UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
FOREST ELECTRICAL SERVICES
Respondent.

OSHRC DOCKET
NO. 92-3609

# 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 June 7, 1993. The decision of the Judge will become a final order of the Commission on July 7, 1993 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 June 28, 1993 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
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
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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

Ray H. Darling, Jr.

Date: June 7, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-3609

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SECRETARY OF LABOR,

Complainant,

v.

FORREST ELECTRICAL SERVICES,

Respondent.

OSHRC DOCKET NO. 92-3609-S

APPEARANCES:

Robert A. Goldberg, Esquire
Dallas, Texas
For the Complainant.

Forrest M. Wallace
Houston, Texas
For the Respondent, *pro se.*

Before: Administrative Law Judge Stanley M. Schwartz

## DECISION AND ORDER

This is a proceeding brought 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") conducted an inspection of a one-story medical clinic construction project in Spring, Texas, where Respondent was an electrical subcontractor, on August 6, 1992; as a result of the inspection, Respondent was issued a serious citation with four items and an "other" citation with one item. Respondent contested the citations, and a hearing was held on March 10, 1993.[1]

[1]At the hearing, the Secretary withdrew items 2 and 3 of serious citation number 1, which alleged violations of 29 C.F.R. §§ 1926.59(e)(1) and 1926.59(h), respectively.

Citation 1 - Item 1 - 29 C.F.R. § 1910.212(a)(5)

The subject standard provides as follows:

> When the periphery of the blades of a fan is less than seven (7) feet above the floor or working level, the blades shall be guarded. The guard shall have openings no larger than one-half (1/2) inch.

Juan Padron, the OSHA compliance officer who inspected the site, testified there was an electric floor fan operating in the middle of the lobby area of the clinic that was unguarded in back and whose front guard had openings about a square inch in size; G-2 depicts the fan, which had metal blades about 48 inches long. Padron discussed the fan with Rick Stewart, Respondent's foreman at the site, who indicated it belonged to the company; Stewart also indicated the company had been on the job about thirty days and identified two other workers at the site as his helpers.[2] Padron said the fan was hazardous because employees of the company or the other contractors at the site would have walked by it when entering or exiting the building, which could have resulted in contact with the blades and serious injuries such as fractures or amputations.

Forrest Wallace, the owner and president of the company, testified the fan was not his, that he did not allow fans on his jobsites, and that Stewart had called him after the inspection and told him he had brought the fan from home that morning; Stewart also told him he put the fan in the building about ten minutes before Padron arrived, and that it was not running at that time. Wallace further testified that Stewart, a journeyman electrician, had worked for him less than a month at the time of the inspection, and that he was foreman that day because Terry Acker, the actual foreman, had been away. Wallace said he had gone over safety basics with Stewart when he hired him, and that he holds safety meetings with his employees every Friday when they pick up their checks; he discussed his policy on fans around the time Stewart was hired, but did not remember if Stewart was actually there. Wallace noted he had reprimanded Stewart and told him to get the fan off the site, after which Stewart had disassembled it.

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[2]Although Respondent contends it has never employed one of the helpers identified by Stewart, there is no dispute that Stewart and the other helper were working for the company on the day of the inspection.

Based on the record, a serious violation of the standard has been established. Padron's testimony that the fan was running when he saw it is credited over Stewart's statement that it was not because Stewart did not appear at the hearing and Padron's testimony was credible and unequivocal. Moreover, even assuming the fan was not running it was nevertheless available for use under established Commission precedent. Finally, that the fan belonged to Stewart does not absolve the company of responsibility; Commission precedent is well settled that an employer is liable for violative conditions to which its employees are exposed, even if the employer did not create the conditions.

The testimony of Wallace indicates he believed the violation was due to unpreventable employee misconduct. To prove this affirmative defense, an employer must show it had established and adequately communicated work rules to prevent the violation, and that it made efforts to detect violations and enforced the rules when it discovered violations. *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479, 1979 CCH OSHD ¶ 23,664, p. 28,695 (No. 76-1538, 1979). Although Wallace had a rule prohibiting fans on his jobs, he related only one occasion in which he had communicated the rule and was unsure if Stewart had been present. Moreover, while Stewart was reprimanded for having the fan at the site, there was no evidence of efforts to detect violations of work rules. Based on the record, the fan's presence at the site was not the result of unpreventable employee misconduct.

Turning to the assessment of an appropriate penalty, I note the company's small size and Wallace's testimony that in the twenty-one years he has owned his own business he has had only one workers' compensation claim. I note also the apparently short duration of the condition, and that although Padron considered it to be of high gravity he acknowledged he was unaware of any cases of injuries from unguarded fan blades; in my view, the likelihood that employees walking by the fan would have accidentally contacted the blades and been seriously injured was not great. After giving due consideration to all of these factors, it is concluded that a penalty of $200.00 is appropriate for this item.

Citation 1 - Item 4 - 29 C.F.R. § 1926.403(i)(2)(i)

The subject standard provides, in pertinent part, as follows:

> [L]ive parts of electric equipment operating at 50 volts or more shall be guarded against accidental contact....

Juan Padron testified a cord attached to a string of lights which provided illumination in the building had no male plug, and that its bare wires had been inserted into a 110-volt multiple receptacle outlet in the lobby area, as shown in G-1; Stewart indicated he had inserted the wires into the outlet, and that the condition had existed for a day. Padron said the condition was a serious hazard because contacting the wires could have caused severe shock or electrocution. He also said the receptacle outlet was the only power source in the building, and that employees of the other contractors could have used it. Padron noted Stewart immediately abated the hazard by putting a plug on the cord.

Padron further testified that the receptacle outlet was powered by a two-outlet temporary power pole outside the building; Padron tested the outlets on the pole and found that both of them were protected by ground fault circuit interrupters ("GFCI's"). He agreed the GFCI's would have interrupted the power in the event of a 5-milliamp difference in current, but said an employee contacting the wires would still have been hurt before the power was cut off; he described a shock under such circumstances as "normal" rather than severe, and did not recall if he had taken the GFCI's into account when assessing the hazard of the condition.

Forrest Wallace testified Stewart told him he had set up the lighting with the cord the previous day; Stewart also told him the cord had not had a male plug, and that he had bought one but had not had time to put it on before Padron arrived. Wallace said the cord should have had a plug, but that in his opinion it was not a serious hazard because of the GFCI's on the power pole his company had set up. He explained that a GFCI operates by measuring current and cutting it off very quickly in the event of a 5-milliamp fluctuation, and that contacting the wires would not have resulted in an injury; he described the sensation an employee would have felt from 5 milliamps as a "tingle." Wallace noted the cord's ground wire not being connected to the outlet had no effect on the operation of the GFCI because GFCI's work off neutral wires.

Although it is clear from the record that the cord violated the standard, the Secretary, to establish a serious violation, must show that it represented a substantial likelihood of serious injury or death. Padron's initial testimony that it did appears not to have considered the presence of the GFCI's, which, as he himself later acknowledged, reduced the severity of the hazard. Moreover, Padron and Wallace agreed that the maximum amperage to which an employee contacting the wires would have been subjected before the GFCI cut off the current would have been 5 milliamps. Padron's opinion was that this amount of current would have injured an employee; Wallace, however, described what an employee would have felt from contacting the wires as a "tingle."

In considering the foregoing, the undersigned notes that while both witnesses were sincere, Wallace exhibited a higher degree of understanding of GFCI's which is undoubtedly the result of his many years of experience in the electrical business.[3] Based on his more extensive experience the opinion of Wallace is given greater weight, and it is found that although the cord was a hazard it was not a serious hazard within the meaning of the Act. This citation item is accordingly affirmed as a nonserious violation, and no penalty is assessed.

Citation 2 - 29 C.F.R. § 1903.2(a)(1)

The subject standard provides, in pertinent part, as follows:

> Each employer shall post and keep posted a notice or notices ... informing employees of the protections and obligations provided for in the Act....Such notice or notices shall be posted by the employer in each establishment in a conspicuous place or places where notices to employees are customarily posted.

Juan Padron testified there was no OSHA notice posted at the site, and that even the general contractor did not have one. He further testified that the standard applies to all employers, but that he usually looks first to the general contractor for this requirement. Padron said he provided an OSHA notice to the general contractor, who indicated he would post it.

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[3]Wallace has been in the electrical business for over 20 years and has been licensed as a master electrician in Houston, Dallas and other cities in Texas for a number of years.

The foregoing, which was not rebutted by Respondent, establishes a violation of the standard. Although the violation is nonserious, the Act requires the assessment of a penalty of not more than $1,000.00 for each violation of a posting requirement. *See* 29 U.S.C. § 666(i). Based on the facts of this case, a penalty of $100.00 is appropriate for this citation item.

## Conclusions of Law

1. Respondent, Forrest Electrical Services, 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 in serious violation of 29 C.F.R. § 1910.212(a)(5).

3. Respondent was not in violation of 29 C.F.R. §§ 1926.59(e)(1) and 1926.59(h).

3. Respondent was in nonserious violation of 29 C.F.R. §§ 1926.403(i)(2)(i) and 1903.2(a)(1).

## Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Item 1 of citation number 1 is AFFIRMED as a serious violation, and a penalty of $200.00 is assessed.

2. Items 2 and 3 of citation number 1 are VACATED.

3. Item 4 of citation number 1 is AFFIRMED as a nonserious violation, and no penalty is assessed.

4. Item 1 of citation number 2 is AFFIRMED as a nonserious violation, and a penalty of $100.00 is assessed.

Stanley M. Schwartz
Administrative Law Judge

Date: JUN -1 1993