



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
BERMUDEZ & LONGO, S. E.
Respondent.

OSHRC DOCKET
NO. 92-3132

**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 November 19, 1993. The decision of the Judge will become a final order of the Commission on December 20, 1993 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 December 9, 1993 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
Washington, D.C. 20036-3419

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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: November 19, 1993

DOCKET NO. 92-3132

NOTICE IS GIVEN TO THE FOLLOWING:

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Irving Sommer
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SECRETARY OF LABOR,

Complainant,

v.

BERMUDEZ & LONGO, S.E.,

Respondent.

Docket No. 92-3132

Appearances:

Jane S. Brunner, Esq.
U.S. Department of Labor
New York, New York

Roberto Lefranc-Romero, Esq.
Santurce, Puerto Rico

For the Complainant

For the Respondent

Before: Administrative Law Judge Irving Sommer

DECISION AND ORDER

BACKGROUND

This is a proceeding under Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. section 651 et seq., (``the Act``), to review citations issued by the Secretary of Labor pursuant to section 9(a) of the Act, and the proposed assessment of penalties therein issued, pursuant to section 10(a) of the Act.

Respondent is a corporation which was engaged in construction contracting and related activities. On May 12-15, 1992, Bermudez & Longo's worksite at Road 165 and Road 28 Amelia Ward, Guaynabo, Puerto Rico was inspected by an OSHA compliance officer. Subsequently, on August 28, 1992, the company received two citations resulting from this inspection. Respondent filed a timely notice of contest to the citations and penalties. A hearing was held on May 20, 1993, in Hato Rey, Puerto Rico. Both parties were represented at the hearing and both parties have filed post-hearing briefs. No jurisdictional issues are in dispute. The matter is now before the undersigned for a decision on the merits.

DISCUSSION

Alleged serious violation of 29 C.F.R. section 1926.303(c)(2)

Serious Citation 1, item 1a alleges:

Floor or bench-mounted grinder(s) were not provided with work rests.

The Secretary alleges that Respondent failed to provide work rests on a grinding machine. At the hearing on May 20, 1993, the compliance officer, Hipolito Maldonado, testified that he observed a grinding wheel at Respondent's construction site that was not provided with work rests. The compliance officer was accompanied during his inspection by Respondent's electrical supervisor, Mr. Collazo, Respondent's engineer and electrical foreman, Mr. Nater, and Respondent's safety engineer, Mr. Diaz. The compliance officer noted that at the time of the inspection the grinding wheel was not in use. However, Respondent's management officials ostensibly acknowledged to Mr. Maldonado, although there was some apparent disagreement, that the grinding wheel was used by Respondent's employees at least once a day to sharpen screw drivers and chisels.

The compliance officer further testified that Respondent's employees would come ``within a few inches`` when using the grinding wheel since the screw drivers and chisels being sharpened were only a few inches long. The employees using the wheel could be exposed to the hazard that the wheel of the grinder could ``grab`` the screw driver or chisel being sharpened and pull it into the wheel, resulting in lacerations and possibly an employee's hand being caught in the wheel, or resulting in the wheel breaking, which could lead to the employee's body being pierced with pieces of the grinding wheel (transcript, p. 7-13, p. 37-41). The compliance officer's testimony was also supported by photographic evidence (exhibit C-1).

Respondent acknowledges that there was a bench grinding wheel at the worksite which was not provided with a work rest. However, Respondent argues that the compliance officer did not see the grinding wheel being used by any of Respondent's employees. Furthermore, Respondent's safety engineer, Mr. Diaz, testified at the hearing that he had ordered that the bench grinding machine be removed from use at the project and taken back to the warehouse to put it in compliance with safety regulations. However, Mr. Collazo, Respondent's electrical supervisor, testified that though Mr. Diaz had indeed ordered the machine not to be used further, Respondent's foreman, Mr. Nater, apparently kept it there for further use (transcript, p. 76- 85, Respondent's brief, p. 2-4). In addition, Respondent argues that even if the standard was violated, none of Respondent's employees were exposed to the hazard. Further, the Respondent contends that since the compliance officer did not see any of Respondent's employees using the grinding wheel, the hazard to which the employees were allegedly exposed was only speculative (Respondent's brief, p. 3-4).

The totality of the evidence concerning this citation item establishes a violation of the standard as cited. Although the compliance officer did not see the grinding machine being used by Respondent's employees during his inspection, nonetheless case law merely requires a finding that a machine is in a violative condition and is accessible and available for use by the Respondent's employees. See Bechtel Power Company, 7 BNA OSHC 1361 (No. 13832, 1979), Westburne Drilling, Inc., 5 BNA OSHC 1457 (No. 15631, 1977). The Secretary has proposed an \$1,125 total amended penalty for citation items 1a, 1b, and 1c. A review of all the relevant factors, the hearing transcript, and the official case record fully establishes that a penalty of \$375 is appropriate for citation item 1a.

Alleged serious violation of 29 C.F.R. section 1926.303(c)(5)

Serious Citation 1, item 1b alleges:

Abrasive wheels were not provided with safety guards to retain fragments of the wheel in case of accidental breakage.

The Secretary alleges that Respondent failed to provide safety guards on a grinding machine. At the hearing, Mr. Maldonado testified that he observed that the same bench grinding wheel as cited in citation item 1a was not provided with safety guards to retain fragments of the wheel in the case of accidental breakage. The compliance officer noted that if the grinding wheel broke while being used by one of Respondent's employees, the employee's body could be pierced with pieces of the wheel since the safety guards were missing. Mr. Maldonado testified that the pieces from the wheel could "fragment like a rocket" as the grinding wheel revolved at 3,500 rpm (transcript, p. 13-16, p. 42-46). The Secretary further notes in his brief to prevent confusion that "there were references by various

witnesses throughout the hearing to ``tongue guards``, ``retaining guards``, and ``safety guards``. As the compliance officer testified, these are simply different names for the same thing`` (Secretary's brief, footnote 3 at page 8). The compliance officer's testimony was also supported by photographic evidence (exhibit C-1).

Respondent counters that the bench grinding wheel did have the required safety guard. Respondent maintains that its assertion is supported by the Secretary's exhibit C-1 (Respondent's brief, p. 4). However, Respondent's witness, Mr. Diaz, testified at the hearing that the tongue guard was missing from the machine (transcript, p. 81).

A preponderance of the credible evidence upholds a finding of a violation of the standard as cited. Under all the existing facts and circumstances herein, a penalty of \$375 for citation item 1b is consistent with the criteria set forth in section 17(j) of the Act.

Alleged serious violation of 29 C.F.R. section 1926.303(c)(7)

Serious Citation 1, item 1c alleges:

Abrasive wheels were not inspected and ring-tested to ensure that they are free from cracks or defects before mounting on grinding machines.

The Secretary alleges that Respondent failed to perform an inspection and ring testing on a grinding machine. Mr. Maldonado testified at the hearing that he cited Respondent for a violation of the standard as cited on the same bench grinding wheel as cited in citation items 1a and 1b. This standard requires that abrasive wheels be inspected and ring tested before mounting on grinding machines to ensure that they are free from cracks or defects.

The compliance officer noted that the inspection required is a visual inspection. He described ring testing as a test where the wheel is hung by a piece of string and then hit with the plastic handle of a screw driver in four different places at 45 degree angles from each other to ascertain that the wheel does not have any internal cracks. Mr. Maldonado further testified that he questioned Respondent's electrical supervisor, Mr. Collazo, and Respondent's engineer and electrical foreman, Mr. Nater, on the day of the inspection whether or not the grinding wheel had been inspected and ring tested. They answered that the wheel had not been inspected or ring tested. They further indicated that they did not even know how to perform a ring test. The compliance officer also noted that Respondent's employees were exposed to the hazard that the wheel could break while being used and the fragments of the wheel could pierce an employee's body and seriously injure him (transcript, p. 16-18, Secretary's brief, p. 9-10).

Respondent argues that the standard cited only requires that a grinding wheel be inspected and ring tested to ensure that it is free from cracks and defects prior to being mounted on a grinding machine. Respondent's safety engineer, Mr. Diaz, testified at the hearing that he had inspected the grinding wheel but had not ring tested it. Furthermore, though he could not specifically verify who ring tested this particular grinding wheel or when, as no records were kept or required to be kept regarding this, the company's regular procedure was to have all grinding wheels purchased, inspected and ring tested at the storage warehouse area prior to being sent out to be utilized (transcript, p. 78-82, Respondent's brief, p. 4-5).

Taking into consideration all the record evidence and credible testimony presented regarding this citation item, the

Secretary has failed to establish the existence of the recognized hazard as cited. Accordingly, since the Secretary has failed to prove a violation of the standard by a preponderance of the evidence, this citation item and proposed penalty are hereby vacated.

Alleged serious violation of 29 C.F.R. section 1926.405(e)(1)

Serious Citation 1, item 2 alleges:

Cabinets, cutout boxes, fittings, boxes, and panel-board enclosures in damp or wet locations were not installed so as to prevent moisture or water from entering and accumulating within the enclosures.

The Secretary alleges that Respondent violated the standard that requires that electric junction boxes that are placed in damp or wet locations shall be insulated so as to prevent moisture or water from entering within the enclosure. The compliance officer testified at the hearing that during his inspection he had observed a junction box, which was lying on top of a tire on a truck, partially on the tire and partially off the tire to the outside of the truck. Mr. Maldonado also noted that the junction box contained electrical wiring and was located outside where rain could get into the box. The junction box was not properly weather-proofed as there were holes in the box which were not covered, and there was no insulation. The compliance officer further added that the junction box powered an ice-making machine which Respondent's employees utilized daily. Respondent's employees were exposed to the hazard of electrocution because of the alleged violation of the standard as cited (transcript, p. 52-64, Secretary's brief, p. 11-13). The compliance officer's testimony was also supported by photographic evidence (exhibits C-2, C-3, and joint exhibit 1).

The Secretary also addressed in his brief Respondent's argument that if a violation of the standard is determined to exist, the violation was caused by the compliance officer's action of moving the junction box in order to take pictures of the alleged violation. The Secretary contends that this allegation was emphatically denied by the compliance officer at the hearing. In addition, even if the compliance officer had moved the junction box, the fact remains that the junction box was in an outside location with no roof over the truck and there still was a violation of the standard as cited (Secretary's brief, p. 12-13).

Respondent contends that the standard cited was not violated. The electric junction box in question had been located over the interior tire of the double set of tires at the rear part of the trailer. This interior tire was about 8-10 inches inside the border of the body of the trailer, making it almost impossible for water to get into the box. In addition, Respondent argues that the rubber tire on which the junction box was placed served as an insulator. Further, the placement of the ice-maker in front of the junction box also protected it from getting wet (transcript, p. 55-64, Respondent's brief, p. 6-7).

The Respondent also strongly asserted that if a violation was found to exist, the compliance officer created the violative condition. Respondent contends that the junction box had been resting on the tire completely under the truck until Mr. Maldonado's inspection. During the inspection, the compliance officer moved the junction box from its original position over the interior tire to the exterior edge of the outside tire. At this point, the compliance officer took pictures of the alleged "violation" (exhibits C-2 and C-3), which in no way reflected the actual existing condition or placement of the junction box

prior to Mr. Maldonado's action of moving the junction box in order to take pictures of the alleged violation (transcript, p. 55-64, p. 71-76, Respondent's brief, p. 6-7).

As to this citation item, I find that the Secretary has established a violation of the standard by a preponderance of the evidence presented. The evidence further reflects that the Respondent knew or should have known of the hazard. The violative condition was readily visible and obvious. Accordingly, the citation and proposed penalty as amended are affirmed.

Alleged other violation of 29 C.F.R. section 1926.405(b)(1)

Other Citation 2, item 1 alleges:

Unused openings in cabinets, boxes, and fittings were not effectively closed.

The Secretary alleges that Respondent failed to cover an unused opening in a circuit breaker panel. At the hearing Mr. Maldonado testified that at the time of the inspection he observed the circuit breaker panel with an unused opening not covered. The compliance officer learned during the inspection from Mr. Nater and Mr. Collazo that the unused opening had been there for several days. In addition, Respondent's supervisory officials informed the compliance officer that the employees normally set the circuit breakers each morning to turn on the power for the worksite when they arrived and also turned off the power at the end of each workday as they left (transcript, p. 31-36, Secretary's brief, p. 13-15). The compliance officer's testimony was also supported by photographic evidence (exhibit C-4).

Respondent argues that the standard cited was not violated. Further, the opening in question, i.e. the unused opening in the circuit breaker panel, "is a hole so small that even intentionally, your small finger will not go through it and even if it did go through, there is no electric power behind it" (Respondent's brief, p. 7). The Respondent also asserts that the Secretary cited Respondent for a violation of an inapplicable standard, as the standard cited is in the electrical section and does not apply to the occurrence of cuts or bruises to employees. In addition, Respondent contends that even if a violation was found to exist, Respondent's employees were not exposed to it (transcript, p. 65-69, Respondent's brief, p. 7-8).

The record evidence and testimony relating to this citation fully demonstrate a violation of the standard as cited. The violation was obvious and discernible by mere observation. Consequently, an other violation has been established.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specifically and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed Findings of Fact or Conclusions of Law inconsistent with this decision are denied.

ORDER

Based upon the Findings of Fact, Conclusions of Law, and the entire record, it is hereby ordered:

1. Citation 1, item 1a, alleging a serious violation of 29 C.F.R. section 1926.303(c)(2), is affirmed and a penalty of \$375 is assessed.
2. Citation 1, item 1b, alleging a serious violation of 29 C.F.R. section 1926.303(c)(5), is affirmed and a penalty of \$375 is assessed.
3. Citation 1, item 1c, alleging a serious violation of 29 C.F.R. section 1926.303(c)(7), is vacated.
4. Citation 1, item 2, alleging a serious violation of 29 C.F.R. section 1926.405(e)(1), is affirmed and a penalty of \$1,125 is assessed.
5. Citation 2, item 1, alleging an other violation of 29 C.F.R. section 1926.405(b)(1), is affirmed and a penalty of \$0 is assessed.



IRVING SOMMER
Judge, OSHRC

DATED: NOV 19 1993
Washington, D.C.