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

METRO POWER, D/B/A GIBSON ELECTRIC,
Respondent.

OSHRC DOCKET
NO. 92-1471

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 18, 1993. The decision of the Judge will become a final order of the Commission on March 22, 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 March 10, 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
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
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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: February 18, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-1471

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. METRO POWER, d/b/a GIBSON ELECTRIC, Respondent.	:	OSHRC Docket No. 92-1471

Appearances:

Ann G. Paschall, Esq.
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Mr. Daniel D. Gibson, Sr.
Manager, Metro Power, d/b/a
Gibson Electric
Chula, Georgia
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Metro Power, d/b/a Gibson Electric (Metro), contests alleged serious violations of 29 C.F.R. § 1926.404(b)(1)(ii), for failure to have a functioning ground fault circuit interrupter on drink and ice machines; of § 1926.404(e)(1)(iv), for positioning breaker panels in hazardous locations on the jobsite; and of § 1926.500(b)(5), for failure to guard pit openings.[1]

[1] Metro did not contest Citation No. 2, alleging "other than serious" violations.

Metro is an electrical contracting company operating in Chula, Georgia. Metro was the electrical subcontractor for the construction of the Eastman Youth Developement Facility. On January 7, 1992, a compliance officer of the Occupational Safety and Health Administration (OSHA) inspected the Eastman jobsite pursuant to the Occupational Safety and Health Act of 1970 (Act).

Alleged Violation of § 1926.404(b)(1)(ii)

Section 1926.404(b)(1)(ii) provides:

> (b) *Branch circuits*--(1) *Ground-fault protection*--(ii) *Ground-fault circuit interrupters.* All 120-volt, single-phase, 15- and 20 ampere receptacle outlets on construction sites, which are not part of the permanent wiring . . . shall have approved ground-fault circuit interrupters for personal protection.

In November, 1992, Metro installed a drink machine and an ice machine owned by the general contractor (Tr. 60, 61). Although belonging to the general contractor, all workers used or had access to the ice and drink machines, including Metro's employees (Tr. 13, 51). The machines were set on a wooden pallet near the general contractor's trailer. They were in the open and exposed to the elements (Tr. 14). The receptacle outlet into which they were plugged was connected to the temporary power (Tr. 51). When OSHA compliance officer Phillip Moncrief tested the outlet, he noted that the ground fault circuit interrupter (GFCI) was not functioning (Tr. 13). Moncrief notified the general contractor of the alleged violation. At its direction, Metro replaced the non-functioning GFCI (Tr. 16).

The drink and ice machines were installed with a functioning GFCI, but the GFCI for that outlet had not been tested since installation (Tr. 30, 46). Neither had the machines been unplugged since they were installed (Tr. 59). Other GFCIs on the jobsite were known to be functioning because they frequently tripped (Tr. 30). It was Metro's responsibility to test all the GFCIs on the site (Tr. 63).

Metro argues first that the standard implies a requirement that GFCIs be inspected only periodically and that, referencing the three-month inspection requirement for an assured equipment grounding conductor program, it was not yet required to inspect the

GFCI for the drink and ice machines. Metro did not have an assured equipment grounding conductor program (Tr. 32). The standard does not discuss how often or whether GFCI protection will be inspected; it requires that the GFCI function. While an employer's conscientious efforts to determine that a GFCI remains operational may affect whether the employer can be charged with knowledge that overcurrent protection was lacking at a particular time, it does not affect the underlying violation in this case. There is no justification in the language of the standard to support the three-month grace period Metro suggested.

The probability and severity of an injury caused by the violation were low. The machines were on the flat surface of the pallet, and the wiring between the receptacle and the machine was in good repair (Tr. 15). The anticipated injury would be burns or electrical shock.

Daniel Gibson, Manager of Gibson Electric, who represented Metro *pro se*, holds an electrician's licenses in five states. Gibson argued that the drink and ice machines did not need GFCI protection because they were internally grounded "to the frame of the equipment just like a washing machine" and had a grounded, three-wire plug (Tr. 62). The Secretary argues that even were this true, it would be possible for an employee to unplug the ice or drink machines and use the outlet for other purposes. Such an occurrence is most remote. The machines were located approximately 400 feet from the area where the building was being constructed, and the power at the trailer location supplied the office and was not intended for construction work (Tr. 34, 83). There were four other outlets available for use directly adjacent to the ice and drink machines (Tr. 83).

To establish a *prima facie* case that an employer has violated a standard promulgated pursuant to Section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies to the facts, (2) the requirements of the standard were not met, (3) employees had access to the hazardous condition, and (4) the employer knew or could have known of the hazardous condition with the exercise of reasonable diligence. *Walker Towing Corp.*, 14 BNA OSHC 2072, 1991 CCH OSHD ¶ 29,239 (No. 87-1359, 1991). The Secretary has met her burden of proving each of these elements. Metro's supervisor, James Taft, a master electrician, was on the site on a daily basis (Exh. R-3, Tr.

86). Metro had constructive knowledge of the violation since, with proper inspections, its supervisor could have known that the GFCI was not functioning.

To establish that a violation is "serious" under Section 17(k) of the Act, there must be a "substantial probability" that death or serious physical harm could result from the violative conditions. This language refers not to the likelihood of an accident occurring, but rather to the severity of an injury if an accident were to occur. *Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 1069 (3rd Cir. 1979). While the Secretary contends that the violation is serious, extenuating circumstances do not warrant that classification. The drink and ice machines were properly installed, set on a pallet, internally insulated and grounded by a three-wire plug. Only the remotest possibility existed that the outlets would be used for any equipment other than the ice and drink machines. It is implausible to assume that employees would unplug continuously running machines to use that particular outlet when others were readily available and the construction work was taking place 400 feet away. The machines were on the ground level and employees would not be subject to a fall from heights if shocked. These facts not only affect the probability of an accident occurring, they also significantly lessen the severity of the potential injury. GFCI provides additional protection and is required by the standard, a fact which Metro impliedly recognized when it installed GFCI for the drink and ice machines. Although Moncrief testified that a shock might result in death "[a]nytime you deal with electrical voltage," he acknowledged that, here, the most probable injury was a burn or electrical shock (Tr. 15, 17). It is not sufficient to classify all electrical violations as "serious" without a realistic consideration of individual circumstances in the case. It is the Secretary's burden of proof to establish the probability of death or serious physical harm as proof of her *prima facie* case. *Crescent Wharf and Warehouse Co.*, 1 BNA OSHC 1219, 1973 CCH OSHD ¶ 15,687 (No. 1, 1973). The severity of a potential burn or shock which could occur with these machines has not been shown to be serious. The probability of serious injury caused by the non-functioning GFCI is remote and speculative. The violation is affirmed; it is properly classified as "other than serious" and no penalty is assessed.

Alleged Violation of § 1926.404(e)(1)(iv)

Section 1926.404(e)(1)(iv) provides:

> (e) *Overcurrent protection.* (1) *600 volts, nominal, or less . . .* (iv) *Location in or on premises.* Overcurrent devices shall be readily accessible. Overcurrent devices shall not be located where they could create an employee safety hazard by being exposed to physical damage or located in the vicinity of easily ignitible material.

The Secretary alleges that the locations of two circuit breaker panels (overcurrent devices), installed by Metro on the jobsite, exposed the panels to physical damage and the employees to electrocution or burns. She contends that placement of the panels made it likely that they could be hit by machinery operating in the vicinity (Tr. 21, 59).

The breaker panels were placed on wooden pedestals, each approximately 4 1/2 feet high. One pedestal was placed on the west side of the site and the other on the north side, near another part of the project (Tr. 34, 48, 49). The location of the pedestals was determined after Metro and the general contractor's representatives met with Georgia Power, the electric utility. All other subcontractors were invited to attend the meeting but did not do so (Tr. 66). At the meeting, the parties reviewed the site plan and the flow of traffic (64). They determined the sites for the main power disconnect as well as where the two branch circuit breaker panels would be placed. They believed that the construction traffic would flow from 10 to 15 feet around the building and between a break in the building (Exh. R-1, Tr. 66-68). They were aware that there would be bulldozers and other equipment in the entire area (Tr. 68). It was the consensus that the panels would be placed approximately 8 feet from the building wall, the best location "with the least amount of abuse . . . to any traffic or anything" and yet be readily accessible to accommodate the construction process (Tr. 67-99).

On the day of the inspection the pedestal at the west side of the building was laying on the ground, de-energized, and had reportedly been hit the day before when the bobcat operator was doing grading and site work in the area (Tr. 18). The second panel on the north side was leaning at a 75 degree angle and appeared to have been disturbed (Tr. 18). Compliance Officer Moncrief gave Metro the option of relocating the panel boxes to an

unspecified location or of putting up a tape and post barricade around the panels so that a machine operator would hit something else before the operator hit the panels (Tr. 50). Metro placed tape around the pedestals, but questioned whether this was effective or was proper, since the tape was continually torn down and the circuit breakers should have remained "readily accessible" (Tr. 71, 84).

The Secretary must establish that the location of the panels "exposed them to physical damage." The exposure to anticipated damage must be greater than a mere possibility of damage. It must rise to a level which would afford an employer a reasonable basis to know that it was placing circuit breakers in an ill-advised and potentially dangerous area. The damage anticipated by the Secretary is that employees operating heavy equipment would not see the panels and would run into them. There is no suggestion that the panels were too low or were improperly marked or flagged (Tr. 49). It is unclear where the panels should have been placed in the Secretary's opinion or why the particular sites chosen were hazardous. The traffic pattern itself was not shown to expose the panels to an increased risk of damage. The mere fact that a bobcat operator ran into one of the pedestals does not establish that the location was improper. Grading work is a normal part of the construction process and is not confined to the roadways or to a specific area of the jobsite. Metro took the anticipated traffic movement into consideration when it made the decision of where to place the pedestals. The Secretary has not established that Metro's placement of the two circuit breaker panels violated the standard. The alleged violation is vacated.

Alleged Violation of § 1926.500(b)(5)

Section 1926.500(b)(5) provides:

> (b) *Guarding of floor openings and floor holes.* (5) Pits and trap-door floor openings shall be guarded by floor opening covers of standard strength and construction. While the cover is not in place the pit or trap door shall be protected on all exposed sides by removable standard railings.

Throughout the worksite the concrete pad had floor openings which had been left open to install vertical supports for the upper members of the planned construction (Tr. 24).

The holes, which measured 3 feet square and were approximately 16 inches deep, were neither covered nor guarded (Tr. 24, 25). Metro's employees were exposed to hazards associated with unguarded floor openings while installing electrical conduit. Three or four days before the OSHA inspection, Kim Davis of Liberty Mutual Insurance Company conducted an inspection of the worksite for Metro's insurance company. She advised Metro that the floor holes presented a hazard to its employees. She suggested that Gibson write to the general contractor "putting the general contractor on notice that he had an unsafe condition and that we did not want to expose our personnel to that possible hazard" (Tr. 73, 74). Gibson had not written that letter at the time of the OSHA inspection (Tr. 74).

Metro argues that the unguarded floor openings were the responsibility of the general contractor. Each employer on a multi-employer work site is responsible for the safety of its own employees. *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1975-76 CCH OSHD ¶ 20,690 (No. 4409, 1976), and *Grossman Steel and Aluminum Corp.*, 4 BNA OSHC 1185, 1975-76 CCH OSHD ¶ 20,691 (No. 12775, 1976). In the present case, although Metro may not have created or controlled the violative condition, it did not provide its employees with realistic alternative protections nor had it notified the general contractor to correct the hazard. Metro has not established a multi-employer defense.

Metro raises a further defense regarding application of the standard. Relying on its reading of the general scope provision of § 1926.500(a), Metro interprets the words "pits" or "trap-door floor openings" as applying only to holes though which someone could fall. The floor holes at issue were closed. Metro's argument has been considered and rejected by the Commission. *See National Industrial Constructors, Inc.*, 10 BNA OSHC 1081, 1095, 1981 CCH OSHD ¶ 25,743 (No. 76-4507, 1981); *Ceco Corp. & McDevitt & Street Co.*, ___ BNA OSHC ___, 1991 CCH OSHD ¶ 29,455 (Nos. 89-2514, 89-2588, 1991). The intent of the standard protects employees from the hazard of falling into open cavities. Consistent with Commission precedent, the standard is applied to openings *into which* an employee may fall or trip, not only to floor openings *through which* an employee may fall.

Metro had knowledge of the violation since its supervisory employee was on the jobsite on a daily basis and the condition was in plain sight. It had also been notified of the

apparent violation by its insurance company. The most likely injury from falling into the pit would be a sprain or twist injury to the leg, which is considered serious. A serious violation of the standard is affirmed.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSAHRC & Interstate Glass Co.*, 487 F.2nd 438 (8th Cir. 1973). Under § 11(j) of the Act, the Commission is required to give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the appropriate penalty. The gravity of the offense is the principal factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972).

Gibson Electric, which may maintain some operating independence from Metro, employs from 8 to 24 employees. Gibson did not know the number of Metro's employees, but the parent company employs a considerably larger number (Tr. 16, 79). Metro has had no previous citations. Compliance officer Moncrief found the company to be cooperative and responsive (Tr. 16). Moncrief also observed with approval such safety precautions as capped re-bars and the generally clean condition of the worksite (Tr. 25, 27, 28). Metro had a safety program, and its employees attended regular safety meetings. A penalty of $600.00 is considered appropriate for this violation.

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 on the foregoing decision, it is ORDERED:

(1) That the violation of § 1926.404(b)(1)(ii) is affirmed as non-serious and no penalty is assessed;

(2) That the violation of § 1926.404(e)(1)(iv) and the proposed penalty are vacated; and

(3) That the violation of § 1926.500(b)(5) is affirmed and a penalty in the amount of $600.00 is hereby assessed.

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

Date: February 9, 1993