

A. Citation 1, item 3a -29 C.F.R. § 1915.132(d)²

Facts

The Secretary cited four specific instances where the compliance officer observed electric cables that were worn and frayed in violation of the standard. In three instances, the cables were heavily taped with a base of Scotch 33, an all weather electrical tape that meets various heating standards, and topped with a layer of friction tape to protect the integrity of the layer of Scotch 33. The fourth instance involved a cord attached to a drop light that had various nicks and cuts that were not taped. The compliance officer testified that while the taped cables had been restored to their original insulation factor and afforded employees the same quality of protection they had when the cables were in their original condition, the standard nevertheless had been violated because, though the cord was taped over, the original insulation was still worn and frayed. In addition, the compliance officer noted that after a cord is wrapped, there is no way to determine if the repairs were adequate without unwrapping the cable. Moreover, he testified that to ensure the integrity of the wrapping on a worn or frayed cable requires that the cable be inspected on a daily basis. In the view of the compliance officer, given the miles of cable present at the worksite, to sustain such a frequency of inspection would be an “overwhelming” task. Because the cables were well repaired in the instant case, the item was cited as other-than-serious.

The judge rejected Trinity’s contention that there was no violation because the electric and friction tape used to wrap the cables restored them to the same quality of insulation as the original. The judge found the standard to be unambiguous and held that worn or frayed cables, even when wrapped, remain worn or frayed. Because the cables presented little risk of electrocution the judge affirmed the violation as other-than-serious and assessed no penalty.

Discussion

Trinity argues that nothing in the standard prohibits worn or frayed electric cables from being used when sufficiently taped to restore them to their original level of insulation. The Secretary, on the other hand, argues that the plain wording of the standard forbids an employer

²§ 1915.132 *Portable electric tools.*

* * *

(d) Worn or frayed electric cables shall not be used.

from using worn or frayed electric cables, regardless of whether they have been wrapped with tape. It is the Secretary's contention that, even after being taped, a worn or frayed cable remains worn or frayed.

The Commission finds that the judge properly concluded that the standard precludes an employer from using worn or frayed cable that has been taped.

Commissioner Weisberg agrees with Judge Simko's finding that "the standard's requirements are specific and do not provide for alternative methods of compliance." In his view, the standard simply and plainly says that such cords cannot be used -- it does not say that they may be taped over and used. Taping over a cord that is worn and frayed does not render it no longer worn and frayed. *Cf. A.L. Baumgartner Construc., Inc.*, 16 BNA OSHC 1995, 1998, 1993-1995 CCH OSHD ¶ 30,554, pp. 42,273-74 (No.92-1022, 1994) ("the standard [29 C.F.R. § 1926.16(e)(1)] plainly prohibits the use of a worn or frayed cord"--- "[t]he existence of a GFCI has no bearing on whether the terms of this standard were violated"). Commissioner Weisberg also observes that although his dissenting colleague focuses on the dictionary definition of the terms "worn" and "frayed," the meaning of those words is not in dispute. Nor is it disputed that the original insulation of the cited cords remained worn and frayed under the layers of added tape. Commissioner Weisberg would find that the addition of the tape does not fundamentally alter the underlying condition of the cords, nor does it override the explicit command of the standard that such cords "shall not be used."

Chairman Rogers finds the standard to be ambiguous. In her view, the standard can be reasonably read to either allow or prohibit the use of worn or frayed electric cables that have been repaired. However, the Chairman finds that the Secretary's interpretation reasonably conforms to the purpose and wording of the standard. *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 150-51 (1991). The Chairman notes that because the standard was drafted to apply to maritime work sites where accumulations of water are common, it anticipates that cables would be used in wet or damp locations where the integrity of insulation is critical. Therefore, a hazard may arise either by an employee directly contacting a worn or frayed cable or by employee contact with a wet location that may become energized by a worn or frayed cable. In the Chairman's view, the Secretary's interpretation reasonably addresses such a hazard by prohibiting the use of worn or frayed cable. As the compliance officer testified, short of unwrapping a taped cable, there is no way to ensure that a worn or frayed cable is properly wrapped. Moreover, worn or frayed cables

that have been wrapped are more susceptible to further damage than unworn/unfrayed cables. Under these circumstances, the Chairman finds it is reasonable to interpret the standard to prohibit worn or frayed cables from being returned to service after taping. The Commission affirms the citation as to the three taped cables.

However, unlike the worn or frayed cables which Trinity concedes it had knowledge of, we find that the Secretary failed to prove by a preponderance of the evidence that Trinity knew or should have known of the presence of the drop light³ with the nicked and cut cord.⁴ There is no evidence in the record that Trinity knew that the drop light cord was damaged. Curtis Chambers, Trinity's corporate safety director, testified without contradiction that inspection teams regularly inspect all cables and cords and repair nicks on the spot. He also testified without rebuttal that employees are instructed to check cords and cables as they use the equipment and to bring to their supervisors any damaged equipment. Indeed, Trinity's written procedures require that employees "Inspect portable equipment, including extension cords, before using them and turn in anything that's defective or damaged." Leadman Charles Smith testified, without contradiction, that this policy was enforced. Where the employer maintains an adequate inspection program, the burden is on the Secretary to demonstrate that the employer's failure to discover the violative condition was due to a lack of reasonable diligence. *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940, 1999 CCH OSHD ¶ 31,932, p. 47,372 (No. 97-1676, 1999). The Secretary has not suggested any reasonable additional measures that Trinity could have taken to detect the damaged drop light. In fact, the compliance officer acknowledged that, because of the miles of electric cord and cable being used at the worksite, the job of inspecting all of them on a daily basis would be an "overwhelming" task. Accordingly, we find that Trinity's program to detect defective electrical equipment, such as the defective drop light, was reasonably diligent. *Centex-Rooney Constr. Co.*,

³We note that although the drop light was involved in the fatal accident, no defect in the drop light was involved in the electrocution. Rather, the accident was caused by a miswired receptacle which caused energization of the metal cage protecting the bulb in the drop light.

⁴It is well-established that, in order to prove a violation, the Secretary must prove that the employer had either actual or constructive knowledge of the violative condition. *Con-Agra Flour Milling Co.*, 15 BNA OSHC 1817, 1823, 1991-93 CCH OSHD ¶ 29,808, p. 40,593 (No. 88-2572, 1992). This means that the employer either knew of the violative conditions or could have known of them with the exercise of reasonable diligence. *Ibid.*

16 BNA OSHC 2127, 2129, 1993-95 CCH OSHD ¶ 30,621, p. 42,410 (No. 92-0851, 1994). We therefore conclude that the Secretary has not established a violation with respect to the drop light.

The Secretary alleged, and the judge affirmed, this item as other-than-serious and recommended that no penalty be assessed. Neither party has objected to either the characterization of the violation or the penalty proposal. We therefore affirm item 3a of citation 1 as an other-than-serious violation as to the three worn and frayed cords and assess no penalty.

Citation 2, Item 1a(b)-29 C.F.R. § 1910.303(b)(2)⁵

Facts

The Secretary alleges that Trinity willfully violated 29 C.F.R. § 1910.303(b)(2) by failing to install electrical equipment in accordance with the instructions included in the listing or labeling on the grounds that the plugs and receptacles on the job-made electrical service boxes, circuit breaker panel box and drop light were used on a 30-amp branch circuit rather than on 10, 15, and 20-amp circuits as they were labeled. John Gore, an electrical engineer with extensive experience in designing electrical systems for industrial facilities and commercial office buildings, testified to the danger of this condition. According to Mr. Gore, the receptacles were not protected at their rating. This could create a situation where there could be a continuous 30-amp current flowing through a 10, 15 or 20-amp rated receptacle. The likely result of such a condition would be some degree of overheating of the device. Mr. Gore noted that this hazard was exacerbated because the receptacles were located in wooden boxes.

The judge found that, as alleged, Trinity was using receptacles labeled for 10, 15, or 20-amps in a circuit breaker labeled for 30 amps. The judge also concluded that by using the lower rated receptacles with the higher rated circuit breaker, Trinity failed to use or install the labeled electrical equipment in accordance with its labeling and instructions. However, the judge did find that the Secretary failed to establish the “heightened awareness” or “state of mind” elements

⁵§ 1910.303 *General requirements.*

* * *

(b) *Examination, installation, and use of equipment.*

* * *

(2) *Installation and use.* Listed or labeled equipment shall be used or installed in accordance with any instructions included in the listing or labeling.

necessary to establish the violation as willful.⁶ Accordingly, the judge affirmed the item as serious and assessed a penalty of \$7000.

Discussion

Trinity concedes that when a single receptacle is attached to a branch circuit, the receptacle must be of the same amperage as the branch. Here, however, it argues that the use of multiple receptacles means that we must consider combination loads. Trinity argues that it is necessary for a branch circuit to have a greater amperage than any individual receptacle on a multi-receptacle line in order to prevent “voltage drop” which can damage electrical devices. According to Trinity, voltage drop is caused when a large number of items are plugged into a branch circuit at the same time.⁷ To prevent voltage drop under these circumstances, Trinity argues, the overall amperage capacity of the circuit must be greater than the capacity of the individual receptacles. Trinity asserts that NEC 220-3⁸ addresses this problem by requiring that an overcurrent device (i.e. circuit breaker) for a branch circuit that supplies continuous and noncontinuous loads have a rating “not less than the sum of 100 percent of the noncontinuous load plus 125 percent of the continuous load.”⁹ According to Trinity, this NEC provision recognizes that branch circuits with combination loads must necessarily exceed the rating of the individual receptacles.

We find no merit in Trinity’s argument. The NEC provision cited by Trinity is irrelevant to

⁶The Secretary does not seek review of the judge’s characterization of the violation.

⁷This is akin to the dimming of lights caused when an electric hair dryer is turned on.

⁸In his decision, the judge refused to consider parts of the National Electrical Code (NEC) that respondent sought to introduce in its post-hearing brief. In the judge’s view, this was an improper attempt “to introduce evidence through legal argument” that should have been introduced at the hearing where it would have been subject to cross-examination. On review, Trinity renewed its efforts to introduce portions of the National Electrical Code to demonstrate that the receptacles were not in a violative state. Although the NEC was introduced late in the proceedings, the Secretary has indicated that she has no objection to it being considered on review

⁹A “continuous load” is one that runs continuously for at least three hours. A noncontinuous load is one that is used intermittently, such as a light that may be turned on and off. NEC Article 100-Definitions.

the cited condition. The provision prescribes the appropriate circuit breaker to be used on a branch circuit that supplies continuous and noncontinuous loads. The citation, on the other hand, pertains to branch circuit and attached receptacle amperage compatibility. NEC section 210-23(b)(3) states that “[w]here connected to a branch circuit supplying two or more receptacles or outlets, receptacle ratings shall conform to the values listed in Table 210-21(b)(3).” The referenced Table plainly requires that for circuits rated 30-amperes, the attached receptacles shall similarly be rated 30-amperes. Thus, regardless of the maximum load associated with the branch circuit system, Trinity contravened the provisions of the NEC when it used 10, 15, and/or 20 ampere receptacles on a 30 ampere branch circuit.

Furthermore, as pointed out by John Gore, Trinity’s interpretation would create a serious hazard. Should an electrical problem arise which results in the individual receptacle drawing more than its rated amperage (i.e. a short circuit), the receptacle could overheat before the amperage of the branch circuit is exceeded and the circuit breaker for the circuit is tripped. This could result in an electrical fire.

We also find no merit in Trinity’s argument that the amperage ratings stamped on the receptacles and appliances do not constitute “instructions” within the meaning of the standard. These ratings compel only one logical conclusion, that the receptacle is to be used on a circuit of comparable rating. Indeed, the standard specifically envisions this situation insofar as it requires equipment to be used in accordance with instructions included “in the listing or *labeling*.” Additionally, the clear language of the NEC provided notice to Trinity’s experienced electricians that the receptacles were to be used only on circuits of comparable amperage. *Cf. Cargill, Inc.*, 10 BNA OSHC 1398, 1982 CCH OSHD ¶ 25,935 (No. 78-5707, 1982)(“voluntary industry standards are admissible and probative evidence of industry recognition of hazards”)(citations omitted). Accordingly, we also reject Trinity’s argument that the standard as applied, is void for vagueness. *See Corbesco Inc. v. Secretary*, 926 F.2d 422, 427 (5th Cir. 1991)(where the language of a regulation is not specific enough, industry custom and practice may provide constructive notice)(citations omitted).

Similarly without merit is Trinity’s contention that it was led to believe that the receptacles were in compliance because of OSHA’s failure to cite them after a 1989 inspection. It is well established that an employer cannot rely on the Secretary’s failure to issue a citation. *Peterson*

Brothers Steel Erection Co., 16 BNA OSHC 1196, 1201, 1993-95 CCH OSHD ¶ 30,052, p. 41,300 (No. 90-2304, 1993), *aff'd*, 26 F.3d 573 (5th Cir. 1994). To draw any inference from an earlier failure to cite a condition would require the Commission to speculate on the reasons for the failure to cite. *Lukens Steel Co.*, 10 BNA OSHC 1115, 1126, 1981 CCH OSHD ¶ 25,742 at p. 32,112 (No. 76-1053, 1981). Moreover, compliance with the Act is a continuing obligation, and an employer cannot show lack of knowledge by relying on the Secretary's earlier failure to cite the condition. *Id.* The mere fact of prior inspections does not give rise to an inference that OSHA made an earlier decision that there was no hazard, and does not preclude the Secretary from pursuing a later citation. *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1224, 1991-93 CCH OSHD ¶ 29,442, p. 39,680 (No. 88-821, 1991).

Finally, Trinity argues that the Secretary's withdrawal of the 1989 citation involving the electrical boxes containing the receptacles at issue implied that it could operate receptacles on circuits with amperage ratings higher than the receptacles. However, as will be discussed *infra*, the portable boxes were cited in 1989 because they were not waterproof. There is no evidence that the citation had anything to do with the amperage ratings of the receptacles in relation to the branch circuit. Trinity's attempt to translate OSHA's withdrawal of a citation for an unrelated hazard into an imprimatur by OSHA of other aspects of the portable plug-in electrical boxes is totally without merit.

Penalty

The judge found the violation to be serious and assessed a \$7000 penalty for grouped items 1a(b) and 1b. Item 1b is not before us on review, and while it takes exception to the judge's affirming of item 1a(b), Trinity does not dispute either the characterization of the violation or the penalty. Accordingly, we affirm item 1a(b) as serious and assess a grouped penalty of \$7000.

C. Citation 2, items 2a and 2b 29 C.F.R. § 1910.305(e)(1) and (2)¹⁰

¹⁰§ 1910.305 *Wiring methods, components, and equipment for general use.*

* * *

(e) *Enclosures for damp or wet locations.* (1) Cabinets, cutout boxes, fittings, boxes, and panelboard enclosures in damp or wet locations shall be installed so as to prevent moisture or water from entering and accumulating

Facts

The facts underlying both items 2a and 2b are not in dispute. At the site, there were approximately 50 electrical service boxes that were lying in an unprotected area on the ground throughout the shipyard. Item 2a alleges that these boxes were made of unpainted wood and were not designed to be weatherproof, as required by 29 C.F.R. § 1910.305(e)(1). In fact, there were areas where a person could actually see into the boxes. The hazard was that water could accumulate in the box and receptacle which, if touched by an employee, could cause a severe electric shock, severe burn, or possibly even electrocution. Moreover, there was rust inside the receptacles, indicating the presence of some degree of moisture.

In item 2b, the Secretary alleged that the circuit breaker panel used at the job site was constructed of wood and was not weatherproof, as required by 29 C.F.R. § 1910.305(e)(2). This circuit breaker was used outdoors to supply power to the electrical service boxes. Although there was a metal enclosure inside the wooden frame, the enclosure was not weatherproof. Moreover, the receptacles on either side of the box were fully open and exposed to the elements. There was no cap or cover to minimize or prevent moisture from accumulating or entering these receptacles.

Because employees frequently worked close to or directly with the equipment, the violations were considered to be of elevated gravity. The compliance officer noted that Ronnie Mitchell, the lead maintenance supervisor, was familiar with the general industry standards and the NEC and understood the nature of the compliance officer's concerns, yet allowed the conditions to exist essentially because that was the way Trinity's predecessor company, Nashville Bridge, had the boxes constructed. On this basis, the violations were cited as willful.

This condition had been subject to a citation issued approximately eight years earlier against Trinity's predecessor company. Following an informal conference, however, the item was withdrawn.

The judge found that the service boxes were constructed of unpainted woods, were not designed to be weather tight and exhibited evidence that moisture had gotten into them. Moreover, the wooden circuit breaker panel was located on the ground outdoors at the shipyard

within the enclosures. In wet locations the enclosures shall be weatherproof.

(2) Switches, circuit breakers, and switchboards installed in wet locations shall be enclosed in weatherproof enclosures.

and was unprotected and exposed to the weather. The judge rejected respondent's argument that it lacked fair notice that it was in violation on the grounds that the previous citation for the same violation had been withdrawn by the Secretary. The judge found insufficient evidence to establish that the violations were willful. He did find that the violations were serious¹¹ because they presented the hazard of electrical shock, including electrocution. The judge assessed a grouped penalty of \$7000 for items 2a and 2b.

Discussion

Trinity's sole defense is that it lacked notice that the plug-in boxes violated OSHA standards. In support of its argument, Trinity points out that the boxes had been in use for at least 15 years without any problems, and that the boxes were cited for this same condition after the 1989 inspection of the predecessor company, but that the citation was withdrawn. Moreover, after this withdrawal, the shipyard was inspected at least four times with teams of up to four compliance officers, including the same compliance officer that conducted this latest inspection.

Trinity can neither point to a statement by OSHA that suggests that its devices complied with the standard, nor provide any other reason why the item was withdrawn. However, Jim Smitson, Trinity's personnel manager, who was the manager of labor relations of the predecessor company at the time of the 1989 citation and was present at the conference with OSHA, testified that it was his understanding that the item was withdrawn because no one could offer anything better or safer. He opined that once the item was dropped, the company was free to continue to use the boxes. He further testified that there were no side agreements between the company and OSHA regarding the boxes. Even though at least 50 boxes were in use throughout the shipyard during the four inspections that followed the withdrawal, they were never cited for not being weatherproof, until the instant citation.

Trinity relies on *Miami Industries*, 15 BNA OSHC 1258, 1991-93 CCH OSHD ¶ 29,465 (No. 88-671, 1991), *aff'd in part without published opinion*, 983 F.2d 1067 (6th Cir. 1992). In *Miami*, the employer was issued a citation alleging a violation of the machine guarding standard at § 1910.212(a)(1). However, ten years earlier, Miami had been issued a citation for the same violation, which it did not contest. Instead, after consulting with OSHA, it devised a guarding system which OSHA led it to believe complied with OSHA requirements. Over the next decade,

¹¹The parties do not dispute the judge's characterization of the violations.

OSHA conducted seven inspections and never cited the machines. In vacating the citation, the Commission found that, having reasonably relied on the representations of OSHA personnel, Miami lacked fair notice of the standard's requirements. According to Trinity, *Miami* is directly on point and is controlling. Trinity argues that, as in *Miami*, OSHA previously agreed that no further abatement of the alleged hazard was required, the boxes were not cited for over eight years despite numerous inspections, and there never was an injury from the purported hazard. Therefore, Trinity argues it had no notice that OSHA had changed its position.

Trinity also contends that the judge's attempt to distinguish *Miami* on the grounds that the standard there was broadly worded while the standard here is specific is irrelevant. The controlling fact, Trinity argues, is that it had cause to rely on what it claims were OSHA's earlier indications that no abatement was necessary.

Trinity's reliance on *Miami* is misplaced. Despite Trinity's attempt to minimize the distinction, the difference in the nature of the standards cited is critical. Opening its discussion of fair notice in *Miami*, the Commission made it clear that the general nature of the standard cited in *Miami*, together with clearly misleading statements by OSHA officials, were central to the determination that Miami lacked fair notice. Here, however, not only does the standard clearly require that electrical boxes and circuit breakers in wet locations be weatherproof, but Trinity was unable to point to any prior statement by an OSHA official indicating that the boxes were in compliance with the standard.

OSHA may withdraw a citation for a number of reasons, but the mere act of withdrawing a citation does not constitute a statement by OSHA that the condition is consistent with the standard's requirements, nor does it provide the employer with a license to continue to operate the facility in violation of the Act. Settlement agreements "by their very nature reflect the give and take, or trading off, particular to a case." *Erie Coke Corp.*, 15 BNA OSHC 1561, 1569, 1991-93 CCH OSHD ¶ 29,653, p. 40,155 (No. 88-0611, 1992), *aff'd*, 998 F.2d 134 (3d Cir. 1993). "Moreover, the Secretary's exercise of her discretion not to issue a citation for a particular condition. . . does not immunize an employer from being cited for the same or a similar condition in a future enforcement action." *Id.* Similarly, "[t]he Secretary's failure to issue a citation for a violation of a standard does not immunize an employer from future enforcement of that standard." *Cardinal Industries*, 14 BNA OSHC 1008, 1013, 1987-90 CCH OSHD ¶ 28,510, p. 37,803 (No.

82-427, 1989)(citations omitted).

Another critical distinction is that in *Miami*, the employer took overt abatement action based on representations by OSHA officials. Thus, not only did Miami reasonably rely on OSHA's representations, it also took affirmative abatement action based on that reliance. Here, however, Trinity took no abatement action whatsoever. Rather, it impermissibly took the withdrawal of the original citation as a license to continue with business as usual, even though the electrical boxes clearly violated the standard. Accordingly, we affirm the violations of sections 1910.305(e)(1) and (2).

Penalty

Neither the Secretary nor respondent take exception to the judge's characterization of the items or to the \$7000 grouped penalty he assessed. Accordingly, we affirm the violations as serious and assess a grouped penalty of \$7000.¹²

Order

Accordingly, it is ORDERED that (1) citation 1, item 3a for an other-than-serious violation of 29 C.F.R. § 1915.132(d) is affirmed as to the three worn and frayed cables and a penalty of \$0 is assessed; (2) citation 2, item 1a(b) for serious violation of 29 C.F.R. § 1910.303(b)(2) is affirmed and a penalty of \$7000 for this item grouped with item 1b is assessed; and (3) citation 2, items 2a and 2b for serious violations of 29 C.F.R. §§ 1910.305(e)(1) and (2) are affirmed and a grouped penalty of \$7000 is assessed.

/s/
 Thomasina V. Rogers
 Chairman

/s/
 Stuart E. Weisberg
 Commissioner

Date: August 1, 2000

¹²Commissioner Weisberg notes that even though neither party has taken exception to the amount of the grouped penalty assessed by the judge for Trinity's failure to use weatherproof electrical boxes and circuit breaker panels, his colleague, Commissioner Visscher, would nevertheless "substantially lower the penalty against Trinity." Commissioner Visscher would lower the penalty substantially not based on due consideration of any of the section 17(j) penalty factors, but rather because the Secretary did not cite Trinity for this condition in previous inspections. Commissioner Weisberg notes that his colleague deems the Secretary's past failure to cite as constituting acquiescence. He also notes that the concept that a reduced penalty is warranted if during a previous inspection the Secretary either missed a violation or otherwise failed to cite that condition would likely result in longer, more comprehensive inspections and the issuance of more citations by OSHA, a practice he doubts his colleague wishes to encourage.

VISSCHER, Commissioner, concurring in part, dissenting in part:

I concur in the majority's decision to affirm a violation of 29 C.F.R. § 1910.303(b)(2), for failure to install listed equipment in accordance with instructions. I also concur in affirming violations of 29 C.F.R. § 1910.305(e)(1) and (2), for failure to use weatherproof electrical boxes and circuit breaker panels. I do not, however, agree that the penalty assessed is appropriate. I would assess a substantially lower penalty against Trinity for its use of non-weatherproofed electrical service boxes and circuit breaker panel enclosures in light of the fact that the Secretary, despite knowing of the conditions, had acquiesced in Trinity's continued use of them in previous inspections.¹

I also disagree with the majority's opinion that 29 C.F.R. §1915.132(d) prohibits Trinity from repairing and returning to use "worn or frayed" electric cords, and I would therefore vacate the violation alleged in Citation 1, Item 3a.

Regarding this item, Trinity was cited for using four electric cords which were allegedly "worn or frayed" in violation of section 1915.132(d). That section simply states that "[w]orn or frayed electric cables shall not be used." One of the cords was attached to a drop light and had nicks and cuts. The majority finds that Trinity lacked knowledge of the damaged condition of that cord, and therefore vacates that particular item. The other three cords had cuts that had been taped. Even though the compliance officer testified that the tape restored the cords' original insulation factor, the majority concludes that Trinity violated the standard by using the cords after they were repaired.

It is axiomatic that the words used in a standard should ordinarily be given their natural and plain meaning. *Bunge Corp.*, 12 BNA OSHC 1785,1791, 1986 CCH OSHD ¶ 27,565, p.

¹Trinity points out that the same wooden boxes that the Secretary cited as *willful* violations in this case had been used on the worksite for the previous 15 years. As a result of an inspection in 1989, OSHA cited a violation for use of wooden electrical boxes, but subsequently withdrew the citation as part of a settlement agreement. OSHA conducted four subsequent inspections of the worksite prior to the inspection that resulted in the citations at issue here, and did not cite the wood boxes and panels. Trinity argues that the citation should be vacated as a result of this history, on the basis that Trinity lacked notice that the boxes violated the OSHA standard. The language of the standard, however, is clear and therefore provides notice of the requirement. *See, e.g., Ed Taylor Constr. v. OSHRC*, 938 F.2d 1265, 1272 (11th Cir. 1991). Nonetheless, I believe that a minimal penalty is appropriate where the Secretary's own actions with regard to the violative condition suggest that she considered it to be of relatively low gravity.

35,806 (No. 77-1622, 1986). Webster's Third New International Dictionary (1986) defines "frayed" as "separated" or "unraveled" and "worn" as "diminished in value or usefulness." While the cords at issue here had at one point apparently been "unraveled" and therefore had "diminished" insulation value, they were so well taped when the compliance officer inspected them that he admitted the insulation protection had been restored to the original factor. In my view, the cords were therefore not worn or frayed at the time of the inspection. The standard does not say that cables *which have ever been* worn or frayed shall not be used.

Indeed the Secretary seems uncertain of her contrary interpretation. Though she cited Trinity on the theory that section 1915.132(d) does not allow employers to use cords which have been repaired, her own case presentation fails to provide consistent support for this position. At the hearing, when first questioned on the issue, the Secretary's compliance officer testified that worn or frayed cords must be removed from service rather than taped. Under later questioning by the judge, however, the same compliance officer squarely contradicted himself by explaining that worn or frayed cables may continue to be used if properly taped. And there are further contradictions in the Secretary's case. As Trinity points out, 29 C.F.R. § 1910.305(g)(2) explicitly allows electric cables to be repaired so long as "the splice retains the insulation, outer sheath properties, and usage characteristics of the cord being spliced." The Secretary insists that her interpretation of section 1915.132(d) is not inconsistent with section 1910.305(g)(2), because the latter standard only applies to cables that are No. 12 or larger. But she then allows that Trinity can use damaged cords of any size, so long as it removes the damaged portion and attaches a "connector" at the severed end.

The Secretary has not referred us to any previous enforcement or agency interpretation of section 1915.132(d). The general industry standard for electrical and safety related practices, 29 C.F.R. § 1910.334(a)(2)(ii), does allow defective or damaged cords to be repaired and returned to use. The maritime standard at issue here was originally published decades ago under the Longshore and Harbor Workers' Compensation Act and simply adopted verbatim by the Secretary as an OSHA regulation pursuant to OSH Act section 6 (a), 29 U.S.C. § 655(a). By contrast, OSHA issued the general industry standard in 1990 following full notice and comment rulemaking as provided for in OSH Act section 6 (b), 29 U.S.C. § 655(b). In other words, when the Secretary herself developed the more recent general industry standard, she determined that the

hazard contemplated by the standard -- electrical shock from use of damaged or defective electrical cords -- is adequately addressed by prohibiting defective cords from being used until they are repaired and tested. There appears to be no basis for the argument that the maritime standard should be interpreted differently because of hazards unique to maritime workplaces, particularly the likelihood of electric cords being used in wet or damp locations, since the hazards associated with using electric cords in wet or damp locations were also contemplated in the general industry standard and addressed at 29 C.F.R. §1910.334(a)(4) without prohibiting the use of repaired cords in those locations.

In short, I do not find that the cited standard prohibits an employer from repairing and returning a previously damaged electrical cord to service, and therefore vacate the citation. Since I do not find the standard to be ambiguous, I would not reach the question of deference to the Secretary's interpretation. *See Christensen v. Harris County*, 120 S. Ct. 1655, 1663 (2000)(deference to an agency's interpretation of its regulation is warranted only when the regulation's language is ambiguous); *accord, Unarco Commercial Products*, 16 BNA OSHC 1499, 1502-03, 1994 CCH OSHD ¶ 30,294, p. 41,732 (No. 89-1555, 1993)(the duty to defer does not arise unless the Commission has first found that the standard in question is ambiguous).

/s/

Gary L. Visscher
Commissioner

Date: August 1, 2000

Secretary of Labor,	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. 98-0144
	:	
Trinity Marine Nashville, Inc.,	:	
Respondent.	:	

Appearances:

Joseph B. Luckett, Esquire
Office of the Solicitor
U. S. Department of Labor
Nashville, Tennessee
For Complainant

Robert E. Rader, Esquire
Rader, Campbell, Fisher & Pyke
Dallas, Texas
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Trinity Marine Nashville, Inc. (Trinity), is a corporation engaged in the manufacture of river barges. The Occupational Safety and Health Administration (OSHA) conducted an investigation and inspection of respondent’s facility in Ashland City, Tennessee, from July 23, 1997, through December 12, 1997. As a result of this inspection, respondent was issued two citations. Respondent filed a timely notice contesting these citations and proposed penalties. A hearing was held in Nashville, Tennessee, on July 30 and 31, 1998. At the hearing, the caption of this case was amended so that the respondent’s name now reads “Trinity Marine Nashville, Inc.” During the hearing the Secretary withdrew Citation No. 1, item 2; Citation No. 1, item 3b; and Citation No. 2, instance (a) of item 1a. Citation No. 1, item 3a, was reclassified as an “other” violation and no penalty was proposed.

For the reasons that follow, Citation No. 1, item 1, is vacated; Citation No. 1, item 3a is affirmed as an “other” violation; Citation No. 2, item 1a, instance (b) is affirmed as a serious violation; Citation No. 2, item 1b, is affirmed as a serious violation; Citation No. 2, item 2a, is affirmed as a serious violation; and Citation No. 2, item 2b, is affirmed as a serious violation.

Background

On July 23, 1997, Trinity employee Kenneth Whalen was electrocuted when a drop light he

was holding was plugged into a receptacle in a portable plug-in box. After the incident, it was discovered that the receptacle was miswired inside the portable plug-in box. The hot wire was connected to the ground terminal on the receptacle. This caused the metal cage of the drop light held by Kenneth Whalen to become energized when it was plugged into that receptacle. As a result of this incident, OSHA began its investigation and inspection on July 23, 1997.

Discussion

The Secretary has the burden of proving the violation.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (1) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Citation No. 1, Item 1 Alleged Serious Violation of 29 C.F.R. § 1910.304(a)(2)

The Secretary in Citation No. 1, item 1, alleges that:

Grounded conductors were attached to terminals or leads so as to reverse designated polarity.

The job-made electrical service box, constructed of wood, in use on July 23, 1997, at the crouse barge #1, located in the Testing Area was wired with reverse polarity.

It is undisputed that the standard is applicable, that the conductors were wired to the terminals on one portable plug-in box so as to reverse polarity, and that respondent's employee holding the drop light was exposed to the violative condition on July 23, 1997. The issue remaining to be decided is whether respondent had actual or constructive knowledge of the violative conditions.

The portable plug-in box is equivalent to an extension cord with multiple receptacles specifically sized for drop lights and ventilation fans. These lights and fans are used by employees working on barges in various locations throughout respondent's shipyard. Approximately fifty to

sixty plug-in boxes are used at this facility. The boxes are plugged into other such boxes or into permanent power sources.

After the July 23, 1997 incident which resulted in the death of respondent's employee, the company checked all plug-in boxes on the yard. It found no boxes miswired other than the one receptacle used by the deceased employee. Other receptacles on that box were also correctly wired. The ground wire was attached to the hot wire in the miswired receptacle that electrocuted respondent's employee. The box was connected to the ground. This resulted in the phase voltage of 120Vs to 240Vs being transmitted to the metal and then to the employee.

Respondent has a written policy requiring that electrical equipment in need of repair be taken to the maintenance department for repair. That department normally does all electrical repairs. Respondent's electricians are experienced and always check and test each other's work after repair and before releasing the equipment for use. Evidence does not indicate that any of these electricians would have so grossly miswired this receptacle. If one electrician had miswired a receptacle, the error would have been detected by another electrician during checking and testing prior to release for use. Respondent took reasonable steps to detect miswired receptacles prior to use. To require respondent to take additional measures during use would be unreasonable, absent some indication that an electrical malfunction or other problem existed. There was no indication of miswiring of this receptacle until the fatal electrocution. No evidence was presented to show prior shocks or other signs of electrical malfunction of this unit.

Upon due consideration of all evidence presented at hearing, I find that respondent did not know of the presence of the violation. In addition, even with the exercise of reasonable diligence, it could not have known of the violative conditions. Since the evidence does not establish respondent's actual or constructive knowledge of the violation, the Secretary did not prove that respondent violated 29 C.F.R. § 1910.304(a)(2).

Citation No. 1, Item 3a
Alleged "Other" Violation of 29 C.F.R. § 1915.132(d)

The Secretary in Citation No. 1, item 3a, alleges that:

Portable electric tools with worn or frayed electric cables were used:

- a) The McGill 7000 series drop-light in use on July 23, 1997, at the crouse barge #1, located in the Testing Area was equipped with a worn electrical cable.
- b) The job-made electrical service box constructed of wood, identified as box #2 in the Power Management Corporation report, in use on July 23, 1997, at the crouse barge #1, located in the Testing Area was equipped with a worn electrical cable.
- c) The job-made electrical service box constructed of wood, identified as box #1 in the Power Management Corporation report, in use on July 23, 1997, at the crouse barge #1, located in the Testing Area was equipped with a worn electrical cable.
- d) The job-made circuit breaker panel constructed of wood, in use on July 23, 1997, at the crouse barge #1, located in the Testing Area was equipped with a worn electrical cable.

At the hearing, the Secretary amended Citation No. 1, item 3a, to allege an “other”: violation and amended the proposed penalty to \$.00.

The OSHA compliance officer testified that during his inspection, he determined that respondent was using electric tools with worn or frayed electric cables. These cables were found to be generally heavily taped and wrapped. The drop light cord, however, had nicks and cuts with no taping.

While respondent admits that the cables were worn and frayed as described in instances b, c and d of this item, it argues that the electrical and friction tape restored the cables to the same quality of insulation as the original. The standard at 29 C.F.R. § 1915.132(d) requires that: “(d) Worn or frayed electric cables shall not be used.”

This standard’s requirements are specific and do not provide for alternative methods of compliance. Respondent must follow the law and comply with the requirements of this standard even though it has a good faith belief that its alternative method provides the same degree of protection. *See Reich v. Trinity Industries, Inc.*, 16 F.3d 1149 (11th Cir. 1994).

The standard prohibits respondent from using worn or frayed electric cables. Respondent used such cables after taping and wrapping them. Respondent violated 29 C.F.R. § 1915.132(d) by using these cables. Its noncompliance cannot be excused by its belief that its taping and wrapping provides equivalent protection. The evidence supports a finding that the violation was “other” as proposed by the Secretary.

Citation No. 2, Item 1a(b)
Alleged Willful Violation of 29 C.F.R. § 1910.303(b)(2)

The Secretary in Citation No. 2, item 1a(b), alleges that:

Listed or labeled electrical equipment was not used or installed in accordance with instructions included in the listing or labeling:

- (b) All of the plugs and receptacles, use [*sic*] on the job-made electrical services boxes, circuit breaker panel box and the drop light in use on July 23, 1997, at the crouse #1 barge, located in the Testing Area were not used or installed in accordance with the instructions included in the listing or labeling, in that these devices were used on a 30 amp branch circuit rather than 10, 15, and 20 amps as they were listed and labeled.

Section 1910.303(b)(2) provides:

(2) *Installation and use.* Listed or labeled equipment shall be used or installed in accordance with any instructions included in the listing or labeling.

John Gore, an electrical engineer with extensive experience in designing electrical systems for industrial facilities and commercial office buildings examined the electrical equipment at issue and testified as complainant's expert in this case. Regarding this alleged violation, he testified in part as follows:

A. Exhibit 18 is what I would call the branch circuit distribution box which broke the initial circuit up into four, 30-amp circuits.

Q. And Government's Exhibit 19, what does that depict?

A. Okay, Exhibit 19 is the same piece of equipment with the metal box cover on the circuit breaker box removed.

Q. Are those circuit breakers loose or labeled in any way?

A. They are labeled as a 30-amp rating. They are at least labeled that much.

Q. Did you determine what receptacles the circuit breakers were linked to?

A. If you remove the cover and trace the wires, you can determine which receptacle is fed from which circuit breaker.

Q. Directing your attention back to the two wooden boxes, did you determine what the receptacles on those boxes were listed or labeled for?

A. The receptacle boxes had two different types of receptacles, and they were rated at 10 amps, 15 amps or 20 amps. The four-fold were rated 20 amps, I believe, and the three fold were rated 15 amps at 125 volts or 10 amps at 250 volts.

Q. Is there any hazard presented by this?

A. The rating of the receptacles was less than the rating of the branch circuit, which was 30 amps. So, it's not permitted to put 10, 15, and

20-amp rated devices on a 30-amp circuit.

Q. What kind of danger could result?

A. Well, the receptacles are not protected at their rating. You could have an over-current situation where the ampere rating of the device itself was exceeded where -- and at the same time, the circuit breaker would still be operating within it's [sic] rating; for instance, if you had a continuous 30-amp current through one of 10 amp rated receptacles.

Q. What would result?

A. Most likely, there would be some degree of overheating of the device.

Q. Would that present any particular danger in this particular situation?

A. Well, any time you have overheating of electrical equipment, there is a potential hazard. These might be a greater hazard in that they were installed into wooden boxes. It might depend on whether there were combustible materials in the same vicinity. (Tr. 151-153)

It is clear from this testimony and that of the OSHA compliance officer that the circuit breaker was labeled 30 amps, and the receptacles were labeled 10, 15 or 20 amps. Furthermore, by using the lower rated receptacles with the higher rated circuit breaker, respondent failed to use or install the labeled electrical equipment in accordance with instructions included in the labeling. Here the instructions are the ampere ratings of each piece of equipment.

In its posthearing brief, respondent attempted to introduce evidence through legal argument. Since no such evidence was presented at the hearing, subject to cross-examination, it will not be considered in this decision.

There is no dispute that the standard cited is applicable. Respondent's employees regularly used the electrical equipment at issue. The condition of this electrical equipment created hazards of overheating, fire and electrical shock.

Respondent knew or could have known of the presence of these conditions with the exercise of reasonable diligence. It has operated this facility since 1995. Only respondent's electrical employees maintain and repair electrical equipment at this facility. All are qualified electricians. Respondent has a workrule that only electricians are allowed to service this equipment. All shipyard employees are aware of this rule and follow it. Respondent's maintenance supervisor and plant manager knew that only the electrical maintenance employees performed maintenance, repairs and service on electrical equipment. Respondent has exclusive control of the shipyard and these working conditions. Respondent violated 29 C.F.R. § 1910.303(b)(2). This violation was serious in that there is a substantial probability that death or serious physical harm could result from this condition.

Citation No. 2, Item 1b
Alleged Willful Violation of 29 C.F.R. § 1910.303(f)

The Secretary in Citation No. 2, item 1b, alleges that:

Each service feeder and branch circuit, at its disconnecting means or overcurrent device, was not legibly marked to indicate its purpose, nor located and arranged so the purpose was evident:

- a) The purpose of each breaker on in the job-made circuit breaker panel constructed of wood, in use at the crouse barge #1, on July 23, 1997, was not evident nor were the breakers legibly marked to indicate their purpose.

Section 1910.303(f) provides:

- (f) *Identification of disconnecting means and circuits.* Each disconnecting means required by this subpart for motors and appliances shall be legibly marked to indicate its purpose, unless located and arranged so the purpose is evident. Each service, feeder, and branch circuit, at its disconnecting means or overcurrent device, shall be legibly marked to indicate its purpose, unless located and arranged so the purpose is evident. These markings shall be of sufficient durability to withstand the environment involved.

Thomas Bosley, the OSHA compliance officer, testified that the job-made wooden circuit breaker panel had two outlets on each side. He and complainant's expert, Mr. Gore, testified that these outlets were not identified regarding the corresponding switches inside the breaker panel. It was not possible to readily identify which of the four circuit breaker switches controlled a particular outlet. The switches were not marked to indicate their purpose and were not located so the purpose was evident. The resulting hazard would be overheating or fire if the wrong outlet were disconnected. Curtis Chambers, respondent's corporate safety director, testified that he was aware that the standard required circuits inside the box to be marked and that these circuits were, in fact, not marked. This establishes the existence of this condition and respondent's knowledge of that condition. At no time did respondent deny knowing of this condition. Employees used this equipment on a daily basis.

The disconnecting means or overcurrent devices in the job-made circuit breaker panel box are the circuit breaker switches. These were not marked. Respondent argues that the plugs are the disconnecting means, while admitting that the circuit breaker switches were not marked as required by the standard. This regulation does not allow an employer to comply by an alternate method. It is specific. As stated above in this decision, respondent must comply with the specific requirements of this standard. Respondent knowingly allowed its employees to regularly use this equipment in violation of the standard. This violation of 29 C.F.R. § 1910.303(f) was a serious violation that could result in death or serious physical harm.

Citation No. 2, Items 2a and 2b
Alleged Violations of 29 C.F.R. § 1910.305(e)(1) and (2)

The Secretary in Citation No. 2, items 2a and 2b, alleges that:

Citation 2 Item 2a

Cabinets, cutout boxes, fittings, boxes, and panelboard enclosures in wet locations were not weatherproof:

- a) The job-made electrical service boxes, constructed of wood, in use on July 23, 1997, at the crouse barge #1, located in the Testing Area were not weatherproof.

Citation 2, Item 2b

Switches, circuit breakers and switchboards installed in wet locations were not enclosed in weatherproof enclosures:

- a) The job-made circuit breaker panel, constructed of wood, in use on July 23, 1997, at the crouse barge #1, located in the Testing Area was not weatherproof.

Item 2a relates to job-made wooden electrical service boxes. Item 2b relates to the job-made circuit breaker panel.

Section 1910.305(e)(1) and (2) provide:

(e) *Enclosures for damp or wet locations.* (1) Cabinets, cutout boxes, fittings, boxes, and panelboard enclosures in damp or wet locations shall be installed so as to prevent moisture or water from entering and accumulating within the enclosures. In wet locations the enclosures shall be weatherproof.

(2) Switches, circuit breakers, and switchboards installed in wet locations shall be enclosed in weatherproof enclosures.

Section 1910.399 defines “Wet location” for purposes of this subpart as follows:

Wet location. Installations underground or in concrete slabs or masonry in direct contact with the earth, and locations subject to saturation with water or other liquids, such as vehicle-washing areas, and locations exposed to weather and unprotected.

The electrical service boxes were located outdoors in respondent’s shipyard exposed to weather and unprotected. Approximately fifty service boxes were lying on the ground throughout the shipyard. Complainant’s expert, Mr. Gore, testified that the boxes were constructed of unpainted wood and were not designed to be weather tight. He observed the receptacles inside the

boxes and found evidence that moisture had been present. Mr. Mitchell, respondent's maintenance supervisor, testified that these wooden service boxes had been used at this facility since the early 1980's. As noted above, respondent bought this shipyard in 1995. At that time, these boxes were in use at this facility. Mr. Mitchell was aware of the continued use of these boxes.

The wooden circuit breaker panel was also located on the ground outdoors at respondent's shipyard. It was unprotected and exposed to the weather. It was not weatherproof and on July 23, 1997, the first day of the inspection, the panel was uncovered. Mr. Mitchell was also aware that this condition had existed at this facility for many years.

Respondent violated 29 C.F.R. §§ 1910.305(e)(1) and (2). The standards apply. Respondent's employees used wooden electrical service boxes and circuit breaker panels in wet locations without enclosing them in weatherproof enclosures. Respondent's supervisors knew its employees used the electrical equipment on a regular and recurring basis over several years.

These violations were serious in that death or serious physical injury could result from these violative conditions. Employees could suffer electrical shock, including electrocution as a result of these conditions.

Respondent's predecessor corporation, Nashville Bridge, was previously cited in 1989 for conditions relating to the use of wooden electrical boxes at this shipyard. That citation item was deleted by the OSHA area office. Respondent's reliance on that deletion to absolve it of all responsibility for continued use of this equipment is misplaced.

Mr. Jim Smitson, respondent's personnel director for this facility, was employed by Nashville Bridge as labor relations manager during the 1989 OSHA inspection. He testified that during an informal conference, an item relating to the wooden service boxes was deleted. He concluded that the boxes could, therefore, be used. He based his conclusion solely on the fact that the alleged violation was deleted. He did not testify to any understanding between OSHA and Nashville Bridge as to whether the plug-in boxes could be used in the future. He testified only that it was his understanding that the boxes could be used based on the deletion of the item by OSHA.

He did not testify regarding any discussions between OSHA personnel and representatives of Nashville Bridge. He did specifically testify that there was no side agreement between representatives of OSHA and the company regarding those boxes.

At the hearing, citing Rule 408, Federal Rules of Evidence, complainant objected to Mr. Smitson's testimony regarding settlement discussions, compromise, and offers of compromise involving the 1989 citation issued to Nashville Bridge discussed above. The original citation and subsequent settlement agreement are matters of public record. Mr. Smitson did not testify to any discussions regarding compromise, but only about his own conclusions as to whether the service boxes could be used. Accordingly, the Secretary's objection is overruled.

Respondent argues that Trinity was not given fair notice of conduct or abatement required. It mistakenly relies on the holding of the Review Commission as affirmed by the Sixth Circuit in *Secretary v. Miami Industries*, 15 BNA OSHC 1258, 1261-1264, 1991 CCH OSHD ¶ 29,465 (No. 88-671, 1991), *aff'd*, 983 F.2d 1067 (6th Cir. 1992). That case involved an alleged violation of 29 C.F.R. § 1910.212(a)(1), the general machine guarding standard, which contained general language relating to guarding various types of machines. In that case, the company relied to its detriment on statements made by OSHA personnel concerning acceptable methods of abatement. In this case, Trinity was cited for the violation of a specific standard with specific requirements for compliance. It requires employers to use weatherproof enclosures when certain electrical equipment is used in wet locations. The standard itself gives respondent fair notice of what is required for compliance. Furthermore, in *Miami Industries, supra*, OSHA made detailed recommendations to the company regarding acceptable abatement measures. Here, OSHA merely deleted the cited item. No evidence was offered at hearing to suggest that Nashville Bridge was ever told by OSHA that the electrical service boxes could be used. There is nothing in the settlement agreement, and there was no side agreement regarding the use of those boxes. Respondent had fair notice of the requirements of this standard. Respondent's manager erroneously concluded that these boxes could be used in wet locations. He was not misled by the Secretary.

Willfulness

The Secretary contends that Trinity's violations of §§ 1910.303(b)(2) and (f) and 1910.305(e)(1) and (2) were willful.

A willful violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), is one committed with an "intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *L. E. Myers*, 16 BNA OSHC 1037, 1046, 1993-95 CCH OSHD ¶ 30,016, pp. 41,123, 41,132 (*quoting Williams Enterp.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987)). "It is differentiated from

other types of violations by a ‘heightened awareness -- of the illegality of the conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference.’ *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHD ¶ 29,240, p. 39,168 (No. 82-630, 1991) (consolidated). A violation is not willful if an employer had a good faith belief that the violative condition conformed to the requirements of the Act. The test of good faith is an objective one, that is, “whether the employer’s belief concerning the factual matters in question was reasonable under all of the circumstances.” *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1124, 1993-95 CCH OSHD ¶ 30,048, pp. 41,261, 41,281 (No. 88-572, 1993).

Mobil Premix Concrete, Inc., 18 BNA OSHC 1010, 1013, 1997 CCH OSHD ¶ 31,416, p. 44,405 (No. 95-192, 1997).

Citation No. 2, Items 1a(b) and 1b

The Secretary argues that respondent’s violations of 29 C.F.R. §§ 1910.303(b)(2) and (f) were willful based primarily on the statement of the maintenance supervisor that he was very knowledgeable of the OSHA standards and the National Electrical Code. An employer’s knowledge of or familiarity with OSHA standards does not automatically establish willfulness. *Morrison-Knudson Co./Yonkers Contracting Co.*, *supra*, 16 BNA OSHC at 1123. There must also be a heightened awareness of the illegality of the conduct or conditions and a state of mind, that is, a conscious disregard for the requirements of the Act or plain indifference for employee safety.

Although the Secretary has proven a serious violation, as discussed above, she has failed to produce sufficient evidence to prove the “heightened awareness” or “state of mind” elements necessary to establish this violation as willful.

The Secretary also introduced a citation issued to respondent’s predecessor, Nashville Bridge, in 1991. That violation occurred at a different location. While that citation introduced at hearing identified an alleged violation of 29 C.F.R. § 1910.303(f), no other evidence was introduced to show the nature of the violation or the extent of respondent’s knowledge. This evidence is insufficient to establish the heightened awareness or state of mind elements of a willful violation.

Citation No. 2, Items 2a and 2b

The Secretary argues that respondent’s violations of 29 C.F.R. § 1910.305(e)(1) and (2)

were willful. She bases her argument in part on the maintenance supervisor's knowledge of the OSHA standards and the National Electrical Code. In addition, she argues that the wooden electrical boxes were used by the respondent since 1995 and its predecessor since the early 1980's. She further asserts that a citation issued to the predecessor, later deleted, made respondent aware of the problem. This is based on the fact that Jim Smitson, respondent's personnel director, was employed by Nashville Bridge and involved with the 1989 inspection which resulted in the citation. Complainant also states that the use of the wooden plug-in boxes was well known at all levels of management; that the plug-in boxes and circuit breaker box were obviously not weatherproof; and that the maintenance supervisor was aware of these conditions for many years.

The requirements of these standards are specific. The respondent either knew or, with the exercise of reasonable diligence, could have known of the violative conditions. As discussed above, the Secretary proved serious violations of these standards. She did not present evidence, however, of a heightened knowledge by respondent.

General assertions of heightened awareness and the requisite state of mind are insufficient proof that a violation is willful. The Secretary failed to submit convincing evidence to show the heightened knowledge which would distinguish this violation from a serious offense.

Evidence did not establish that Trinity is indifferent to employee safety. Respondent maintains a comprehensive safety program that includes safety training for all employees, written safety guidelines, regular safety inspections, and enforcement of its safety rules.

Respondent's erroneous understanding regarding a deletion of a citation item relating to wooden plug-in boxes does not relieve it from its obligation to comply with a specific standard. With the exercise of reasonable diligence, it could have known of the violative conditions and the requirements of the standard. This erroneous understanding does, however, mitigate against a finding of willfulness.

Penalties

Under § 17(j) of the Act, in determining the appropriate penalty, the Commission must give due consideration to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations.

At the time of the OSHA inspections, Trinity employed approximately 230 workers at this facility. The violations in Citation No. 2, items 1a(b), 1b, 2a, and 2b are serious violations of high gravity. There is a substantial probability that death or serious physical injury could result from these violative conditions. This could include electric shock and electrocution. Respondent has been previously inspected and cited for violations at this facility. I find an overall lack of good faith on the part of the respondent due to the nature and extent of the violations.

Upon due consideration of these factors, it is determined that the following penalties totaling \$14,000 are appropriate.

1. For Citation No. 1, item 3a, I find a penalty of \$.00 appropriate.
2. For Citation No. 2, items 1a and 1b, I find a grouped penalty of \$7,000 appropriate.
3. For Citation No. 2, items 2a and 2b, I find a grouped penalty of \$7,000 appropriate.

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

1. Citation No. 1, item 1, is vacated.

2. Citation No. 1, item 2, was withdrawn by the Secretary.

3. Citation No. 1, item 3a, as amended, is affirmed as an "other" violation. No penalty was proposed, and none is assessed.

4. Citation No. 1, item 3b, was withdrawn by the Secretary.

5. Citation No. 2, item 1a(a), was withdrawn by the Secretary.

6. Citation No. 2, items 1a(b) and 1b, are modified and affirmed as serious violations.

A grouped penalty of \$7,000 is assessed.

7. Citation No. 2, items 2a and 2b, are modified and affirmed as serious violations. A grouped penalty of \$7,000 is assessed.

/s/

STEPHEN J. SIMKO, JR.
Judge

Date: December 28, 1998