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**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
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SECRETARY OF LABOR,

Complainant,

v.

OTIS ELEVATOR COMPANY,

Respondent.

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OSHRC Docket No. 91-919

***DECISION***

Before: FOULKE, Chairman and MONTOYA, Commissioner.

BY THE COMMISSION:

Otis Elevator Company, Inc., ("Otis") was cited for a serious violation of 29 C.F.R. § 1926.404(f)(7)(iv)(C)(2)<sup>1</sup> for failing to ground a metal-encased portable electric heater that was being used by employees who were standing on a concrete floor. For the reasons that follow, we find that the Secretary failed to prove a violation of the standard.

**Background**

Otis was a subcontractor employed to replace an elevator in a 4-story masonry brick aircraft hangar at the Westover Air Force Base in Chicopee, Massachusetts. On January 23, 1991, a compliance officer of the Occupational Safety and Health Administration ("OSHA") began an inspection of Otis' work area. During this inspection, he encountered two Otis employees who were working on the first floor of the hangar in

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<sup>1</sup> Otis was initially issued a citation for a serious violation of 29 C.F.R. § 1926.404(f)(7)(iv)(C). The compliance officer testified at the hearing and the judge found in his decision that Otis is specifically alleged to have violated § 1926.404(f)(7)(iv)(C)(2).

a room near an elevator shaft. The employees were within a 6-foot radius of a portable electric heater. The heater was sitting on a plywood plank that was placed on top of cinder blocks. The plank and cinder blocks served as a makeshift table for Otis' employees. The heater was plugged in and working at the time of the inspection. The compliance officer described it as "an old type of a heater [with a] metal encasement" and testified that it did not have a 3-wire grounded cord and plug. The heater, which belonged to one of the Otis employees, was being used to warm their work area because the hangar's heating system was not operating. The employees were standing on a concrete floor. The plank, the cinder blocks, and the area around the heater were dry.

The compliance officer testified that if the heater's circuitry failed for any reason, an employee would be exposed to the hazard of shock or electrocution. The circuit that the heater was plugged into was equipped with a ground fault circuit interrupter ("GFCI"). However, the compliance officer noted that the use of a grounded three-prong plug would further ensure the workers' safety should the GFCI system fail. The compliance officer also noted that Otis is required to ground all tools and appliances that are not double-insulated.<sup>2</sup> The compliance officer did not test the GFCI that the heater was plugged into, but tested several throughout the building, and was satisfied that they were all operating. More importantly, the compliance officer did not test the concrete floor to see if it was grounded.

As a result of the inspection, Otis was issued a 1-item citation for an alleged serious violation of 29 C.F.R. § 1926.404(f)(7)(iv)(C)(2). The cited standard requires that exposed noncurrent-carrying metal parts of cord- and plug-connected equipment which may become energized shall be grounded if used in damp or wet locations or by employees standing on the ground or on metal floors or working inside of metal tanks or

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<sup>2</sup> Under 29 C.F.R. § 1926.404(f)(7)(iv)(C)(6), "[l]isted or labeled portable tools and appliances protected by a system of double insulation, or its equivalent, need not be grounded."

boilers.<sup>3</sup> The Secretary proposed a penalty of \$480. The Secretary argues that the term “ground” as stated in subparagraph (2) includes the concrete floor that Otis’ employees were standing on. Otis argues that the Secretary failed to prove that the standard required the heater to be grounded.

### The Judge’s Decision

The judge affirmed the citation and assessed a penalty of \$250. He found that the employees were not: working in a damp or wet location; working inside a metal tank or boiler; or standing on a metal floor. He determined that the existence of a violation therefore depended on whether the Secretary had shown that the Otis employees were “standing on the ground” within the meaning of the standard. The judge found that “the hazards of shock or electrocution to an employee are present whether standing on concrete or on earth.”<sup>4</sup> He concluded that “the Commission’s literal interpretation of ‘the ground’ in [*Clement Food Co.*, 11 BNA OSHC 2120, 2125-2126, 1984 CCH OSHD ¶ 26,972, pp. 34,634-35 (No. 80-607, 1984)] falls short of protecting those employees who might be standing on a conducting surface other than the earth.” The judge found that

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<sup>3</sup> The standard provides, in pertinent part, as follows:

**§ 1926.404 Wiring design and protection.**

.....

(f) *Grounding.* Paragraphs (f)(1) through (f)(11) of this section contain grounding requirements for systems, circuits, and equipment.

.....

(7) *Supports, enclosures, and equipment to be grounded —*

.....

(iv) *Equipment connected by cord and plug.* Under any of the conditions described in paragraphs (f)(7)(iv)(A) through (f)(7)(iv)(C) of this section, exposed noncurrent-carrying metal parts of cord- and plug-connected equipment which may become energized shall be grounded:

.....

(C) If the equipment is one of the types listed in paragraphs (f)(7)(iv)(C)(1) through (f)(7)(iv)(C)(5) of this section. . . .

.....

(2) Cord- and plug-connected equipment used in damp or wet locations or by employees standing on the ground or on metal floors or working inside of metal tanks or boilers. . . .

<sup>4</sup> The judge did not cite any support for this finding.

“[i]n order to fill this void left by the narrow definition set forth in *Clement*, . . . the Secretary deliberately included the language, ‘or some conducting body that serves in place of the earth,’ in the definition found at § 1926.449<sup>5</sup> so that workers, such as the Otis employees, would be afforded full protection from the dangers of shock or electrocution that are present in their workplace.” The judge also found that the preamble to the final rule for Part 1926 set forth the Secretary’s specific purpose:

Employees on construction sites, because of the environment involved, are likely to be in contact with ground or a grounded conductive surface most of the time. Therefore, the possibility of receiving an electrical shock on a construction site is much greater than for most other workplaces.

51 Fed. Reg. 25,294 (1986). The judge lowered the penalty to \$250 because the heater was owned by an employee and because the site was equipped with a GFCI system. Otis’ petition for review of the Judge’s decision was granted by the Commission.

#### **Arguments of the Parties<sup>6</sup>**

On review, Otis maintains that the Judge’s decision is contrary to the Commission’s holdings in *Clement* and *Blocksom and Co.*, 11 BNA OSHC 1255, 1983 CCH OSHD ¶ 26,452 (No. 76-1897, 1983), that “on the ground” means “on the earth.” Otis notes that

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<sup>5</sup> The standard provides as follows:

**§ 1926.449 Definitions applicable to this subpart.**

.....

*Ground.* A conducting connection, whether intentional or accidental, between an electrical circuit or equipment and the earth, or to some conducting body that serves in place of the earth.

<sup>6</sup> Otis argues that the Commission should not give any weight to the judge’s determination because “[h]e acted in a partisan fashion” and “took it upon himself to question Mr. Varney essentially to make a record for OSHA.” Having reviewed the record, we see no merit to this argument. The judge’s questioning was designed to elicit necessary material that the attorneys had not obtained. It does not appear from the record that the judge prejudged any issue in this case, but instead relied on the evidence presented at the hearing for his decision. See *United States Steel Corp.*, 10 BNA OSHC 2123, 2155-56, 1982 CCH OSHD ¶ 26,297, pp. 33,258-59 (No. 77-3378, 1982) (Commission found that a hearing was fair because there was no evidence that judge prejudged any specific issue in the case, but instead relied on the evidence presented at the hearing to resolve the disputed issues). We also note that this case does not turn on the weight that is given to the judge’s findings.

the Commission specifically held in *Clement* that it does not interpret the term “ground” to include concrete factory floors. Otis claims that the current definition of “ground” in § 1926.449 is virtually identical to the definition of “ground” in effect at the time the Commission issued its decision in *Clement*<sup>7</sup>, and thus was not modified by the Secretary in response to the *Clement* decision, as the judge found.<sup>8</sup> Otis argues that the Secretary is required to prove that the cited concrete floor was grounded, and failed to do so. Otis further contends that the compliance officer did not determine whether the outer casing of the heater could become electrified.

The Secretary notes that the compliance officer’s testimony that the heater’s outer metal casing could have become electrified through contact with the wires that led to the heating element was un rebutted. The Secretary acknowledges that the definition of “ground” in section 1926.449 is virtually identical to the definition of “ground” applicable when *Clement* was decided, but argues that the Commission never addressed the definition of “ground” in the *Clement* decision. The Secretary maintains that it is not his burden to prove that the concrete floor was grounded because the standard *presumes* that the concrete floor was grounded. He relies in part on a standard promulgated after *Clement*, section 1926.403(i)(1)(i), which provides that “walls constructed of concrete,

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<sup>7</sup> In 1979, the definition for the term “ground,” then located under 29 C.F.R. § 1926.405(f), was as follows:

“Ground” — a conducting connection, whether intentional or accidental, between an electrical circuit or equipment and earth, or to some conducting body which serves in place of the earth.

This definition is the same as the definition found in the 1971 edition of the National Electrical Code (“NEC”), NFPA No. 70-HC, ANSI C1-1971.

<sup>8</sup> Otis argues that the Commission should not defer to the Secretary’s interpretation of the term “ground” in part because it was not originally authored by the Secretary but was instead adopted from the NEC. This argument is without merit. There is no evidence that the Secretary has ever interpreted the definition of the term “ground” any differently than its plain meaning found in both the NEC and now found in section 1926.449.

brick or tile are considered to be grounded.”<sup>9</sup> The Secretary argues that when section 1926.404(f)(7)(iv)(C)(2), the standard Otis was cited under, is read in conjunction with section 1926.403(i)(1)(i) and the definition of the term “ground” in section 1926.449, it is reasonable to interpret the cited standard’s requirement of “standing on the ground” to include standing on the cited concrete floor. In response, Otis argues that there is no merit in the Secretary’s argument that concrete floors should be considered grounded simply because another standard states that concrete walls are considered grounded. Otis notes that “[t]he statement that concrete walls are to be considered ground was in existence during the time the Commission decided *Clement*, and the Commission obviously chose not to apply this reasoning to floors.”

### Analysis

The cited standard requires that exposed noncurrent-carrying metal parts of cord- and plug-connected equipment which may become energized shall be grounded if the equipment is used by employees standing on the ground. Although Otis challenged

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<sup>9</sup> The standard provides as follows:

**§ 1926.403 General requirements.**

.....

(i) *600 Volts, nominal, or less.* This paragraph applies to equipment operating at 600 volts, nominal, or less.

(1) *Working space about electric equipment.* Sufficient access and working space shall be provided and maintained about all electric equipment to permit ready and safe operation and maintenance of such equipment.

(i) *Working clearances.* Except as required or permitted elsewhere in this subpart, the dimension of the working space in the direction of access to live parts operating at 600 volts or less and likely to require examination, adjustment, servicing, or maintenance while alive shall not be less than indicated in Table K-1. In addition to the dimensions shown in Table K-1, workspace shall not be less than 30 inches (762 mm) wide in front of the electric equipment. Distances shall be measured from the live parts if they are exposed, or from the enclosure front or opening if the live parts are enclosed. *Walls constructed of concrete, brick or tile are considered to be grounded.* Working space is not required in back of assemblies such as dead-front switchboards or motor control centers where there are no renewable or adjustable parts such as fuses or switches on the back and where all connections are accessible from locations other than the back.

(Table omitted; emphasis added).

whether the heater may become energized, it is clear from the record that the Secretary established that it is possible for the heater's casing to become energized. The compliance officer's un rebutted testimony was that the metal case of the heater could become energized through contact with the energized wires that lead to the heating element. We therefore turn to the issue of whether the employees were standing on the ground.

In *Clement*, the Commission held that "the ground" does not include concrete factory floors or similar surfaces, but that "'the ground' was used in the ordinary sense of 'earth'." 11 BNA OSHC at 2125-6, 1984 CCH OSHD at p. 34,635. *Blocksom* does not mention what type of surface the employees were standing on. It states that there was no evidence of "metal floors or of any of the other conditions mentioned in the standard." 11 BNA OSHC at 1258, 1983 CCH OSHD at p. 33,597. Neither *Clement* nor *Blocksom* reveal how the Commission determined that "ground" only meant "earth." We conclude that under 29 C.F.R. § 1926.449, the definition of "ground" includes not only the earth, but also a "conducting body that serves in place of the earth." This definition reflects the hazard of electrocution that exists when an employee touching energized metal equipment is standing on the earth or a conductor to the earth. The floor at issue can be considered "ground" within the meaning of 29 C.F.R. § 1926.404(f)(7)(iv)(C)(2) only if it is shown to be a *conducting body* that serves in place of the earth and is therefore grounded. The Secretary argues that because another standard, 29 C.F.R. § 1926.403(i)(1)(i), presumes concrete walls to be grounded, concrete floors should be presumed to be grounded as well. We cannot so conclude. The cited standard, 29 C.F.R. § 1926.404(f)(7)(iv)(C)(2), explicitly only presumes the earth, damp or wet locations, metal floors or metal tanks to be grounded. Concrete floors are not included in this list.

Based on the record before us, we find that the Secretary failed to establish that the employees were exposed to the hazard of electrocution because there is no evidence that the concrete floor on which the Otis employees were standing was grounded. Although the compliance officer could have made this determination, he admitted that he did not test to determine whether the cited floor was grounded.

**Order**

For the reasons given above, we vacate the citation alleging a violation of 29 C.F.R. § 1926.404(f)(7)(iv)(C)(2).

  
Edwin G. Foulke, Jr.  
Chairman

  
Velma Montoya  
Commissioner

Dated: January 31, 1994



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SECRETARY OF LABOR,

Complainant,

v.

OTIS ELEVATOR CO.,

Respondent.

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Docket No. 91-0919

**NOTICE OF COMMISSION DECISION**

The attached decision by the Occupational Safety and Health Review Commission was issued on January 31, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

*Ray H. Darling, Jr.*

Ray H. Darling, Jr.  
 Executive Secretary

January 31, 1994  
 Date

Docket No. 91-0919

NOTICE IS GIVEN TO THE FOLLOWING:

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Administrative Law Judge  
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SECRETARY OF LABOR  
Complainant,

v.

OTIS ELEVATOR (UNITED TECHNOLOGIES)  
Respondent.

OSHRC DOCKET  
NO. 91-0919

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 July 16, 1992. The decision of the Judge will become a final order of the Commission on August 17, 1992 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 August 5, 1992 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  
1825 K St. N.W., Room 401  
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.  
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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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.  
Executive Secretary

Date: July 16, 1992

DOCKET NO. 91-0919

NOTICE IS GIVEN TO THE FOLLOWING:

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David G. Oringer  
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SECRETARY OF LABOR,

Complainant

v.

OTIS ELEVATOR COMPANY

Respondent.

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OSHRC Docket No. 91-0919

Appearances:

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 Office of the Solicitor  
 U.S. Department of Labor  
 For Complainant

W. Scott Railton, Esq.  
 Reed, Smith, Shaw & McClay  
 Washington, D.C.  
 For Respondent

Before: Administrative Law Judge David G. Oringer

**DECISION AND ORDER**

This is a proceeding under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et. seq.*, (hereinafter referred to as "the Act") to review citations issued by the Secretary of Labor pursuant to § 9(a) of the Act and a proposed assessment of penalties thereon issued, pursuant to § 10(a) of the Act.

**BACKGROUND**

On January 22, 1991, Compliance Officer Dale Varney entered Westover Air Force Base in Chicopee, MA to conduct an inspection of a worksite located there. (Tr. 8) At this worksite, a four story, masonry brick aircraft hangar, known as a B-7000 hangar, was being reconstructed in order to accommodate a new type of airplane. (Tr. 9)

After first meeting with the general contractor ("GC") for the worksite, Mr. Varney met with the other contractors on site, including the foreman for Otis Elevator Company ("Otis"), R.J. Cook. (Tr. 8-10) At this worksite, Otis was reconstructing an old elevator and installing a new one on the first floor of the hangar. (Tr. 12) On January 23, 1991, Mr. Varney conducted an inspection of Otis' work area accompanied by the GC's superintendent. (Tr. 11) At that time, he met the two Otis employees working on the project, Chris Bartlett and Scott Hastings. (Tr. 14-15)

During his inspection of Otis, Mr. Varney observed a portable electric heater sitting atop a 2 x 12 plywood plank which was positioned across cinder blocks and served as a makeshift table for the Otis employees. (Tr. 15-16, 17; see also Exhibit C-1) The workers were using the heater, which belonged to one of the Otis employees, to warm their work area since the hangar's heating system was not operating on that day. (Tr. 15, 18, 27-28, 40) According to Mr. Varney, the Otis employees were working within six feet of the heater. (Tr. 16-17)

Mr. Varney testified that the portable heater was equipped with a two wire cord; the absence of a third wire indicated that the heater was not grounded. (Tr. 15-16; see also Exhibit C-2) As a result, if the heater's circuitry failed for any reason, the Otis employees would be exposed to the possibility of shock or even electrocution. (Tr. 29-32) The worksite, Mr. Varney subsequently determined, was equipped with a ground fault circuit interrupter ("GFCI") system, which covered the outlet that the heater was plugged into. (Tr. 23-25) While the GFCI system would serve to break any fault that might occur if the heater malfunctioned, the use of a three wire, grounded plug would further ensure the workers' safety should the GFCI system fail as well. (Tr. 29-30, 39, 41, 49-50)

As a result of Mr. Varney's observations, Otis was issued a one item citation on March 7, 1991 alleging a serious violation of 29 C.F.R. § 1926.404(f)(7)(iv)(C).<sup>1</sup> Specifically, Mr. Varney testified at the hearing that Otis allegedly violated § 1926.404(f)(7)(iv)(C)(2), which states in relevant part:

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<sup>1</sup> At the hearing, Mr. Varney testified that the location listed on the citation as the inspection site is incorrect. The inspection site location should read "Westover Air Force Base, Chicopee, MA". (Tr. 8)

“...exposed noncurrent-carrying metal parts of cord- and plug-connected equipment which may become energized shall be grounded...[when] used in damp or wet locations or by employees standing on the ground or on metal floors or working inside of metal tanks or boilers....”

A penalty of \$480.00 was proposed.

Otis filed a timely notice of contest and a hearing was held pursuant to due notice in Boston, MA on April 6, 1992. Both parties have submitted post-hearing briefs.

### DISCUSSION

First, Otis argues that it should not be held responsible for grounding the portable heater in question because it was not supplied to the employees by Otis, but belonged to one of the Otis employees on site. However, the Commission has held that while “an employer is responsible for ensuring the safety of equipment it owns and provides to its employees...[it] is *equally* responsible for ensuring the safety of equipment over which it has control, but not ownership, that is used by its employees.” *Chicago and N. W. Transp. Co.*, 5 BNA OSHC 1121, 1122-23, 1977-78 CCH OSHD ¶ 21,608, pp. 25,938 (No. 13071, 1977) (“*Chicago*”) (emphasis added). Accordingly, the Commission in *Chicago* rejected the employer’s argument that it could not be held responsible for failing to guard the blades of an electric fan because the fan was owned by one of its employees. *Id.* at 1122. See also *Porter Plastics, Inc.*, 8 BNA OSHC 1933, 1980 CCH OSHD ¶ 24,618 (No. 79-1921, 1980).

In reaching this conclusion, the Commission noted that even if the employer were truly unaware of the fan’s existence, it could have easily been discovered with reasonable diligence; the employer then could have required the employee to either remove the fan from the worksite or properly guard it. *Chicago* at 1123. Here, the portable heater was located in a prominent place atop the makeshift table in the Otis work area; if, as Mr. Varney testified, the Otis employees were within six feet of the heater while they worked, anyone entering the work area to interact with them would have surely noticed its presence. (Tr. 16-17) Also, considering the cold temperatures which existed both outside and inside the hangar, particularly on days when the hangar’s heating system was not functioning, anyone entering the Otis work area should have noticed that it was considerably warmer there than in other areas of the worksite. (Tr. 40)

Furthermore, the two wire cord extending from the back of the heater appears to have been plugged into an outlet that was located above both the heater and the makeshift table on which it rested; indeed, as pictured in Exhibit C-1, the cord extends *up* from the back of the heater, not down to an area below the table. (Exhibit C-1 and C-2) Therefore, the ungrounded plug was not inserted into an outlet located at floor level or even into an outlet that may have been obscured by the makeshift table; it was plugged into an outlet in full view, making its lack of a third wire all the more discoverable by Otis. In summary, I find that with reasonable diligence, Otis could have discovered the portable heater's presence, noticed its ungrounded plug, and taken steps to correct the hazard. Accordingly, Otis was responsible for ensuring the safe use of the heater, even though it was owned by an Otis employee.

Otis also argues that the Secretary has failed to prove a violation because she has not met her burden of showing that the cited standard applies to the facts as presented. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578 (No. 78-6247, 1981), *aff'd*, 681 F.2d 69 [10 BNA OSHC 1697] (1st Cir. 1982). Specifically, Otis argues that the Secretary has not proven that the portable heater was being used in a manner, as defined by the cited standard, that requires it to be grounded. The standard clearly sets forth that cord- and plug-connected equipment must be grounded if used "in damp or wet locations or by employees standing on the ground or on metal floors or working inside of metal tanks or boilers...." The Otis employees were working in an enclosed area in the hangar, not in a metal tank or boiler. (Tr. 12) Also, Mr. Varney testified that the entire work area, as well as the plank on which the heater sat, was dry, not wet or damp. (Tr. 17-18, 37-40) Further, Mr. Varney testified that the floor of Otis' work area was concrete, not metal. (Tr. 27) Thus, the existence of a violation turns on whether the Secretary has shown that the Otis employees were "standing on the ground".

Otis, citing to two Commission decisions for support, contends that the term "the ground", as used in the cited standard, literally means "the earth"; as a result, any other surface, including the concrete floor here, would not come within its meaning. The two cases cited by Otis, though, do not deal with the cited standard at issue here, but deal with

§ 1910.309(a), which incorporates section 250-45 of the 1971 edition of the National Electrical Code (“NEC”). Section 250-45 of the NEC states in relevant part:

250-45. ...exposed noncurrent-carrying metal parts of cord- and plug-connected equipment, which are liable to become energized, shall be grounded....[when] used in damp or wet locations or by persons standing on the ground or on metal floors or working inside of metal tanks or boilers...”

National Electrical Code (“NEC”), NFPA No. 70-FC, ANSI C1-1971. Because the language contained in section 250-45 of the NEC is virtually identical to that found in the standard cited here, these Commission decisions cannot be dismissed, as the Secretary argues, by asserting that they are distinguishable from the case at hand simply because they deal with a different standard than the one cited here.

In *Clement Food Co.*, 11 BNA OSHC 2120, 2125-2126 1984-85 CCH OSHD ¶ 26,972 (No. 80-607, 1984) (“*Clement*”), the Commission vacated an alleged citation against the employer for failing to ground two electric fans in violation of § 1910.309(a), because “one of the fans was on a concrete factory floor...[and] we do not interpret the term ‘the ground’ in section 250-45 to include such factory floors.” The Commission concluded that in section 250-45, “the term ‘the ground’ was used in the ordinary sense of ‘earth.’” *Id.* See also *Blocksom and Co.*, 11 BNA OSHC 1255, 1983-84 CCH OSHD ¶ 26,452 (No. 76-1897, 1983) (“*Blocksom*”) (alleged violation of § 1910.309(a) vacated because Secretary failed to prove that ungrounded electrical equipment was being used under any of the conditions listed in section 250-45 of the NEC).

As the Secretary points out, however, while the standard at issue here, § 1926.404(f)(7)(iv)(C)(2), is derived from the language found in section 250-45, it was promulgated *after* both *Clement* and *Blocksom* were decided. See 51 Fed. Reg. 25,309 (1986). This fact becomes even more significant when § 1926.449, the definition section applicable to the standard cited here, is considered. Under this section, “ground” is defined as:

A conducting connection, whether intentional or accidental, between an electrical circuit or equipment and the earth, *or to some conducting body that serves in place of the earth.*<sup>2</sup>

(emphasis added).

Since the hazards of shock or electrocution to an employee are present whether standing on concrete or on earth, the Commission's literal interpretation of "the ground" in *Clement* falls short of protecting those employees who might be standing on a conducting surface other than the earth. In order to fill this void left by the narrow definition set forth in *Clement*, I believe that the Secretary deliberately included the language, "or some conducting body that serves in place of the earth", in the definition found at § 1926.449 so that workers, such as the Otis employees, would be afforded full protection from the dangers of shock or electrocution that are present in their workplace. Indeed, the text of the final rule for Part 1926 sets forth the Secretary's specific purpose:

"Employees on construction sites, because of the environment involved, are likely to be in contact with ground or a grounded conductive surface most of the time. Therefore, the possibility of receiving an electrical shock on a construction site is much greater than for most other workplaces."

51 Fed. Reg. 25,294 (1986).

Therefore, I find that the language contained in § 1926.449 demonstrates the Secretary's intent for these standards to apply to any kind of conducting surface, which includes the concrete floor on which the Otis employees were standing, as well as the earth. Accordingly, the alleged violation of § 1926.404(f)(7)(iv)(C)(2) is affirmed. Given that the portable heater belonged to an Otis employee, and that the worksite was equipped with a GFCI system, I find that a penalty of \$250.00 is more reasonable and appropriate in the premises.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

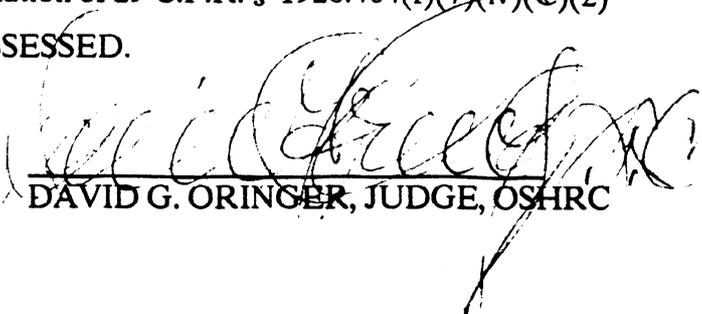
The findings of fact and conclusions of law contained in this opinion are incorporated herein in accordance with Rule 52 of the Federal Rules of Civil Procedure.

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<sup>2</sup> See also the definition of "grounded" found at § 1926.449, which states, "connected to earth or to some conducting body that serves in place of the earth."

**ORDER**

1. Serious citation 1, item 1 alleging a violation of 29 C.F.R. § 1926.404(f)(7)(iv)(C)(2) is **AFFIRMED** and a penalty of \$250.00 is **ASSESSED**.

  
**DAVID G. ORINGER, JUDGE, OSHRC**

**Dated:** July 6, 1992  
Boston, Massachusetts