UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET NW
4TH FLOOR
WASHINGTON, DC 20006-1246

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SECRETARY OF LABOR
Complainant,
v.
JOHN J. KIRLIN
Respondent.

OSHRC DOCKET
NO. 92-0469

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 December 10, 1992. The decision of the Judge will become a final order of the Commission on January 11, 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 December 30, 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.
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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: December 10, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-0469

NOTICE IS GIVEN TO THE FOLLOWING:

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Michael H. Schoenfeld
Administrative Law Judge
Occupational Safety and Health
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Washington, DC 20006 1246

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SECRETARY OF LABOR, Complainant, v. JOHN J. KIRLIN, INC., Respondent.	OSHRC Docket No. 92-0469

Appearances:

John M. Strawn, Esq.
Office of the Solicitor
U. S. Department of Labor
For Complainant

James Brent Clarke, Esq.
McLean, Virginia
For Respondent

Before: Administrative Law Judge Michael H. Schoenfeld

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

Having had its worksite inspected by a compliance officer of the Occupational Safety and Health Administration, John J. Kirlin, Inc., ("Respondent") was issued one citation alleging one serious violation and another citation alleging three other-than-serious violations of the Act. A penalty of $1,125 was proposed for the serious violation and a penalty of $0

was proposed for the three other violations. Respondent timely contested. Following the filing of a complaint and answer and pursuant to a notice of hearing, the parties appeared for hearing on September 8, 1992. No affected employees sought to assert party status. Both parties have filed post-hearing briefs. [1]

Jurisdiction

Complainant alleges and Respondent does not deny that it is an employer engaged in the plumbing business. It is undisputed that at the time of this inspection Respondent was engaged in the renovation and construction of a retail and office complex known as Postal Square in Washington, D.C. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent in an employer within the meaning of § 3(5) of the Act.[2] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

In regard to the alleged serious violation, the Secretary has failed to demonstrate, by a preponderance of the evidence, that the standard under which Respondent has been cited is applicable. Thus, the citation is vacated.[3]

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[1] Respondent's post-hearing Motion for Leave to Offer Additional Documents in Evidence is granted.

[2] Title 29 U.S.C. § 652(5).

[3] In general, to prove a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) non-compliance with the terms of the standard, (3) employee exposure or access to the hazard created by the non-compliance, and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the condition. *Antra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand*

The Commission has concluded that the standard cited, 20 C.F.R. § 1926.300(b) (1990),[4] is "generally applicable to all tools covered by Subpart I (of Title 1926)." *Daniel Construction Co.*, 10 BNA OSHC 1549, 1554 (No. 16265, 1982). Respondent raises the issue of whether the scissors lift was actually or intended to be covered. It relies on the argument that the ANSI standard referred to in the construction standard does not cover scissors lifts. More importantly, argues Respondent, ANSI, in subsequent publications specifically dealing with scissors lifts, made it abundantly clear that predecessor ANSI standards (including the ANSI standard incorporated by the cited standard) were not considered by ANSI to be applicable to scissors lifts. (Exhibits B and D).[5]

A review of the evidence leads to the same conclusion. ANSI would have no other reason to publish in its forward to its first standard for Self-Propelled Elevating Work Platforms the following:

> On May 19th, 1976, a group of work platform manufacturers was invited....to a meeting...to discuss the absence of standards pertaining to self-propelled, elevating work platforms.[6]

In addition, discovery revealed that the Compliance Officer initially recommended the

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13 BNA OSHC 2147 (1989).

[4] The cited standard provides:

> (2) Belts, gears, shafts, pulleys, sprockets, spindles, drums, flu wheels, chains, or other reciprocating, rotating or moving parts of equipment shall be guarded if such parts are exposed to contact by employees or otherwise create a hazard. Guarding shall meet the requirements set forth in American national Standards Institute, B15.1-1953 (R1958), Safety Code for Mechanical Power-Transmission Apparatus.

[5] Revisions to its own standards by a private standards setting organization made after the earlier standards were incorporated into OSHA standards are in no way binding upon OSHA or the public, nor can such subsequent revisions be automatically incorporated into the OSHA standards without an opportunity for public notice and comment as required by the section 6 of the Act.

[6] Foreword, ANSI, A92.6-1979, American National Standard for Self-Propelled Elevating Work Platforms.

issuance of a citation alleging a violation of § 5(a)(1) of the Act, the "general duty clause." Her recommendation was overruled by a supervisor who indicated that legal research found that the cited standard should or could be used. (Ex. C) That legal research was not shared with Respondent or the Administrative Law Judge in this case.

Even assuming the cited standard is applicable, the Secretary failed to show employee exposure by a preponderance of the evidence.

The Secretary does not have to prove actual exposure to a hazard, but need show only that employees had access to an area of potential danger based on reasonable predictability. The question of exposure is a factual one "to be determined by considering the zones of danger created by the hazard, employee work activities, their means of ingress-egress, and their comfort activities." The question is whether, the employees, within reasonable predictability, were within the zone of danger created by the violative condition. *Brennan v. Gilles & Cotting, Inc.*, 504 F. 2d 1255, 1263 (4th Cir. 1974), *Dic-Underhill, a Joint-Venture*, 4 BNA OSHC 1489, 14909 (No. 3042, 1976); *Adams Steel Erection*, 12 BNA OSHC 1393, 1399 (No. 84-3586, 1985). But a machine guarding standard such as 29 C.F.R. § 1910.212(a)(1), requires more than proof that employees could possibly come into contact with unguarded machinery. The Secretary must show that employees were exposed to the hazard "as a result of the manner in which the machine functions and the way it is operated.") *Jefferson Smurfit Corp.*, 15 BNA OSHC 1419, 1421 (No.89-0553, 1992) ("*Smurfit*"). In this case the Secretary's evidence fails to meet the above test.

The Compliance Officer simply testified that Respondent's employees were seen working "within a couple of feet" of the scissor lift. Such evidence. by itself, might show exposure to a static hazardous condition such as an unguarded floor edge but, as the Commission noted in *Smurfit*, exposure under a machine guarding standard is dependent upon a showing of employee exposure related to a hazard which only exists when the machine is operating. Indeed, the wording of the cited standard suggests that the parts of tools which must be guarded are those which are "reciprocating, rotating or moving." In this case, there is no evidence that the scissors lift was in fact used or was required to be used at any time while Respondent's employees were in the zone of danger created by the pinch

points. At the time of the inspection, the lift was in a raised position with an employee of another contractor on it. (Tr. 16) Indeed, the compliance officer described the hazard to Respondent's employees as existing only when the other contractor's employee "lowered the lift at the same time (Respondent's employees) were in close proximity or right at the pinch point . . . ." (Tr. 18) She acknowledged that pinch points or sheer points exist on the scissor lift when it is in motion (raising or lowering the platform) (Tr. 16). As opposed to tools and other equipment (even cranes) which present hazards when actually operating, the scissor lift presented a hazard only when the work platform was being raised or lowered as part of the equipment being set-up. It is important to distinguish between hazards created by tools and equipment when they are operating (as contemplated by the cited standard) and such intermittent hazards as cited here. In sum, I find that it has not been shown that anything in the nature of the way the scissor lift operated or the way employees of Respondent were performing their duties that they were either actually exposed, or could reasonably be anticipated to be exposed to, pinch points which existed only during the times when the lift was actually raising or lowering the work platform. Accordingly, the citation is vacated.

The only other item at issue is an alleged failure to comply with the standard at 29 C.F.R. § 1926.405(g)(1)(iii)(b) (1990).[7] The Compliance Officer described observing a group of electrical cords passing through a hole at the base of a dry wall. The cords were close to or resting on a metal track at the wall's base. (Tr. 95, CX 6). Respondent does not claim that the condition did not exist. It maintains, however, that electrical cords in such a "bundle" resist abrasion or losing their insulation by virtue of the fact that each cord has a cushioning effect on the others. Respondent would analogize between this cushioning effect and the bushing or fitting required under the cited standard. In addition, Respondent

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[7] The initially cited standard, 29 C.F.R. § 1926.405(g)(2)(v) applies to electrical cords passing thorough "holes in covers, outlet boxes, or similar enclosures." At the outset of the hearing Complainant's motion to amend this item so as to allege, in the alternative, a violation of § 1926.405(g)(1)(iii)(b), covering electrical cords which have been "run through holes in walls, ceilings, or floors" was denied. The parties, nonetheless, tried and briefed the case under the latter standard. Inasmuch as the latter standard is more applicable, the parties tried all issues by consent, and Respondent has not been prejudiced, the denial of the amendment is reversed.

offered evidence as to the thickness of the insulation on its cords. Respondent suggests that the condition be regarded as *de minimis* as an alternative.

The Secretary has made a case for this alleged violation. Her Compliance Officer testified without rebuttal as to the applicability of the standard, the existence of the non-complying condition, the knowledge of Respondent and the exposure of its employees to potential shock hazard. Respondent's argument as to the effect of having several cords passing through one hole without a bushing or fitting is rejected. Which of the several cords would be protected by the others is a matter of mere happenstance. Each of the several cords passing thorough such a hole had an equal chance of being scraped or cut into by the floor track. That Respondent's extension cord was undamaged was a matter of luck not care. Respondent's suggestion that the condition be regarded as *de minimis* is rejected in light of the Compliance Officer's unrebutted testimony that a shock hazard potential existed. The item is affirmed. The proposed penalty is appropriate in light of the low gravity of this other-than-serious violation.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

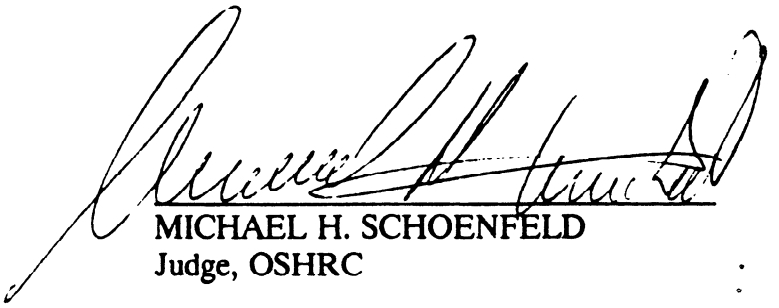
3. Respondent was not in violation of the Act in that it did not fail to comply with the standard at 29 C.F.R. § 1926.300(b)(2), as alleged.

4. Respondent was in violation of the Act in that it failed to comply with the standard at 29 C.F.R. § 1926.405(g)(1)(iii)(b). This violation was other-than-serious. A civil penalty of $0.00 is appropriate.

ORDER

1. Citation 01, issued to Respondent on January 6, 1992, is VACATED.

2. Item 3 of Citation 02, issued to Respondent on January 6, 1992, is AFFIRMED. No civil penalty is assessed.



MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: December 4, 1992
Washington, D.C.