



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. 93-2844
	:	
AUBREY-NATIONAL, INC.,	:	
	:	
Respondent.	:	

ORDER

On February 24, 1995, the Secretary filed a Notice of Withdrawal in the above-captioned case. The Commission acknowledges receipt of the Secretary's Notice of Withdrawal and sets aside that portion of the Judge's Decision and Order vacating the alleged violation of 29 C.F.R. § 1910.303(g)(2)(i). There being no matters remaining before the Commission requiring further consideration, the Commission orders the above-captioned case dismissed.

Stuart E. Weisberg
 Stuart E. Weisberg
 Chairman

Edwin G. Foulke, Jr.
 Edwin G. Foulke, Jr.
 Commissioner

Dated 2/28/95

Velma Montoya
 Velma Montoya
 Commissioner

I certify that on February 28, 1995, I served a copy of the attached order on the following persons:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
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Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

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SECRETARY OF LABOR
Complainant,

v.

AUBREY NATIONAL, INC.
Respondent.

OSHRC DOCKET
NO. 93-2844

**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 July 18, 1994. The decision of the Judge will become a final order of the Commission on August 17, 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 August 8, 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.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
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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: July 18, 1994

DOCKET NO. 93-2844

NOTICE IS GIVEN TO THE FOLLOWING:

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Stanley M. Schwartz
Administrative Law Judge
Occupational Safety and Health
Review Commission
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SECRETARY OF LABOR,

Complainant,

v.

AUBREY-NATIONAL, INC.,

Respondent.

OSHRC DOCKET NO. 93-2844

APPEARANCES:

Robert A. Goldberg, Esquire
 Dallas, Texas
 For the Complainant.

Joe K. Gordon, Esquire
 Arlington, Texas
 For the Respondent.

Before: Administrative Law Judge Stanley M. Schwartz

DECISION AND ORDER

This is a proceeding brought before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) inspected Respondent’s plastic manufacturing facility, located in Arlington, Texas, on August 2 and 3, 1993, after an accident on August 2 which caused the electrocution of an employee. As a result of the inspection, a serious citation alleging a violation of 29 C.F.R. § 1910.303(g)(2)(i) was issued.¹ Respondent contested the citation, and a hearing was held March 16, 1994.

¹The citation originally alleged a violation of 1910.303(b)(1); however, the Secretary’s complaint amended the citation to allege a violation of 1910.303(g)(2)(i).

The Accident

The regrinding machine which is the subject of this citation was used to recycle defective plastic parts at the facility. To operate the regrinder, employees stood on a work platform in front of it and fed plastic into the top; they also taped cardboard onto the front of the machine so that any plastic material which might be expelled in case of an overload would not get on them. The regrinder's 480-volt electrical control box was located on the side of the machine, and the cover to the box, as designed, had a hole at the top which fit over a securing pin or bayonet as well as a butterfly-type fastener at the bottom. The accident occurred when Nelson Viera, a machine operator, slipped or fell as he stood on the work platform, causing him to knock the cover from the box and fall face first onto the conductors; the platform had side rails, but Viera's body lodged between the machine and the left-hand rail when he fell. Pursuant to the OSHA inspection, it was discovered that one of the "ears" on the butterfly fastener of the cover was missing and that there was a slot rather than a hole at the top. (Tr. 11-14; 22-24; 31-39; 44-45; 49-50; 59-61; 69-70; 83-84; G-1-3; G-5-8; R-1). *See also* Complainant's post-trial brief.

The Testimony

Charles Moore, the OSHA compliance officer who inspected the facility, has been with the agency for fourteen years and has conducted over 1400 inspections. He testified the control box cover violated the standard because it was not in approved condition, based on his comparing it with an identical cover in new condition at an electrical wholesale supply company, and that the defective fastener and modified hole made the cover hazardous because it could be displaced by someone bumping into it. He further testified that the hazard was serious because employees worked near the box and that the employer should have known of the condition in light of the high voltage of the box and the obvious nature of the cover's defects; in this regard, Moore noted they could be easily seen by picking up the cover and looking at it. Moore opined the slot had been made to facilitate putting the cover on and that it could not have been caused by the accident because it appeared to be a smooth cut with no burns or other irregular marks. (Tr. 5-8; 11-27; 30-31).

James Knorpp, the Ft. Worth OSHA area director, has been an OSHA area director since 1971; he is a registered professional engineer and a certified safety professional, and he has worked in the safety field since 1961. Knorpp testified he visited the site on October 6, 1994, and inspected the machine in the company of plant management personnel.² He took the cover off and examined it and then replaced it and hit it with the heel of his hand without much force; when he did so the cover fell away from the box and hung at an angle with the latch at the bottom partially holding it. He then examined the slot with a magnifying glass, and while there was some rust it was fairly smooth and did not appear to be torn, disfigured or burned. Knorpp tried to position the cover on the box so that the slot would contact one of the terminals with burn damage but was unable to do so, and there was no burn damage on the bayonet on which the slot positioned. Knorpp concluded the slot was made intentionally to facilitate the removal of the cover; he also concluded the slot and defective fastener compromised the safety of the cover as designed and made it more likely someone would contact the box's conductors. Knorpp examined the cover, R-1, again at the hearing, and noted that while he did not recall the molten metal on the slot's edge it could have formed when the slot was cut with a hot weld; he also noted the box's condition was easy to see upon visual inspection. (Tr. 39-55; 81-85).

Gary Huggins, the facility's plant manager, has been in the injection molding business for nineteen years. He testified he did not believe the hole was deliberately altered because the plant's electrical box covers were rarely removed except for maintenance; he also testified the subject cover would only partly come off when attached, as Knorpp testified, and that the slot did not make it easier to replace the cover.³ It was Huggins' opinion the cover lodged on a conductor when it was knocked off, which burned the hole into a slot; in this regard, he said he was able to position the cover so the slot contacted the right-hand conductor at the bottom of the box, and he explained how the cover could have fallen so

²The machine was being stored in a warehouse at the facility at that time. (Tr. 43).

³Huggins noted that a maintenance supervisor had hit the box in Moore's presence to see if it would come off and that it did so only after being struck with considerable force on the right-hand side. (Tr. 68).

that this occurred. Huggins initially said the slot was an electric burn instead of a weld cut, but then indicated both would look the same. (Tr. 56-57; 61-64; 68-69; 72-75).

Huggins further testified maintenance supervisors inspected the plant and reported to him on a daily basis, and that they were specifically told to inspect electrical boxes to make sure they were safe; in addition, the plant hired a safety consultant just before the accident to perform inspections twice a year, and the first inspection occurred about mid-July 1993. Huggins said the inspection was very thorough, and that while a number of safety recommendations were made which the plant followed none of them addressed the regrinder. Huggins identified G-9 as a February 1992 safety report from CCSI, an employee leasing and consulting firm his company used for about a year and a half, which addressed missing covers from a breaker box and a relay box; he noted these conditions were related to an electrical rewiring job performed under contract that did not involve any plant employees, and that CCSI's practice was to make notations of things observed without inquiring into the reason. (Tr. 57-59; 64-65; 70-71; 74-80).

Decision

The subject standard provides as follows:

Except as required or permitted elsewhere in this subpart, live parts of electric equipment operating at 50 volts or more shall be guarded against accidental contact by approved cabinets or other forms of approved enclosures....

It is clear from the record the slot and defective fastener rendered the subject cover unapproved. Respondent apparently does not dispute the fastener was defective at the time of the accident; however, it does dispute the existence of the slot at that time. Huggins believed the slot was caused by the accident, while both Knorpp and Moore opined it was made intentionally. The undersigned has considered the testimony of these three witnesses and has also noted their respective experience and credentials. Those of Knorpp are particularly impressive, and his visit to the plant for the purpose of examining the cover is commendable. Knorpp determined the slot was not created by the accident after examining it with a magnifying glass and trying unsuccessfully to position the cover in such a way that it contacted a conductor with burn marks. After comparing the testimony and credentials of Knorpp and Huggins, I find Knorpp's conclusions about the cause of the slot persuasive.

I also find, based on the record, that the slot and fastener compromised the safety of the cover as designed and made it more likely an employee would contact the conductors in the box.

Based on the foregoing, the Secretary has established a violation of the standard. However, the Secretary must also establish that Respondent knew, or could have known with the exercise of reasonable diligence, of the existence of the condition. *See, e.g., CF & T Available Concrete Pumping, Inc.*, 15 BNA OSHC 2195, 2196-97, 1991-93 CCH OSHD ¶ 29,945, p. 40,936 (No. 90-329, 1993), and cases cited therein. Since there is no evidence Respondent had actual knowledge of the cover's condition, the issue is whether the company exercised reasonable diligence.

Huggins testified maintenance supervisors inspected the plant and reported to him daily, and that they were specifically told to inspect electrical boxes to make sure they were safe. Huggins also testified that the plant had hired a safety consultant prior to the accident to perform inspections twice yearly, and that the first such inspection occurred about mid-July 1993; he said the inspection was very thorough, and that although a number of safety recommendations were made which the plant adopted none had to do with the regrinder. The Secretary attempted to show the facility had previously had uncovered electrical boxes through G-9, the 1992 CCSI report; however, Huggins rebutted this evidence by explaining that these conditions were related to a rewiring job the company had contracted out.

In addition to the above, Moore and Knorpp testified that the cover's defects were easily detectible upon visual inspection. This is undoubtedly true with the benefit of hindsight. However, upon examining the cover itself and the various photos in the record, it is the finding of the undersigned that the cover's deficiencies were not as obvious as indicated by the Secretary's witnesses; in fact, with the cover in place and without a specific reason for removing it, its condition could easily be overlooked, a conclusion supported by the fact the consulting company did not discover it two weeks before the accident. Based on the record, it is found that Respondent exercised reasonable diligence under the facts of this case. The citation is accordingly vacated.

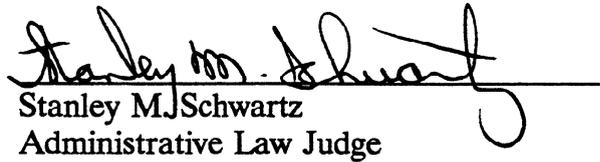
Conclusions of Law

1. Respondent, Aubrey-National, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.
2. Respondent was not in violation of 29 C.F.R. § 1910.303(g)(2)(i).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Item 1 of serious citation number 1 is VACATED.


Stanley M. Schwartz
Administrative Law Judge

Date: JUL 12 1994