

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

SHAW AREVA MOX SERVICES, LLC,

Respondent.

OSHRC Docket No. 09-1284

ON BRIEFS:

Kristen M. Lindberg, Attorney; Charles F. James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor; M. Patricia Smith, Solicitor; U.S. Department of Labor, Washington, DC

For the Complainant

Carl B. Carruth; McNair Law Firm, P.A., Columbia, SC

For the Respondent

DECISION

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

At issue before the Commission is a serious citation issued by the Occupational Safety and Health Administration (“OSHA”) under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, alleging that Shaw Areva Mox Services, LLC (“Shaw Areva”) failed to ground an electrical adaptor and the plug of a fuel pump cord in violation of 29 C.F.R. § 1926.404(f)(6).¹ OSHA issued the citation following an inspection of a worksite in Aiken, South Carolina where Shaw Areva was constructing a nuclear fuel conversion facility.² The Secretary proposed a penalty of \$1,625 for the alleged grounding violation. After a hearing in

¹ This provision states: “*Grounding path.* The path to ground from circuits, equipment, and enclosures shall be permanent and continuous.”

² The citation included two other items, neither of which is at issue on review.

the matter, Administrative Law Judge Ken S. Welsch affirmed the citation item, recharacterized the violation as other-than-serious, and assessed a penalty of \$200. For the following reasons, we reverse the judge and vacate the citation.

DISCUSSION

I. The Adaptor

In a trailer that Shaw Areva used as an office at the worksite, the OSHA compliance officer (“CO”) observed a “triple tap” (three-plug) adaptor plugged into an energized 120v wall outlet and determined that it did not have a grounding prong. Nothing was plugged into the adaptor, but the CO testified that employees could have plugged either “a fan or any other piece of personal equipment” into it. On review, Shaw Areva argues that the judge erred in finding that (1) the requirements of the cited standard apply to the adaptor and (2) the Secretary established exposure to an electrical hazard. *See Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, p.31,899 (No. 78-6247, 1981) (holding that Secretary must establish applicability of the cited standard, existence of a violative condition, employee exposure, and employer knowledge to prove a violation), *aff’d in pertinent part*, 681 F.2d 69 (1st Cir. 1982). We find that the Secretary established applicability of the cited standard, but not employee exposure.

Applicability

The Secretary does not dispute Shaw Areva’s contention on review that the “permanent and continuous” path to ground requirement in the cited standard applies to the adaptor only if a separate requirement to ground the adaptor is set forth in another applicable provision. Indeed, the phrasing of the cited provision presumes, rather than prescribes, the presence of a grounding path. *See* 29 C.F.R. § 1926.404(f)(6) (“*the* path to ground . . . shall be permanent and continuous”) (emphasis added). And to interpret the cited standard as including a grounding requirement would render superfluous a number of other provisions in the electrical standard that specify which circuits, equipment and enclosures must be grounded. *See, e.g.*, 29 C.F.R. §§ 1926.404(f)(1) (identifying which electrical systems must be grounded); 1926.404(f)(7) (specifying particular types of supports, enclosures, and equipment that shall be grounded). Thus, the Secretary points to a separate provision that sets forth the threshold grounding requirement for all receptacles: “Receptacles shall be of the grounding type . . . and all receptacles shall be electrically connected to the grounding conductor.” 29 C.F.R.

§ 1926.405(a)(2)(ii)(C) (“ground-required provision”). Under the electrical standard, a “receptacle” is defined as “a contact device installed at the outlet for the connection of a single attachment plug” and a “multiple receptacle” as a “single device containing two or more receptacles.” 29 C.F.R. § 1926.449.

Shaw Areva claims that the adaptor cannot be a “receptacle” as defined under the standard because, although plugged in, it was not “installed” at the outlet and the definition of receptacle is limited to devices that are *permanently* installed. In support of its view, Shaw Areva relies on the standard’s definition of an “attachment plug,” which contains a reference to receptacles: “[a] device which, by insertion in a receptacle, establishes connection between the conductors of the attached flexible cord and the *conductors connected permanently to the receptacle.*” 29 C.F.R. § 1926.449 (emphasis added). The Commission has held, however, that the receiving end of an extension cord is a “receptacle outlet” for purposes of a requirement for ground-fault protection. *Otis Elevator Co.*, 17 BNA OSHC 1166, 1167 n.3, 1995 CCH OSHD ¶ 30,730, p. 42,662 n.3 (No. 90-2046, 1995).³

We similarly hold that the receiving end of the adaptor is a multiple receptacle for purposes of the ground-required provision. First, Shaw Areva’s reliance on the definition of “attachment plug” is misplaced, as it focuses on how a plug functions, not the characteristics of a receptacle. And in defining a “receptacle,” OSHA does not use the word “permanently.” Rather, the definition simply uses the term “installed” and does so in a broader sense than Shaw Areva suggests. In the preamble to the standard, the Secretary specifically referred to “the *receptacle outlets* on the end of extension cord sets” even though an extension cord, like the adaptor here, is not permanently installed in the outlet into which it is plugged. *Electrical Standards for Construction*, 51 Fed. Reg. 25,294, 25,310 (Jul. 11, 1986) (emphasis added).⁴

³ In *Otis*, the issue was whether an extension cord plugged into a building’s outlet receptacle was considered part of the permanent wiring of the building for purposes of the ground fault protection requirements in 29 C.F.R. § 1926.404(b)(1)(i). The Commission concluded that plugging the extension cord into the building’s outlet did not render the extension cord part of the building’s “permanent wiring” and that the cord’s receiving end was a “receptacle outlet” under the standard. *Otis*, 17 BNA OSHC at 1167-1168, 1995 CCH OSHD at 42,662-63.

⁴ Also, under the electrical standard, 29 C.F.R. Part 1926 Subpart K, “install” is used to refer to all electrical-related actions and processes transpiring prior to an electrical system’s actual use. See 29 C.F.R. § 1926.400 (dividing “installation safety requirements” and “safety-related work

Second, Shaw Areva's interpretation of this provision would lead to an anomalous result. Indeed, under such a reading, the standard would require a permanently connected receptacle to be grounded but would permit the use of an ungrounded adaptor which, when plugged into that receptacle, would effectively defeat the required ground.⁵ *See Manganas Painting Co., Inc.*, 21 BNA OSHC 1964, 1977, 2004-2009 CCH OSHD ¶ 32,908, p. 53,394 (No. 94-0588, 2007) (rejecting interpretation of lead standard that would lead to anomalous result).

Because the adaptor was a multiple receptacle "required to be connected to the equipment grounding conductor in the branch circuit" under § 1926.405(a)(2)(ii)(C), it was required to be "of a grounding type," i.e. to have a grounding path, and the cited provision required that path to be "permanent and continuous."⁶ Accordingly, we reject Shaw Areva's argument and conclude that the cited standard applies to the adaptor.

Exposure

The Secretary proves exposure by showing that it was "reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1074, 1998 CCH OSHD ¶ 31,463, p. 44,506 (No. 93-1853, 1997). Access to a hazard is considered reasonably predictable where noncompliant equipment is "available for use." *Dover Elevator Co.*, 16 BNA OSHC 1281, 1284, 1993-1995 CCH OSHD ¶ 30,148, p. 41,478 (No. 91-862, 1993). Here, the judge found that exposure to the hazard posed by the adaptor was reasonably predictable because it was available for use and a Shaw Areva employee plugging ground-required equipment into it would have been exposed to an electric shock hazard.

practices"); *see also U.S. Nat'l Bank of Or. v. Ind. Ins. Agents*, 508 U.S. 439, 455-56 (1993) (considering statute's structure in resolving statutory interpretation issue). There is no dispute that the "installation safety requirements" apply here.

⁵ Shaw Areva's interpretation would similarly defeat other ground-related requirements for receptacles. For example, if an employer used an assured equipment grounding conductor program, ground testing requirements would be applicable to "all cord sets, receptacles which are not a part of the permanent wiring of the building or structure, and cord- and plug-connected equipment required to be grounded" but not to an ungrounded adaptor used between the equipment and the receptacle. 29 C.F.R. § 1926.404(b)(1)(iii)(D).

⁶ Shaw Areva concedes that the adaptor lacked a ground prong. Thus, the path to ground was not "permanent and continuous." 29 C.F.R. § 1926.404(f)(6).

We find, however, that on this record the Secretary has not established exposure. While she has shown that the cited standard applies to the adaptor at issue, grounding is not necessarily required for all equipment that could be plugged into it. For example, cord- and plug-connected equipment that is not used in a damp or wet location need not be grounded. *See* 29 C.F.R. § 1926.404(f)(7)(iv)(C)(2). Thus, proof of exposure here must rest on evidence establishing it was reasonably predictable that equipment that is required to be grounded might be connected to the adaptor. *See Dover*, 16 BNA OSHC at 1283-84, 1993-1995 CCH OSHD at 41,481 (finding that receptacle lacking ground-fault protection violated § 1926.404(b)(1)(i) because it was available for use with certain equipment on the construction site and the record showed such equipment required ground-fault protection).

There was no equipment plugged into the adaptor at the time of the inspection and the record does not establish that any of the office equipment in Shaw Areva's trailer—computers and other equipment, including a battery charger, radios, and a surge protector—required grounding. Furthermore, the record lacks evidence as to whether there was any other cord- and plug-connected equipment in the trailer that Shaw Areva employees might have plugged into the adaptor, let alone whether such equipment would have required grounding. Nor did the Secretary show it was reasonably predictable that the adaptor might have been used to power ground-required equipment outside the trailer. The CO testified only generally that certain equipment “on construction sites” must be grounded, such as non-double-insulated drills and circular saws, but did not indicate that any such equipment was present or even anticipated at this worksite.⁷ Under these circumstances, we find that the Secretary failed to establish exposure and, therefore, has not proven a violation of 29 C.F.R. § 1926.404(f)(6) with regard to the adaptor.

II. The Fuel Pump Plug

After inspecting Shaw Areva's office trailer, the CO approached the back of a concrete-mixing batch plant and observed a 500-gallon portable fuel tank with an attached fuel pump. He saw that the plug on the pump's power cord, which was lying on top of the tank, was missing its grounding prong. Under its safety program, Shaw Areva conducted weekly inspections of the

⁷ The record also does not specify where the fuel pump, discussed in the next section, was located relative to the office trailer.

fuel tank and its electrical components. Shaw Areva's assistant plant manager testified that he observed the cord's ground prong, intact, when he inspected the fuel pump at the close of business on Wednesday, June 10, 2009, and again on Thursday, June 11, when he last inspected the pump prior to the OSHA inspection. The plant was closed for the next three days, and re-opened on Monday, June 15. The CO observed the plug mid-morning on Tuesday, June 16, a little more than a day after the plant re-opened. In affirming the violation on the basis of the pump plug, the judge found that the grounding prong had been missing for one business day, the cord was in plain view, and some of the fuel from the tank had been used. He also pointed out that although the cord was inspected the previous week, Shaw Areva had no specific written requirement for its supervisors to inspect the pump's electrical equipment.

On review, Shaw Areva disputes only the judge's conclusion that it had constructive knowledge of the plug's missing ground prong. To prove constructive knowledge, the Secretary must show that the employer, with the exercise of reasonable diligence, could have known of the hazardous condition. *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1406, 2001 CCH OSHD ¶ 32,331, p. 49,552 (No. 99-0707, 2001). Whether an employer was reasonably diligent involves consideration of several factors, including an employer's obligation to inspect the work area, anticipate hazards to which employees may be exposed, and take measures to prevent the occurrence of violations. *N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2122-2123, 2000 CCH OSHD ¶ 32,101, p. 48,238-39 (No. 96-0606, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001). In evaluating these factors, the Commission has considered "how long the violative condition[] had been in existence," *Kaspar Wire Works Inc.*, 18 BNA OSHC 2178, 2196-97, 2000 CCH OSHD ¶ 32,134, p. 48,422 (No. 90-2775, 2000), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001), and whether the condition was readily apparent, *Hamilton Fixture*, 16 BNA OSHC 1073, 1091, 1993-1995 CCH OSHD ¶ 30,034, p. 41,187 (No. 88-1720, 1993), *aff'd*, 28 F.3d 1213 (6th Cir. 1994) (unpublished).

We agree with Shaw Areva that the record does not establish it had constructive knowledge of the cited condition. In her brief on review, the Secretary maintains only that Shaw Areva could have seen the missing prong on the day before, or on the morning of, OSHA's

inspection because it was “in plain view.”⁸ But our inquiry is not that narrow. Whether Shaw Areva had constructive knowledge depends upon whether, with the exercise of reasonable diligence, it could have discovered the plug’s condition. *See, e.g., id.* at 1091-1092, 1993-1995 CCH OSHD at p. 41,187. The Secretary has not questioned the adequacy of Shaw Areva’s safety program, including its weekly inspections of the fuel pump. On the contrary, the CO conceded that its safety program was “very good,” if not “spectacular.” *See Precision Concrete Constr.*, 19 BNA OSHC at 1407, 2001 CCH OSHD at p. 49,553 (finding Secretary failed to prove constructive knowledge where she did not challenge the adequacy of employer’s safety program or foreman’s supervision of employees). Nor does the Secretary claim, given the judge’s finding that the condition existed for only one day, that Shaw Areva should have inspected the fuel tank, or even the worksite in general, with any greater frequency or diligence. *See Texas A.C.A. Inc.*, 17 BNA OSHC 1048, 1050, 1993-1995 CCH OSHD ¶ 30,652, p. 42,526 (No. 91-3467, 1995) (stating that “where the employer maintains an appropriate monitoring or inspection program [to detect safety hazards], the burden is on the Secretary to demonstrate that the employer’s failure to discover the violative conditions was nevertheless due to a lack of reasonable diligence”). Indeed, we find the record here establishes that Shaw Areva exercised “reasonable diligence” with respect to the cited condition, and this finding is not undermined by the fact that Shaw Areva did not put its fuel tank inspection requirement in writing. *Gem Indus. Inc.*, 17 BNA OSHC 1861, 1863 n.5, 1995-1997 CCH OSHD ¶ 30,762, p. 42,747 n.5 (No. 93-1122, 1996) (Commission does not require written safety rules as long as rules are clearly and effectively communicated to employees). Under these circumstances, we find that Shaw Areva lacked constructive knowledge of the fuel pump plug’s missing prong.

⁸ To the extent the Secretary’s argument can be construed as raising a question of actual rather than constructive knowledge, we note that the Secretary has conceded Shaw Areva lacked actual knowledge of the cited condition. In any event, the record does not establish that any Shaw Areva personnel were sufficiently close to the fuel tank to have necessarily observed such a small and subtle defect during the time the cited condition existed.

Therefore, we conclude that the Secretary has failed to prove a violation of § 1926.404(f)(6) with respect to both the adaptor and the fuel pump plug. Accordingly, we vacate Citation 1, Item 2.

SO ORDERED.

/s/

Thomasina V. Rogers
Chairman

/s/

Cynthia L. Attwood
Commissioner

Dated: February 6, 2012

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,

Complainant

v.

Shaw Areva Mox Services, LLC,

Respondent.

OSHRC Docket No. **09-1284**

Appearances:

Yasmin K. Yanthis-Bailey, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

Carl B. Carruth, Esquire, McNair Law Firm, P.A., Columbia, South Carolina
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Shaw Areva MOX Services, LLC (Shaw Areva), a joint venture, is engaged in the construction of a MOX facility at the Savannah River site, Aiken, South Carolina. On June 16, 2009, the construction project was inspected by the Occupational Safety and Health Administration (OSHA). As a result of the inspection, Shaw Areva received serious and other-than-serious citations for alleged violations at an onsite mobile batch plant on July 30, 2009. Shaw Areva timely contested the citations.

The serious citation alleges Shaw Areva violated 29 C.F.R. § 1926.152(e)(4) (item 1) for failing to protect a 500-gallon diesel fuel tank from collision and 29 C.F.R. § 1926.404(f)(6) (item 2) for missing ground prongs from a 120-volt triple tap adapter in the manager's office and from a 120-volt electric cord for the pump on the 500-gallon diesel fuel tank. The serious citation proposes penalties of \$975.00 and \$1,625.00, respectively.

The other-than-serious citation alleges Shaw Areva violated 29 C.F.R. § 1926.152(g)(11) (item 1) for failing to have a portable fire extinguisher within 75 feet of the 500-gallon diesel fuel tank. The other-than-serious citation proposes no penalty.

Upon receipt of Shaw Areva's notice of contest, the case was designated for handling pursuant to the Commission's simplified proceedings, 29 C.F.R. § 2200.200 *et seq.* The hearing was held in Aiken, South Carolina, on October 30, 2009. The parties have stipulated jurisdiction and coverage (Tr. 8). The parties have filed post hearing briefs.

Shaw Areva denies the alleged violations. It claims the dispensing unit on the fuel tank did not require protection from collision, and a fire extinguisher was within 75 feet of the tank. Although not denying the missing ground prongs, Shaw Areva argues it lacked knowledge of the missing prongs, and the protection from an electric hazard afforded by the ground prongs was not needed. Also, if a violation was found, Shaw Areva claims it should be considered *de minimis*

As discussed, serious citation item 2 is affirmed as other-than-serious and a \$200.00 penalty is assessed. Serious citation item 1 and other-than-serious citation item 1 are vacated.

The Inspection

Shaw Areva, a joint venture, contracted with the federal government to construct a MOX facility at the Savannah River site, in Aiken, South Carolina.¹ Shaw Areva employs 852 employees onsite. As of the date of the hearing, the construction project is continuing (Tr. 51, 53).

To make concrete for the project, Shaw Areva uses two onsite mobile batch plants. The plants, north and south, operate from Monday thru Thursday. At the south batch plant, there is also the manager's office, a trailer full of ice used to control the temperature of the concrete mix, and a 500-gallon tank containing diesel fuel to keep the ice trailers running at both batch plants (Exh. R-2, Tr. 59, 60, 62-63, 68, 71).

¹When completed, the facility will engage in the disposal of surplus weapons-grade plutonium by converting it into mox diesel fuel (Tr. 8-9),

On June 16, 2009, OSHA safety compliance officer John Madden conducted a general scheduled inspection of the MOX construction project.² The inspection took three days. According to Madden, OSHA's inspection found that the project was overall a safe workplace (Tr. 12, 14, 47).

²Madden was accompanied by OSHA industrial hygienist Brian Robertson (Tr. 13).

However, while inspecting the south batch plant, Madden observed a 120-volt triple tap adapter without a ground prong in the manager's office. The adapter was plugged into a wall receptacle but nothing was plugged into the adapter (Exh. C-2). Madden was told the adapter belonged to the previous contractor who had occupied the office until January 2009 (Tr. 23-24, 31, 39, 86, 129).

Behind the batch plant, Madden observed a 500-gallon diesel tank sitting on a gravel bed. The tank was constructed of two, one-eighth inch layers of steel. There was no barrier or other protection from collision other than that provided by the plant and the adjacent ice trailer around the tank. A gauge on the tank showed that it was seven-eighths full of diesel fuel. The diesel fuel, described by Madden as combustible, was used to keep the ice trailers running at the north and south batch plants (Exh. C-1; Tr. 15, 17, 68, 94). The tank's pump, lever, and nozzle were attached to the top of the tank. Madden observed that the electric cord used to power the pump lacked a ground prong (Exh. C-3; Tr. 25). Also, Madden testified that he did not observe a fire extinguisher in the area of the diesel tank (Tr. 35, 45).

As a result of the OSHA inspection, Shaw Areva received the serious and other-than-serious citations at issue on July 30, 2009.

Discussion

The Secretary has the burden of proving a violation of a standard and must show:

(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).

In this case, there is no dispute the construction standards including the flammable and combustible liquids and electrical wiring standards at 29 C.F.R. § 1926.152 and 1926.404 apply to Shaw Areva's batch plant.³

³Issues not briefed are deemed waived. See *Georgia-Pacific Corp.*, 15 BNA OSHC 1127 (No. 89-2713, 1991).

Alleged Violation
Serious Citation Item 1- Alleged Violation of §1926.152(e)(4)

The citation alleges the 500-gallon diesel fuel tank stored at the batch plant was not protected from collision by a barrier, concrete island or other means. Section 1926.152(e)(4) which regulates dispensing flammable and combustible liquids, provides:

The dispensing units shall be protected against collision damage.

It is undisputed the 500-gallon diesel fuel tank was located on the ground, behind the south batch plant, and adjacent to the ice trailer (Exh. R-2). The tank was used to refuel the ice trailers at the north and south batch plants. The tank was constructed of two layers of one-eighth inch steel. The pump with hose, nozzle, lever, and 25-foot electric cord were located on top of the tank, on the side nearest the ice trailer (Exh. C-3A; Tr. 94, 95, 130). There was no barrier, concrete island or other means to protect the tank from collision. Its only protection was provided by the ice trailer on one side and the batch plant behind the tank (Exh. C-1; Tr. 92). The diesel tank was periodically moved by a loader to refuel the ice trailer at the north batch plant (Tr. 80). Once emptied of ice, the trailers were replaced with new trailers full of ice (Tr. 62). The tank was refilled with diesel fuel once a week (Tr. 73).

The standard cited in this case by its terms applies to the protection of the dispensing unit. The standard does not address the fuel tank, and there is no definition of “dispensing unit.” According to Shaw Areva, the dispensing unit and tank are purchased separately from different manufacturers (Tr. 95). Where § 1926.152 directs its requirements to tanks or containers, it plainly says so. *See* § 1926.152(e)(1), (e)(2), and (e)(3). In interpreting a safety standard, “where a term is carefully employed in one place and excluded in another, it should not be implied where excluded.” *Diamond Roofing Co. v OSHRC*, 528 F2d 645, 648 (5th Cir. 1976). A standard cannot be construed to mean what the agency may have intended but did not adequately express. *Id.* at 649. As argued by Shaw Areva, the cited standard applies to protecting the dispensing unit, not the tank. The dispensing unit consists of the pump, hose, lever, nozzle, and 25-foot electric cord.

Although the standard applies to only the dispensing unit, the dispensing unit in this case sits on top of the tank, and a collision to the tank could also damage the dispensing unit (Exh. R-3). The record, however, fails to establish the tank or dispensing unit was subject to a risk of collision by vehicular traffic or equipment.

The fuel tank was protected from damage by location because of the ice trailer, batch plant, and the restricted access road (Exh. R-2). The concrete mixing trucks when being loaded use the roadway in front of the batch plant (Tr. 60). The fuel tank is behind the plant and is only used to refuel the ice trailers (Tr. 68). Assistant batch plant manager Brian Bodiford explained that the area behind the batch plant was not a road used by vehicular traffic and was totally “off limits.” Signs were posted which restricted access behind the batch plant, and no vehicles were allowed whatsoever (Tr. 63). The speed limit in the area of the batch plant was 5 MPH (Tr. 94).

There is no showing the tank is approached by vehicles or equipment except the loader used to move the tank to refuel the other ice trailer and when the adjacent ice trailer needs to be replaced. The tank is not used to refuel any other vehicles or equipment as Madden erroneously believed (Tr. 49). There is no evidence showing how the diesel tank itself was refilled.

The tank is kept at its storage location until needed to refuel the other ice trailer. It is then moved by a loader with fork attachments and returned to its storage location (Tr. 80-81). Any protective barriers around the tank have to be moved for the loader to pick up the tank for transport to the north batch plant.⁴ The loader is also used around the batch plant but the record does not show it coming within 15 feet of the tank (Exh. C-1A; Tr. 51, 75). When the ice trailer which is located 15 feet to one side of the fuel tank is replaced by a new trailer, a spotter is required to direct the new trailer into position (Tr. 78-79). The use of the spotter ensures that the replacement trailer is kept a safe distance from the tank. No other vehicles or equipment was shown to work or travel in the area of the tank.

The Secretary’s Standard Interpretation, 12/31/2002, recognizes that the lower the collision risk, the less collision protection is required (Exh. C-5). Applying this criterion, the

⁴Since issuance of the citation, Shaw Areva has erected a movable concrete block barrier around the tank (Exh. R-5; Tr. 77, 80, 98).

record fails to show the need for additional collision protection, regardless of whether the standard addresses the tank or dispensing unit.

A serious violation of § 1926.152(e)(4) is not established.

Serious Citation Item 2 - Alleged Violation of
§1926.404(f)(6)

The citation alleges that ground prongs were missing from a 120-volt triple tap adapter in the manager's office and from the 120-volt electric cord for the 500-gallon diesel tank. Section 1926.404(f)(6) provides:

The path to ground from circuits, equipment, and enclosures shall be permanent and continuous.

Shaw Areva does not dispute the ground prongs were missing at the time of the OSHA inspection. The adapter in the manager's office was plugged into a wall receptacle (Exh. C-2). There was no equipment plugged into the adapter, although it was available for use (Tr. 30). The adapter had been in the trailer since January 2009 when Shaw Areva acquired the office from another contractor.

The electric cord to operate the pump for the diesel tank was not plugged in at the time of the inspection (Tr. 70-71). According to Shaw Areva's assistant batch plant manager, the ground prong was not missing from the cord on Thursday, June 11, 2009, when he conducted his weekly inspection of the plant (Exh. R-1; Tr. 69). It was found missing by OSHA on Tuesday morning, June 16. Therefore, according to Shaw Areva, the ground prong was missing for no more than one workday because the plant did not operate from Friday through Sunday (Tr. 110).

Shaw Areva argues the adapter was not in violation because it was not in use. With regard to the electric cord for the diesel tank, Shaw Areva argues that it did not know of the missing ground prong based upon its regular inspections. Also, if the cord was used, Shaw Areva claims no hazard of electric shock because the cord was plugged into an extension cord which was in turn plugged into a GFCI (ground fault circuit interruptor) in the batch plant (Exh. R-6; Tr. 70-71).

Shaw Areva's arguments are rejected. The standard requires a continuous path to ground. With the ground prongs missing, the path to ground was not continuous. The adapter

and electric cord required the presence of the ground prongs. The requirements for GFCI and a continuous path to ground are intended to protect against injury resulting from an instance of inattention or bad judgment, as well as from risks arising from the operation of the equipment. *Pass & Seymour*, 7 BNA OSHC 1961, 1963 (No. 76-4520, 1979). As stated by Madden, the use of a GFCI does not eliminate the need for a ground prong. The GFCI and ground prong serve two different purposes (Tr. 24-25). The ground prong maintains a continuous path to ground. The GFCI functions “to energize a circuit or a portion of a circuit within an established period of time when a current to ground exceeds some predetermined value that is less than that required to operate the overcurrent protective device of the supply circuit.” 29 C.F.R. § 1910.399 (Definitions).

The adapter in the office was plugged into a receptacle. With a missing ground prong, the path to ground was not continuous, and a violation is established. Although no equipment was plugged into the adapter, it was available for use. The adapter with the missing ground prong may have existed for five months. There is no showing Shaw Areva ever inspected the adapter, and there was nothing preventing an employee from using the adapter, temporarily or through inadvertence. The plant manager and assistant manager regularly used the office. If a piece of equipment that was required to be grounded as described in § 1926.404(f)(7)(iv) was plugged into the adapter, the employee would have been exposed to electric shock because of the missing ground prong. The adapter was accessible to employees for use. An employee’s exposure to the electric hazard created by the missing ground prong was reasonably predictable, either by operational necessity or otherwise (including inadvertence). The employees were in the zone of danger. *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997).

The electric cord for the fuel tank pump was also missing a ground prong. The missing ground prong existed for one workday prior to the OSHA inspection. The cord was in plain view. The record shows that approximately 62 gallons (one-eighth of the tank capacity) of diesel fuel had been used. Although the assistant plant manager described inspecting the electric cord on the previous Thursday, the written inspection report he followed, does not specifically

identify the electrical system and components as part of its inspection requirement (Exh. R-1). Shaw Areva should have known of the missing ground prong.

A violation of § 1926.404(f)(6) is established. The violation is reclassified to other-than-serious because of the grounding of most office equipment, the presence of the GFCIs, and the short duration of the missing ground prong on the electric cord.

Shaw Areva's *de minimis* argument is rejected. A *de minimis* violation, according to the Commission, has no direct or immediate relationship to safety or health. *Holly Springs Brick & Tile Co.*, 16 BNA OSHC 1861, 1865 (No. 90-3312, 1994). In addition to a technical noncompliance with a standard, a *de minimis* violation is one which the departure from the standard bears such a negligible relationship to employee safety as to render inappropriate the assessment of a penalty or the entry of an abatement order. *Erie Coke Corp.*, 15 BNA OSHC 1561, 1571 (No. 91-3606, 1992). The lack of ground prongs was not a technical violation. Although the risk and duration of exposure to possible injury may have been low, it was not eliminated. The missing ground prongs subjected employees to possible electric shock.

Other-Than-Serious Citation Item 1 - Alleged Violation of §1926.152(g)(11)

The citation alleges that a fire extinguisher was not within 75 feet of the 500-gallon diesel tank. Section 1926.152(g)(11) provides:

Each service or fueling area shall be provided with at least one fire extinguisher having a rating of not less than 20-B.C. located so that an extinguisher will be within 75 feet of each pump, dispenser, underground fill pipe opening and lubrication or service area.

Compliance Officer Madden testified that during his inspection, he inquired about the location of the nearest fire extinguisher from the 500-gallon diesel tank at the batch plant. He testified that company officials did not know where a fire extinguisher was located. He said no one could find an extinguisher even after checking several nearby rooms (Tr. 35, 45).

Patrick McDonald⁵ disputed Madden's testimony. He testified that when asked about a fire extinguisher, Madden was shown an extinguisher on a stanchion on the other side of the ice

⁵McDonald is Shaw Avera's environmental, safety and health manager.

trailer (Exh. R-7). According to McDonald, Madden told the company that the fire extinguisher was more than 75 feet from the diesel tank and therefore not acceptable (Tr. 103-104).

McDonald's testimony was supported by assistant batch plant manager, Brian Bodiford, who also saw the fire extinguisher on a stanchion on the other side of the ice trailer (Tr. 60). After receiving the citation, McDonald measured the distance of the fire extinguisher from the tank to be 63 feet (Tr. 106-107).

Madden did not remember the conversation with McDonald. He could not refute that it occurred (Tr. 146-147). Madden agreed he did not measure the distance of the extinguisher from the diesel tank.

The record fails to establish a violation based upon the weight of the evidence and Madden's inability to recall his discussion with McDonald. McDonald's measurement of 63 feet from the diesel tank shows compliance with the standard.

Penalty Determination

The Commission is the final arbiter of penalties. In determining an appropriate penalty, the Act requires consideration of the employer's size, its history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Shaw Areva is a large employer with approximately 852 employees and is, therefore, not entitled to credit for size. Shaw Areva is given credit for history and good faith because it has not received any citations in the past three years, and it has a good safety program (Tr. 51-52). Madden described Shaw Areva as a safe employer because of the lack of safety violations for such a large construction project. He testified that the "site was spectacular as far as safety" (Tr. 14).

A penalty of \$200.00 is reasonable for Shaw Areva's other than serious violation of § 1926.404(f)(6). The hazard to electric shock because of the missing ground prongs was reduced by the GFCI and the short or intermittent period of exposure. Also, Shaw Areva conducts weekly inspections of the batch plant.

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:

Serious Citation No. 1:

Item 1, alleged serious violation of §1926.152(e)(4), is vacated, and no penalty is assessed.

Item 2, alleged serious violation of §1926.403(f)(6), is affirmed as other than serious, and a penalty of \$200.00 is assessed.

Other than Serious Citation No. 2:

Item 1, alleged other than serious violation of §1926.152(g)(11), is vacated, and no penalty is assessed.

_____/s/_____
KEN S. WELSCH
Judge

Date: December 17, 2009