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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. DOVER ELEVATOR COMPANY, INC., Respondent.	OSHRC Docket No. 91-862

DECISION

BEFORE: FOULKE, Chairman; and MONTOYA, Commissioner.

BY THE COMMISSION:

At issue in this case is item 1 of the Secretary's citation no. 1 alleging that Dover Elevator Company ("Dover") committed a serious violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act") by failing to comply with the standard at 29 C.F.R. § 1926.404(b)(1)(i), which requires electrical receptacles on construction worksites to be equipped with a ground-fault circuit interrupter ("GFCI") under certain conditions.[1] The Secretary charged that Dover did not meet the terms of the standard be-

[1]The standard provides in pertinent part as follows:

> **§ 1926.404 Wiring design and protection.**
> . . . .
> (b) *Branch circuits*—(1) *Ground-fault protection*—(i) *General.* The employer shall use either ground fault circuit interrupters as specified in paragraph (b)(1)(ii) of this section or an assured equipment grounding conductor program as specified in paragraph (b)(1)(iii) of this section to protect employees on construction sites. . . .
> (ii) *Ground-fault circuit interrupters.* All 120-volt, single-phase 15- and 20-ampere receptacle outlets on construction sites, which are not part of the permanent wiring of the building or structure and which are in use by employees, shall have approved ground-fault circuit interrupters for personnel protection.

cause power tools which its employees intended to use were connected to a receptacle that was not protected with a GFCI, and no assured equipment grounding program was in effect. Administrative Law Judge Edwin G. Salyers affirmed this item and assessed a penalty of $500.[2] Dover contends that the judge erred because the circuit was not in use at the time and therefore no GFCI was required under the terms of the standard. Dover also argues that it did not and could not with the exercise of reasonable diligence have known of the alleged violative condition. Although we find that Dover failed to comply with the terms of the standard, we also find that it had implemented, communicated, and enforced a work rule which meets the requirements of the standard. We therefore conclude that Dover took reasonable measures to prevent the occurrence of the violation, and we vacate the citation item.

FACTS

At the time of the inspection Dover was installing an elevator in an office building under construction in Ridgeland, Mississippi. An electrical panel box supplied power to two duplex receptacles located directly below the box. One of these receptacles was equipped with a GFCI; the other receptacle did not have a GFCI. It is undisputed that the purpose of a GFCI is to protect an employee from serious or possibly fatal electric shock which could be caused by a damaged cord or defective electrical equipment.

Dover had started work at the site during the week before the Secretary's inspection, which took place on Monday, March 4, 1991. On that day Dover's work crew arrived at the site to put guide rails in place in the elevator shaft. The crew consisted of two mechanics and two helpers. One of the mechanics, Elvis A. Sledge, instructed one of the helpers to connect an extension cord so that they could use their drill. Sledge was aware that a GFCI was installed at the panel box and that he was supposed to use this GFCI. However, after the cord was connected to the GFCI, the drill would not operate; the GFCI tripped and cut off

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[2]Dover also was cited for a serious violation of 29 C.F.R. § 1926.405(b)(1), which requires that unused openings in electrical circuitry boxes be sealed, and for a nonserious violation of section 1926.405(a)(2)(ii)(B), which requires that electrical conductors not be exposed to damage and be fastened at specified intervals. The judge affirmed the panel box allegation as a *de minimis* violation and vacated the alleged nonserious charge. The judge's disposition of these items is not on review.

the circuit. Sledge then left the elevator shaft and went up to the second floor where the panel box was located. He was unable to reset the GFCI so that it would supply power. He then connected the extension cord to the other receptacle in order to determine whether that receptacle was functioning. Finding that there was power in this receptacle, he removed the GFCI and discovered that the receptacle into which the GFCI was inserted was itself broken. Because he did not have a spare receptacle, he left the work area to find an electrician. It took about 15 to 20 minutes to locate the electrical foreman and then look through the electrical foreman's supplies for a receptacle. During this time, Sledge left the extension cord connected to the operable receptacle, that is, the receptacle lacking a GFCI. When he returned to the work area, Sledge replaced the defective receptacle himself and then asked the electrician to check it. The electrician found that the replacement receptacle was working properly, but the GFCI still continued to trip. Sledge then removed the cover to the panel box itself, and the electrician checked the wiring and grounding within the box. Finding no problem there, the electrician then examined the extension cord and informed Sledge that the cord was "bad." Sledge went back down to the first floor to get a replacement plug for the extension cord from his tool box.

In the meantime, Compliance Officer Cortney Willis Bohannon had arrived to conduct a general inspection of all of the contractors at the site. When Sledge came down to the first floor to go to his tool box, he asked Bohannon to test the extension cord. Bohannon confirmed that the hot and ground leads were reversed at the plug of the extension cord. Sledge then replaced the plug in Bohannon's presence and asked Bohannon to recheck the cord. Bohannon then stated that the cord had been satisfactorily repaired, at which point Sledge asked Bohannon to check the GFCI. When Bohannon informed Sledge that the GFCI was defective, Sledge discarded the GFCI and sent his helper to obtain a replacement, which he again asked Bohannon to test. Bohannon stated that the replacement checked out "fine." This replacement GFCI was of a different design, one that could be installed on the end of a power cord. Sledge connected the extension cord to this GFCI and resumed work. When asked whether the extension cord found to be defective had been used during the previous week, Sledge replied that he could not be sure because there were five or six cords in Dover's tool or equipment box.

At the hearing, Sledge described Dover's safety program. Dover requires its employees to use GFCI's and so instructs them at safety meetings, which are usually held monthly, and through its safety handbook and other safety material distributed to employees. Sledge testified that Dover had issued four versions of its safety manual during the twenty years he had been employed by the company. All of these editions of the safety manual stated that GFCI's were to be used. Sledge also testified that he understood that any electrical equipment, even a drop light, is supposed to be plugged into a GFCI. The record further shows that Dover had issued a GFCI to Sledge. There were also two other GFCI's available at the worksite; Sledge found one in his truck, and he took another one out of the tool box assigned to a mechanic who no longer worked for Dover. Nevertheless, despite Dover's instruction and training program on GFCI's, there is some evidence that Dover was aware of earlier violations of its GFCI rule. At the most recent safety meeting at this jobsite held on February 25, 1991, approximately one week before the inspection on March 4, Robert Mason, Dover's construction and service superintendent, discussed the "ten most recurring safety violations," failure to use GFCI's being the first infraction on the list.

After the incident, on April 3, Mason issued a written reprimand to Sledge which was placed in his personnel file and which stated as follows:

> On Tuesday, March 19, 1991, we received an OSHA citation (attached)
>
> A subsequent meeting with OSHA revealed that the GFI [sic] was not being used at the time OSHA made their inspection.
>
> This is a serious violation of Dover Elevator Company's safety policy; further violations will require additional action up to and including termination.
>
> Please give serious consideration to this matter and take time to review the safety handbook provided to and accepted by you.

This reprimand was accompanied by a "critical incident appraisal" which reads as follows:

> INCIDENT:
>
> > Not following Dover's safety hand book[.] Two citations for violations of OSHA.

EMPLOYEE'S ACTION:

He was furnished a GFCI but pictures indicate it was not in use during the OSHA inspection.

EXPECTED PERFORMANCE:

He is expected to comply with Dover's safety policy as described in Dover safety hand book as previously instructed.

SUPERVISOR'S APPRAISAL:

1st offense for this violation a letter of reprimand.

COMMENTS:

Further violations of Dover's safety hand book will result in further action up to and including termination.

This was the first time Sledge had ever been disciplined for failing to use a GFCI.

JUDGE'S DECISION AND PARTIES' ARGUMENTS

The judge found that Dover had failed to comply with the terms of section 1926.404(b)(1)(i). The judge reasoned that notwithstanding Sledge's testimony of the efforts he had made to correct the defective GFCI, there remained an unprotected circuit available for employee use even if it was not in actual use. However, although Dover had raised the issue of knowledge of the violative condition before the judge, he did not address the issue.[3]

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[3]The parties did not file posthearing briefs with the judge. Judge Salyers issued an oral decision at the close of the hearing that he thereafter adopted in his written decision. Neither party objected or requested an opportunity to file a brief. Commission Rule 74(a), 29 C.F.R. § 2200.74(a) states that "[a]ny party shall be entitled, upon request made before the close of hearing, to file a brief, proposed findings of fact and conclusions of law, or both, with the Judge." Thus, the rule permits but does not require the parties to file posthearing briefs. See section 8(b) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 557(c), which provides that parties "are entitled to a reasonable opportunity to submit . . . proposed findings and conclusions [and] supporting reasons for the . . . proposed findings or conclusions" before the judge issues his decision. Since neither party sought to file a brief here, the judge's action conforms with the APA and the Commission's rule. We further note that, contrary to the representation in the Secretary's brief before us, there is no contention by either party that the judge committed a procedural error.

Dover, on the other hand, had previously filed a prehearing statement of unresolved issues and authorities in compliance with the judge's pretrial order. In that submission Dover indicated that noncompliance with the terms of the standard and knowledge of the violative conditions were both disputed issues. Therefore, while

(continued...)

In Dover's view, no violation existed because the circuit was not in actual use and because, contrary to the judge's decision, it was not available for use since it was defective and was being tested to determine what the problem was. Dover points out that the judge did not find that Sledge was not a credible witness and that Bohannon corroborated Sledge's testimony that power tools were not being operated at the time because Sledge was having difficulty obtaining power. Dover interprets the judge's decision that the circuit was at least available for use as a finding "concerning what could happen on the construction site." Dover contends that that finding is erroneous not merely because the defect in the GFCI prevented the GFCI itself from being used but also because the defect was such as to preclude any current at all from going through the cord. Dover points out that Sledge did not have the crew resume work but instead elected to find the cause of the loss of power in the receptacle to which the GFCI was affixed. Dover argues that since the circuit was under Sledge's control, the judge erred in concluding that it was available for use.

Dover also contends that the Secretary failed to meet his burden of proof because the Secretary failed to demonstrate that Dover knew or reasonably could have known of the existence of the violative conditions. In Dover's view, it took sufficient measures to ensure that its employees used GFCI's: it had a work rule requiring their use; it communicated this rule to employees, including Sledge; it provided GFCI's for employees to use; and the employees followed these rules, since Sledge's helper plugged the extension cord into the GFCI when they attempted to begin their work. Dover further points out that it enforced its work rule through the reprimand it issued to Sledge. Because it had safety rules and a safety program from which employees understood that they were not to use any receptacle that was not protected by a GFCI, Dover contends that the Secretary did not meet his burden to show that it knew, or could have known with the exercise of reasonable diligence,

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[3](...continued)
the judge did not err in announcing a decision at the close of the hearing without briefs, he did err insofar as his decision fails to address a disputed factual issue material to the disposition of the case. The Commission, however, is empowered to review the evidence independently and make its own factual findings. *Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828, 834, 1302 (5th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976); *Hamilton Fixture*, 16 BNA OSHC 1073, 1089, 1993 CCH OSHD ¶ 30,034, p. 41,184 (No. 88-1720, 1993), *petition for review filed*, No. 93-3615 (6th Cir. June 7, 1993). Accordingly, we will decide the knowledge issue without remanding to the judge.

that employees might use an unprotected receptacle and thus be exposed to the hazard covered by the standard.

The Secretary contends that the unprotected circuit was available for use by the three other members of the crew while Sledge was absent from the work area looking for a replacement receptacle. The Secretary points out that before leaving the work area, Sledge had connected the extension cord to the operable, but unprotected, receptacle and that Sledge had not instructed the other members of the crew not to use the extension cord. On the contrary, in the Secretary's view, Dover relies on the "fortuitous" circumstance that the employees in fact did not use their power equipment in his absence. The Secretary cites case law holding that where defective equipment creates a hazard, proof of a violation does not require evidence that the defective equipment actually was put into use; rather, the Secretary need only show that employees had access to the equipment and could have used it.

As to the issue of employer knowledge, the Secretary argues that he met his burden of proof because Sledge was aware that the unprotected receptacle was operable and, when he connected the extension cord to the operable receptacle, he was aware that that cord was available for use. As a supervisory employee at the site, his knowledge is imputable to Dover. The Secretary also argues that at a safety meeting held only one week previously, Dover recognized that failure to use GFCI's was the most common safety infraction committed by its employees. Nevertheless, it took no steps other than to issue safety handbooks and discuss the use of GFCI's at safety meetings. In the Secretary's view, Dover's safety program was deficient because it failed to show that it had a mechanism for monitoring employee conduct and detecting violations of safety rules and because its actions to enforce its safety rules are not motivated by concern for the elimination of safety hazards. Rather, the Secretary contends, Sledge was reprimanded simply because Dover happened to get "caught" by OSHA at a time when Sledge was in charge. That is, the Secretary appears to suggest that Dover was simply retaliating against Sledge.

The Secretary also advances two additional contentions. He contends that under the Act, knowledge by the employer is a prerequisite only for a serious violation. Therefore, the Secretary asserts, the Commission should affirm the citation item as a nonserious violation even if the Commission concludes that Dover lacked knowledge of the violative condition.

Furthermore, the Secretary argues, knowledge is not an element of his prima facie case; rather, the burden is on Dover to demonstrate as an affirmative defense that the violation resulted from misconduct by its employees.

DISCUSSION AND ANALYSIS

Noncompliance

As the Secretary correctly points out, the Commission has held that a violation is established where defective equipment is available for use. The cases the Secretary cites, however, are concerned with the issue of employee exposure to the hazard that a standard is intended to protect against where there is no evidence that employees have actually used the equipment or machinery in question. Although these cases are analogous, they do not directly address the question presented here: whether an employer can be found in noncompliance with a standard requiring that certain equipment be installed at a worksite where the employer is in the process of attempting to correct the violative condition at the time the violation is alleged to have occurred.

For example, *Pennsylvania Steel Foundry & Machine Co.*, 12 BNA OSHC 2017, 1986-87 CCH OSHD ¶ 27,671 (No. 78-638, 1986), *aff'd*, 831 F.2d 1211 (3d Cir. 1987), involved a standard which set forth design specifications for a machine guard. The issue before the Commission was whether the Secretary had established exposure to the hazard. The Commission applied the well-established "access" test under which exposure is found if it is "reasonably predictable" that employees during the course of their normal work duties might come within the "zone of danger" resulting from the violation. *Id.* at 2030-31, 1986-87 CCH OSHD at p. 36,074 (citing *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 1975-76 CCH OSHD ¶ 20,448 (No. 504, 1976)). *See Armour Food Co.*, 14 BNA OSHC 1817, 1824, 1987-90 CCH OSHD ¶ 29,088, p. 38,886 (No. 86-247, 1990). Accordingly, the Commission concluded that access to the hazard--and hence employee exposure--existed so long as the unguarded equipment was "available for use," that is, so long as it "was located where employees *could* gain access to it and use it in the course of their normal duties." 12 BNA OSHC at 2030-31, 1986-87 CCH OSHD at p. 36,074 (emphasis added). The Commission reached the same

conclusion with respect to a defective ladder in *Brown-McKee, Inc.*, 8 BNA OSHC 1247, 1249, 1980 CCH OSHD ¶ 24,409, p. 29,736 (No. 76-982, 1980). Neither of these cases involved circumstances similar to those presented in this case.[4]

Nevertheless, the general rule that exposure is established by proof that employees could have access to the hazard suggests that Dover cannot be said to be in compliance with section 1926.404(b)(1)(i) simply because it was in the process of correcting the violative condition. In the first place, contrary to Dover's argument, the standard cannot be interpreted literally to mean that no violation exists because the Secretary failed to show that employees actually used the unprotected circuit. Such an interpretation would be contrary to the Act's remedial purpose because it would allow the employer to avoid having to institute preventive measures to protect its employees from the hazard. *See Havens Steel Co.*, 6 BNA OSHC 1564, 1566, 1978 CCH OSHD ¶ 22,689, p. 27,386 (No. 13463, 1978), *aff'd without published opinion*, 607 F.2d 493 (D.C. Cir. 1979) (proof of availability for use is sufficient to establish a violation of a standard prohibiting "the use of" defective ladders). Secondly, the fact that Sledge was engaged in a repair effort does not establish that the unprotected circuit was rendered unusable by employees. As the Commission stated in *Gilles & Cotting*,

> "If defective equipment is available for use by the employee and a standard is violated, then a citation should issue. Under such circumstances, the employee is exposed to a potential hazard even if he is not using the equipment at the time of the inspection. The equipment is accessible to him and could be used.
>
> "Where [an] employer asserts his intention not to use . . . defective equipment until repaired and his contention is manifested in overt acts which have denied accessibility to the equipment by the employees, then the employer should not be held in violation of the particular safety standard which might apply to that equipment. If the equipment has been effectively removed from accessibility by the employees, the employer has taken positive means to assure safe and healthful working conditions for his employees."

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[4]The third case the Secretary cites, *Well Solutions, Inc.*, 15 BNA OSHC 1718, 1723, 1992 CCH OSHD ¶ 29,743, p. 40,422 (No. 89-1559, 1992), is inapposite. The issue before the Commission in that case was whether the Secretary had proven that a hammer having a substantially cracked handle failed to comply with a standard requiring that tools be in "safe condition." The Commission concluded that the fact that the hammer was available for use was a factor in determining that it was unsafe.

3 BNA OSHC at 2004, 1975-76 CCH OSHD at p. 24,425 (quoting *Allied Electric Co.*, 72 OSAHRC 5/F6 (No. 433, 1972) (ALJ) (deletions in original)). As the Secretary points out, Sledge did not take direct measures to prevent Dover's employees from using the receptacle, such as deenergizing it, during the 15- or 20-minute period when he had left the immediate work area to find a replacement receptacle. Nothing would have precluded Dover's employees from operating their power equipment either with the extension cord Sledge had connected to the unprotected receptacle or by using any of the other extension cords available at the site. We therefore conclude that the unprotected receptacle was available for use by Dover's employees and that Dover failed to comply with the terms of the standard.

Knowledge

At the outset, we will not address the Secretary's contentions that knowledge is a necessary element only of a serious violation and that the employer rather than the Secretary should have the burden of proof on this issue. The Secretary failed to raise either of these arguments before the judge but rather has presented them for the first time in his review brief. While the Commission has authority to consider any issue raised by a party once a case is directed for review, the Commission also has discretion to limit the scope of its review. *Bay State Ref. Co.*, 15 BNA OSHC 1471, 1476, 1992 CCH OSHD ¶ 29,579, p. 40,025 (No. 88-1731, 1992). Commission Rule 92(c), 29 C.F.R. § 2200.92(c), provides as follows:

> (c) *Issues not raised before Judge.* The Commission will ordinarily not review issues that the Judge did not have the opportunity to pass upon. In exercising discretion to review issues that the Judge did not have the opportunity to pass upon, the Commission may consider such factors as whether there was good cause for not raising the issue before the Judge, the degree to which the issue is factual, the degree to which proceedings will be disrupted or delayed by raising the issue on review, whether the ability of an adverse party to press a claim or defense would be impaired, and whether considering the new issue would avoid injustice or ensure that judgment will be rendered in accordance with the law and facts.

The Secretary has neither made nor sought to make any showing of good cause for not raising these arguments below, nor has the Secretary advised us of any grounds on which we can conclude that consideration of his arguments is warranted under the remaining criteria of Rule 92(c). Indeed, the issues which the Secretary now asks us to consider relate to

questions of law which are well-settled.[5] In these circumstances we decline to exercise our discretion to review matters that were not raised before the judge. *American Cyanamid Co.*, 15 BNA OSHC 1497, 1505 n.16, 1992 CCH OSHD ¶ 29,598, p. 40,069 n.16 (No. 86-681, 1992), *petition for review filed*, No. 93-3321 (6th Cir. Apr. 7, 1992); *Peavey Grain Co.*, 15 BNA OSHC 1354, 1358 n.7, 1991 CCH OSHD ¶ 29,533, p. 39,872 n.7 (No. 89-3046, 1991); *See J.L. Manta Plant Servs. Co.*, 10 BNA OSHC 2162, 1982 CCH OSHD ¶ 26,303 (No. 78-4923, 1982) (amendment sought by the Secretary for the first time on review is untimely because the Secretary could have moved to amend before the judge). *Compare Archer-Western Contrac., Ltd.*, 15 BNA OSHC 1013, 1015 n.4, 1991 CCH OSHD ¶ 29,317, p. 39,376 n.4 (No. 87-1067, 1991), *aff'd without published opinion*, 978 F.2d 744 (D.C. Cir. 1992) (matter raised in party's posthearing brief is properly before the Commission for review).

Although the Secretary has the burden to establish employer knowledge of the violative conditions, when a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies his burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program. *Baytown Constr. Co.*, 15 BNA OSHC 1705, 1710, 1992 CCH OSHD ¶ 29,741, p. 40,414 (No. 88-2912S, 1992), *aff'd without published opinion*, 983 F.2d 282 (5th Cir. 1993); *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007, 1991 CCH OSHD ¶ 29,223, p. 39,129 (No. 85-369, 1991). Here, the Secretary contends, and Dover does not

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[5]In our recent decision in *CF & T Available Concrete Pumping, Inc.*, 15 BNA OSHC 2195, 1993 CCH OSHD ¶ 29,945 (No. 90-329, 1993), we followed the existing precedent that as part of his prima facie case the Secretary must demonstrate that the employer knew or reasonably could have known of the existence of the violative conditions. As *CF & T* indicates, the case law holding that knowledge is essential to a violation under the Act and placing the burden of proof on the Secretary is well-established and long-standing. *Id.* at 2196-97 & n.4, 1993 CCH OSHD at p. 40,936 & n.4. *See Scheel Constr., Inc.*, 4 BNA OSHC 1824, 1976-77 CCH OSHD ¶ 21,263 (No. 8687, 1976). In addition, the Court of Appeals for the Fifth Circuit, in which this case arises, has consistently held that knowledge is a necessary element of a serious as well as nonserious violation and that the burden of proof is on the Secretary. *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 570-71 (5th Cir. 1976); *accord H.B. Zachry Co. v. OSHRC*, 638 F.2d 812, 819 n.17 (5th Cir. 1981); *Floyd S. Pike Electrical Contrac. v. OSHRC*, 576 F.2d 72, 76 (5th Cir. 1978). Therefore, if we were to consider the Secretary's arguments even though they were not raised in a timely fashion, the weight of this established case law is a substantial factor that militates against our now adopting a wholly different approach to the matter of employer knowledge. *See Smith Steel Casting Co. v. Donovan*, 725 F.2d 1032, 1035 (5th Cir. 1984) (Commission bound to follow the law of the Fifth Circuit in cases arising within that circuit); *Reich v. OSHRC (Erie Coke Corp.)*, 16 BNA OSHC 1241, 1244 (3d Cir. 1993) (adherence to existing circuit court precedent in the absence of a change in the Act or contrary holding by the Supreme Court).

dispute, that Sledge was a supervisory employee for purposes of applying this rule. An employee who has been delegated authority over other employees, even if temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537, 1992 CCH OSHD ¶ 29,617, p. 40,100 (No. 86-360, 1992) (consolidated). It is the substance of the delegation of authority that is controlling, not the formal title of the employee having this authority; an employee who is empowered to direct that corrective measures be taken is a supervisory employee. *Mercer Well Serv., Inc.*, 5 BNA OSHC 1893, 1977-78 CCH OSHD ¶ 22,210 (No. 76-2337, 1977); *Iowa S. Utils. Co.*, 5 BNA OSHC 1138, 1977-78 CCH OSHD ¶ 21,612 (No. 9295, 1977). Accordingly, Sledge's knowledge of the conditions at the site is imputable to Dover.

Since the Secretary made a prima facie showing of knowledge through Dover's supervisory employee, the burden shifts to Dover to rebut the Secretary's case by showing that it took reasonable measures to prevent the occurrence of the violation. *Baytown*, 15 BNA OSHC at 1710, 1992 CCH OSHD at p. 40,414; *Dover Elevator Co.*, 15 BNA OSHC 1378, 1382, 1991 CCH OSHD ¶ 29,524, p. 39,849 (No. 88-2642, 1991). Specifically, Dover must demonstrate that it had prescribed work rules that satisfy the requirements of the cited standard and that it had adequately communicated and effectively enforced such rules. In particular, the employer must demonstrate that it took action to discover violations of work rules by implementing measures to monitor its employees' adherence to safety rules. *Id.*; *Regina Constr. Co.*, 15 BNA OSHC 1044, 1051, 1991 CCH OSHD ¶ 29,354, p. 39,470 (No. 87-1309, 1991).

Here, the evidence shows that Dover had a rule requiring the use of GFCI's and that it communicated this rule to its employees both at safety meetings and through all versions of its safety manual. Sledge and the members of his crew were aware of the rule since they attempted to use the existing GFCI. While there is some indication that Dover was on notice that non-use of GFCI's was a common safety infraction, the reference to other violations is a very brief and passing mention in Sledge's testimony which fails to show the extent or frequency of such infractions or that they involved Sledge or any member of his crew. The Act does not mandate that an employer necessarily eliminate all instances of employee

noncompliance with its workrules. Where the evidence fails to show that the employer should have perceived a need for additional monitoring or that such an effort would have led to the discovery of instances of employee misconduct, increased supervisory efforts to monitor employee compliance are not required. *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973); *Jones & Laughlin Steel Corp.*, 10 BNA OSHC 1778, 1783, 1982 CCH OSHD ¶ 26,128, p. 32,888 (No. 76-2636, 1982). Indeed, the record here shows that Dover was cognizant of employee violations of its workrule and that it enforced those rules through disciplinary action.[6] Accordingly, we conclude that the safety program is not deficient merely because Dover failed to show specifically that it had a mechanism for monitoring employees for conformity with its safety rules. In evaluating the adequacy of a safety program, the substance of the program is determinative rather than its formal aspects. *Pennsylvania Pwr. & Light Co. v. OSHRC*, 737 F.2d 350, 358 (3d Cir. 1984); *Jones & Laughlin*, 10 BNA OSHC at 1782, 1982 CCH OSHD at p. 32,887. *Cf. Texland Drilling Corp.*, 9 BNA OSHC 1023, 1980 CCH OSHD ¶ 24,954 (No. 76-5307, 1980) (employer not required to institute a work rule explicitly tracking the precise language of the standard where employees knew of and acted in accordance with safe work practices).

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[6]The Secretary contends that Dover's enforcement of its safety rules was inadequate because Sledge was not reprimanded for violating Dover's safety rule but rather for causing an OSHA citation to be issued. The Secretary relies on the following statement in Sledge's testimony: "Well, the reason I was issued the reprimand was because Dover got the citation and I was the man in charge."

In its recent decision in *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164-65, 1993 CCH OSHD ¶ 30,041, pp. 41,216-17 (No. 90-1307, 1993), the Commission criticized an employer for not expressly informing employees that they were being terminated for failing to comply with a safety rule. That case, however, is factually distinguishable because the entirety of the evidence demonstrated that noncompliance with work rules was not the reason why the employer was terminating employees. In this case, the precise meaning of Sledge's testimony is unclear, and his statement can be interpreted as an explanation of why he and not any other employee was issued a reprimand. The written reprimand and accompanying "appraisal" repeatedly emphasized that Sledge violated Dover's safety policy and warned that further violations of Dover's rules would result in termination. We therefore cannot conclude that Sledge believed that he would not have received a reprimand if there had not been an OSHA inspection.

For the reasons stated above, we conclude that Dover failed to comply with the terms of 29 C.F.R. § 1926.404(b)(1)(i) but that it did not and could not with reasonable diligence have known of the violative condition. We therefore vacate item 1 of citation no. 1.

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: July 16, 1993

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SECRETARY OF LABOR, Complainant, v. DOVER ELEVATOR COMPANY, INC., Respondent.	:	Docket No. 91-862

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on July 16, 1993. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

July 16, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 91-862

NOTICE IS GIVEN TO THE FOLLOWING:

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Edwin G. Salyers
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309-3119

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET N.W.
4TH FLOOR
WASHINGTON D.C. 20006-1246

FAX
COM (202) 634-4008
FTS 634-4008

SECRETARY OF LABOR
Complainant,
v.
DOVER ELEVATOR CO., INC.
Respondent.

OSHRC DOCKET
NO. 91-0862

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on April 16, 1992. The decision of the Judge will become a final order of the Commission on May 18, 1992 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before May 6, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: April 16, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-0862

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. DOVER ELEVATOR COMPANY, Respondent.	OSHRC Docket No. 91-862

APPEARANCES:

Cynthia Welch-Brown, Esquire
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

W. Scott Railton, Esquire
Reed, Smith, Shaw & McClay
Washington, D. C.
For Respondent

Before: Administrative Law Judge Edwin G. Salyers

DECISION AND ORDER

In early March 1991, respondent's employees were installing an elevator at a multi-employer worksite in Ridgeland, Mississippi. Compliance Officer Cortney W. Bohannon conducted an inspection of this worksite under the provisions of the Occupational Safety and Health Act (29 U.S.C. § 651, *et seq.*) and, thereafter, on March 14, 1991, the Secretary of Labor issued the following citations:

Serious Citation No. 1

1
29 CFR 1926.404(b)(1)(i): Employer did not use either ground-fault circuit interrupters as specified in paragraph (b)(1)(ii) of this section, or an assured equipment grounding conductor program as specified in paragraph (b)(1)(iii) of this section to protect employees on construction sites:

> (a) Employees were exposed to the hazard of electric shock from tools connected to circuit panels without ground fault circuit interrupters or an assured equipment grounding program.

2
29 CFR 1926.405(b)(1): Unused openings in cabinets, boxes, and fittings were not effectively closed:

> (a) Unused opening in circuit panel box was not effectively closed exposing employees to electric shock.

"Other" Citation No. 2

1
29 CFR 1926.405(a)(2)(ii)(B): Runs of open conductors used as temporary wiring branch circuits were located where the conductors would be subject to physical damage, or the conductors were fastened at intervals exceeding 10 feet:

> (a) West side of construction site - Temporary wiring laying on ground was exposed to both vehicular and pedestrian traffic.

On March 27, 1991, respondent filed its notice of contest with respect to all charges and the case was heard on December 18, 1991, in Jackson, Mississippi.

At the conclusion of the hearing, this court issued a bench decision disposing of all issues (Tr. 155-157). Item 1 of serious Citation No. 1 was affirmed, and a penalty of $500 was assessed. Item 2 of serious Citation No. 1 was affirmed as *de minimis* with no penalty assessed. "Other" Citation No. 2 was vacated based upon the Secretary's failure to establish that respondent's employees were exposed to this alleged hazard.

After reviewing the transcript of this proceeding, the court concludes the evidence of record supports the findings reached at the hearing.

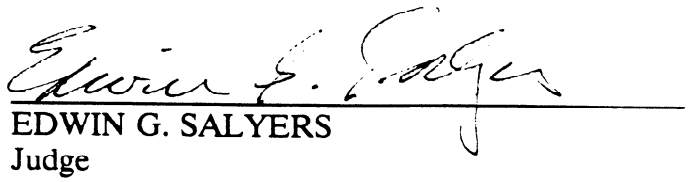
ORDER

It is therefore ORDERED:

1. Serious Citation No. 1, item 1, is affirmed and a penalty of $500 is assessed.

2. Serious Citation No. 1, item 2, is reclassified as *de minimis* and affirmed with no penalty assessed.

3. "Other" Citation No. 1 is vacated.



EDWIN G. SALYERS
Judge

Date: April 9, 1992