SECRETARY OF LABOR,

Complainant,

v.

THOMPSON ELECTRIC, INC.

Respondent.

DOCKET No. 01-1544

APPEARANCES:

Linda M. Hastings, Esquire
Heather A. Joys, Esquire
Office of the Solicitor
U.S. Department of Labor
Cleveland, OH
For the Complainant

Keith L. Pryatel, Esquire
Kastner, Westmand & Wilkins, LLC
Akron, OH
For the Respondent

BEFORE: Covette Rooney
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On May 16, 2001, Douglas Young, an employee of Respondent, received a fatal electric shock while re-insulating terminations in a switch break box at the University of Akron in Akron, Ohio. The ensuing OSHA inspection resulted in the issuance of a serious citation alleging violations of 29 C.F.R. §§ 1926.95(a) and 1926.416(a)(1), and an "other"

citation alleging a violation of 29 C.F.R. § 1904.2(a).[1] Respondent filed a timely notice of contest, and a hearing was held on March 5, 2002. Both parties have submitted post-hearing and reply briefs.

Jurisdiction

At all times relevant to this action, Respondent, Thompson Electric, Inc. ("Thompson"), was a full-service electrical contractor. By stipulation, Thompson admits that it is a construction employer subject to the Act, and I so find. I accordingly conclude that the Commission has jurisdiction over the parties and the subject matter of this proceeding.

Background

Several hours before the accident, a contractor using a backhoe at the University of Akron undermined a concrete duct bank containing conduits for electrical phases. The duct bank led to an enclosed vault containing an electrical switch and terminations for the phases, and Young, whose crew was performing other work at the university, was asked to inspect the electrical switch and cables for damage. The work of Young's crew ultimately involved pulling the cables through the conduit and reconnecting the cables to the switch. (Tr. 14-15, 23-24, 43-44, 85-88, 167).

The vault containing the electrical switch was 8 feet by 12 feet , and the switch was charged to 4,160 volts. The termination ends feeding into the switch break box were aligned vertically in rows of threes and were labeled, from left to right, "Student Center," "Heating Plant" and "Jackson Field," respectively. Each termination contained three phases, and the lugs for the phases were insulated with 3M Scotch Brand 130-C rubber insulating tape with an overlay at the edges of Scotch Brand 70 tape. The lugs for the Student Center termination had been re-taped by Young two or three weeks before the accident. (Tr.14-15, 26, 40, 52-62, 90, 106-112, 168-169, 238, 265-266, Exh. J-12).

Shortly after 5:30 p.m. on the day of the accident, Young de-energized, bled and tested the Heating Plant cable, but did not de-energize the other two circuits. While taping the lug to the middle phase of the Heating Plant termination, Young's left elbow hit the bottom lug of the Student Center termination. He received an electric shock through his elbow and died later that evening. During the

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[1] As issued, Item 1 of the serious citation alleged a violation of 29 C.F.R. §1926.102(a)(1).. Before the hearing, the Secretary moved to amend this item to allege a violation of 29 C.F.R. § 1926.95(a) in the alternative. I granted the motion, and, as the alleged violation of 1926.95(a) is being affirmed, the alleged violation of 29 C.F.R. §1926.102(a)(1) is vacated in my Order, *infra*.

investigation following the accident, a "burr" or bare piece of metal about the size of a pinhole was discovered poking through the electrical tape on the underside of the lug Young's elbow had contacted. (Tr. 48-54, 106-110).

Serious Citation 1, Item 1

Citation 1, Item 1 alleges a violation of 29 C.F.R. §1926.95(a). The cited standard requires the provision and use of protective equipment, including personal protective equipment for eyes, face, head and extremities, protective clothing, and protective shields and barriers, whenever hazards of processes or environment could cause injury.[2] It is conceded that no member of the crew wore safety goggles or other eye protection during the work inside the vault. (Tr. 33).

The evidence demonstrates that only 4 ½ inches separated the lugs on the Heating Plant circuit from the lugs on the Student Center and Jackson Field circuits on either side. (Tr. 14-15, 26). Young and the three other members of his crew were necessarily working well within arms' reach of energized cables. Any one of them easily could have contacted a live source with a tool, which could have created an arc blast resulting in serious injury to an employee's face and eyes. I also find that it was likely that an arc blast could occur, either during the bleeding and testing of the middle cable or from knocking one of the energized cables on the side. This likelihood was proven by the facts of Young's accident, and the close quarters and use of hand tools, such as socket wrenches and electrical energy testers, made it probable that an arc blast could have caused an eye injury. (Tr. 37-40, 90). I find that the standard applies and that Thompson employees were exposed to the cited hazard. *See Con Agra Flour Milling Co.*, 15 BNA OSHC 1137, 1138-1142 (No. 88-1250, 1993). None of the employees in the vault wore eye protection, and Young, the supervisor of the crew, made no effort to have the employees put on such protection. (Tr. 33-35). I also find, therefore, that the terms of the standard were violated.

The Secretary has established that Thompson had knowledge of the violation. Young, as noted above, was the supervisor at the site. He was the Thompson employee in charge of how the

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[2] In order to prove that an employer violated an OSHA standard, the Secretary must prove that: (1) the standard applies to the working conditions cited; (2) the terms of the standard were not met; (3) employees had access to the violative condition; and (4) the employer either knew, or with the exercise of reasonable diligence should have known, of the violative condition. *Kiewit Western Co.*, 16 BNA 1689, 1691 (No. 91-2578, 1994).

work at the university was to proceed, and his duties also required that he conduct weekly safety talks and determine what safety measures were necessary for the job at the university. (Tr. 255). It is clear that he knew that no member of his crew was wearing protective eye goggles while working in the vault and that he also was aware of the presence of live cables in close proximity to the work area. (Tr. 59-60). He thus had actual knowledge of the violation, and, under Commission precedent, this knowledge is imputed to the employer. *See Southwestern Bell Tel. Co.,* 19 BNA OSHC 1097, 1099 (No. 98-1748, 2000). *See also Halmar Corp.*, 17 BNA OSHC 1014 (No. 94-2043, 1997).

Thompson argues it complied with the standard's terms because protective eye wear had been purchased, and, therefore, provided. However, this argument ignores the standard's further requirement that the safety protection be *used*. Moreover, Thompson's efforts in this regard, such as providing face shields to new employees and requiring in its written safety plan that employees use the face shields or eye protection when working on electrical equipment, were insufficient. (Tr. 232-233, Exh. J-17). There was no proof that Thompson undertook to enforce its rule or that it even discussed the rule with employees with any regularity, even though there were at least five reported eye-related injuries to Thompson employees in 1999. (Exh. J-29). Finally, as indicated above, Young made absolutely no effort on May 16, 2001, to have the members of his crew wear any eye protection. This citation item is accordingly affirmed.

This citation item is affirmed as a serious violation because there was a substantial probability of serious physical harm or even blindness if an arc blast had occurred near the face of an employee not wearing eye protection. This danger was heightened because the employees were working in a small, enclosed space. The Secretary has proposed a penalty of $1,375.00 for this item. After giving due consideration to the evidence regarding Thompson's size, history and good faith, and to the gravity of the violation, the proposed penalty is appropriate and is therefore assessed. (Tr. 44-48).

Serious Citation 1, Item 2

This item alleges a violation of 29 C.F.R. § 1926.416(a)(1), which provides as follows:

> No employer shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by

deenergizing the circuit and grounding it or by guarding it effectively by insulation or other means.

I conclude that the standard applies, as four Thompson employees worked in such proximity to two energized electric cables that contact, in the course of work, was possible. (Tr. 43). I also conclude the terms of the standard were violated and that employees had access to the violative condition. The standard requires that circuits be either de-energized and grounded or guarded effectively before work in close proximity to them occurs. It is undisputed that the Student Center and Jackson Field cables were not de-energized, and Young's accident shows that the bottom lug of the Student Center termination was not effectively insulated.

The Secretary has nonetheless failed to establish a violation of the standard because she has not met her burden of proving that Thompson had knowledge of the violation. While it is clear that Young knew the two cables were not de-energized, there is nothing in the record to indicate that he knew or should have known of the tiny breach in the tape on the underside of the bottom lug of the Student Center termination; in my view, it is highly unlikely that the breach would have been detected during a physical inspection because of its small size and location. Moreover, as is discussed below, I find that there was insufficient proof that the use of the 3M Scotch Brand 130-C rubber insulating tape was inappropriate. I accordingly conclude that the Secretary failed to establish that Thompson knew, or with the use of reasonable diligence should have known, of the cited hazard.

The Secretary asserts that flagging, or unraveling, of the tape on one of the lugs negated the insulating effects of the tape, that the dampness of the vault contributed to the hazard, and that Young should have been aware of these conditions. However, the Secretary failed to show that the flagging of the tape on the middle lug of the Student Center termination rendered the insulation ineffective. There was no metal showing through the tape, and while there was no conclusive evidence as to how many layers of tape were underneath the flagging, there was testimony that there were several layers. (Tr.52-54, 126, 153).[3] Further, the evidence shows that Young had to be forcibly removed from the circuit following the electric shock, (Tr. 122), and it is possible that the flagging

[3] I do not credit the CO's testimony that the photos taken after the accident prove there were not enough layers of tape, as neither condition the CO described--ridging through the tape and insufficient "balling" around the lugs--is evident in the photos. (Tr. 61-63; Exhs. J-7-8, J-11-13).

occurred at that time.[4] I also do not adopt the Secretary's argument that the dampness of the vault negated the effectiveness of the insulating tape because there was no proof that the tape was damp; in this regard, I note that 3M's product catalog indicates that its Scotch Brand 130-C insulating tape is waterproof. (Exh. R-B).

The Secretary also asserts that Thompson knew or should have known that the 3M Scotch Brand 130-C insulating tape was an insufficient insulator for the cable terminations. The Secretary, however, did not submit evidence to prove this assertion. According to 3M's catalog, the Scotch Brand 130-C tape is a high-voltage insulating tape capable of protecting terminations with up to 35,000 volts. As is indicated above, the subject switch was charged only to 4,160 volts, and there was no proof that the tape was not clean and dry at the time of the accident. (Tr. 114-116). Further, the term "effective insulation" is defined in the preamble to Subpart K of 29 C.F.R. § 1926 as "insulation...appropriate for the voltage...and clean and dry...." 48 Fed. Reg. 45,871, 45,873 (1983). Based on this definition and the evidence of record, the Scotch Brand 130-C insulating tape would appear to have been appropriate for use on the lugs in issue.

In support of her position, the Secretary relies solely on the testimony of Peter McDonough, a technical manager for 3M, to the effect that 3M does not specifically recommend the use of the Scotch Brand 130-C tape to act as a barrier to prevent shock in the event of human contact. (Tr.192-194).[5] Standing alone, his testimony does not support the further implication that the tape is not effective insulation for an electrical cable termination, and such a deduction would be contrary to the statements in the 3M catalog. (Exh. R-B). Moreover, McDonough himself admitted that 3M recommends 130-C tape for primary insulation of terminations and cables and for moisture sealing,

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[4] Of note, the CO admitted there was no flagging on the lug Young contacted. (Tr. 155-157).

[5] The Secretary sought to have McDonough qualified as an expert witness at the hearing, but I precluded him from testifying in this regard because he was never identified as an expert until the hearing. 29 C.F.R. § 2200.52.(e). I did allow McDonough to testify as a fact witness, however. (Tr. 185-194, Exhs. J-31-32). In its brief, Thompson argues that McDonough should not even have been allowed to testify about 3M's recommendations. This argument is rejected because this testimony concerned facts within McDonough's personal knowledge that should have been available to any non-specialist through review of 3M's literature. *See* F.R.E. 701.

which is precisely the purpose for which the tape was used in this instance.[6] (Tr. 192-194). In any case, there was no evidence that employers like Thompson could have known that 3M purportedly does not recommend the use of the tape as a barrier against human contact, particularly since neither the catalog nor the tape packaging has any such warning.[7] This citation item is accordingly vacated.

"Other" Citation 2, Item 1

This item alleges a violation of 29 C.F.R. § 1904.2(a), which requires that the employer's occupational injury log be completed in the detail provided on OSHA Form No. 200. Thompson's occupational injury logs for 1999 and 2000 were indeed not completed in sufficient detail. Nine of the entries did not contain a description of the injury, a few of the entries were not legibly written, one entry was missing a date, and the 2000 log was not certified. Further, the data for the 2000 log was not totaled, and the totals for the 1999 log were inaccurate. (Exhs. J-28-29). Thompson has not disputed these facts and, in its post-hearing brief, does not even address this item. Accordingly, I conclude that the terms of the regulation were violated, and I affirm this citation item. No penalty for this citation item was proposed, and, based on the record, none is assessed.

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 hereby ORDERED that:

1. Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.95(a), is AFFIRMED, and a penalty of $1,375.00 is assessed. The alleged violation of 29 C.F.R. § 1926.102(a)(1) in the alternative is VACATED.

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[6] I do not give weight to the CO's testimony that he called 3M during his investigation and was told by an unidentified person that the tape should not be used as personal protection. (Tr. 57).

[7] For example, there was no evidence that the statement McDonough made during his testimony at the hearing had ever been communicated to purchasers of the product.

2. Citation 1, Item 2, alleging a serious violation of 29 C.F.R. § 1926.416(a)(1), is VACATED.

3. Citation 2, Item 1, alleging a non-serious violation of 29 C.F.R. § 1904.2(a), is AFFIRMED, and no penalty is assessed.

/s/

COVETTE ROONEY
JUDGE, OSHRC

Dated: July 25, 2002
Washington, D.C.