

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR, :
 :
 Complainant, :
 :
 v. :
 :
 ACTIVE FIRE SPRINKLER CORP., :
 :
 Respondent. :

OSHRC DOCKET NO. 96-1037

APPEARANCES:

Luis A. Micheli, Esquire
New York, New York
For the Complainant.

Morti Hirsch
Brooklyn, New York
For the Respondent, *pro se*.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is 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”). In May of 1996 the Occupational Safety and Health Administration (“OSHA”) inspected a construction site where Respondent was installing sprinkler system piping; as a result of the inspection, the company was issued a two-item serious citation alleging violations of OSHA’s electrical standard. Respondent contested the citation, the case was designated as an E-Z Trial case pursuant to the Commission’s E-Z Trial Rule 203(a), and a hearing was held on January 16, 1997. At the hearing, the company presented testimony and documentary evidence establishing that the individual exposed to the condition cited in item 1, which alleged a violation of 29 C.F.R. 1926.403(b)(1), was not its employee. The Secretary accordingly withdrew item 1, leaving for resolution item 2, which alleged a violation of 29 C.F.R. 1926.405(g)(2)(iv).

Discussion

Item 2 of the citation alleges an employee at the site was using an extension cord that was connected to an outdoor-type receptacle box by means of an ordinary cable clamp which had no strain relief, in violation of 1926.405(g)(2)(iv). That standard provides as follows:

Flexible cords shall be connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminal screws.

Frank Ufert, the OSHA compliance officer (“CO”) who conducted the inspection, testified that he observed a drill plugged into an outdoor receptacle box that was connected to the temporary power source at the site by an extension cord; the extension cord was attached to the box by means of a cord clamp, which would have been acceptable if the box had been mounted on a rigid surface as intended, but the cord was draped over a pipe and the box was simply hanging in midair. Ufert said the connection to the box had been made by stripping the end of the cord, wrapping its three conductor wires around the screws on the ground fault circuit interrupter (“GFCI”) inside the box, and pulling the clamp down tightly onto the cord. He also said that the clamp was a hazard; with the box hanging in midair the conductor wires could have been twisted or pulled loose and if they had contacted the box or the edge of the GFCI someone touching the box could have been severely shocked or electrocuted. Ufert noted that a strain relief device prevents this from happening by gripping the cord tightly and holding it rigid so that the conductor wires cannot move inside the box. Ufert further noted that John Kritis, Respondent’s foreman at the site, told him he had been using the drill that day and that electricians on the job had made the cord connection for him. (Tr. 7-30).

Respondent offered nothing at the hearing to rebut the CO’s testimony other than the statement of Morti Hirsch, the company’s president, that “[i]t’s our position that in this particular instance, that no violation existed.” (Tr. 33). After this statement, the undersigned asked Hirsch if he had any other witnesses he wanted to call, to which Hirsch responded that he did not. Hirsch was then asked if he rested his case, Hirsch answered in the affirmative, and the hearing was closed; however, Hirsch was advised that he could submit a post-hearing brief “to add anything that you might not have added today.” (Tr. 33-34). Respondent consequently submitted a one-page brief incorporating by reference an affidavit of John Kritis and two sketches. According to the brief and affidavit, there was no hazard because the power supply Kritis was hooked up to was protected by

another GFCI in the circuit, as shown in sketch #2, and the CO's description of the condition, as depicted in sketch #1, was incomplete as it did not show the GFCI in the circuit.

Although the record in this case was closed at the end of the hearing, it is clear Respondent's post-hearing submission is an attempt to rebut the CO's testimony with additional evidence. In deciding whether to reopen a record, the Commission considers the character of the additional evidence, the effect of opening the record, and the time the motion was made; a decision to reopen a record is made in the interest of fairness and substantial justice. *Chesapeake Operating Co.*, 10 BNA OSHC 1790, 1793 (No. 78-1353, 1982). It is apparent that the additional evidence Respondent is attempting to present is not newly discovered and that its failure to offer the testimony of Kritis and the sketches at the hearing shows a lack of due diligence which weighs against allowing the evidence into the record. Moreover, while Hirsch may have taken my comments about submitting a brief to mean that he could also present additional evidence, the nature of the evidence leads me to conclude that even if it had been offered at the hearing it would not have rebutted the CO's testimony and that, accordingly, it need not be made part of the record. First, Ufert specifically testified there was no GFCI in the circuit. (Tr. 17). Second, when Ufert asked Kritis about the cord connection, his only response was that electricians at the site had made it. (Tr. 15; 23). Third, Ufert has conducted almost 400 OSHA inspections and his experience before joining OSHA consisted of almost twenty years in construction, including eight years of owning his own business. (Tr. 8; 25). Finally, Ufert's testimony about the cord connection and the hazard it presented was clear, credible and convincing, and I find that the Secretary has demonstrated the alleged violation. This item is therefore affirmed as a serious violation, and the proposed penalty of \$375.00 is assessed.

Conclusions of Law

1. Respondent Active Fire Sprinkler Corporation 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. 1926.403(b)(1).

3. Respondent was in serious violation of 29 C.F.R. 1926.405(g)(2)(iv).

Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Item 1 of citation 1 is VACATED.
2. Item 2 of citation 1 is AFFIRMED, and a penalty of \$375.00 is assessed.

Irving Sommer
Chief Judge

Date: