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Secretary of Labor,
Complainant,

v.

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Ben Shepherd
d/b/a Happy Candy Company,
Respondent.

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OSHRC Docket No. **99-1387**

Appearances:

Helen Schuitmaker, Esq.
U. S. Department of Labor
Office of the Solicitor
Chicago, Illinois
For the Complainant

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Ben Shepherd d/b/a Happy Candy Co. (Shepherd) is a sole proprietorship, which produced cotton candy for shipment and sale. Shepherd contested two citations issued to him on July 7, 1999, as a result of the Occupational Safety and Health Administration (OSHA) complaint investigation of his small production facility in Secor, Illinois (Tr. 8). Having contested the citation, however, Shepherd did not attend the scheduled hearing. As noted below, Shepherd had full knowledge of the date, time, and location of the hearing. The Secretary put on evidence of her *prima facie* case.

The citation alleges that Ben Shepherd violated: § 1910.141(a)(3)(i) (item 1a) because its manufacturing facility was not kept as clean as the nature of the work permitted; § 1910.303(g)(1)(ii) (item 1b) because cardboard boxes and debris were stored directly in front of an electrical panel and disconnect switch; § 1910.303(b)(2) (item 2a) because metal receptacle boxes, designed to be mounted, were not installed as intended; § 1910.304(f)(4) (item 2b) because machinery did not have a permanent and continuous ground; § 1910.305(g)(1)(iii) (item 2c) because flexible wiring was used as fixed wiring; § 1910.334(a)(2)(ii) (item 2d) because cords without grounds were not removed from service; and § 1910.334(b)(2) (item 2e) because employees had the practice of repetitively re-closing the circuit breakers. In addition, Citation

No. 2, alleges a violation of § 1910.132(a) (item 1) because employees were exposed to outside environmental hazards without using gloves or other protective clothing.

Procedural Background

After securing a warrant for entry into the facility, compliance officer Tricia Rankin conducted the inspection on June 22, 1999. On July 26, 1999, Shepherd contested the resulting citation, and the case was designated for E-Z trial. At the pre-hearing telephone conference conducted on November 17, 1999, and at a subsequent conference of December 8, 1999, Shepherd stated that he was no longer operating any candy making company or acting as an employer. He advised of his intention to file for personal bankruptcy and further stated that he may not attend the hearing which was then scheduled for December 16. Nevertheless, he did not wish to withdraw his contest of the citation. The parties advised that if and when Shepherd filed for bankruptcy, they would be able to reach a settlement of the matter. Under those circumstances, the parties' request for additional time to work out an agreement was granted. E-Z trial proceedings were no longer the most appropriate for the case, and it was returned to conventional proceedings. The undersigned continued the hearing until January 31, 2000, upon the verbal concurrence of both parties.

On January 13, 2000, in response to repeated requests from the Judge's office, Shepherd contacted the Judge's secretary and informed her that he had not yet filed for bankruptcy and, as she understood him, stated that he would not attend the hearing. On January 14, 2000, the undersigned issued an Order requiring Shepherd to report an intention to attend the January 31, 2000, hearing or to face the sanction of dismissal. On January 17, 2000, Shepherd telefaxed the Judge stating, "Obviously a misunderstanding! I DO plan to attend any hearing you feel necessary prior to any pre- or post-bankruptcy filing." Since Shepherd's telephone number was no longer working, on January 26, 2000, the Order setting the specific location for the January 31 hearing was telefaxed to him. Since the date of the hearing, Shepherd contacted the Judge's office to once again advise that he directed his attorney to file for bankruptcy. No circumstances which could have prevented his participation in the hearing were addressed.

As discussed below, the Secretary proved each of the cited violations.

Jurisdiction

The OSH Act covers employers, and under section 3(5) of the Act, "[t]he term 'employer'

means a person employed in a business affecting commerce who has employees . . .” Shepherd employed Teresa Betts, who identified herself to Rankin as a supervisor, and three other persons working at the candy making facility. Employees operated a candy spinning machine, a sealer, and other equipment manufactured outside the state of Illinois. The sugar, which was spun and sold as the business’s sole product, was grown and refined outside the State of Illinois (Exh. C-1; Tr. 21-32). Ben Shepherd’s business activities affected commerce. Jurisdiction and coverage are established.

Serious Citation No. 1

Item 1a: §1910.141(a)(3)(i)

The Secretary asserts that Shepherd violated the housekeeping requirements of § 1910.141(a)(3)(i). The standard requires:

All places of employment shall be kept clean to the extent that the nature of the work allows.

The videotape of the inspection (Exhibit C-1) and Rankin’s testimony support that the five-room production facility was not maintained in a reasonably clean condition. Sugar and liquid flavoring were on the floor and had drifted on the windowsills, vents, and pipes in the main processing room. Boxes and cords were discarded but were left to clutter the area (Tr. 12). For this, and for the electrical violations which follow, the violative conditions were in plain sight and the knowledge of supervisor Teresa Betts is imputed to Ben Shepherd. *See e.g., Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992). At a minimum, Shepherd had constructive knowledge of the violations sufficient to establish the element of knowledge.

The undersigned considers the appropriateness of the serious classification for each of the alleged violations based on the unrebutted evidence of one party. Under § 17(k) of the Act a violation is serious if there is a substantial probability that death or serious physical harm could result. It is not necessary to prove that there is a substantial probability that an accident will occur, but only that an accident is possible and that death or serious physical harm could result. *See, e.g., Bethlehem Steel Crop. v. OSHRC*, 607 F.2d 1069 (3rd Cir. 1979).

The floor was sticky in some places and slick in others. Four employees were exposed in the relatively small working area. Anticipated hazards included slipping and tripping, or in case of fire, delays in exiting through the discarded cords and boxes (Tr. 10, 23). The probable result of

falls onto the floor or into tables or equipment would be bruises or sprains, but could also include broken bones. A delay in exiting from a fire could result in serious injury. The violation is affirmed as serious.

Item 1b: §1910.303(g)(1)(ii)

The Secretary asserts that cardboard boxes and debris were stored directly in front of the facility's electrical panel and disconnect switch in violation of §1910.303(g)(1)(ii). The standard requires:

Clear spaces. Working space required by this subpart may not be used for storage

Cardboard boxes, pallets, and other debris were piled in front of the large electrical panel box, rated at 600 volts. Again, the employees worked in close quarters and were exposed to the potential hazard, *i.e.*, a delay in reaching the fuse breaker panel to disconnect the electricity in case of an emergency (Exh. C-1; Tr. 15-16, 23). Given the relatively high voltage of the panel and the other conditions which enhanced the possibility for electrical malfunction, the violation is properly classified as serious.

The proposed penalties for items 1a and 1b are grouped. The Commission gives "due consideration" to the size of the employer's business, the gravity of the violation, the employer's good faith, and its history of past violations in determining an appropriate penalty. The gravity of the violation is the primary element in the penalty assessment. *Trinity Indus.*, 15 BNA OSHC 1481, 1483 (No. 88-691, 1992). The hazards created by these two violations concern delays in responding to emergencies when access is blocked or crowded with debris.

Shepherd is a very small employer and is afforded full credit for size. His recent history of a previous serious citation (while he was doing business as the Challenger Candy Co.) prevents him from receiving a credit for past history. Shepherd had no safety program or positive indication that the safety of employees played a part in his business decisions (Tr. 14, 15). Accordingly, he is not entitled to a good faith credit. A penalty of \$1,400 is assessed for grouped items 1a and 1b.

Item 2a: § 1910.303(b)(2)

The Secretary asserts that Shepherd used metal receptacle boxes which were hung from the ceiling or laid near the floor in violation of § 1910.303(b)(2). The standard requires:

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

According to Rankin, metal electrical receptacle boxes which are manufactured to be mounted into fixed locations, were not properly installed. Shepherd strung electrical wire through the metal boxes and left the boxes hanging loose from the ceiling, on a cart near the floor, or at other locations (Exh. C-1; Tr. 16). Metal junction or receptacle boxes are used to join conduit. If the junction box is left hanging or placed on a cart, the wires could be pulled away exposing energized live wires and energizing surrounding metal or conduit. Also, junction boxes are designed with easily dislodged knockouts, which could provide inadvertent access to live wires. The violation exposed employees to the potential of an electrical shock as they operated equipment or came into contact with the boxes and to a fire hazard (Tr. 16-17). A serious violation is affirmed.

Item 2b: § 1910.304(f)(4)

The Secretary contends that the electrical equipment had no grounding path in violation of § 1910.304(f)(4). The standard requires:

Grounding path. The path to ground from circuits, equipment, and enclosures shall be permanent and continuous.

The candy spinning machine, the sealer, and the extension cord used to provide power did not have grounding prongs. Their absence prevented the existence of a continuous path to ground. Some of the receptacle plugs in use were blackened, indicating past electrical shorts (Tr. 23). Employees operated the ungrounded equipment, which subjected them to the hazards of being shocked in case a fault occurred (Tr. 18, 25). Wet places on the concrete floor could aggravate the possibility of a serious shock. A serious violation is affirmed.

Item 2c: § 1910.305(g)(1)(iii)

The alleged violation is that flexible cords, *i.e.*, extension cords, were used as fixed wiring in violation of § 1910.305(g)(1)(iii). The standard requires:

Unless specifically permitted in paragraph (g)(1)(i) of this section, flexible cords and cables may not be used:

The inspection videotape follows extension cords and other flexible wiring through rooms and hallways, around holes in walls, ceilings, and windows, and behind walls and ceilings, into the

main area where the wiring was used to power the equipment (Tr. 18, 23-25). This flexible wiring was used in place of fixed wiring, which is prohibited by the standard. Since flexible wiring is not designed with a heavy enough gage to prevent an electrical overload and since flexible wiring is more easily damaged, frayed, or cut, the likelihood of a fire, or conditions causing electrical shock are high. The violation is affirmed as serious.

Item 2d: § 1910.334(a)(2)(ii)

The Secretary asserts that Ben Shepherd failed to remove from service the equipment or extension cords which did not have grounding prongs in violation of § 1910.334(a)(2)(ii). The standard provides:

If there is a defect or evidence of damage that might expose an employee to injury, the defective or damaged item shall be removed from service, and no employee may use it until repairs and tests necessary to render the equipment safe have been made.

The ungrounded equipment and ungrounded electrical cords were not removed from service, even though the grounding pins were obviously missing from the plugs. Repairs should have been made to the cords and plugs and the extension cords replaced before employees continued to use them. The physical appearance of the male and female receptacles indicated past electrical shorts, since some plugs were blackened and had parts of the receptacle prongs melted away (Tr. 18, 22-23, 25). The violation exposed employees to shocks, which given the other conditions in the facility, could have been severe. The violation is affirmed as serious.

Item 2e: § 1910.334(b)(2)

The Secretary contends that Ben Shepherd failed to prohibit the employees' practice of re-closing the circuit breakers in violation of § 1910.334(b)(2). The standard provides:

Reclosing circuits after protective device operation. After a circuit is deenergized by a circuit protective device, the circuit may not be manually reenergized until it has been determined that the equipment and circuit can be safely energized. The repetitive manual reclosing of circuit breakers or reenergizing circuits through replaced fuses is prohibited.

Teresa Betts admitted that the circuit breaker in the back room repeatedly tripped and had to be reset. Betts did not determine the cause for the trip but simply reset the circuit so that the employees could continue operating the machinery (Tr. 19). Circuits are designed to trip if

problems exist on the circuit, for example, if too much current is being pulled through a maze of extension cords. Ignoring a repeated trip permits the underlying problem to exist and could result in a fire or a serious electrical shock, especially under the circumstances in this facility. The violation is affirmed as serious.

Considering the penalty factors previously discussed, together with the facts related to the gravity of hazards associated with the electrical violations, the penalty for the five grouped violations is assessed at the recommended amount of \$2,000.

Other Citation No. 2

Item 1: § 1910.132(a)

Citation No. 2, alleges a nonserious violation of § 1910.132(a) because employees were exposed to environmental hazards without being provided with gloves or other protective clothing. Teresa Betts advised Rankin that the path that employees had to use taking trash to the dumpster at the back of the building required them to pass through poison ivy. Betts stated that other employees performed this task since she did not wish to be subjected to the plant irritants which cause rashes in susceptible people. Shepherd did not provide protective clothing for employees who encountered the environmental irritant in the course of performing their assigned work. Nor did he remove the irritants. Because of the very low gravity of the nonserious violation, no penalty is recommended and none is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a), Fed. R. Civ.P.

ORDER

Based on the foregoing decision, it is ORDERED:

Serious Citation No. 1

| Item | Standard | Disposition | Penalty |
|------|-----------------------|-------------|----------------------|
| 1a | § 1910.141(a)(3)(i) | affirmed |) grouped \$1,400.00 |
| 1b | § 1910.303(g)(1)(ii) | affirmed |) |
| 2a | § 1910.303(b)(2) | affirmed |) |
| 2b | § 1910.304(f)(4) | affirmed |) |
| 2c | § 1910.305(g)(1)(iii) | affirmed |) grouped \$2,000.00 |
| 2d | § 1910.334(a)(2)(ii) | affirmed |) |
| 2e | § 1910.334(b)(2) | affirmed |) |

Other Citation No. 2

| Item | Standard | Disposition | Penalty |
|------|---------------|-------------|---------|
| 1 | § 1910.132(a) | affirmed | - 0 - |

/s/
NANCY J. SPIES
Judge

Date: February 22, 2000