



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
HIRSCH ELECTRIC COMPANY
Respondent.

OSHRC DOCKET
NO. 94-0161

**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 17, 1994. The decision of the Judge will become a final order of the Commission on December 19, 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 December 7, 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
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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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.
Ray H. Darling, Jr.
Executive Secretary

Date: November 17, 1994

DOCKET NO. 94-0161

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,
 Complainant,

v.

HIRSCH ELECTRIC COMPANY,
 Respondent,

OSHRC
 Docket No. 94-0161

Appearances:

Heather A. Joys, Esq.
 Office of the Solicitor
 U.S. Department of Labor
 For Complainant

William B. Hirsch, Chairman
 Hirsch Electric Company
 Bedford Heights, Ohio
 For Respondent

Before: Administrative Law Judge Robert A. Yetman

DECISION AND ORDER

This proceeding arises under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651. *et. seq.* ("the Act") to review a citation issued by the Secretary of Labor pursuant to § 9(a) of the Act and a proposed assessment of penalty thereon issued pursuant to § 10(a) of the Act.

As a result of an inspection of respondent's worksite located at the Hillcrest Hospital during the period December 1 to December 9, 1993, the Secretary issued a Serious Citation to respondent on December 14, 1993 alleging one serious violation of 29 C.F.R. 1926.416(a)(1) with a proposed penalty of \$3,500. Respondent filed a timely notice of contest and the Secretary filed a complaint with this Commission on February 3, 1994 amending the citation to plead in the alternative as follows:

29 CFR 1926.416(a)(1): Employees were permitted to work in proximity to electric power circuits and were not protected against electric shock by deenergizing and grounding the circuits or effectively guarding the circuits by insulation or other means:

On the site at 6780 Mayfield Road in Mayfield Heights, Ohio, employees were permitted to work in proximity to electric power circuits and were not protected against electric shock by deenergizing and grounding the circuits or effectively guarding the circuits by insulation or other means.

or in the alternative:

29 CFR 1926.416(a)(3): Before work is begun the employer shall ascertain by inquiry or direct observation or by instruments, whether any part of an energized electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool, or machine into physical or electrical contact with the electric power circuit. The employer shall post and maintain proper warning signs where such a circuit exists. The employer shall advise employees of the location of such lines, the hazards involved, and the protective measures to be taken.

On the site at 6780 Mayfield Road in Mayfield Heights, Ohio, the employer failed to post and maintain proper warning signs where an energized electric power circuit was so located that persons came in contact with it; and the employer failed to advise employees of the location of the electric power circuit, the hazard involved and the protective measure to be taken under the circumstances.

Respondent's Chairman, William Hirsch filed a response to the complaint on February 7, 1994. Mr. Hirsch is a non lawyer and his response is accepted as a general denial of the averments in the complaint. A hearing was conducted on June 8, 1994 at which time two written stipulations were filed by the parties. The stipulations are as follows:

1. Jurisdiction of this action is conferred upon this Occupational Safety and Health Review Commission by section 10(c) of the Act.

2. Respondent is subject to the provisions of the Occupational Safety and Health Act (29 U.S.C. 651, et seq.) and its implementing regulations.

3. Respondent maintained a worksite at 6780 Mayfield Road, Hillcrest Hospital, in Mayfield Heights, Ohio on or about November 29, 1993.

4. Respondent was responsible for installation of electrical wiring at the worksite referenced in paragraph 3, above.

5. Respondent was issued, and received Citation No. 1, Inspection No. 103510335 on December 14, 1993.

6. On or about November 29, 1993, Respondent's employees installed and energized electrical wiring in an operating room at the worksite referenced in paragraph 3, above.

7. On or about November 29, 1993, Respondent was aware that employees of Duct Fabricators were installing defusers in the operating room referenced in paragraph 6, above.

8. On or about November 29, 1993, Respondent was aware that its employees had installed and energized electrical wiring in the operating room referenced in paragraph 6, above, prior to the installation of defusers by employees of Duct Fabricators.

9. On or about November 29, 1993, Respondent was aware that one flexible conduit remained energized while the employees of Duct Fabricators installed the defusers in the operating room referenced in paragraph 6, above.

10. Respondent was responsible for the installation, energizing, de-energizing, and guarding of all electrical circuits and/or wires at the worksite referenced in paragraph 6, above.

Second Stipulation

1. Respondent's worksite at 6780 Mayfield Road, Hillcrest Hospital in Mayfield Heights, Ohio is covered by the standard at 29 CFR 1926.416.

2. Respondent's worksite referenced in paragraph 1, above, was inspected by Mike Pappas on December 1, 1993 through December 9, 1993.

3. Complainant's inspection of Respondent's worksite referenced in paragraph 1, above, was initiated in response to

an employee complaint filed with the Cleveland Occupational Safety and Health Administration office.

4. At the worksite referenced in paragraph 1, above, Duct Fabricator employees worked in proximity to live parts of an electric power circuit.

5. Respondent employed approximately 30 employees at the worksite referenced in paragraph 1, above.

6. Respondent was aware that live parts of electric power circuits were located at the worksite referenced in paragraph 1, above.

According to the evidence presented at the hearing, Respondent's employees were responsible for installing electrical circuits and lighting systems at the Hillcrest Hospital, including the operating rooms, (Tr. 72). On November 28, 1993, a number of contractors were working in the operating rooms simultaneously and it was necessary to provide energy and lights to those contractors. Accordingly, perimeter lighting was installed and energized by respondent to provide lighting to the other craftsmen. The center bank of lights could not be installed, however, until the sheet metal duct diffusers¹ were installed. The wiring for the center lights had been installed and was hanging from the opening in the middle of the ceiling in a configuration known as a "greenfield" (tr. 74). The greenfield is flexible conduit approximately six feet long extending from an electrical box attached to the concrete structural ceiling (tr. 75) and contained six wires. These wires were exposed at the end of the greenfield hanging below the ceiling. Two of the wires were energized and carried 270 volts. The neutral wire also had the potential to become energized. The other three wires were "switch" wires and not energized (Tr. 77, 78, 79). According to respondent, the two energized lines and the neutral wire had scotch locks² on them to protect employees from accidental contact (Tr. 26, 79). Respondent intended to install the center lights after the diffusers had been installed (Tr. 72).

¹Diffusers are approximately 2' x 4' in dimension (Tr. 18).

²Scotch locks are plastic caps that are screwed onto the exposed ends of electrical wiring to prevent contact with the wire.

The project superintendent, Michael Picciano, an employee of Batia Construction Company, testified that he held weekly safety meetings attended by the foremen for each subcontractor at the site (Tr. 86). Respondent maintains that its representative at these meetings warned the other contractors that electrical lines were energized and if any contractor was required to work close to exposed energized lines, that the contractor should contact an electrician to “take care of it properly” (Tr. 27, 28). The foreman for Duct Fabricators, David Owen, attended the safety meetings but he did not recall being informed at those meetings to call an electrician if his crew was required to work close to energized line (Tr. 36). However, he works around energized lines “all the time” (Tr. 35) and he knew the lines were energized in the operating room because the perimeter lights were on in that room (Tr. 35).

On November 28, 1993, Brian Yacso, an employee of Duct Fabricators was installing metal duct diffusers in the operating room with his foreman, David Owen (Tr. 10, 11). While standing on a ladder installing a diffuser in the ceiling, he received an electrical shock. He noticed the greenfield hanging from the ceiling and “a couple of scotch locks on it” prior to the installation (Tr. 13). Mr. Yacso maintains that the scotch locks were on the wrong wires (Tr. 17). Respondent asserts that a scotch lock had been knocked off during installation of the diffuser (Tr. 84). Both parties agree that the electrical shock received by Mr. Yacso resulted from an exposed live wire. Based upon the evidence the Secretary asserts that respondent violated the provisions of 29 C.F. R. 1926.416(a)(1).

In order to establish that respondent failed to comply with the standard, the Secretary must prove that (1) the standard applies; (2) the employer failed to comply with the terms of the standard; (3) employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence, could have known of the violative condition *Astra Pharmaceutical Products, Inc.* 1981 CCH OSHD ¶ 25,578 Aff'd 681 F.2d 69 (1st Cir. 1982); *Gary Concrete Prods.* 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344, P. 39,449 (1991). Respondent acknowledges that the standard applies to its work activities. (Second Stipulation ¶ 1). However, respondent maintains that it had complied fully with the standard during all times alleged in the citation and complaint. Under the conditions present at the worksite, it was not possible to deenergize the electrical lines because other

crafts needed lights and power to perform their work activities (Tr. 29). Respondent also knew that diffusers has to be installed prior to placing the center bank of lights in the ceiling (Tr. 26), and that the sheet metal components of the diffuser has sharp edges (Tr. 29). In respondent's view, it acted in a reasonable and prudent manner under these circumstances by placing scotch locks at the ends of the energized lines and notifying other crafts during the weekly safety meetings to contact one of its electricians if any employees of other crafts were required to work in close proximity to energized line (Tr. 27). Upon being so notified, respondent intended to move the energized line away from the work area (Tr. 32). Thus, respondent placed the responsibility upon the employees of other crafts to notify respondent each time work was to be preformed in close proximity to energized lines. However, the injured employee, Brian Yacso, stated that he was not told to contact an electrician when he was required to work in close proximity to energized line (Tr. 18).

The standard cited requires employers to deenergize and ground electrical circuits when employees are exposed to those circuits. Alternatively, employers must effectively guard the circuit from contact. In this case, it was not practical for respondent to deenergize the lines because of work activities of other contractors. Therefor, respondent "guarded" the lines by placing scotch guards at the exposed ends of the lines. The issue then, is whether the guard placed upon the lines was "effective" within the meaning of the standard.

The term "guarded" is defined at 29 C.F.R. 1926.449 as follows:

Guarded. Covered, shielded, fenced, enclosed, or otherwise protected by means of suitable covers, casings, barriers, rails, screens, mats, or platforms to remove the likelihood of approach to a point of danger or contact by persons or objects.

There is agreement between the parties that Mr. Yacso received an electrical shock from the greenfield suspended from the ceiling. Although there is disputed testimony relating to the placement of scotch guards on the wires, respondent's general foreman acknowledges that a properly installed scotch guard could have been knocked off during the installation of the diffuser or the insulation covering the wires could have been "pinched" (Tr. 84). In view of the work activity of the employees of Duct Fabricators, the sharp edges of the materials being installed as well as the close proximity of the electrical lines, it is concluded

that merely placing scotch locks at the exposed ends of the energized lines did not constitute “effective guarding” of those lines from employee contact.

Moreover, respondent, upon notification from Mr. Yacso or Mr. Owen, intended to move the greenfield “out of the way” of the work performed by those employees (Tr. 107, 108). In addition, the project superintendent testified that the greenfield could have been secured “up tight to the deck” (Tr. 98) when it was installed. Thus, in view of the fact that respondent knew that diffusers were to be installed, the electrical lines should have been removed from that area at the time that the wiring was installed. Accordingly, the violation is affirmed. *See: Brennan v. OSHRC (Underhill Construction Corp.)*, 513 F.2d 1032 (2d Cir. 1975), followed in, *Grossman Steel & Aluminum Corp.*, 1975 CCH OSHD ¶ 19,982 (No. 12775, 1975); and *Anning-Johnson Co.*, 1973-74 CCH OSHD ¶ 17,725 (No. 4409, 1974).

Section 17(k) of the Act provides that a violation is “serious” if there is “a substantial probability that death or serious physical harm could result” from the violation. *Pack River Lumber Co.* 2 BNA OSHC 1614, 1615, 1974-75 CCH OSHD ¶ 19,323 p. 23,097 (1975). The Secretary need not establish that an accident is likely to occur in order to prove that the violation is serious. Rather, he must show that “an accident is possible and there is substantial probability that death or serious physical harm could result from the accident.” *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1324, 1991 CCH OSHD ¶ 29,500 p. 39,813 (No. 86-351, 1991); *see Super Excavators, Inc.*, 15 BNA OSHC 1313, 1317, 1991 CCH OSHD ¶ 29,498, p. 39,804 (No. 89-2253, 1991); *Natkin & Co.*, 1 BNA OSHC 1204, 1205, 1971-73 CCH OSHD ¶ 15,679, pp. 20,967-68 (No. 401,1973); *see also Bunge Corp. v. Secretary of Labor*, 638 F.2d 831, 834 (5th Cir. Unit A 1981); *California Stevedore and Ballast Co. v. OSHRC*, 517 F.2d 986, 988 (9th Cir. 1975).

In this case, employees were exposed to 270 volts of electricity. The Compliance Officer determined that the exposure could result in burns, impact injuries from shock reaction or electrocution (Tr. 54). Although Mr. Yacso was not seriously injured, the probability of serious injury by contacting a line carrying 270 volts is substantial. Accordingly, the violation is affirmed as a serious violation.

Section 17(j) of the Act requires that due consideration must be given to four criteria in assessing penalties: the size of the employer's business, gravity of the violation, good faith and prior history of violations. In *Secretary of Labor v. J.A. Jones Construction Company*, 15 BNA OSHC 2201 (1993), the Commission stated:

These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶29,582, p. 40,033 (No. 88-2691, 1992); *Astra Pharmaceutical Prods., Inc.*, 10 BNA OSHC 2070 (No. 78-6247), 1982). The gravity of a particular violation, moreover, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1132, 1981 CCH OSHD ¶25,738, p.32,107 (No. 76-2644, 1981).

The Secretary proposed a penalty in the amount of \$3,500 for the violation. This is based in large part upon "the severity of the possible potential injury" (Tr. 54). This amount proposed after reducing the original penalty for size of the company and past history. No reduction was given for good faith (Tr. 55, 56). In this case it is clear that the policy of this company was to guard live wires by placing scotch locks on the wires. Moreover, there is evidence that respondent attempted to warn employees of other contractors not to work close to energized lines without informing an electrician. Accordingly, a reduction in the penalty for good faith is appropriate. A penalty in the amount of \$1,000 is assessed for the violation.

Since it is concluded that respondent violated 29 C.F.R. 1926.416(a)(1) as alleged, there is no need to consider complainant's alternative pleading. Accordingly, the alleged violation of 29 C.F.R. 1926.416(a)(3) is **dismissed**.

FINDINGS OF FACT

Findings of fact relevant and necessary to a determination of all issues have been made above. Federal Rules of Civil Procedure 52(a). All proposed findings of fact inconsistent with this decision are hereby **denied**.

CONCLUSIONS OF LAW

1. Respondent is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act.

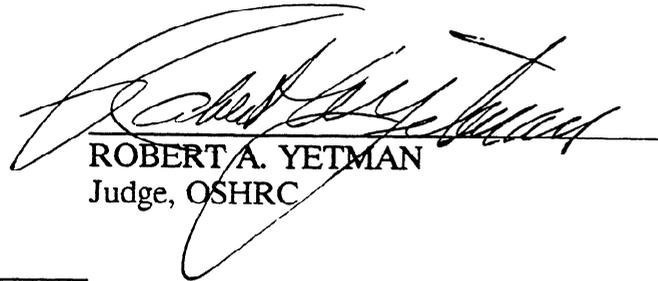
2. Respondent, at all times material to this proceeding was subject to the requirements of the Act and the standards promulgated there under. The Commission has jurisdiction of the parties and of the subject matter of this proceeding.

3. At the time and place alleged, respondent was in Serious violation of 29 C.F.R. 1926.416(a)(1).

ORDER

Serious Citation No. 1, Item No. 1 is **affirmed** and a penalty of **\$1,000** is assessed.

NOV 10 1994


ROBERT A. YETMAN
Judge, OSHRC

Dated: _____

Boston, Massachusetts