was obvious. The knowledge of maintenance supervisor Davis that they were unlabeled is properly imputed to Beverly. *Superior Electric Co.*, 17 BNA OSHC 1635, 1637 (No. 91-1597, 1996).

The violation of § 1910.303(f) is affirmed.

Repeat Classification

Under the Commission's long stated test, a repeat violation under § 17(a) of the Act occurs if the Secretary shows "a Commission final order against the same employer for a substantially similar violation." *Potlatch Corporation*, 7 BNA OSHC 1061, 1063 (NO. 16183, 1979). On February 23, 1999, the Secretary issued Beverly Enterprises – Pennsylvania, Inc., in Uniontown, Pennsylvania, a one-item, other-than-serious citation, for violation of § 1910.303(f) (Exh. C-3). The Secretary submitted the signed abatement document which sufficiently establishes that Beverly did not contest the violation

and that it is a final order of the Commission (Exh. C-3, p. 7). For purposes of this case, Beverly does not assert that the two facilities are other than the same employer.

Were the violations substantially similar? When the violated standard is specific rather than general, the Secretary may establish a prima facie case of substantial similarity if the final order alleged a failure to comply with the same standard. Beverly is incorrect in its suggestion that § 1910.303(f) is a general standard because it may apply to different types of disconnecting means and circuits. The breath of a standard's application does not determine whether it is general or specific. A standard is considered specific when it contains "explicit, unambiguous safety precautions that employers must take in specific situations." *Corbesco Inc. v. Dole*, 926 F.2d 422, 427 (5th Cir. 1991). Section 1910.303(f) is a specific standard, and Beverly violated that standard twice. The Secretary established her prima facie case of substantial similarity.

The burden shifts to the employer to rebut that showing. *Monitor Constr. Co.* 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994) (citing *Potlatch)* (even though the two standards addressed falls into openings, falling into a manhole when its cover breaks differs from the hazard of stumbling into a beam). The courts do not limit the concept of repeated violations to factually identical occurrences, however. *J. L. Foti Construction v. OSHRC,* 687 F. 2d 853, 856 (6th Cir. 1982). Similarity includes consideration of factors such as the obviousness of the hazard, the abatement required, and the actual hazard posed. Such things as "geographical proximity of the violations, the commonality of supervisory control over the violative condition, and the time lapse between the violations bear only on the size of the penalty to be assessed, not on the 'repeated' character of the infractions." *Id*. at 875.

The Eleventh Circuit found a violation to be repeated "if (1) the same standard has been violated more than once and (2) there is a 'substantial similarity of violative elements' between the current and prior violations." *D & S Grading Co., Inc. v. Secretary of Labor*, 899 F. 2d 1145 (11th Cir. 1990) (repeat violations supported by same violative elements in the nature of conditions and hazards of cave-ins). The Commission holds that the "principal factor to be considered in determining whether a violation is repeated is whether the prior and instant violations resulted in substantially similar hazards." *Stone Container Corp.,* 14 BNA OSHC 1757, 1762 (No. 88-310, 1990) (citations which involved the same standard and applied to similar conditions of exposure and similar falls are repeat); *Hudson Wood*

Recycling, Inc., 17 BNA OSHC 1635 (No. 91-1597, 1996) (prior violation for failure to have midrail was substantially similar to failure to have guardrail).

Beverly emphasizes that § 1910.303(f) contains two sentences and that the previous and current violations were predicated on different sentences. The prior Pennsylvania violation applied to the first sentence, which requires an employer to mark the disconnecting means for motors and appliances. The Secretary found that Beverly had not marked three disconnect boxes for exhaust fans and appliances in the kitchen area (Exh R-2). The three disconnect boxes were next to each other on the wall, with nothing to indicate which box controlled which equipment. The current Alabama violation referred to the second sentence requiring an employer to mark the branch circuits at the disconnecting means or the breaker panel in the maintenance shop. The panel box contained four 215- to 230-volt circuits and three 110-volt circuit breakers (Exh. C-2; Tr. 69, 82, 76). Even if all the breakers were not active, someone unfamiliar with the wiring in the shop would not know this.

Both sentences of the standard require labels to identify the purpose of the disconnecting means. Both violative conditions relate to the electrical hazard in the same way, *i.e.*, employees will not know which cutoff devices control which circuits, thus delaying disconnects from the electricity in case of emergency or for maintenance. For example, an employee could be injured while repairing equipment, an employee might restart a machine that was being repaired, or a helper might mistake which circuit controlled the equipment that was to be repaired. Despite Beverly's argument that a disconnect box and a circuit breaker panel are not identical, they both perform the same function of disconnecting electrical power from specific circuits.

Violations of either sentence of the standard could result in employee exposure to shock, electrocution, burns or other injury. Employees must be able to see the exact method to disconnect the electricity in order to lessen or avoid these hazards. Regardless of the location of the disconnecting means, kitchen area disconnect boxes or maintenance shop circuit breakers, the two hazards are substantially similar.

In addition to similar hazards, these two violations have the same means of abatement: labeling the disconnect. *See Centex-Rooney Construction Co.*, 16 BNA OSHC 2127 (No. 92-0851, 1994) (hazards and means of abatement were the same in both citations and violations were repeated). The

similarity of the hazard and the identity of the means of abatement support the conclusion that the present violation is repeated.

Field Inspection Reference Manual

Beverly contends that Curry did not follow the FIRM because the FIRM provides that a repeat violation only applies to a multi-facility employer if the repeated violation recurred within the same OSHA area office jurisdiction. However, that section of the FIRM begins with the statement that "(w)here a national inspection history has not been obtained, the following criteria regarding geographical limitations shall apply." (FIRM Chapter III.C.2.f.(4)(c); Exh. R-1). In this case, Curry obtained Beverly's national inspection history. Curry testified that he routinely checked an employer's nationwide inspection history on all of his cases (Tr. 41). This procedure is recommended by the FIRM. It requires OSHA to obtain a nationwide inspection history of an employer were high gravity serious violations are to be cited; it encourages OSHA to obtain a nationwide inspection history for lesser gravity violations. (FIRM Chapter III.C.2.f.(4)(a) and (b); Exh. R-1). Moreover, the FIRM does not have the force of law. It provides guidance to assist inspectors in the uniform enforcement of the Act. Beverly's contention that OSHA did not follow the FIRM is without merit.

The violation of § 1910.303(f) is affirmed as repeat.

PENALTY ASSESSMENT

The Commission is the final arbiter of penalties in all contested cases. Section 17(j) of the Act requires that when assessing penalties, 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 prior history of violations. 29 U. S. C. § 666(j). Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). Considerations of gravity include the nature of the violation, the number of employees exposed, the duration of exposure, and the likelihood that any injury would result from the hazard. Although Davis used electrical tools and equipment throughout the workday, the gravity of this violation is low. The maintenance supervisor was knowledgeable and kept the shop area in notable order. The small number of breakers and the ease with which the breaker panel could be accessed would permit someone, even without knowledge of the wiring, to disconnect all the circuits in a relatively short time. As an enterprise, Beverly has 900 employees and has 120 to 130 employees in the facility (Tr. 42). It is given

no credit for size. Beverly is credited for good faith. It has an active safety program, was cooperative throughout the inspection, and immediately abated the violation. Based on all of the above, the proposed penalty of $200 is reduced to $100.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Citation 2, Item 1, alleging a repeat violation of § 1910.303(f), is affirmed as repeat and a penalty of $100 is assessed.
2. Citation 3, Item 1, alleging a violation of § 1910.212(a)(1), is withdrawn by the Secretary.

/s/

NANCY J. SPIES
Judge

Date: December 15, 2000