



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
OTIS ELEVATOR
Respondent.

OSHRC DOCKET
NO. 92-2189

**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 December 23, 1993. The decision of the Judge will become a final order of the Commission on January 24, 1994 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 January 14, 1994 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
1120 20th St. N.W., Suite 980
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. / RHA
Ray H. Darling, Jr.
Executive Secretary

Date: December 23, 1993

DOCKET NO. 92-2189

NOTICE IS GIVEN TO THE FOLLOWING:

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Richard DeBenedetto
Administrative Law Judge
Occupational Safety and Health
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SECRETARY OF LABOR,	:
	:
Complainant,	:
	:
v.	: OSHRC Docket No. 92-2189
	:
OTIS ELEVATOR COMPANY,	:
	:
Respondent.	:

Appearances:

James Glickman, Esq.
 Office of the Solicitor
 U.S. Department of Labor
 For Complainant

W. Scott Railton, Esq.
 Reed, Smith, Shaw & McClay
 McLean, VA
 For Respondent

Before: Administrative Law Judge Richard DeBenedetto

DECISION AND ORDER

On May 27, 1992, Otis Elevator Company ("Otis") was issued a citation alleging serious violations of two electrical safety standards: 29 C.F.R. § 1926.403(i)(2)(i), which requires that the live parts of electrical equipment operating at 50 or more volts be guarded against accidental contact by cabinets or other forms of enclosures; and § 1926.405(a)(2)(ii)(E), which requires that lamps used for general illumination be protected from accidental contact or breakage. A penalty of \$1875.00 is proposed for these grouped violations.

The citation was issued as the result of an inspection conducted by Compliance Officers Carl Lemos and Pete Atack on April 29, 1992, at a construction site in Providence, Rhode Island (Tr. 6-7, 11, 19-20). An eight story parking garage was being constructed at this site by Marshall Contractors, Inc. ("Marshall"), the general contractor for the project, and several subcontractors including Otis, which was responsible for constructing the elevators. The project was about 80% complete on the day of the OSHA inspection at

which time a crew of three Otis employees was installing mechanical equipment in the machine room or "penthouse" located above the elevator shafts in the east end of the garage (Tr. 22-23, 40, 42, 86, 130-322, 139-40, 142-43; Exhibit R-3). Each end of the parking garage was designed to contain a set of elevators and a set of stairs, and as of April 29, 1992, only the stairs in the east end of the garage were available for use (Tr. 20-22, 101, 139-41, 146, 199).

During the course of their inspection, Lemos and Atack came upon two instances where, they believed, temporary lighting equipment was not properly guarded as required by the cited standards. The Secretary contends that Otis's employees were exposed to an electrical hazard created by these conditions because they had to pass through the areas in which the light fixtures were found in order to gain access to the penthouse. Lemos noticed the first fixture dangling over the left side of a railing on the eighth floor landing as he, Atack, and Dan Morris, a representative of Marshall, climbed the last flight of stairs in the east end of the garage in order to reach the area where the Otis employees were working (Tr. 24-28, 35, 50; Exhibit C-1). There was no light bulb in the fixture's socket and the plastic bulb guard attached to the fixture was open (Tr. 27-28; Exhibit C-1). Lemos testified that the fixture was lying across the red metal frame of a railing which led up to the penthouse and upon testing it, he determined that the exposed socket was energized with what he assumed to be, on the basis of his examination of other fixtures on the same circuit, approximately 110 volts (Tr. 21-22, 29-37, 106-07).¹

According to Conrad Goodreau, Otis's foreman for the project, and Frank Dombkowski, the chief electrician at this site for E.W. Audet, the electrical subcontractor responsible for the garage's temporary lighting, the only "live" portion of this fixture was the metal tab or button recessed inside the socket (Tr. 20, 78-79, 152, 190-92, 196-97).² Both Goodreau and Dombkowski testified that short of sticking a finger up inside the socket, contact with this inner element was highly unlikely, particularly since the socket was

¹A photograph submitted into evidence by the Secretary in connection with this alleged violation does not depict the fixture as Lemos initially observed it, but instead shows Lemos holding the fixture in his hand after he had picked it up off the floor (Tr. 28-31, 34, 102; Exhibit C-1).

² Lemos himself acknowledged that when he tested the socket to see if it was energized, he found voltage in the "inner ring" (Tr. 36, 106).

surrounded by a ring of insulation made of plastic or rubber (Tr. 104-05, 150, 152-53, 196-98; Exhibit C-1).³ Lemos testified, however, that although the probability of an accident occurring under these conditions was low, it was still possible for an Otis employee using the stairs adjacent to this fixture to step on the socket and possibly crush it, causing the live part of the fixture to ground out and conduct electricity through the metal frame and railing (Tr. 37, 103-05, 109-17; Exhibit C-1). Lemos also theorized that an employee could have accidentally hit the socket with a piece of equipment he might have been carrying to or from the penthouse area and possibly contacted the live part of the fixture, allowing electricity to pass through the equipment to the employee (Tr. 37, 105, 109-17).

Neither of these scenarios seems plausible. It would be extremely difficult for a person carrying any piece of equipment up or down the stairs to accidentally contact the live element of this light fixture. In order to crush the socket in the manner described by Lemos, a considerable amount of force would have to be applied, and even then, as Dombkowski indicated, the plastic or rubber ring of insulation surrounding the socket would likely prevent any actual contact with the inner live element (Tr. 104-05, 196-98; Exhibit C-1). Lemos's testimony also falls short of explaining exactly how an employee could be expected to step on the unguarded socket in the course of walking past the fixture. According to Lemos, the bottom half of the fixture's bulb guard was touching the floor, but the top half, which contained the socket, was "dangling...up, off the floor", apparently resting upon the elevated metal frame of the stairs' railing (Tr. 30-34; Exhibits R-4 [Polaroid] & C-1). Since the socket was not even touching the floor of the landing, it would seem virtually impossible for someone simply walking up or down the adjacent stairs to actually trample on the unguarded socket; indeed, contact with the elevated metal frame could only be made by consciously raising one's foot and stepping up onto it (Exhibit R-4 [Polaroid]). In fact, in this position, a passing employee would have to follow a rather unusual path in order to even come close

³ Otis suggests that this ring of insulation served as an adequate guard for the live socket and therefore, satisfied the guarding requirements of § 1926.403(i)(2)(i) (Tr. 114-15). However, both Goodreau and Dombkowski testified that contact with the live part of the socket, though unlikely under the circumstances of this case, was possible, despite the presence of the insulation. As such, it cannot be credibly argued that the standard's intended purpose - to prevent contact with the live parts of certain electrical equipment - has been achieved.

to where the fixture was located on the landing and in that case, it would seem more likely that he would tread upon the bottom half of the bulb guard than upon the elevated half containing the socket.

Added to this uncertainty regarding contact with the unguarded socket is the fact that Lemos did not witness any Otis employees actually using the stairs adjacent to the fixture on the day of his inspection (Tr. 39-40, 119). Moreover, Lemos did not inquire as to the number of times or under what conditions Otis's employees may have used the stairs that day, but simply assumed that the alleged hazard must have existed whenever the employees had last entered the penthouse area (Tr. 43, 87-91). When questioned on this point, however, he was unable to say how long the fixture had been on the eighth floor landing in this condition prior to his observation of it (Tr. 102-03).

In order to establish exposure to a hazardous condition, the Secretary must show that employees, "...in the course of their assigned work duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, 1975-76 CCH OSHD ¶ 20,448 (No. 504, 1976). See also *Armour Food Co.*, 14 BNA OSHC 1817, 1824, 1990 CCH OSHD ¶ 29,088 (No. 86-247, 1990) ("*Armour*"); *Clement Food Co.*, 11 BNA OSHC 2120, 2123, 1985 CCH OSHD ¶ 26,972 (No. 80-607, 1984). Since the possibility of contact with the live, recessed component of the fixture was so remote, it cannot be reasonably said that Otis's employees were exposed to the rather circumscribed "zone of danger" created by the unguarded socket during the course of their work. *Jefferson Smurfit Corp.*, 15 BNA OSHC 1419, 1422, 1991 CCH OSHD ¶ 29,551 (No. 89-0553, 1991); *Armour* at 1824. Thus, the Secretary has failed to establish a violation of § 1926.403(i)(2)(i).

The Secretary's case is even more speculative with regard to the alleged exposure of Otis's employees to a hazard associated with an unguarded light bulb located in one of the east end elevator shafts. Lemos testified that on his way back down the east end stairs, after he and Attack had met with Goodreau in the penthouse and discussed the fixture they had found on the eighth floor landing, he noticed an unguarded light bulb hanging inside the

third elevator shaft on one of the levels of the garage (Tr. 39-43, 49-53, 85-87, 94-100, 129-30, 148-50; Exhibits C-3 & R-6).⁴ The bulb was lit and a broken bulb guard, presumably belonging to this fixture, was lying on the floor outside the shaft (Tr. 50, 52-53, 195; Exhibit C-3) According to Lemos, this fixture could have been dislodged and the unguarded light bulb in it could have been broken, at which point any live filaments which may have remained in the fixture could have come in contact with the metal railing running up the middle of the shaft two to three feet away from the bulb, which in turn could have conducted electricity all the way up to the floor of the penthouse where Otis's employees were working (Tr. 57-63, 65-74, 76; Exhibits C-3 & R-6).

The record, however, does not support this proffered chain of events. Dombkowski testified that the fixture was securely fastened to the wall and could only be dislodged by a deliberate attempt to do so (Tr. 196; Exhibit C-3). Furthermore, Lemos's theory that the elevator car suspended several floors above the fixture might be lowered down onto the bulb was completely discredited by his admission that the elevators were not yet operational and Goodreau's testimony that the shafts lacked power as well as the lift cables necessary for the car to function (Tr. 42-43, 62-63, 65, 67-68, 76, 133-34, 178-79). There is also nothing in the record to indicate that Otis's employees performed work in this elevator shaft or had reason to be on any of the floors in question on the day of the inspection; in fact, Goodreau testified that Otis had not worked in the east end elevator shafts for at least a week and their work on April 29th was primarily limited to the penthouse (Tr. 134-36, 139-41, 177; Exhibit R-3). Moreover, the employees' use of the east end stairs located to the right of the elevator shaft clearly would not have brought them within any "zone of danger" the unguarded light bulb might have created; and even if an Otis employee had had reason to walk near the shaft containing the fixture, the wooden guardrails positioned across the front of the shaft would have protected him from any direct contact with the bulb (Tr. 62, 74-75, 177; Exhibits C-3 & R-6). The Secretary, therefore, has failed to prove that Otis's employees were exposed to a hazard stemming from the unguarded light bulb.

⁴ Lemos indicated that he was unable to identify the exact level on which he observed this condition because the floors were not yet marked with numbers and it was difficult to keep track of how many flights they had descended (Tr. 92, 97-100).

Because the Secretary has not satisfied his burden of proving a violation under either of the two standards for which Otis was cited, it is ORDERED that the May 27, 1992, citation is vacated.


RICHARD DeBENEDETTO
Judge, OSHRC

Dated: December 14, 1993
Boston, Massachusetts