UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
KIEWIT-ATKINSON-KENNY,
Respondent.

OSHRC DOCKET
NO. 92-3786

# 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 4, 1993. The decision of the Judge will become a final order of the Commission on July 6, 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 24, 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
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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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: June 4, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-3786

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>KIEWIT-ATKINSON-KENNY,<br><br>Respondent. | OSHRC<br>Docket No. 92-3786 |

Appearances:

James Glickman, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Richard D. Wayne, Esq.
Hinckey, Allen, Snyder & Comen
Boston, Massachusetts
For Respondent

Before: Administrative Law Judge Richard W. Gordon

## DECISION AND ORDER

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

On or about December 9, 1992, the Occupational Safety and Health Administration, ("OSHA"), issued to Respondent, Kiewit-Atkinson-Kenny, a citation. On September 14, 1992, the parties agreed to settle all but one item of the original twenty items. This was Serious Citation No. 1, item no. 2. The proposed penalty for this item was $1,275.00.

By filing a timely notice of contest, Respondent brought this proceeding before the Occupational Safety and Health Review Commission ("Commission"). A hearing was held

in Boston, Massachusetts on September 14, 15, and 17, 1992. The parties submitted their briefs and this matter is now ready for decision.

## ALLEGED VIOLATION

Serious Citation No. 1, item no. 2 states:

29 C.F.R. § 1926.403(a): All electrical conductors and equipment were not approved:

> (a) CP-101: Data for the following equipment and related installations was not provided to the Assistant Secretary'sauthorized representative to determine if the equipment was safe for its intended use: mine power feeder cable and associated gear and equipment related to electrical power for the tunnels and shafts on Deer Island.

The cited standard in effect at the time of the alleged violation states:

29 C.F.R. § 1926.403(a) Approval. All electrical conductors and equipment shall be approved.

## SUMMARY AND EVALUATION OF THE EVIDENCE

Respondent was awarded a contract by the Massachusetts Water Resources Authority to perform work in connection with the construction of the North Tunnel System on Deer Island (also known as "CP-101"), Winthrop, Massachusetts. During the summer of 1991, Respondent constructed a shaft and tunnel at that sight. Respondent used a tunnel boring machine, powered by a 13,800 volt cable ("cable"), to excavate the tunnel.

In August 1991, the OSHA Boston South Area Office was notified that an accident occurred at the Deer Island site. OSHA sent compliance officers Grafton and Steele to investigate. Although Grafton discovered that no accident had occurred, he proceeded to conduct an investigation. The investigation lasted eleven days. In the course of the investigation, Grafton noticed the mine power feeder cable. The cable proceeded from CP-282, down a road, along a quarter to a half-mile stretch of beach, under a street, through a jobsite, and finally hung down a shaft. Grafton testified that the shaft was full of water.

In the course of his investigation, Grafton examined the cable for a stamp which he testified would indicate that the cable had been approved as required by 29 C.F.R. § 1926.403(a). Grafton noted the cable identifications and attempted to contact the

manufacturer whose stamp was found on the cable to verify the uses for which the cable was rated. The next step was to compare "approved" uses to the actual uses of the cable.

Identifying letters on the cable were "Essex", the letter "P", and "MSHA". Essex is the company which manufactured the cable. "P" represents the Pennsylvania Bureau of Deep Mine Safety and "MSHA" stands for the United States Department of Labor, Mine Safety and Health Administration.

Complainant argues that the cable lacked approval pursuant to 29 C.F.R. § 1926.403(a) using one of the applicable definitions of "acceptable" under 29 C.F.R. § 1926.449: (a), approval by a "qualified testing laboratory"; (b), approval by a Federal, state, or municipal authority; or (c), custom-made equipment.

Respondent argues alternatively that the cable is approved because: under section (a), Complainant has not met its burden of proof with regard to what is "acceptable"; under section (b), approval by MSHA satisfies "acceptable" or; under section (c), the cable is custom manufactured and therefore satisfies "acceptable".

Respondent first argues that the citation must be vacated because § 1926.403(a) Approval, is void for vagueness. The regulation states, "[a]ll electrical conductors and equipment shall be approved." 29 C.F.R. § 1926.403(a). "Approved is defined as "[a]cceptable to the . . . Assistant Secretary of Labor for Occupational Safety and Health." 29 C.F.R. § 1926.449 offers three alternative options for "acceptable": a qualified testing laboratory; a Federal or municipal agency, or; the manufacturer itself under certain specified conditions.[1] Respondent's argument is that the standard does not define "test data", disclose which tests are to be performed, or relate the form of the data or the standards to which the tests must conform. Respondent claims that the manufacturer's data sheet, and the approvals the cable received should be sufficient proof of safety; if it is not sufficient, it is because the standard is vague.

The Respondent's contention must fail because the regulation is not void for vagueness. The regulation cannot list every possible test or reporting format for every type of electrical

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[1] Definitions for "certified" and "listed" also require the use of a "qualified testing laboratory". 29 C.F.R. § 1926.449.

equipment, installation, or environment. Moreover, the same piece of equipment may be used in different places for different purposes (e.g. mine feeder cable not used in a mine). Tests for approval vary according to the particular uses and the environmental conditions under which the equipment or installation will function. Respondent's evidence, while indicating that the cable was manufactured and tested with success, does not satisfy the regulatory criteria for laboratory testing for environmental conditions. The regulation recognizes three approval entities, while at the same time maintaining flexibility in testing based on equipment, use, and environment. There is no need to second-guess either the regulation concerning designated approving agencies or the implied confidence in the agencies' abilities to properly test environmental factors. Accordingly, I find that the regulation is not void for vagueness.

The Respondent's second argument for dismissal is that the two OSHA employees who initiated the investigation and/or issued the citations were book-carrying members of unions representing Respondent's employees.[2] As such, Respondent asserts because of their long-term union affiliation, the two officials were not impartial. This argument is without merit. When the OSHA inspector examined an open shaft and copied stamped insignia from the cable which was hanging into the tunnel, it is far-fetched to suggest that he was being influenced by his union membership.[3] Merely by looking at the insignia on the cable, the inspector would be unable to predict whether the cable was approved for its observed use. Likewise, it is far-fetched to suggest that the chief investigator, in verifying approval or lack thereof, and the consequent issuing of a citation, was also influenced by his union membership. Both the inspector and chief investigator were unaware of the cable's compliance or non-compliance with safety requirements until they compared the actual use of the cable with the qualified testing laboratory results. At that point, issuance of a citation

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[2] The two employees did not belong to the same union. The inspector belonged to the IBEW. The chief investigator belonged to the ICEA.

[3] While the inspector may be familiar with some of the more common testing laboratories, it is unlikely that he knew them all. He did not know the entities represented by the insignia which he copied. For all he knew, these letters and numbers might have represented qualified testing laboratories.

was based on the regulations, not union membership. I hold that the public's confidence in its government employees was not compromised here. In deciding the issue of approval, I turn my attention to the three-option definition of approval within the meaning of Subpart K. In so doing, I hold that the Essex cable is not approved as required by 29 C.F.R. § 1926.403(a) and 29 C.F.R. § 1926.449(a).

First, section (a) states that the cable must be " . . . determined to be safe by a qualified testing laboratory [4] capable of determining the suitability of material and equipment for installation. . .". The uncontroverted testimony of the Secretary's expert was that in determining suitability of equipment, a qualified testing laboratory tests for such environmental factors as exposure to water, corona, gasses, exposure to earth, ozone, low smoke density, flame retardancy, explosive atmospheres, exposure to possible physical damage, etc. After the laboratory has tested for these factors, it stamps the cable with the laboratory's insignia. Later, on site, an OSHA inspector observes the equipment or installation in use, and, with the helpful identifying insignia from the equipment, communicates with the testing laboratory to determine whether the actual usage[5] is the same as the permissive usage based on laboratory test results.

The Pennsylvania Bureau of Mines and the Mine Safety and Health Administration are not "qualified testing laboratories" in the full sense of the regulatory definition. They are "properly equipped and staffed" for "safety...or performance [testing] in a specified manner" for flame resistant properties only. Tests for flame retardancy are not sufficient determinations of safe cable use as it was observed at CP-101 - near rocks, water, underground, exposed to air and buried. Since the spectrum for testing "safety... or

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[4] *Qualified testing laboratory.* A properly equipped and staffed testing laboratory which has capabilities for and which provides the following services: (a) Experimental testing for safety of specified items of equipment and materials referred to in this standard to determine compliance with appropriate test standards or performance in a specified manner; (b) Inspecting the run of such items of equipment and materials at factories for product evaluation to assure compliance with the test standards; (c) Service-value determinations through field inspections to monitor the proper use of labels on products and with authority for recall of the label in the event a hazardous product is installed; (d) Employing a controlled procedure for identifying the listed and/or labeled equipment or materials tested; and (e) Rendering creditable reports or finding that are objective and without bias of the tests and test methods employed. 29 C.F.R. § 1926.449

[5] "Usage" is not at issue in this case. The only issue is whether the cable has been "approved" according to 29 C.F.R. § 1926.403(a).

performance" is greater than just flame retardancy (corona, gasses, ozone, etc.) I can assume that these two laboratories cannot, did not, or were not asked to test for other relevant environmental factors related to safety issues.[6]

Respondent next argues that if the Essex cable was not approved under section (a), it is approved under section (b) because no qualified testing laboratory tests mine feeder cable and because MSHA has approved it. Respondent's expert witness testified that to his knowledge, no qualified testing laboratory tests mine power feeder cable. After the citation was issued, Respondent contacted two qualified testing laboratories, Underwriter's Laboratory and Factory Mutual, concerning testing. One laboratory stated that it did not test mine power feeder cable; a second stated that it did not "normally" test mine power feeder cable. Complainant's expert witness stated, however, that he had seen mine power feeder cable in test situations. Testimony elicited little evidence concerning the existence of other qualified testing laboratories and what evidence there is conflicts. I am therefore unwilling to accept that no qualified testing laboratory accepts, certifies, lists, labels, or determines to be safe, mine power feeder cable. Since there may exist a qualified testing laboratory which tests mine power feeder cable, section (b) does not apply.

As to Respondent's second point concerning approval under section (b), since the MSHA does not test according to the safety provisions of the National Electric Code, as required by section (b), the cable is not approved by section (b).

Finally, Respondent argues that the Essex cable was custom-made and, therefore, on the basis of test data provided by the manufacturer, is "approved" under section (c). Custom-made is defined in Section 1926.449(c) as ". . . equipment or related installations which are designed, fabricated for and intended for use by a particular customer. . .". Respondent purchased the cable in question in 1982. At that time, Respondent ordered the cable with 133% insulation -- 33% more insulation than what was "standard." Both Complainant and Respondent submitted specification sheets from manufacturers of mine power feeder cable. These specification sheets indicate that the extra 33% insulation on the

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[6] While Respondent made efforts to obtain approval of the cable by submitting the cable to the manufacturer for tests and by conducting hypot tests, these test results were either insufficient or not from qualified testing laboratories.

Essex cable is a standard variation, indicative rather of normal industry activity than of " . . . use by a particular customer . . .". Even if *arguendo* the cable was custom-made, the current manufacturer, due to inadvertent loss or destruction, had no knowledge of earlier test data, nor could it produce test data of its own concerning the safety of the cable as used under the specific conditions at Deer Island. Even if Respondent could prove in some way (requirements, industry standards, etc.) that testing had to have been done, I have no way of knowing which tests were performed or how many or how appropriate they were for the Deer Island usage.[7]

Respondent claims infeasibility of compliance as a defense, (29 C.F.R. § 2200.36(b)(1)), but Respondent did not specifically plead or state the facts concerning the infeasibility defense during the hearing. Respondent's only argument was that testing by MSHA satisfies the alternative protective measure prescribed in the regulation, and therefore the cable should be approved.

Had Respondent undertaken to plead the facts of an infeasibility defense, it would have been required to satisfy both parts of the defense. The burden of proof is on Respondent to prove first the infeasibility of the standard abatement measure under 29 C.F.R. § 1926.449(a),(b), and (c), and then, that the alternative means employed, namely MSHA approval, demonstrates compliance, or that there was no feasible alternative measure.

Under the relaxed standard of *Dun-Par I-A*, 1986-1987 OSHD (CCH) ¶ 27,650, *rev'd. in part*, 843 F.2d 1135 (8th Cir. 1988), Respondent need not prove that compliance was impossible, but may rely on "genuinely practical circumstances revealing the unreasonableness of an abatement measure". *Seibel Modern Manufacturing & Welding Corp.*, 1991 OSHD (CCH) ¶ 29,442. In the instant case, Respondent has not proved that compliance, i.e., finding a qualified testing laboratory which would test for the appropriate

[7]After the citation was issued, Respondent requested that the manufacturer test the cable. Even then, the full gamut of environmental tests was not performed. Respondent makes much of the fact that the company wrote to OSHA and asked what information OSHA needed. OSHA did not respond. While this is regrettable, it does not absolve Respondent from the obligation to follow the regulation and to find a qualified testing laboratory which would have tested for use under specific environmental conditions.

environmental conditions, was either impossible or unreasonable. Testimony revealed that Respondent had not inquired into qualified testing laboratories before the citation was issued and investigated the same only to the barest minimum, post-citation. It is unlikely, given but the current facts in the instant case, that Respondent could make out an infeasibility defense.

The Secretary has proved by a preponderance of the evidence that the Essex cable does not satisfy "acceptable" under any of the three alternative methods of 29 C.F.R. § 1926.449. It is therefore not "approved" under 29 C.F.R. § 1926.403(a) by the Secretary of Labor for use at the North Tunnel System.

## FINDINGS OF FACT

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

## CONCLUSIONS OF LAW

1. Respondent, Kiewit-Atkinson-Kenny, a joint venture, at all times material to this proceeding, was an employer engaged in a business affecting commerce and had employees within the meaning of section 3(5) of the Act, and the Commission has jurisdiction of the parties and the subject matter herein pursuant to section 10(c) of the Act.

2. Respondent, at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated by the Secretary pursuant to section 6(a) of the Act.

3. At the time of inspection herein, Respondent was in serious violation of the standard at 29 C.F.R. § 1926.403(a).

## ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED:

1. Serious Citation No. 1, item no. 2, is AFFIRMED and a penalty of $1,275.00 is ASSESSED.

Richard W. Gordon

RICHARD W. GORDON
Judge, OSHRC

Date: May 25, 1993
Boston, Massachusetts