

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. :
 :
 NATIONAL ACOUSTICS, INC., :
 :
 Respondent. :

DOCKET NO. 96-1570

APPEARANCES:

Helen J. Schuitmaker, Esquire
Chicago, Illinois
For the Complainant.

Steven M. Magoon
Chicago, Illinois
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”). The Occupational Safety and Health Administration (“OSHA”) investigated a construction site in Chicago, Illinois, on August 22, 1996, where Respondent National Acoustics (“National”) was a subcontractor engaged in demolition and cleanup work; as a result, National was issued a serious citation alleging violations of 29 C.F.R. §§ 1926.25(a), 1926.416(a)(1) and 1926.416(a)(3). National contested the citations, and a hearing was held on April 9, 1997.

The Evidence

Walter Gulik, the OSHA compliance officer (“CO”) who conducted the inspection, appeared and testified. Based on his testimony, the job was a hotel renovation involving various employers, and after meeting with the general contractor, who had no objections, he began his inspection. On the 11th floor, the CO found two National employees working in a suite which had plaster, scrap metal and lumber with protruding nails all over the floors, which created a tripping and a puncture

hazard; in addition, the electrical boxes and outlets were pulled out of the walls and electrical wires were hanging from upper levels, and although the CO initially assumed the electricity was off he discovered upon using a tracer it was on, and the employees were getting within 1 to 2 feet of the 110-volt circuitry. The CO said the circuitry had exposed wires, like those shown in C-1, a photo he took, that an employee contacting a live wire could have received an electrical burn or even a lethal shock, and that the general contractor told him the power had not been turned off to avoid disrupting the hotel residents; the CO also said that Tom Williams, National's foreman, terminated the work in the suite upon being advised of the hazards, and that when he returned the next day most of the electrical problems had been resolved by the general and the electrical contractor. (Tr. 5-25).

Steve Magoon, National's president, also appeared and testified. Pursuant to his testimony, the general contractor gave National a list of the rooms in which it was to work each day, and the work in the subject suite involved tearing down walls and then removing the debris; the walls were torn down with crow bars and sledge hammers and the debris was removed by filling dumpsters, taking them downstairs and emptying them, and then bringing them back upstairs. Magoon said debris removal was part of the job and that an employee of the general contractor had told him the electricity would be off in the rooms in which his company would be working; he also said he did not know the electricity was on and that National had not checked it as it had relied on the general contractor. Magoon stated National had been in business 37 years and had had no prior violations, and that it gave its workers safety training and was very concerned about safety. (Tr. 27-39).

Citation 1 Item 1

This item alleges that the floors of the suite where the employees were working were littered with debris, including scrap lumber with protruding nails, in violation of 29 C.F.R. 1926.25(a). That standard provides as follows:

During the course of construction, alteration, or repairs, form and scrap lumber with protruding nails, and all other debris, shall be kept cleared from work areas, passageways, and stairs, in and around buildings or other structures.

The record plainly shows there was scrap lumber with protruding nails and other debris on the floors of the suite in which National's employees were working when the CO observed them. However, as Steve Magoon testified, the job in the suite involved tearing down walls and then removing the debris which, in my view, would necessarily have resulted in debris being on the floors

at least temporarily. Further, the CO himself testified he was not sure what the employees were doing when he was there but that they were bending down and picking things up and that they could have been cleaning up the debris; he also testified he was concentrating on the electrical hazards and that while he did not recall any dumpsters in the suite there could have been some on the premises. (Tr. 10-11; 17-21; 24). Based on the record, I conclude that the Secretary has not met her burden of proving the alleged violation. This item is accordingly vacated.

Citation 1 Items 2-3

Item 2 alleges that the employees were permitted to work in proximity to energized power circuits and were not protected against electric shock, in violation of 29 C.F.R. 1926.416(a)(1), which states as follows:

No employer shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it effectively by insulation or other means.

Item 3 alleges that the employees were working in close proximity to open junction boxes, uncovered wall outlets and dangling wires and that National did not ascertain whether the condition presented a hazard before permitting the work, in violation of 29 C.F.R. 1926.416(a)(3), which provides in pertinent part as follows:

Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an energized electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool, or machine into physical or electrical contact with the electric power circuit.

The CO's testimony, which National did not rebut, establishes the alleged conditions.¹ However, as noted above, Steve Magoon testified as to his lack of knowledge of the hazard and as to his belief, based on what an employee of the general contractor told him, that the electricity in the rooms in which his employees would be working would be turned off. Although employers are generally held responsible under the Act for protecting their own employees, the employer of an exposed employee may defend against an alleged violation by demonstrating what is known as the

¹In reaching this conclusion, I have considered R-1, a letter from the hotel's management company stating it was unaware of any exposed circuitry or other unsafe conditions at the project.

multi-employer work site defense; to establish this affirmative defense, the employer has the burden of showing that it did not create or control the hazardous condition, and either (1) that its exposed employees were protected by realistic measures taken as an alternative to literal compliance with the cited standard, or (2) that it did not know, and could not have known in the exercise of reasonable diligence, of the hazardous condition. *See, e.g., Weisblatt Elec. Co., Inc.*, 10 BNA OSHC 1667, 1668 (No. 79-2537, 1982). While it is clear that National did not create or control the hazard of the live circuitry, it is equally clear that the company should have known of the hazard and taken measures to protect its employees. National's reliance on the prior representation of an employee of the general contractor that the electricity would be turned off was not reasonable, especially in view of the contrary information the CO received and the fact that National could have learned this same information or checked the circuitry itself before permitting its employees to commence working in the suite. Items 1 and 2 are therefore affirmed as serious violations.

The Secretary proposed a penalty of \$1,250.00 for each of these items. The CO testified that these penalties included reductions for the company's small size and lack of history of previous violations but no reduction for good faith due to National's failure to assess the situation before allowing the work in the suite; however, the CO also testified that National's foreman stopped the work "immediately" upon being informed of the hazard, and Magoon's testimony about the safety training provided employees was un rebutted. (Tr. 18-21; 24-26; 38-39). On balance, I conclude that a penalty of \$1,000.00 for each of these items is appropriate.

Conclusions of Law

1. Respondent 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. § 1926.25(a).
3. Respondent was in serious violation of 29 C.F.R. §§ 1926.416(a)(1) and (a)(3).

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. Items 2 and 3 of citation 1 are AFFIRMED, and a penalty of \$1,000.00 for each of these items is assessed.

Irving Sommer
Chief Judge

Date: