



OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

AMANDA BENT BOLT CO.,

Respondent.

OSHRC DOCKET NO. 13-1527

Appearances: Paul Spanos, Attorney
U.S. Department of Labor, Office of the Solicitor, Cleveland, Ohio
For the Complainant.

Douglas J. Suter, Attorney
Hahn Loeser & Parks, LLP, Columbus, Ohio
For the Respondent.

Before: Carol A. Baumerich
Administrative Law Judge

DECISION AND ORDER

Amanda Bent Bolt Company (ABB, Amanda, or Respondent) is in the business of manufacturing automotive parts, at its facility in Logan, Ohio. In December 2011, the Occupational Safety and Health Administration (OSHA) conducted inspection number 110138 at ABB's facility. As a result of that inspection, on January 30, 2012, OSHA issued to ABB a three item serious citation, with subparts. Relevant here is serious citation item 3 that alleged a violation of 29 C.F.R. § 1910.305(g)(1)(iv)(A), regarding the use of flexible cords as a substitute for fixed wiring. (Ex. C-1). ABB filed a notice of contest. This case was docketed with the Occupational Safety and Health Review Commission (Commission) as case no. 12-0454. (Exs. C-2, 3, 4 and 5).

In October 2012, the parties resolved all of the citation items in case no. 12-0454, including citation item 3, and signed a stipulation and settlement agreement. (Ex. C-2). The

settlement agreement became a final order of the Commission on December 17, 2012 (October 2012 settlement agreement). (Exs. C-2, 3, 4 and 5; J-1).

On July 17, 2013 OSHA conducted a follow-up inspection number 922120 at ABB's facility. As a result of the follow-up inspection, on September 4, 2013, OSHA issued to ABB a Notification of Failure to Abate Alleged Violation (FTA). In particular, the FTA alleged that ABB continued to be in violation of 29 C.F.R. § 1910.305(g)(1)(iv)(A), in ABB's production area, as "flexible cords were used in lieu of approved fixed wiring to provide power to mechanical power presses and other machines." The Secretary proposed a penalty of \$27,000.00 for the alleged failure to abate violation. ABB timely contested the FTA.

This proceeding is before the Commission under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (Act). A hearing in this matter was held on July 9, 2014, in Columbus, Ohio. The parties stipulated to jurisdiction and coverage. (Tr. 6-7; Ex. J-1). Both parties filed post-hearing briefs.

For the reasons discussed below, the FTA violation is affirmed and a penalty of \$1,000.00 is assessed.

Factual Background

Amanda Bent Bolt's Logan, Ohio facility

Amanda Bent Bolt Company is in the business of manufacturing parts, at its facility in Logan, Ohio, for automakers including, Ford, Chrysler, General Motors, and Honda. Examples of the automotive parts ABB manufacturers include exhaust hangers, U-bolts, tow hooks, fender braces, and hood prop rods. (Tr. 87-88).

At all relevant times, ABB's Plant Manager was Michael Hood. ABB's Human Resources and Safety Director was Polly Puterbaugh. Seth Matheny, who also is an ABB Human Resources and Safety Director, participated in the July 2013 OSHA follow-up inspection.¹ At the time of the follow-up inspection, ABB employed approximately 190-200 employees. (Tr. 104).

To manufacture a typical automotive part ABB uses several power presses. For manufacturing efficiency, ABB groups the necessary power presses together in a cell. Presses may be moved in the plant depending on plant space, the length of the particular job, the number

¹ Hood and Puterbaugh testified at the hearing; Matheny did not.

of presses capable of manufacturing the part, and the purchase of new machinery. (Tr. 52, 87-91).

Most of the presses in ABB's facility are floor standing presses that are bolted to the floor. Floor standing presses may be moved. (Tr. 88-89. *See also* Tr. 73-74). At the hearing, presses anchored or bolted to the plant floor were also referred to as stationary equipment or, generally, as mechanical power presses, presses, or machinery.² (Tr. 30-31, 48-49, 52, 72-74, 78, 95, 101-02, 106, 108, 113; Ex. J-1). Plant Manager Hood estimated that one or two presses are moved each month. (Tr. 89). Some floor standing mechanical power presses are set up for long term jobs that will last as long as five years. (Tr. 90).

At ABB's facility there also are four "pitted" presses that are not moved. The "belly" of a "pitted" press extends down into a hole or pit dug into the plant floor. Once the pit is dug, the press remains in that location, unmoved. (Tr. 88-89, 101).

At the time of the follow-up inspection, ABB had 80 mechanical power presses. At the time of the hearing, ABB had 91 mechanical power presses.³ (Tr. 90).

Initial OSHA Inspection December 2011; Citation issued January 2012

OSHA inspected ABB's facility in December 2011. The OSHA Columbus Area Office inspector was Compliance Safety and Health Officer (CSHO) Johnson. (Tr. 22-23, 25; Ex. C-7). As a result of this inspection, on January 30, 2012, OSHA issued to ABB a three item serious citation, with subparts. (Exs. C-1; J-1; R-C). Serious citation item 3, citing a violation of 29 C.F.R. § 1910.305(g)(1)(iv)(A), alleged that in ABB's production area, flexible cords were in use in lieu of approved fixed wiring to provide power to mechanical power presses and other machines. ABB filed a notice of contest. OSHA inspection number 110138 was filed and docketed with the Commission as case no. 12-0454. (Exs. C-2, 3, 4 and 5).

October 2012 Settlement Agreement and December 2012 Commission Final Order

² During the hearing, all witnesses generally referred to ABB's presses as mechanical power presses, presses, stationary equipment, or machinery. Witness testimony generally did not specifically differentiate between floor standing presses and pitted presses, press types more specifically described by Plant Manager Hood. However, the record is clear that only floor standing mechanical power presses are moved. (Tr. 88-89. *See also* Tr. 73-74)

³ Since December 2013 ABB purchased presses. (Tr. 90-91).

Regarding serious citation item 3, in case no. 12-0454, ABB's position was that some of the big presses were never moved. ABB agreed to hardwire those presses. ABB asserted that a large number of presses were frequently moved and grouped together in a cell to run a particular part. ABB asserted that it was not feasible to hardwire presses that were constantly moved and reconfigured in the facility. Further, ABB asserted that 29 C.F.R. § 1910.305(g) specifically allowed the use of flexible cords and cables on stationary equipment to facilitate their movement and interchange.⁴ (Ex. J-1).

In October 2012, a settlement meeting was held with Plant Manager Hood, Safety Director Puterbaugh, Respondent Counsel Suter, OSHA CSHO Johnson, and OSHA Counsel Spanos. At the meeting, the parties discussed and resolved all of the citation items in case no. 12-0454, including citation item 3. Their agreement was incorporated into a stipulation and settlement agreement that was executed by the parties. The settlement agreement became a final order of the Commission on December 17, 2012 (October 2012 settlement agreement). (Exs. C-2, 3, 4 and 5; J-1; *See* Tr. 91-92, 108-10).

The settlement agreement, regarding serious citation item 3, set forth the parties' agreement to reclassify the alleged violation to other-than-serious and amend the penalty to \$0.00. (Exs. C-2; J-1). In the settlement agreement, ABB withdrew "its notice of contest with respect to the citations and proposed penalty as modified by the terms of this Agreement." (Ex. C-2, para. 11). Regarding abatement, paragraph 10 of the settlement agreement, stated:

Respondent will comply with all applicable abatement verification provisions of 29 C.F.R. § 1903.19, including, but not limited to, all certification, documentation, and posting requirements and shall complete abatement within 180 days of the final order of the Commission. With respect to abating the alleged violation of Citation 1, Item 3 (29 CFR 1910.305(g)(1)(iv)(A)) any permanent machines or presses that will not be frequently moved will be hardwired by certified electricians within six months. To address flexible cords wrapped around the rafters / joists in the ceiling area of Amanda Bent Bolt's Logan, Ohio facility, all horizontally run electrical wiring that powers 450 volt power sources shall be encased in Armorlite or equivalent shielded metal conduit rated at 600 volts within six months.

(Ex. C-2, para. 10).

⁴ 29 C.F.R. § 1910.305(g)(1)(ii)(G) states that "Flexible cords and cables may be used . . . [for] [c]onnection of stationary equipment to facilitate their frequent interchange."

The abatement completion date set forth in the settlement agreement was unambiguous. The abatement date was stated as 180 days after the Commission final order: stated otherwise, the abatement completion date was on or about June 17, 2013. (Ex. J-1, p. 2).

ABB's Facility - Subsequent to the October 2012 Settlement Agreement

Following execution of the October 2012 settlement agreement, ABB in house maintenance employees began to work on the wiring for the large presses that were not moved. (Tr. 93-94, 110-11). Thereafter, in April 2013, ABB contracted with Longstreth Electric to complete the necessary abatement electrical work. (Tr. 98-100; Exs. R-A, R-B).

While working on the electric wiring abatement, ABB was awarded a contract to manufacture 13 new automotive parts for Ford Motor Company. This new work required ABB to buy and move many presses and to set up new press cells and processes at its facility. This movement and reconfiguration of the presses impacted ABB's electrical abatement work. (Tr. 94-96, 111-12).

February or March 2013 Discussion Regarding Abatement Completion Extension.

Soon after OSHA issued the citation to ABB in inspection number 110138, on January 30, 2012, OSHA issued unrelated citations to ABB. (Ex. J-1. See Tr. 112). Regarding the unrelated OSHA citations,⁵ representatives of ABB and OSHA participated in a face to face

⁵ Two exhibits are attached to Respondent's Answer to the First Amended Complaint in the instant case. Exhibit A is an email chain dated April 9, 2013 and September 5, 2013, between Respondent Counsel Suter and OSHA Counsel Spanos. Other recipients are named on the September 5, 2013 email. The email discusses draft settlement agreements regarding unrelated OSHA inspections, drafted in April 2013, months after the initial OSHA inspection no. 110138, in the instant case, was settled in October 2012. Exhibit B is a letter dated May 31, 2013, from Counsel Suter to Counsel Spanos, regarding other cases involving OSHA and ABB, Commission docket nos. 12-1729 and 12-1824. As exhibits to Respondent's Answer, exhibits A and B are a part of the Answer for all purposes. See Commission Rule 30(d); 29 C.F.R. § 2200.30(d).

While a part of the Answer setting forth Respondent's asserted defenses, these exhibits were not offered or received into evidence at the hearing. The parties did not stipulate to the receipt of these documents into the record. At the hearing there was no voir dire, direct, or cross examination, identifying, authenticating, or explaining these documents. Therefore, these pleading exhibits are accorded little weight.

However, if Respondent's Answer exhibits are considered on review, I note that both exhibits concern later OSHA inspections that post-date the initial inspection no. 110138 that is the basis for the FTA at issue in the instant case. Both 2013 documents post-date execution of the October 2012 settlement agreement, in OSHA inspection no. 110138, that became a Commission final order in case no.

meeting. This meeting took place sometime in February or March 2013, after the October 2012 settlement agreement, in inspection number 110138, became a Commission final order. (Tr. 96). Present at this meeting were ABB's Plant Manager Hood, Safety Director Puterbaugh, Respondent Counsel Suter, OSHA CSHO Smith, and OSHA Counsel Spanos. At this meeting, ABB mentioned to OSHA's CSHO and Counsel that ABB was reconfiguring its facility and the reconfiguration would affect "a lot of the different machinery." (Tr. 96-97, 113-14; Ex. J-1).

The parties stipulated⁶ that:

Solicitor Spanos was asked if Amanda could, on that basis, obtain an abatement extension in order to address abatement of the electrical safety violation arising from OSHA Inspection No. 110138. Solicitor Spanos *suggested* that Amanda could have until December 31, 2013 to abate the electrical safety citations and to hardwire the presses after the presses had been reconfigured at the facility. This was memorialized in both emails and a letter.

(Ex. J-1, p. 2)(emphasis added). No letter or emails were offered or received into evidence at the hearing. *See note 5 supra*. The OSHA Area Director did not participate in discussions regarding an abatement extension. (Tr. 102).

Plant Manager Hood and Safety Director Puterbaugh testified that as a result of the discussion at this meeting it was their understanding⁷ that OSHA granted ABB a six month extension of time, until December 31, 2013, to complete abatement of the electrical wiring, in light of the facility reconfiguration. (Tr. 96-97, 102, 113-14).

12-0454, on December 17, 2012. These documents reflect discussions between the parties. They do not reflect a final agreement or a "meeting of the minds" between the parties regarding an extension of the abatement completion date, regarding citation item 3, as set forth in the October 2012 settlement agreement.

Further, documents outside the record referenced in Respondent's Brief are not in evidence and are accorded no weight. (Resp't Br. pp. 12-13, n. 1)

⁶ Respondent's Brief misstates the parties' agreed stipulation. *Compare* Ex. J-1, p. 2 *with* Resp't Br. pp. 12-13.

⁷ Safety Director Puterbaugh testified:

Q. Tell Judge Baumerich as specifically as you can recollect what was ultimately agreed to *in your mind* during the February-March, 2013 meeting.

A. It was agreed that OSHA would give us another six months till December 31st of 2013 to get the machines moved and get all the wiring finished because of the reconfiguration of the plant that we had to do. (Tr. 114)(emphasis added).

It is undisputed that ABB's abatement extension request was discussed informally with OSHA. The record does not disclose that the parties' discussions regarding an abatement extension of time were finalized, reflecting a meeting of the minds regarding an extension of the abatement completion date. ABB did not file a written petition for modification of the abatement period. (Tr. 103, 115). See Section 10(c) of the Act; 29 U.S.C. § 659(c), 29 C.F.R. § 1903.14a (a)(b); Commission Rule 37; 29 C.F.R. § 2200.37.

Follow-up OSHA Inspection July 2013; FTA Notification issued September 2013

One month after the agreed abatement completion date of June 17, 2013, as set forth in the October 2012 settlement agreement, OSHA conducted a follow-up inspection of ABB's facility. On July 17, 2013, CSHO Marcinko conducted the follow-up inspection.

When CSHO Marcinko arrived at ABB's facility for the follow-up inspection, ABB managers stated that ABB had been given an extension of time until December 31, 2013 to abate the electrical wiring. CSHO Marcinko asked Safety Director Puterbaugh if she had anything in writing regarding the claimed abatement completion extension of time.⁸ Puterbaugh answered no, not at that time, but she would try to get "a copy of an email or something." Therefore, CSHO Marcinko proceeded with the follow-up inspection. (Tr. 62-63, 115-16).

Safety Director Puterbaugh told CSHO Marcinko that ABB planned to remodel the facility beginning in December 2013.⁹ (Tr. 53-54). ABB's Safety Director Matheny told Marcinko that the company was growing, production was increasing, and the company wanted to be able to move equipment when needed. (Tr. 52). Matheny told Marcinko that equipment to make a specific part was kept in the same area of the facility. (Tr. 51-52).

During the follow up inspection, CSHO Marcinko observed that ABB was continuing to use flexible cords to power equipment and mechanical power presses, rather than using fixed wiring.¹⁰ Flexible cords were still observed in the rafters, running from a bus bar, through and

⁸ Marcinko had not been party to the discussions between OSHA and ABB regarding the abatement extension request. (Tr. 63).

⁹ ABB broke ground on the building expansion in July 2014. (Tr. 95-96).

¹⁰ CSHO Marcinko photographed mechanical power press 892, as ABB was still using flexible wiring to power this press instead of permanent wiring. Press 892 is the same mechanical power press that had been photographed and identified during the 2011 inspection due to the use of flexible wiring to power the press. (Tr. 36-39, 48-50; Exs. C-6, pp. 2-3; C-7, pp. 2-3). CSHO Marcinko did not know if press 892 was a frequently moved press. (Tr. 67-68).

along the ceiling, and down to the mechanical power presses. (Tr. 23, 27, 31, 33, 34, 35, 36, 39-40, 44; Ex. C-6, pp. 2-4, 9-12, 17, 33, 38, 49, 53-56). CSHO Marcinko testified that during the follow-up inspection the condition at ABB's facility was the same as the condition or hazard that had been cited, in citation item 3, during the initial 2011 inspection as "there were still flexible cords that ran through the rafters from the bus bars down to the mechanical power presses that the employees were operating." (Tr. 48-50, 70; Exs. C-6, p. 4; C-7, p. 1). The employees in the work area continued to be exposed to the hazards present when flexible cords are used instead of fixed wiring, including electrical shock, burns, and fire. Flexible power cords are vulnerable to physical damage.¹¹ Any employee in the work area who came into contact, including accidental contact, with a damaged flexible cord was exposed to the hazards. (Tr. 51, 55. *See* Tr. 37).

At the time of the follow-up inspection, ABB had 80 mechanical power presses. It is undisputed that at the time of the follow-up inspection only three presses were hardwired and the other 77 presses were powered by flexible cords. (Tr. 52-53, 63). The record does not disclose whether the three hardwired presses were pitted presses or floor standing mechanical power presses. If the three hardwired presses were pitted presses, then at least one of the four pitted presses was not hardwired at the time of the follow-up inspection. As discussed above, once installed the pitted presses are not moved. (Tr. 90, 101). Plant Manager Hood conceded that at the time of the follow-up inspection some of the pitted presses may not have been hardwired. (Tr. 88-80, 101).

¹¹ The record documents physical damage to flexible power cords observed at ABB's facility, during the follow-up inspection. CSHO Marcinko observed damaged flexible cords wrapped with electrical tape (Tr. 27-30, 41-43; Ex. C-6, pp. 11-12, 38), a flexible cord with a damaged jacket in use (Tr. 39; Ex. C-6, p. 61), zip ties used to secure temporary electrical cord being used as permanent wiring (Tr. 39-40; Ex. C-6, p. 61), a flexible cord plugged into an electrical extension cord (Tr. 39-40; Ex. C-6, p. 9), a spliced flexible cord (Tr. 41-43; Ex. C-6, pp. 9-12), and electrical cords coming from the electrical panel box without protective raceways (Tr. 36-39, 48-50; Exs. C-6, pp. 2-3; C-7, pp. 2-3).

The specific conditions of damaged and spliced flexible cords, and the use of zip ties, electric extension cords, and electrical cords without protective raceways, were not specifically described or cited as violative conditions in original citation item 3. *See generally*, Ex. C-1; Tr. 60-61, 71, 74, 76. For example, Respondent was not cited for a violation of standards 29 C.F.R. §§ 1910.305(g)(2)(ii), 1910.305(g)(2)(iii), among others.

An OSHA Standard Interpretation Letter, dated March 31, 2004, regarding standard 29 C.F.R. § 1910.305(g), states "[t]he basic problem with flexible cords is that they generally are more vulnerable than fixed wiring." This letter is found on the official OSHA website at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=2484 3.

Safety Director Matheny told CSHO Marcinko, during the follow-up inspection, that some presses had not been moved for over six months. (Tr. 52-53, 64-65). Plant manager Hood acknowledged that at the time of the follow-up inspection, some of the twelve floor standing presses, that were set up for long term jobs and remained unmoved for the next twelve months, were powered by flexible cords and not hardwired. (Tr. 90, 101-02). The record reveals that long term jobs were anticipated to last as long as five years. If the three hardwired presses were floor standing mechanical power presses set up for long term jobs, then as many as nine – and possibly fewer - of these floor standing presses were not hardwired at the time of the follow-up inspection.

CSHO Marcinko did not know if the presses he observed and inspected had been moved between the time of the initial inspection and the follow-up inspection or if they were frequently moved presses. (Tr. 61, 67-68, 73, 75, 77, 79-80). He did not know if the power cords he photographed powered frequently moved presses. (Tr. 69, 71-74; Ex. C-6, p. 4, 38). That said, as discussed above, the undisputed record evidence reveals that, at the time of the follow-up inspection, presses that were not frequently¹² moved (pitted presses and floor standing presses configured for long term jobs) were powered by flexible cords and not hardwired.

As a result of the follow-up inspection, on September 4, 2013, OSHA issued to ABB a Notification of Failure to Abate Alleged Violation (FTA). CSHO Marcinko reviewed the October 2012 settlement agreement before the FTA issued.¹³ (Tr. 70). In particular, the FTA notification alleged that ABB continued to be in violation of 29 C.F.R. § 1910.305(g)(1)(iv)(A), in ABB's production area, as "flexible cords were used in lieu of approved fixed wiring to provide power to mechanical power presses and other machines."

¹² "Frequently" is not defined by the parties in the October 2012 settlement agreement. (Ex. C-2). "Frequently" is not defined in the cited standard. *See* 29 C.F.R. §§ 1910.305(g)(1)(iv)(A); 1910.305(g)(i)(ii)(G); 1910.399 (definitions). *See generally*, OSHA Standard Interpretation Letter, dated March 31, 2004, discussed above at note 11 (research equipment wiring remaining in place for years is permanent wiring) (emphasis added).

The record also does not include a definition of "frequently." However, the record does establish that at ABB's facility, at the time of the follow-up inspection, pitted presses once installed were not moved and several standing presses were configured for long term jobs, lasting for as long as five years, and, therefore, not frequently moved.

¹³ CSHO Marcinko did not recall if he saw the October 2012 settlement agreement before he conducted the follow-up inspection. (Tr. 64, 70).

Abatement of citation item 3 – regarding 29 C.F.R. § 1910.305(g)(1)(iv)(A).

It is undisputed that ABB did not abate citation item 3, in case no. 12-0454, on or before June 17, 2013, in compliance with the terms of the settlement agreement that set the abatement date as 180 days after the Commission final order. (Tr. 117; Ex. J-1, p. 2). It is undisputed that ABB did abate citation item 3 by December 31, 2013. (Tr. 100, 116. *See also* Tr. 93, 102). ABB provided to OSHA Counsel copies of all invoices and receipts for electrical work performed at ABB’s facility. (Ex. J-1, p. 2). Business records, invoices and vouchers, reflect electrical work, including buss runs and machine hook-ups, performed at ABB’s facility by Longstreth Electric, in April 2013. (Ex. R-A). Business records, invoices and vouchers, reflect electrical work, including relocating busses, adding busses, and redoing horizontal machine feeds, performed weekly at ABB’s facility by Longstreth Electric, between August 1, 2013 and December 1, 2013.¹⁴ (Ex. R-B). Respondent expended significant funds to complete abatement of the electrical hazards cited.¹⁵ (Tr. 98-100, 113-14; Exs. R-A, R-B).

Positions of the Parties

The Secretary alleges ABB violated the cited standard 29 C.F.R. § 1910.305(g)(1)(iv)(A), during the initial inspection in 2011 and during the follow up inspection in 2013, as ABB continued to use flexible cords in lieu of approved fixed wiring to provide power to mechanical power presses and other machines, in the production area. The Secretary contends that the same condition or hazard found on re-inspection was identical to the condition or hazard found during the 2011 inspection.

The Secretary provided adequate notice to ABB of the nature of the violation and hazards found during the 2011 inspection, as well as the needed corrective action, in the description of the hazards set forth in the 2011 citation item 3 and in the corrective action agreed to by the parties set forth in the October 2012 settlement agreement that became the Commission final order in December 2012. It is undisputed that ABB did not complete abatement of citation item 3, as agreed in the October 2012 settlement agreement, by June 17, 2013. (Sec’y. Brief p. 5-6).

¹⁴ A handwritten invoice entry reads: “Note – All work on Redoing 450V and above is – to the best of our knowledge & belief done as of 12/1/13. All work has been videotaped and is complete as per requested.” (Ex. R-B, p. 24). A further December 1, 2013 notation reads: “Work order is complete.” (Ex. R-B, p. 24).

¹⁵ The Longstreth Electric business records in evidence include expenses incurred for electrical work beyond the work needed to abate citation item 3. (Exs. R-A, R-B).

In its Answer, ABB denies that it failed to abate the hazards identified in serious citation item 3 of inspection number 110138, that the proposed additional penalty is appropriate, and that the proposed abatement dates are reasonable. ABB contends that Complainant, by OSHA Counsel and the OSHA Columbus Area Office, expressly agreed to modify the abatement periods arising from inspection number 110138 to allow ABB until December 31, 2013 to abate the alleged hazards. (Resp't Br. p. 1). ABB further contends that 29 C.F.R. § 1910.305(g) specifically allows the use of flexible cords and cables on stationary equipment to facilitate their movement and interchange. (Resp't Br. p. 2). ABB contends that when OSHA and an employer enter into a settlement agreement that becomes a Commission final order, the settlement agreement terms regarding abatement control over any contrary provisions in the cited OSHA standard. (Resp't Br. p. 2). ABB contends that, even if there is evidence in this case of a failure to abate, in light of ABB's substantial efforts to abate the violation, no monetary penalty is warranted. (Resp't Br. p. 2-3).

The Secretary's Burden of Proof

The Secretary has the burden of establishing that ABB failed to abate the conditions cited in the original citation. To do so, the Secretary must prove that (1) the original citation and finding of a violation became a final order of the Commission and (2) at the time of the re-inspection the same violative conditions or hazards set forth in the original citation were found and remained violative. *See* Section 10(b) of the Act, 29 U.S.C. § 659(b); *Hercules, Inc.* 20 BNA OSHC 2097, 2098, 2103 n.19 (No. 95-1483, 2005); *Kit Mfg. Co.*, 2 BNA OSHC 1672, 1673 (No. 603, 1975); *York Metal Finishing Co.*, 1 BNA OSHC 1655, 1656 (No. 245, 1974). *See also* *Launder-Clean, Inc.*, 11 BNA OSHC 1674, 1677 (No. 83-0057, 1983) (ALJ) (evidence of employee exposure to the hazard at the time of re-inspection required). The original citation must describe with "particularity" the nature of the violation, to provide the employer with notice of what must be changed and to allow the Commission, in a later failure to abate proceeding, the ability to ascertain whether the cited condition was abated. *See Hercules, Inc.* 20 BNA OSHC at 2098.

An employer may rebut the Secretary's prima facie failure to abate case by showing actual abatement of the violative condition, by correction of the physical condition or prevention of employee exposure to the hazard or violative condition. Where the original citation became a Commission final order by operation of law without prior adjudication, the employer also may

rebut the Secretary's prima facie failure to abate case by showing that the alleged violative condition contained in the original citation was, in fact, not violative of the Act.¹⁶ *York Metal Finishing*, 1 BNA OSHC at 1656. See also *Franklin Lumber Co., Inc.*, 2 BNA OSHC 1077, 1078 (No. 900, 1974). It is the cited employer's burden to establish these defenses. *York Metal Finishing*, 1 BNA OSHC at 1656.

Discussion

In citation item 3 the Secretary alleges that during the 2011 initial inspection and during the 2013 follow-up inspection, ABB violated the cited standard, in the production area, as "flexible cords were used in lieu of approved fixed wiring to provide power to mechanical power presses and other machines."

The cited standard, 29 C.F.R. § 1910.305(g)(1)(iv)(A) provides:

Unless specifically permitted otherwise in paragraph (g)(1)(ii) of this section,¹⁷ flexible cords and cables may not be used... [a]s a substitute for the fixed wiring of a structure.

The record evidence establishes the failure to abate violation alleged. The original citation item 3, issued in January 2012, alleged ABB's violation of 29 C.F.R. § 1910.305(g)(1)(iv)(A). Citation item 3 was settled by the parties, in October 2012, and the executed stipulation and settlement agreement became a final order of the Commission, in case no. 12-0454, on December 17, 2012. In the settlement agreement, ABB withdrew its notice of contest to the original citation item 3, conceded the merits of the original citation, and agreed to abate the violation alleged. The settlement agreement set the abatement completion date at 180 days after the Commission final order. It is undisputed that ABB did not abate citation item 3 on or before June 17, 2013.

A follow-up inspection was conducted on July 17, 2013. At the time of the follow-up inspection the same violative conditions or hazards cited in the original citation were found and remained violative. The record reveals that at the time of the follow-up inspection, in ABB's production area, flexible cords were used in lieu of fixed wiring to provide power to mechanical

¹⁶ In a case where the original citation was settled by the parties and the employer withdrew the notice of contest, conceded the merits of the original citation, and agreed to abate the violation alleged, in a subsequent failure to abate case, the Commission stated that the employer was "not in any position to relitigate the validity of the violation as originally alleged." *Hercules*, 20 BNA OSHC at 2104.

¹⁷ 29 C.F.R. § 1910.305(g)(1)(ii)(G) states that "Flexible cords and cables may be used . . . [for] [c]onnection of stationary equipment to facilitate their frequent interchange."

power presses that were not frequently moved. This is the same violation cited in the original 2011 citation that Respondent agreed to abate in the October 2012 settlement agreement. At the time of the follow-up inspection, employees in the work area continued to be exposed to the hazards present when flexible cords are used instead of fixed wiring, including electrical shock, burns, and fire.

ABB contends that 29 C.F.R. § 1910.305(g) specifically allows the use of flexible cords and cables on stationary equipment to facilitate their movement and interchange. (Resp't Br. p. 2). ABB contends that OSHA's settlement agreement to reclassify citation item 3 to other-than-serious, with zero penalty, was in recognition of ABB's legal position that ABB had no duty pursuant to standard § 1910.305(g) to hardwire power presses and machinery regularly moved to facilitate parts manufacture. (Resp't Br. pp. 18-19. *See* Tr. 9-10).

The October 2012 stipulation and settlement agreement, executed by the parties, states [w]ith respect to abating the alleged violation of Citation 1, Item 3 (29 CFR 1910.305(g)(1)(iv)(A)) any permanent machines or presses that will not be frequently moved will be hardwired by certified electricians within six months.

(Ex. C-2, para. 10)

The settlement terms agreed to by the parties reflect ABB's admission that at its facility there were permanent machines or presses that were not frequently moved (such as the pitted presses and floor standing presses configured for long term jobs) which would be hardwired by certified electricians within six months. The undisputed record evidence confirms this admission. (Tr. 88-90, 101).

Further, the settlement agreement abatement description reveals the parties agreement that the cited standard must be read in conjunction with standard 29 C.F.R. § 1910.305(g)(1)(ii)(G) regarding the frequent interchange of stationary equipment and the permissible use of flexible cords and cables. Stated otherwise, the October 2012 settlement agreement reflects ABB's agreement regarding the validity of the original citation as it concerned the requirement that ABB use fixed wiring on its mechanical power presses and other machines that are not frequently moved.

The follow-up inspection revealed that ABB had not hardwired its mechanical power presses that were not frequently moved as required by the cited standard. As stated above, at the time of the follow-up inspection, ABB had 80 mechanical power presses. It is undisputed that

only three presses were hardwired. ABB's other 77 presses remained powered by flexible cords. The record does not disclose whether the three hardwired presses were pitted presses or floor standing presses. If the three hardwired presses were pitted presses, then at least one of the four pitted presses was not hardwired at the time of the follow-up inspection. If the three hardwired presses were floor standing presses configured for long term jobs, then as many as nine – and possibly fewer - of those floor standing presses were not hardwired at the time of the follow-up inspection. Plant manager Hood acknowledged that at the time of the follow-up inspection, some of the twelve floor standing presses, that were set up for long term jobs and remained unmoved for the next twelve months, were powered by flexible cords and not hardwired. The record does not disclose the *exact number* of presses that were not frequently moved and remained powered by flexible cables at the time of the follow-up inspection. *See* discussion at pages 8-9 above.

The evidence reveals that ABB was in violation of standard 29 C.F.R. § 1910.305(g)(1)(iv)(A) at the time of the original inspection and at the time of the follow-up inspection as Respondent used and continued to use flexible cords and cables to power mechanical power presses that were not frequently moved. Therefore, the failure to abate violation is established.

ABB contends that when OSHA and an employer agree to abatement terms in a settlement agreement, when evaluating whether an employer failed to abate the cited violation at the time of the follow-up inspection, the parties' agreed abatement terms control, not the requirements of the cited OSHA standard. (Resp't Br. p. 16-17). Therefore, in the instant case ABB contends that OSHA may only cite ABB for a failure to abate violation if OSHA finds that ABB failed to comply with paragraph 10 of the October 2012 settlement agreement and with Respondent's understanding regarding the subsequent agreement of the parties to extend the abatement completion date to December 31, 2013. (Resp't Br. p. 17). Respondent's contention is unpersuasive.

The cited standard 29 C.F.R. § 1910.305(g)(1)(iv)(A) states that flexible cords and cables may not be used "as a substitute for the fixed wiring of a structure." Abatement of the cited standard is achieved by the agreed settlement term that "any permanent machines or presses that will not be frequently moved will be hardwired by certified electricians within six months." (Ex. C-2, para. 10). Neither the cited standard nor the agreed settlement abatement term is limited by voltage amount. As stated by the Secretary, the voltage amount is not determinative of whether

the cited standard is violated. (Sec’y. Br. pp. 6-7; *See* Tr. 61, 66-67, 76-77, 81-82).

The October 2012 settlement agreement includes other terms, agreed to by the parties, beyond the specific scope of the cited standard. For example, the settlement agreement includes the following abatement provision:

To address flexible cords wrapped around the rafters / joists in the ceiling area of Amanda Bent Bolt’s Logan, Ohio facility, all horizontally run electrical wiring that powers 450 volt power sources shall be encased in Armorlite or equivalent shielded metal conduit rated at 600 volts within six months.

(Ex. C-2, para. 10). The record reveals that Armorlite is a brand of flexible conduit used to protect electrical cords from damage when crossing metal rafters and to reduce strain. (Tr. 46; Ex. C-7, p. 1. *See also* Tr. 109). In this case, Respondent was not cited for a violation of a standard regarding damage to flexible cords and cables or strain relief. *See* note 11 *supra*.

To prove a failure to abate violation the Secretary must establish that at the time of the follow-up inspection the requirements of a previously cited standard remained unabated. In cases where the requirements of a settlement agreement “go beyond or differ from” the requirements of the cited standard those additional settlement terms are not relevant to the failure to abate analysis. Regarding those additional settlement requirements, the Secretary may seek enforcement of a Commission final order, approving a settlement agreement, in the United States Circuit Courts of Appeal pursuant to section 11(b) of the Act, 29 U.S.C. § 660(b). *See Atl. Battery Co., Inc.*, 16 BNA OSHC 2131, 2135-36, 2146 n.22, 2165 n.54 (No. 90-1747, 1994).

It is undisputed that ABB did not comply with the relevant settlement agreement term by hardwiring the presses not frequently moved by the agreed abatement completion date, June 17, 2013. This undisputed noncompliance distinguishes the instant case from the cases relied upon by ABB. *See Copomon Enters., LLC*, 24 BNA OSHC 2177, 2187 (No. 13-0709, 2014)(ALJ) *aff’d* 601 F.Appx 823 (11th Cir. 2015)(unpublished)(holding at the time of the second inspection the employer was in strict compliance with the Commission final order and the settlement agreement terms agreed to by the parties regarding the hazard warning label language); *Spaulding Lighting, Inc.*, 13 BNA OSHC 1412, 1415 (No. 86-1193, 1987)(ALJ)(finding employer consistently complied with the settlement agreement terms; failure to abate not established).

The record reveals that while there was a discussion between the parties regarding an abatement completion extension of time, no final agreement or meeting of the minds was

reached between the parties regarding an abatement completion extension. Respondent's confusion or misunderstanding regarding whether an abatement completion extension of time had been agreed to by the parties is, in large part, the result of Respondent's failure to file a written petition for modification of the abatement period. Respondent's decision to informally request an extension of the abatement completion date, regarding inspection number 110138, during a meeting with OSHA regarding unrelated citations appears to have contributed to the confusion. A written petition for modification of the abatement period would have outlined the steps taken by the employer to achieve compliance during the abatement period, the specific additional time necessary to achieve abatement, the reasons the additional time is necessary, and the available interim steps taken to safeguard employees against the cited hazard during the abatement period. The absence of a written petition left these questions unanswered. *See* Section 10(c) of the Act; Secretary's Regulations 29 C.F.R. § 1903.14a (a)(b); Commission Rule 37; 29 C.F.R. § 2200.37.

To support its contention that an abatement completion extension of time had been granted, ABB relies on cases that are factually distinct. In the cases cited by ABB, the parties negotiated settlement terms that were set forth in written settlement agreements, that were executed by representatives of both parties, who held full settlement authority. (Resp't Br., pp. 13-15). *See Nat'l Elec. Coil Co.*, No. 13-1199, 2014 WL 3778586 (O.S.H.R.C.A.L.J. Apr. 14, 2014) *remand*, 2014 WL 3778585 (O.S.H.R.C. July 28, 2014)(noting discretionary review granted; joint motion to remand for consideration settlement agreement approved). *See also Copomon*, 24 BNA OSHC at 2187. In the instant case, discussions in 2013, between the parties regarding the possible extension of the abatement completion date, were never finalized and included in an amended settlement agreement or in an order granting a petition for modification of the abatement period.

The abatement completion date set forth in the October 2012 settlement agreement was not ambiguous. Parole evidence, outside the written terms of the agreement, is not needed to understand the 2012 agreement of the parties regarding the abatement completion date. The Secretary correctly states that when a settlement agreement is extensively negotiated with the assistance of counsel, entered into freely, and complete in its terms, parole evidence is not admissible. (Sec'y Br. p. 8). *See Phillips 66*, 16 BNA OSHC 1332, 1340 (No. 90-1549, 1993). *See also S. Rosenthal & Co. v. Hantscho*, 961 F.2d 1579 (6th Cir. 1992)(unpublished).

Therefore, as original citation item 3 was settled by agreement of the parties and became a final order of the Commission and, at the time of the follow-up inspection, the same violative conditions set forth in the original citation were found and remained violative, a failure to abate violation has been established.

Penalty

The Secretary contends that the proposed penalty of \$27,000 is well below the statutory maximum set forth in section 17(d) of the Act¹⁸ and is reasonable in light of ABB's failure to abate for 30 days. (Sec'y Br. p. 9). ABB contends that if the evidence reveals a failure to abate, it is appropriate to issue no monetary penalty for the FTA, in light of ABB's substantial efforts in terms of manpower and financial expenditure to abate the electrical wiring violation in citation item 3, in the manner agreed to by OSHA. *See Braswell Motor Freight Lines, Inc.*, 5 BNA OSHC 1469, 1470 (No. 9480, 1977). (Resp't Br. pp. 19-20). I disagree.

It is undisputed that ABB did not abate citation item 3, on or before June 17, 2013, the agreed abatement completion date set forth in the October 2012 settlement agreement. Respondent's confusion or misunderstanding regarding whether an abatement completion extension of time had been agreed to by the parties is, in large part, the result of Respondent's failure to file a written petition for modification of the abatement period. Assessing a monetary penalty in this case will serve to highlight the importance of filing a written petition for modification of the abatement period to ensure clarity between the parties regarding the steps taken by the employer to achieve compliance during the abatement period, the specific additional time necessary to achieve abatement, the reasons the additional time is necessary, and the available interim steps taken to safeguard employees against the cited hazard during the abatement period. Therefore, a monetary penalty is appropriate in this case.

The record reveals that on the agreed abatement completion date, June 17, 2013, presses at ABB's facility that were not frequently moved remained powered by flexible cords and were not hardwired. There were 80 presses at ABB's facility at the time of the follow-up inspection.

¹⁸ Section 17(d) of the Act, 29 C.F.R. § 666(d), states that:

Any employer who fails to correct a violation for which a citation has been issued under section 9(a) within the period permitted for its correction (which period shall not begin to run until the date of the final order of the Commission in the case of any review proceeding under section 10 initiated by the employer in good faith and not solely for delay or avoidance of penalties), may be assessed a civil penalty of not more than \$7,000 for each day during which such failure or violation continues.

It is undisputed that only three presses were hardwired. The record does not reveal the *exact number* of presses not frequently moved that remained powered by flexible cords at the time of the follow-up inspection: at most sixteen presses (four pitted presses and twelve floor standing presses) or possibly as few as two or three presses total (possibly one of the four pitted press and “some,” one or two, floor standing presses). (Tr. 89-90, 101-02). See discussion at pages 8-9, 13-14 *supra*.

As the number of presses that were not frequently moved and remained unabated at the time of the follow-up inspection is a small fraction of the total number of presses at ABB’s facility, a reduction in the penalty amount is appropriate.¹⁹ Further, a reduction in the penalty amount is appropriate as the record evidence reveals Respondent’s misunderstanding regarding the status of ABB’s negotiation with OSHA for an abatement completion extension of time. Importantly, the record reveals that Respondent worked in good faith to complete the agreed abatement set forth in the October 2012 settlement agreement by the requested abatement completion extension of time deadline. It is undisputed that ABB completed the agreed electrical wiring abatement by December 31, 2013. Considering all of the circumstances in this case, including Respondent’s good faith efforts at compliance and the *record evidence* of the limited number of noncompliant presses at the time of the follow-up inspection, I find that a significant reduction in the monetary penalty is appropriate.

Accordingly, in this case I find the penalty of \$1,000.00 for the FTA violation appropriate.

¹⁹ When issued the original proposed penalty for serious citation item 3 was \$4,500.00. (Ex. C-1). The OSHA violation worksheet for this item assessed the severity as high, the probability as lesser, and the gravity as moderate. The gravity based penalty was \$5,000.000, with a 10 percent size reduction. (Ex. R-C).

The October 2012 settlement agreement provided that citation item 3 would be reclassified as other-than-serious, the monetary penalty would be zero, and ABB would complete the electrical wiring abatement described.

Regarding the FTA, CSHO Marcinko assessed the severity as high, due to the hazard of electrocution or death, and the probability of a serious hazard as high, due to the amount of flexible cord not protected, damaged cords, spliced cords, and cords not inspected daily. (Tr. 54-55). Lesser weight is given to the CSHO’s gravity assessment as this assessment included conditions not cited in the original citation, such as damaged and spliced cords. See note 11 *supra*. Further, the CSHO’s assessment did not consider the *record evidence* of the limited number of presses that were not frequently moved and remained unabated.

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:

Citation 1, Item 3, alleging a failure to abate violation of 29 C.F.R. § 1910.305(g)(1)(iv)(A), is AFFIRMED, and a penalty of \$1,000.00 is assessed.

/s/

Carol A. Baumerich
Judge, OSHRC

Dated: June 29, 2015
Washington, D.C.