



UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION  
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SECRETARY OF LABOR  
Complainant,

v.

TRI-CITY ELECTRICAL CONTRACTORS, INC  
Respondent.

OSHRC DOCKET  
NO. 93-2723

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 February 9, 1995. The decision of the Judge will become a final order of the Commission on March 13, 1995 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 March 1, 1995 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  
Room S4004  
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

Date: February 9, 1995

Ray H. Darling, Jr.  
Executive Secretary

DOCKET NO. 93-2723

NOTICE IS GIVEN TO THE FOLLOWING:

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Nancy J. Spies  
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**SECRETARY OF LABOR,**  
 Complainant,

v.

**TRI-CITY ELECTRICAL  
 CONTRACTORS, INC.,**  
 Respondent.

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OSHR Docket No. 93-2723

**APPEARANCES:**

**Donald R. McCoy, Esquire**  
 Office of the Solicitor  
 U. S. Department of Labor  
 Fort Lauderdale, Florida  
 For Complainant

**Mr. James Powers**  
 Safety Director  
 Tri-City Electrical Contractors, Inc.  
 Altamonte Springs, Florida  
 For Respondent

Before: **Administrative Law Judge Nancy J. Spies**

***DECISION AND ORDER***

Tri-City Electrical Contractors, Inc. (Tri-City), contests a citation issued to it by the Secretary on September 15, 1993. The Secretary alleges in the citation that Tri-City violated § 5(a)(1) (item 1); § 1926.405(a)(2)(ii)(I), (item 2a); and § 1926.405(g)(2)(iii) (item 2b) of the Occupational Safety and Health Act of 1970 (Act). The Secretary classified the alleged violations in the citation as serious. The citation arose from an inspection conducted on June 16 and 17, 1993, by Occupational Safety and Health Administration (OSHA) compliance officer James Mosley.

At the time of Mosley's inspection, Tri-City was the electrical sub-contractor on a construction project in Fort Myers, Florida. The project was a Builder's Square store which by June 16, 1993, was near completion. When Mosley arrived at 8:00 a.m., employees of

Builder's Square were moving in merchandise while several of the projects' contractors were finishing the construction work (Tr. 16-18).

Exhibits JD-1 and JD-3

At the May 24, 1994, hearing held in this matter, the Secretary's Request for Admissions and Tri-City's Answer to Request were entered into the record as Exhibits JD-1 and JD-2 respectively (Tr. 11). Tri-City's answer to the Secretary's interrogatory No. 3 was also read into the record (Tr. 8). The following narrative is taken from those two documents and answer to the interrogatory:

On June 16, 1993, Tri-City had seven employees employed at 13711 S. Tamiami Trail, Fort Myers, Florida. OSHA compliance officer Mosley invited employee Mike LaSanska to walk around with him while Mosley conducted his inspection of the workplace. LaSanska declined to accompany Mosley. On June 17, 1993, Mosley held a closing conference with Tri-City's safety director, Lou Pietrobono.

On June 16, 1993, there was a carbon dioxide tank standing upright outside of the electric room of the workplace, north of the electric room entry door. The pressure of the tank ranged from 750 to 850 pounds per square inch (p.s.i.). The carbon dioxide tank did not have a valve protection cap in place.

Tri-City was using the tank to provide pressure for an air gun. The air gun was being used to blow a "mouse" tied to a filament through electrical conduits so that electrical lines could later be passed through these conduits. The air gun was not equipped with a pressure regulator. The working pressure of the air gun's hose was 250 p.s.i.

Also on June 16, 1993, Tri-City was using a round 14 gauge AWS extension cord at the cash register aisle on the west side of the worksite. Mosley observed a hand-operated fork lift carrying a box of materials or equipment run over the extension cord. He also observed Tri-City's scissor lift run over the extension cord.

The extension cord had been spliced by twisting the conductors together. The splice was wrapped with black PVC electrical tape.

On June 16, 1993, Tri-City employee Jim Hendershot worked at or near the location of the carbon dioxide tank. Mike LaSanska worked with the air gun.

### Item 1: The General Duty Clause

The Secretary charges Tri-City with a serious violation of § 5(a)(1), the general duty clause. Section 5(a)(1) requires that:

- (a) Each employer --
  - (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

The citation alleges that Tri-City's "employees were exposed to the hazard of being struck by the unregulated release of carbon dioxide and/or the related equipment used with it."

The citation asserts three instances in which § 5(a)(1) was violated. Instance (a) states that "the cylinder of carbon dioxide was standing upright and unsecured from falling over. The cylinder did not have a valve protection cap in place which posed the problem of [the] cylinder (with 1800 p.s.i. or more inside), becoming a projectile, on or about 6/16/93."

Tri-City does not dispute most of the general facts alleged by the Secretary. Tri-City admits that the carbon dioxide tank was standing upright and was unsecured. The company also admits that the tank's valve protection cap was not in place (Exhs. C-1, C-2). Tri-City does dispute, however, the Secretary's contention that the tank's pressure was 1800 p.s.i. or more.

Mosley attempted to measure the pressure by firing the air gun into his gauge, which had the capacity to measure up to 100 p.s.i. The pressure measured up to the full 100 p.s.i (Tr. 38). The only conclusion that can be drawn from this is that the tank's pressure exceeded 100 p.s.i. Mosley explained how he arrived at the figure of 1800 p.s.i. (Tr. 58-59):

When I questioned Mike [LaSanska] and I also spoke to Mr. Hendershot, no one could really tell me what the pressure was. But, that particular pressure rating on those cylinders, . . . [t]he ratings for those tanks are 2,500 p.s.i normally. That's what they can go up to, up to 2,200, . . .

. . . .

Without a gauge on it to tell us what the pressure was, we were doing a best guess until we knew for sure.

In effect, Mosley admitted that he did not know what the tank's pressure was.

Tri-City contends the tank's pressure was between 750 to 850 p.s.i. The Secretary offered no real rebuttal to Tri-City's claim. It is concluded that Tri-City is in a better position to know the pressure of its tank. The carbon dioxide tank's pressure was between 750 and 850 p.s.i. However, Mosley testified that even at the 750 to 850 p.s.i. the hazards presented by the carbon dioxide tank would be the same (Tr. 60).

Instance (a)

In instance (a), the hazard that the Secretary is concerned with is that the unsecured, uncapped carbon dioxide tank could fall or be knocked over, and become a projectile through the release of gas. Mosley testified as to this hazard (Tr. 51):

[I]f the tank had fallen over and it was in a flat room and there was nothing but the hose connected to it, the likelihood [of the tank becoming a projectile] is not that great. But, it had a steel pipe attached to it, which caused the protrudence [sic], which, if it fell on a pipe, it would absolutely transfer that energy to the brass valve.

Tri-City denies that its use of the carbon dioxide tank was a hazard. In its defense, it submitted a videotape (Exh. R-5) which showed, among other things, that when carbon dioxide is released from a tank, it eventually freezes up and no more carbon dioxide can be released. However, the videotape shows that several seconds elapse before the carbon dioxide freezes. There was sufficient time before the tank froze during which it could have become a projectile. Mosley stated that a damaged cylinder pressurized at 2,200 p.s.i. could reach a speed of 30 miles per hour in one 1/100 of a second. A tank-turned-projectile can go through a cinder block wall at 200 feet (Tr. 56). Mosley stated that even at 750 to 850 p.s.i., a tank could inflict serious injuries to anyone that it hit (Tr. 56-57).

Both the Secretary and Tri-City refer to a pamphlet issued by the Compressed Gas Association (Exh. C-5) to bolster their arguments.

Section 3.6 of the pamphlet is captioned "Connecting Container and Withdrawing Content." The Secretary references paragraph 3.6.4, "Secure Container," which provides (Exh. C-5, p. 9):

The user shall secure containers while connected to a portable welding, cutting, brazing or heating appliance or other portable utilization equipment to prevent them from being knocked over.

The hose and air gun attached to the carbon dioxide tank constitute “other portable utilization equipment” (Tr. 63).

Tri-City references paragraph 3.5.8 of the pamphlet. Section 3.5 is captioned “Storing Containers.” Tri-City cites the following in support of its argument that its carbon dioxide container did not need to be secured (Exh. C-5, p. 9):

**3.5.8. Storage and Use of Containers.** All compressed gas containers in service or in storage shall be *stored* standing upright where they are not likely to be knocked over, or the containers shall be secured (emphasis added).

Tri-City focuses on the part of the paragraph which states that compressed gas containers should be located “where they are not likely to be knocked over.” Tri-City claims that the carbon dioxide tank, which was standing next to an electrical panel, was located in an area where it was not likely to be knocked over. Tri-City is ignoring, however, that the cited paragraph refers to cylinders in storage. It describes how compressed gas containers “shall be stored.” It is undisputed that Tri-City was using the carbon dioxide tank to provide pressure for an air gun being used to blow a “mouse” through electrical conduits. The Review Commission has consistently held that “cylinders are not ‘in storage’ if they are located in an area where they are used intermittently.” *MCC of Florida, Inc.*, 9 BNA OSHC 1895, 1981 CCH OSHD ¶ 25,420, p. 31,681 (No. 15757, 1981); *See also, Grassman Steel & Aluminum Corp.*, 6 BNA OSHC 2020, 1978 CCH OSHD ¶ 23,097 (No. 76-239, 1978); *Armour Food Co.*, 14 BNA OSHC 1817, 1990 CCH OSHD ¶ 29,088 (No. 86-247, 1990). The carbon dioxide tank was in use and not in storage.

To prove that an employer violated § 5(a)(1), the Secretary must show: (1) that a condition or activity in the employer’s workplace presented a hazard to employees; (2) that the cited employer or the employer’s industry recognized the hazard; (3) that the hazard was likely to cause death or serious physical harm; and (4) that feasible means existed to eliminate or materially reduce the hazard. *United States Steel Corp.*, 12 BNA OSHC 1692, 1697-98, 1986-87 CCH OSHD ¶ 27,517, p. 35,669 (No. 79-1998, 1986).

*Coleco Industries, Inc.*, 14 BNA OSHC 1961, 1963, 1991 CCH OSHD ¶ 29,200 (No. 84-546, 1991).

(1) *A Condition in the Workplace Presented a Hazard to Employees.* The Secretary has established that the unsecured, uncapped tank of carbon dioxide presented a hazard to employees. The tank was connected to a hose, that was connected to an air gun, which was in use. The tank could have been knocked over by someone near it or it could have been pulled over by someone using it. If the tank had been knocked or pulled over, it could have become a projectile due to the unregulated release of compressed gas.

(2) *The Electrical Construction Industry Recognizes the Hazards.* Tri-City claims that the hazard of being struck by a compressed gas cylinder that has become a projectile is not recognized in its industry. The Secretary's proof on this issue is convincing. In addition to the pamphlet put out by the Compressed Air Association, the Secretary introduced into evidence Exhibit C-6, a publication of the Union Carbide Company. The publication shows a diagram of a cylinder and refers to the cylinder as "The Sleeping Giant." The text of the publication provides in pertinent part:

**I AM A HIGH PRESSURE, COMPRESSED GAS CYLINDER**

....

I am too frequently left standing alone on my small base without other visible means of support -- my cap removed and lost by an unthinking workman.

I am ready to be toppled over -- when my naked valve can be damaged or even snapped off -- and all of my power unleashed through an opening no longer than a lead pencil.

I am proud of my capabilities -- here are a few of them:

- I have on rare occasions been known to jetaway -- faster than any dragster.
- I might smash my way through brick walls.
- I might even fly through the air.
- I may spin, ricochet, crash and slash through anything in my path.

You can be my master only under these terms:

- Full or empty -- see to it that my cap is on straight and snug.
- Never -- repeat -- never leave me standing alone. Secure me so that I cannot fall.



Tri-City's use of the carbon dioxide cylinder on the Builder's Square job was not a rare occurrence. It is the method Tri-City routinely uses to prepare the electrical conduits for the installation of electrical lines. Anyone who uses a compressed gas cylinder should be aware that it should be secured when in use to prevent it from becoming a projectile should it be knocked over. Both Exhibits C-5 and C-6 make it clear that an unsecured compressed gas cylinder is a recognized hazard.

(3) *The Hazard was Likely to Cause Death or Serious Physical Harm.* The Secretary established that the hazard of using an unsecured compressed gas cylinder could cause death or serious physical harm if the cylinder became a projectile due to the unregulated release of gas.

(4) *Feasible Means Existed to Eliminate or Materially Reduce the Hazard.* Mosley suggested several means of securing the tank upright. Tri-City could have put an anchor bolt into the drywall behind the tank and secure it to the wall with a wire, rope or chain (Tr. 71). Or Tri-City could have purchased a moveable cart specifically designed to secure a cylinder with chains or straps (Tr. 72-73).

The Secretary has established that Tri-City committed a serious violation of § 5(a)(1) with regard to instance (a) of item 1 of the citation.

#### Instance (b)

Instance (b) of item 1 alleges that "the pressure in the red rubber, SpeedAire hose was not regulated. The hose was deformed and in danger of rupturing. The working pressure of the air hose is 250 p.s.i. . . ." As noted, although the citation wrongly assumed the carbon dioxide in the cylinder was 1800 p.s.i., it was actually between 750 and 850 p.s.i.

The hose was visibly swollen (Exh. C-1, C-2; Tr. 46-47). Mosley stated that a hose rated for a higher pressure should have been used. Hoses rated for pressures between 750 to 850 p.s.i. are readily available (Tr. 75). It may be assumed that manufacturers rate a hose to alert users to the pressures which will be accepted by the hose. A prudent user would comply with a product's restrictions. Leaving aside the issue of hazard recognition, however, and even accepting that a lack of a restrictor on the hose nozzle (see instance (c) below) may heighten the possibility of an accident, there is insufficient evidence that any resultant

**injury could be classified as serious. Mosley testified that the hose could rupture and injure an employee (Tr. 50):**

**You could have injection of air into the body. You could have foreign matter on the skin injected through openings in the body, you could have damage to several internal organs.**

**Mosley's conclusion is considered speculative. There was no showing that there was anything in the air hose line which, if it ruptured, would puncture the skin. The 750 and 800 p.s.i. pressure in a ruptured hose would dissipate rapidly. Even if air pressure injected dirt or other foreign matter into areas where the employee was not clothed, it is difficult to understand how this could damage internal organs. The injury anticipated by the hazard is too remote and speculative to be classified as serious.**

**The Secretary has failed to establish a § 5(a)(1) violation with respect to instance (b) of item 1 of the citation.**

#### **Instance (c)**

**The Secretary alleges in instance (c) that "the blow gun was unrestricted with a nozzle pressure in excess of 100 p.s.i., on or about 6/16/93."**

**Mosley testified that the nozzle of the air gun had no safety device on it regulating the release of the carbon dioxide (Tr. 77). He recommended the use of a "metered" nozzle that would meter out a certain amount of compressed gas. He also recommended the use of a pin, called a "safety detent," which is contained in the handle and which must be removed in order to activate the device (Tr. 78-79). Tri-City's employee manually turned the valve on and off.**

**The Secretary failed to adduce evidence demonstrating how the air gun's unregulated nozzle could cause death or serious physical harm. Mosley stated that a safety device would keep the air gun "from accidentally being stepped on, pushed or anything else" (Tr. 78). The Secretary does not explain why stepping on or pushing the air gun would cause death or serious physical harm.**

**The Secretary has failed to establish that Tri-City violated § 5(a)(1) with respect to instance (c) of item 1 of the citation.**

Item 2a: § 1926.405(a)(2)(ii)(I)

The Secretary alleges that Tri-City committed a serious violation of § 1926.405(a)(2)(ii)(I), which provides:

Flexible cords and cables shall be protected from damage. Sharp corners and projections shall be avoided. Flexible cords and cables may pass through doorways or other pinch points, if protection is provided to avoid damage.

Exhibit C-7 shows a flexible extension cord lying in an aisleway where the cash registers were to be located. The extension cord, which was approximately 50 feet long, belonged to Tri-City (Tr. 86). The cord was energized, with no operating ground fault circuit interrupter (GFCI) (Tr. 88-89). Tri-City had been using it with the scissor lift for a drill (Tr. 89). Black tape was wrapped around one end of the extension cord. Mosley had LaSanska unplug the cord and unwrap the black tape, revealing that the cord had been spliced (Tr. 90).

Mosley observed forklifts and hand trucks (pallet jacks) being used to move pallets of merchandise (Tr. 90-91). Exhibit C-8 shows a pallet jack running over the extension cord (Tr. 92).

The Secretary alleges that the extension cord was not protected from damage because it was exposed to being run over by the forklifts and pallet jacks. Tri-City argues that it is commonplace on construction sites to have equipment run over extension cords (Tr. 224-225, 260-261).

The cited standard requires that flexible cords “be protected from damage.” Exposing an extension cord to heavy traffic is not protecting it from damage. When forklifts or pallet jacks continually run over a cord, damage can occur, though it may not be visible. Mosley explained the hazard (Tr. 157).

[A]ll the conductors are on the inside. There is separate insulation on the inside. When you take a piece of copper, which is round, multi-strand, and you flatten it, you go through a form of extrusion. Any extrusion makes the piece that extruded harder, less capable of bending. And, that’s why you have multi-strands so it’s flexible cord. You run over it, you continue to run over it, you flatten those wires on the inside.

Damage to the cord could cause an electrical shock or electrocution to an employee using the cord (Tr. 102-103). The Secretary has proven a serious violation of § 1926.405(2)(ii)(I).

Item 2b: § 1926.405(g)(2)(iii)

The Secretary alleges that Tri-City violated § 1926.405(g)(2)(iii), which provides:

Flexible cords shall be used only in continuous lengths without splice or tap. Hard service flexible cords No. 12 or larger may be repaired if spliced so that the splice retains the insulation, outer sheath properties, and usage characteristics of the cord being spliced.

Tri-City admits that the cord at issue in item 2a was spliced but claims that the cord was not in violation of the cited standard by virtue of § 1926.402(a). Sections 1926.402 through 1926.449 are contained in “Subpart K - Electrical” of the construction standards. Section 1926.402 is captioned “Applicability.” Section 1926.402(a) contains a Note, which provides:

**NOTE:** If the electrical installation is made in accordance with the National Electrical Code ANSI/NFPA 70-1984, exclusive of Formal Interpretations and Tentative Interim Amendments, it will be deemed to be in compliance with §§ 1926.403 through 1926.408, except for §§ 1926.404(b)(1) and 1926.405(a)(2)(ii)(E),(F),(G), and (J).

Tri-City cites Article 400-9 of the National Electric Code (NEC) in support of its argument that it was in compliance with OSHA regulations. Article 400-9 provides:

**Splices.** Flexible cord shall be used only in continuous lengths without splice or tap when initially installed in applications permitted by Section 400-7(a). The repair of hard-service cord (see Column 1, Table 400-4) Nos. 14 and larger shall be permitted if conductors are spliced in accordance with Section 110-14(b) and the completed splice retains the insulation, outer sheath properties, and usage characteristics of the cord being spliced.

Therefore, in order for the splice to be permissible, the splice would have to be made in accordance with Article 110-14(b) of the NEC, which provides:

**Splices.** Conductors shall be spliced or joined with splicing devices identified for the use or by brazing, welding, or soldering with a fusible metal or alloy.

Soldered splices shall first be so spliced or joined as to be mechanically and electrically secure without solder and then soldered. All splices and joints and the free ends of conductors shall be covered with an insulation equivalent to that of the conductors or with an insulating device identified for that purpose.

The extension cord at issue had been spliced by twisting the wires together (Tr. 97). It was not spliced or joined with a splicing device, nor was it brazed, welded, or soldered. The black electrical tape wrapped around the cord did not have the same mechanical strength of the original cord (Tr. 100). The splice that Tri-City made did not meet the requirements for splices under Article 110-14(b). Therefore, because the cord does not comply with the NEC, it is covered by § 1926.405(g)(2)(iii), with which it also does not comply. Tri-City's extension cord was spliced in violation of the cited standard.

Mosley explained why the splice was hazardous (Tr. 101):

When you knot something the way these were, they have a tendency to stretch. Fourteen gauge is fragile for construction site anyway. What would happen or potentially what could happen is that it could be pulled apart. The energized wire, after our examination showed that there was GFCI and the energized wire could make contact with personnel or with equipment, potentially water.

.....

You happen to get some sweat or whatever as you're pulling the cord through your hands or on your body, yes, it can make contact.

The violation was serious.

#### PENALTY DETERMINATION

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that when assessing penalties, the Commission must give "due consideration" to four criteria: the size of the employer's business; gravity of the violation; good faith; and prior history of violations. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14, 1993 CCH OSHD ¶ 29,964, p. 41,032 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight. Generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus.*, 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶ 29,582, p. 40,033 (No. 88-2691, 1992). The gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *J. A. Jones*, 15 BNA OSHC at 2214, 1993 CCH OSHD at p. 41,032.

*Hern Iron Works, Inc.*, 16 BNA OSHC 1247, 1994 CCH OSHD ¶ 30,155 (No. 88-1962, 1994).

Tri-City employs approximately 700 employees (Tr. 106). Tri-City had previous serious violations within the past three years (Exh. C-10; Tr. 115). Tri-City showed good faith during the inspection.

In instance (a) of item 1, the unsecured carbon dioxide cylinder, the gravity of the violation is severe. The severity of the possible injury would be high -- death or serious physical injury. The probability of an accident occurring is not high. Although employees were in the area, the cylinder was not located in an area of heavy traffic. Further, only one of the three alleged instances of § 5(a)(1) violation was proven. Based upon these factors, it is determined that a penalty of \$2,000.00 is appropriate.

The gravity of items 2a and 2b is high. The hazardous condition presented by the extension cord was electrocution or electrical shock. The probability of this happening was also high. The extension cord was exposed to heavy traffic and was routinely run over. The splice was crudely done. It is determined that the appropriate penalty for items 2a and 2b together is \$1,500.00.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

#### ORDER

Based upon the foregoing decision, it is hereby ORDERED:

1. That item 1 of citation No. 1, alleging a serious violation of § 5(a)(1) is affirmed, and a penalty of \$ 2,000.00 is assessed; and
2. That items 2a and 2b of citation No. 1, alleging violations of §§ 1926.405(a)(2)(ii)(I) and (g)(2)(iii) respectively, are affirmed, and a penalty of \$1,500.00 is assessed.

/s/ Nancy J. Spies  
NANCY J. SPIES  
Judge

Date: February 2, 1995