

**UNITED STATES OF AMERICA**  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR	:	
	:	
Complainant	:	
	:	OSHRC DOCKET NO. <b><u>94-3484</u></b>
v.	:	
	:	
<b>GEO &amp; TED ELECTRIC CORP.,</b>	:	
	:	
Respondent	:	
	:	

Appearances:

Alan Kammerman, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
For Complainant

John J. P. Krol, Esq.  
Rockville, New York  
For Respondent

Before Administrative Law Judge Richard DeBenedetto

**DECISION AND ORDER**

Geo & Ted Electric Corp. (G&T) was cited on November 9, 1994, for serious (citation number 1) and repeat (citation number 2) violations of various safety standards and a regulation for maintaining a log of occupational injuries and illnesses. Citation number 1 included four items

and citation number 2 had three items, some of which were withdrawn by the Secretary either in the complaint or the posthearing brief. The items remaining in contest include items 1 and 4(b) of citation number 1, and items 1 and 2(b) of citation number 2, involving the maintenance of a safety program, log of injuries and compliance with two electrical safety standards.

G&T, an electrical contractor based in Brooklyn, New York, was one of several contractors (including a general contractor and a plumbing contractor) engaged by the City of New York to renovate its medical examiner's building. All work on the building was stopped by the City of New York in February 1994 because of a contract dispute with the plumbing contractor.

According to the undisputed testimony of George Kokakis, one of the owners of G&T, work did not resume until he received a telephone call from the City's resident engineer on June 22, 1994; G&T was told to return to the job and complete the electrical services. Kokakis went to the job site on that same day to survey the existing conditions and to draw up a list of things to be done. Kokakis found that much of the electrical system had been damaged and disarranged (Tr. 107). The following day, June 23 at about 1:00 p.m., two G&T employees started their work on the temporary electrical system and the electricals "damaged under the counters" (Tr. 112-13).

The OSHA inspection was triggered by the occurrence of a fatal accident on Friday, June 24, 1994, involving an employee of the general contractor. Upon arriving at the site that day at about 4:00 p.m., some six hours after the accident, the OSHA compliance officer was informed by the City's resident engineer that the work had been shut down for the day and all construction workers had left the building. He returned the following Monday, June 27, and conducted his inspection.

G&T had two employees working that Monday, Scott Adelle and Theodore (Teddy) Papadatos, the same two employees who worked at the site on Thursday and Friday, the previous week. They were currently in the process of changing the temporary lighting to a permanent system and installing conduit for computer wiring (Tr. 14).

**ACCIDENT PREVENTION RESPONSIBILITY UNDER 29 C.F.R. § 1926.20(b)(2)**

The 20(b)(2) standard requires the employer to initiate and maintain a program that provides for frequent and regular inspections of the job sites, materials and equipment, to be made by competent persons designated by the employer. The Secretary contends that G&T failed to inspect for hazardous conditions at the job site at the time work was resumed in June 1994.

The Secretary pins his case on the testimony of the compliance officer who stated that when he interviewed G&T's two employees, Scott Adelle and Teddy Papadatos, on Monday, June 27, they described their work activities since returning to the job after the contract dispute shutdown in February, and, according to the compliance officer, "none of this was inspection activity" (Tr. 14-17).

Opposing testimony was provided by George Kokakis, Scott Adelle, and Joseph Scutero, G&T's superintendent. The initial visit to the site after the long work interruption was made by Kokakis on June 22 for the very purpose of inspecting the conditions of the job site before any work was started. That inspection disclosed that a substantial part of the electrical system had been damaged and disarranged. The situation obviously called for corrective action to eliminate hazardous conditions involving the electrical services. When G&T's two-man crew started work during the afternoon of the following day, they understood their assignment was to correct the temporary electrical system and whatever else posed a hazard before proceeding with their regular duties (Tr. 113). Based upon his initial inspection on June 22, Kokakis estimated that the repair work would require 3 or 4 days for a two-man crew to accomplish (Tr. 116-17).

Scott Adelle testified that either one of the owners of G&T, or superintendent Joseph Scutero conducted periodic safety inspections at the job site in issue (Tr. 165-66). Joseph Scutero stated that his job as superintendent required him to oversee all G&T jobs, and that he visited every site at least once a week during which he conducted safety inspections (Tr. 184, 196).

The compliance officer's inquiry into the matter during the inspection was limited in scope. The positive and uncontradicted testimony of G&T's witnesses supports the conclusion that G&T did in fact maintain a program to prevent accidents and safeguard employees, consequently item 1 of citation number 1 relating to the 20(b)(2) standard cannot be sustained.

**STRAIN RELIEF FOR FLEXIBLE CORDS: § 1926.405(G)(2)(IV).**

Item 4(b) of citation number 1 charges that flexible cords entering a wall-mounted circuit breaker box were not “connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminal screws,” in accordance with the 405(g)(2)(iv) standard.

A circuit breaker box was mounted on the wall of the fifth floor hallway. The box was open and the wiring and cables exposed. The G&T employees worked on the cords and cables in the course of changing the temporary lighting. Demolition laborers passed within three feet of the panel box while moving metal carts filled with debris (Tr. 28-29; Exhs. C-1, C-2). These conditions were noted by the compliance officer while he was at the site on June 27. He also noticed that the cords in the panel box were not provided with strain relief by any devices, fittings or other suitable means (Tr. 38).

The compliance officer testified that without a means to prevent a pull on the cords from being directly transmitted to joints on terminal screws, the cords were subject to being pulled by someone passing by with equipment or materials which could result in energizing the panel box thereby exposing employees of G&T and other contractors in the vicinity to electric shock hazard (Tr. 27, 30-33, 39).

Based upon the testimony of George Kokakis (Tr. 128-31, 146-49), G&T makes the following arguments: that it was infeasible to use a fitting to prevent pulling at joints and terminals; that as long as the installation was temporary and under the supervision of an electrician “there was no need to have an inside fitting”. G&T’s brief at 8-9. These arguments have no substance or merit.

Infeasibility of compliance is an affirmative defense which must be raised in the answer. Generally, an affirmative defense not asserted during the issue-formulation stage of the proceeding is deemed to be waived. Under Commission Rule 34(b)(4), 29 C.F.R. § 2200.34(b)(4), affirmative defenses not raised in the answer may not be raised unless those defenses are otherwise asserted as soon as practicable. The only reference to infeasibility contained in G&T’s answer appears in the second affirmative defense as follows:

...In the short period of time G&T was on the worksite, at the direction of the owner, G&T was in the process of locating, identifying, and correcting any alleged

violations which were unpreventable in that they were caused by the misconduct of unknown others and earlier corrections were infeasible.

The question of infeasibility of compliance was initially mentioned at a point during the direct testimony of George Kokakis when he was questioned by the Judge to clarify his testimony which was thought to be vague and discursive on the issued at hand (Tr. 127-28):

JUDGE DeBENEDETTO: Mr. Kokakis, my understanding of the allegation made by the Secretary, and the basis for their issuing the citation on this particular item, is the fact that the wires in the circuit breaker box were not run through fittings.

THE WITNESS: That's correct.

JUDGE DeBENEDETTO: Well, explain why the fittings weren't there.

THE WITNESS: The wires were - first of all the panel was recessed inside the wall. The wires that were run into it was a temporary Romex cable suitable for temporary lighting and can be run on the outside temporarily while they're working someplace else to give it power. It's the same thing like an extension cord that you plug in. So those wires were there but it was under the supervision of an electrician constantly.

And when they - at the end of the day that they went home, those cables were taken out and just let it hang there until the next day that the electrician's going to come in -

Q BY MR. KROL: And then he would reconnect the cables and watch them.

A Right.

JUDGE DeBENEDETTO: Well look, Mr. Kokakis, this is your trade we're talking about.

THE WITNESS: That's right.

JUDGE DeBENEDETTO: And I'm puzzled as to how to connect your information, your testimony, to the Secretary's allegation that there was a failure to have these fittings in that box. Now, tell us, why couldn't there have been the fittings that the Secretary wants so much?

THE WITNESS: There were -- okay. There were -- I mean the circuit breaker was recessed in the wall with the conduits coming up and down, plaster on top. There is no possible way to put the Romex cable into the panel unless you chop the wall to put it in to get the device to put in the fitting.

Infeasibility of compliance was not asserted as a defense as soon as practicable in this case, consequently it has been waived.

It is perhaps instructive to note that even if infeasibility of compliance had been properly asserted as a defense, the evidence of record would not be supportive. Both parties took a very narrow approach in litigating the issue as defined by the language of the standard, in that both parties apparently read the standard as requiring the installation of a *fitting* in order to prevent the pull of flexible cords, and that no other device or method would be in compliance. This view overlooks the basic purpose of the standard: to provide strain relief for flexible cords and prevent a pull on the cord from being transmitted to joints or terminal screws.

The hazard addressed by the OSHA standard is also covered by the following section of the National Electrical Code, although the latter is admittedly somewhat more informative:

400.10. Pull at Joints and Terminals. Flexible cords shall be so connected to devices and to fittings that tension will not be transmitted to joints or terminal screws. This shall be accomplished by a knot in the cord, winding with tape, by a special fitting designed for that purpose, or by other approved means which will prevent a pull on the cord from being directly transmitted to joints or terminal screws.

*The National Electrical Code Handbook*, Second Ed. (1981) at p. 407. G&T's own witness, Joseph Scutero, described the availability of an alternative means of preventing a pull on the cords of the panel box in question at the time of the OSHA inspection (Tr. 191-92):

Q By MR. KROL: Let me ask you this. In the general scheme of your work inspections, what would you do had you observed this condition, in any other -- this job or any other job?

A First you would see if you can enter the box with fittings. Okay? If it's a service method box and there's room at the top to put fittings, you would put the fittings. That would be the first course of action.

If it's a recessed box and it calls for chopping the plaster to get into the top of the box, okay, you'd have to first find out if you can do that. It might be a finished wall or might be a wood wall. It might be a marble wall. Okay. You'd have to get to the customer to find out if they'd let you do it. Most likely they won't let you do it. Okay?

Third situation is, being it's a temporary situation, you're allowed to run the Romex temporary wires outside of the box

because the Romex carries a ground conductor which protects the power and lighting circuits. Okay. So, what you would do, you would put a -- what we call a victor split. It's a porcelain insulator. Okay. You would wrap the Romex wire around it in a loop. Okay. Tie it off to the top of the panel. Enter the panel without fittings into the panel box. Okay.

If the wires are pulled, the loop, okay, allows less stress on the wires; in other words, it allows a slack to be pulled, okay, before it actually pulls off of the panel box. That's the standard procedure.

Because G&T failed to provide a safeguard against a pull on the cords entering the circuit breaker box, item 4(b) of citation number 1 is affirmed as a serious violation and a penalty of \$625 is assessed, in accordance with the statutory penalty criteria of section 17(j) of the OSH Act, 29 U.S.C. § 666(j)<sup>1</sup>

#### **LOG OF INJURIES AND ILLNESSES: § 1904.2(a)**

The regulation at § 1904.2(a) requires each employer to maintain a log and summary of all recordable occupational injuries and illnesses. In item 1 of citation number 2, G&T is charged with repeat violation of this regulation, having been previously cited for violating the regulation in June 1991 which became a final order in July 1991.

The compliance officer testified that he asked to see the OSHA log on two occasions without success: on the first occasion he telephoned G&T's superintendent on June 27, 1994, the first full day of the inspection and requested Joseph Scutero to make the log available; the second request was made by fax transmitted to G&T's office on July 5, 1994. The compliance officer stated with certainty that no injury and illness log was made available at any time before the citation was issued on November 9, 1994 (Tr. 41-43).

George Kokakis testified that the log of injuries and illnesses was kept at G&T's office and a copy sent to the local union insurance agency. He stated that he gave an envelope containing the logs (OSHA Form 200) to the compliance officer during a meeting on July 27, 1994. Kokakis described the events of that meeting as follows (Tr. 238):

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<sup>1</sup>The Secretary's proposed penalty of \$1,250 was based upon two subitems; as previously noted, subitem 1 was withdrawn by the Secretary in the complaint.

Q Can you explain to the Court what happened when you arrived at Mr. Steinke's [compliance officer's] office for this meeting?

A Mr. Steinke came out, we said hello to each other, we shook hands. I hand[sic] him the envelope that he requested. He hand[sic] it right back to a lady behind the counter. That is the last - I didn't pursue it after that.

Kokakis stated further that he handed another copy of the log to OSHA personnel during another meeting in December 1994, after the citations had been issued (Tr. 239):

A It was in Mr. Steinke's office with supervisor which I don't recall the name, Joe Scutero, Scott Adelle, Mr. Papadatos, that we call Pappo, and a fellow named Mr. Haring, consulting engineer, a friend of mine.

Q Now, at that point did you - what did you do with the envelope containing the form 200's on - during the December meeting?

A I don't - I don't remember which one I handed[it] to, but it was either Mr. Steinke or his boss. I don't remember which one from the two was handed[sic].

Q Okay.

A In fact, I did not hand[it to] the person; Mr. Haring did.

On the recross-examination the following exchange took place (Tr. 239-40):

Q Mr. Kokakis, did you complain to Mr. Steinke at the December meeting that something to the effect that I already gave you these OSHA 200's?

A No, I did not. I was really too nervous with OSHA to complain about anything. If they would have hit me on the head, I would have said thank you. So, I really didn't, no.

When initially questioned on the matter by his attorney on direct examination, Kokakis's testimony was replete with vagueness, ambiguity and uncertainty (Tr. 123-24). And it is surprising, to say the least, that Kokakis - an active owner of G&T which was previously cited by OSHA for the same offense - would exhibit such demure simplicity at a post-citation meeting if he had given the logs to OSHA as requested before the citations were issued. Kokakis's testimony on this issue was seriously flawed and questionable. Consequently, the statements of the compliance officer are adopted as true.



The \$1200 penalty proposed for the repeat violation is consistent with the penalty-assessment provisions of 29 U.S.C. § 666(j).

**GUARDING OF LIVE PARTS: § 1926.403(i)(2)(i)**

Item 2(b) of citation number 2 charges repeat violation of the 403(i)(2)(i) standard for failure to guard exposed live wires on the temporary power and light cables where light fixtures had been removed. The standard requires that live parts of electrical equipment be guarded against accidental contact by cabinets or other forms of enclosures or by other means, including by elevation of 8 feet or more above the floor. G&T was previously cited for violating the same standard in August 1993. That citation became a final order in September 1993.

When the compliance officer visited the work site at about 4:00 p.m., on Friday, June 24, to investigate the accident that occurred earlier that day, he noticed that temporary cable had been snipped off apparently to remove light fixtures, thereby exposing the tips of the wires which on testing proved to be live and 110 volts. The exposed live wires were located just a few inches above a 5-foot-high file cabinet in one of the fifth floor offices (Tr. 44-45, 227). The compliance officer acknowledged that he did not know who or what contractor had been responsible for creating the condition of the exposed live wires (Tr. 48).

The Secretary contends that both Scott Adelle and Teddy Papadatos were exposed to the potential electric shock hazard presented by the exposed live wires because Teddy told the compliance officer “that they had been in the room where the live wire tips were located while moving cabinets”; and that the condition was readily observable and should have been corrected by G&T. Secretary’s brief at 12.

George Kokakis testified that the wires were not cut by G&T personnel, and that the condition was likely caused by another contractor to install the duct system. He also stated that when he questioned his employees regarding the matter, they informed him that they did not observe the exposed wires (Tr. 132-34).

The Secretary’s case rests entirely upon an admission or statement purportedly made by G&T’s employee, Teddy Papadatos, to the compliance officer during the OSHA inspection sometime on or after June 27 when the work crews returned to their jobs following the fatal accident on Friday, June 24. When questioned on direct examination as to whether G&T’s

employees had been exposed to the hazard of the live wires, the compliance officer made the following statements (Tr. 45):

Q Did you conclude that any -- employees of Geo & Ted were exposed to a hazard in connection with this condition?

A Yes, I did.

Q And who would that have been?

A Scott Adelle and Terry [sic] Papadatos.

Q And how did you reach that conclusion that they were allegedly exposed?

A Being -- working in this construction site, it was a fairly small site, and I believe Terry [sic] had been in that room that he had mentioned when they were moving the cabinets at some point earlier in the week.

The record reflects that the compliance officer observed the condition late in the day on Friday and, apparently, it was corrected by the compliance officer himself when he returned to the job site the next day, on Saturday morning, for that very purpose, which he accomplished by wrapping tape around the exposed wires (Tr. 63-64). During the entire time the condition was observed by the compliance officer, no employees were working at the site, and he had no knowledge as to when the condition first came into existence.

The compliance officer's testimony was impaired by uncertainty and filled with gaps. The record does not disclose whether there was only one room or office on the fifth floor containing file cabinets; other contractors were at the site during the time in question who might have cut the temporary wires at a time when G&T employees did not have occasion to enter the room and had no opportunity to observe the violative condition before the compliance officer saw it on June 24. These gaps and uncertainties in the evidence preclude sustaining the Secretary's charge of failing to guard live electrical parts, as alleged in item 2(b) of citation number 2.

Based upon the foregoing findings and conclusions, it is **ORDERED** that item 1 of citation number 1 relating to the safety program required by § 1926.20(b)(2) is vacated. It is further **ORDERED** that item 3 of citation number 1, having been withdrawn by the Secretary in his posthearing brief, is vacated. It is further

**ORDERED** that item 4(b) of citation number 1 relating to strain relief for flexible cords under § 1926.405(g)(2)(iv) is affirmed and a penalty of \$625 is assessed. It is further

**ORDERED** that item 1 of citation number 2 relating to log of injuries and illnesses under § 1904.2(a) is affirmed as a repeat violation and a penalty of \$1200 is assessed. It is further

**ORDERED** that item 2(b) of citation number 2 relating to guarding of live parts under § 1926.403(i)(2)(i) is vacated. It is further

**ORDERED** that item 2(c) of citation number 2, having been withdrawn by the Secretary in his posthearing brief, is vacated.

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RICHARD DeBENEDETTO  
Judge, OSHRC

Dated: \_\_\_\_\_  
Boston, MA