United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, NW, Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC DOCKET NO. 00-1213
R.G. BIGELOW ELECTRICAL CO., INC.,	:	
Respondent.	:	

APPEARANCES:	Kevin E. Sullivan, Esquire U.S. Department of Labor Office of the Solicitor Boston, Massachusetts For the Complainant.	Barrett A. Metzler, CSP Northeast Safety Management, Inc. Columbia, Connecticut For the Respondent.
BEFORE:	G. MARVIN BOBER Administrative Law Judge	

DECISION AND ORDER

Background and Procedural History

This case is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970) ("the Act"), to review (1) citations issued by the Secretary of Labor pursuant to section 9(a) of the Act, and (2) proposed assessments of penalties pursuant to section 10(a) of the Act. On March 1, 2000, an employee of Respondent was injured while performing electrical work at a printing company. As a result of the accident, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of the site, after which Respondent was issued a serious citation proposing a total penalty of $2,250.00. Respondent timely contested the citation, and, following the filing of a complaint and answer and pursuant to a notice of hearing, an administrative trial was held in

Hartford, Connecticut on January 17, 2001. Both parties have filed post-trial briefs.[1]

Jurisdiction

The parties agree that Respondent, R.G. Bigelow Electrical Company, Inc., is an employer engaged in interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5), and that the Commission has jurisdiction over this case.

Relevant Testimony

Daniel Ruggles, an apprentice electrician for four years and licensed electrician for three years, has been an electrician for Respondent since 1998. Mr. Ruggles testified that his supervisor, Dave Morneault, assigned him to perform an electrical task at the subject site on a " bus plugs box" 20 to 25 feet above the ground using an aerial lift. He also testified that his supervisor told him that "[t]he job was all set right to the point of tying in the wires to the lugs; that's all he said to do. That's all that had to be done." Mr. Ruggles stated that his company had never trained him on an aerial lift and that his supervisor had not provided him with any personal protective equipment ("PPE") or insulated tools when assigning him to work on the energized box. When Mr. Ruggles suggested de-energizing the box, his supervisor said "no." Wearing only jeans, a polyester t-shirt and safety glasses with no side protection, Mr. Ruggles proceeded to do his assigned job. (Tr. 9-17, 29-30.)

Mr. Ruggles further testified that he was injured while performing his assigned task of tightening a neutral connection, which required the use of an Allen or "hex" wrench. According to Mr. Ruggles, he could not access the neutral connection with the Allen wrench when the switch was in the off position, *i.e.*, de-energized, and he therefore had to do his work with the box energized. While working on the circuit, Mr. Ruggles felt an "explosion," and he suffered severe burns above his waist because his polyester t-shirt melted onto his body. Mr. Ruggles had to lower himself down in the aerial lift because the people on the ground could not operate the lift since the key to the ground-level controls was missing. (Tr. 11, 17-28.)

Todd Brooks, a licensed electrician, was working as a temporary electrician for Respondent at the time of the accident. Mr. Brooks' testimony confirmed that of Mr. Ruggles that Respondent did not provide any PPE to employees. Mr. Brooks witnessed Mr. Ruggles "on fire from his waist

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[1]At the trial, Respondent moved to dismiss Citation 1, Items 1a, 1b and 1c for "lack of proof." (Tr. 132-34.) The motion for dismissal was denied. Upon further review, Respondent's motion for dismissal was properly denied.

up," and he stated that neither he nor anyone else could operate the ground-level controls on the aerial lift to bring Mr. Ruggles down because the key to those controls was missing. (Tr. 31-37.)

Compliance Officer ("CO") Anthony Fuscillo testified that he investigated the accident on the same day that OSHA received a report that there had been an explosion. The CO's testimony confirmed Mr. Ruggles' account of the task he was assigned and the fact that the circuit had to be energized for Mr. Ruggles to do his job. The CO said Respondent's supervisor could not produce any PPE when he (the CO) asked for it. The CO also said that his interviews with Respondent's employees, including Mr. Ruggles, established the company did not provide harnesses for employees or train employees in the use of aerial lifts. Although these employees told the CO they generally did not use harnesses for fall protection, the employees' explanations of how they would tie off demonstrated that they were not properly trained. (Tr. 51, 56-58, 65-66, 71-73, 76-78.)

William Coffin, an assistant area director and district office supervisor for OSHA, was the Secretary's expert witness.[2] He testified that in his opinion, Mr. Ruggles could not have completed his assigned task with the circuit box in the off position. He also testified that Respondent's insurance company reports confirmed that the only way for an electrician to tighten the neutral screw was to leave the switch in the energized position. Mr. Coffin noted that when working with a circuit box of 480 volts, as Mr. Ruggles was doing, it is industry practice to use proper equipment and PPE. He further noted that Mr. Ruggles should have worn insulated gloves, safety glasses and a face shield, and fire retardant clothing; he also should have used insulated tools and an insulated blanket to protect himself. According to Mr. Coffin, if such equipment had been used, Mr. Ruggles' injuries would have been prevented or minimized. (Tr. 96-97, 104-11, 114-17, 120, 125, 129.)

Randy Bigelow, Respondent's vice-president and owner, testified that PPE was available in the company's office. He stated that if the supervisor had told him that PPE was needed, he would have had appropriate equipment delivered to the work site from the office. He further stated that no one asked for additional equipment. (Tr. 136-42.)

Discussion

In Citation 1, Item 1a, the Secretary alleges a serious violation of the general duty clause, section 5(a)(1), which requires employers to furnish its employees a workplace free from recognized

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[2]Mr. Coffin started work as an apprentice electrician in 1969 and became a licensed electrician in 1973. (Tr. 93.)

hazards that are causing or likely to cause death or serious physical harm. Specifically, the Secretary alleges that Respondent's employees were exposed to electrocution and burn hazards resulting from the use of conductive tools in close proximity to a live electrical circuit in excess of 50 volts. To prove a violation of section 5(a)(1), the Secretary must establish that (1) a condition or activity in the employer's workplace presented a hazard to employees, (2) the cited employer or the employer's industry recognized the hazard, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) feasible means existed to eliminate or materially reduce the hazard. *Nat'l Realty & Constr. Co.*, 489 F.2d 1257, 1265-67 (D.C. Cir. 1973); *Connecticut Light & Power Co.*, 13 BNA OSHC 2214, 2217 (No. 85-1118, 1989).

The Secretary has satisfied her burden of proving that Respondent failed to provide its employees a workplace free from recognized hazards that were causing or likely to cause death or serious physical harm. First, it is undisputed that Respondent's employee was using a conductive tool (an uninsulated Allen wrench) while working in close proximity to a live electrical circuit in excess of 50 volts. (Tr. 17-30.) This condition exposed the employee to electrocution and burn hazards. Second, the unrebutted testimony of the Secretary's expert witness confirmed that this was a recognized hazard in the industry. (Tr. 97, 110, 128-29; C-25.)[3] Third, it is clear that the cited hazards of electrocution and burns are likely to result in death or serious physical harm. Finally, feasible means, such as insulated tools, existed to eliminate or materially reduce this hazard. (Tr. 97, 104, 107-10, 117; C-25-26.) Therefore, I affirm this citation item as a serious violation.[4]

In Citation 1, Items 1b, 1c, 2a, 2b and 2c, the Secretary alleges serious violations of specific

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[3]Complainant's and Respondent's exhibits are identified as "C" and "R," respectively.

[4]Respondent argues that specific standards 29 C.F.R. §§ 1926.95 and 1926.954 preempt section 5(a)(1). "The Commission has held that an applicable standard preempts application of the general duty clause. In order for a specific standard to preempt the general duty clause, however, the standard must be addressed to the particular hazard for which the employer has been cited under the general duty clause." *Armstrong Cork Co.*, 8 BNA OSHC 1070, 1073 (No. 76-2777, 1980) (citations omitted); *see also, New York State Electric & Gas Corp.*, 17 BNA OSHC 1129 (No. 91-2897, 1995), *rev'd on other grounds*, 88 F.3d 98 (2d Cir. 1996). Moreover, a section 5(a)(1) allegation will not be vacated where the hazards presented are "interrelated and not entirely covered by any single standard." *Ted Wilkerson, Inc.*, 9 BNA OSHC 2012, 2015 (No. 13390, 1981) (citing *Crescent Erection Co.*, 5 BNA OSHC 1711, 1712 (No. 2159, 1977)). Neither one of the standards cited by Respondent addresses nor entirely covers the cited hazard of employees using conductive tools near a live electrical circuit. Therefore, I reject Respondent's preemption argument.

standards. Generally, in order to establish a violation of a specific standard, the Secretary must show by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) there was a failure to meet the terms of the standard; (3) employees had access to the violative condition; and (4) the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Halmar Corp.*, 18 BNA OSHC 1014, 1016 (No. 94-2043, 1997); *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Citation 1, Item 1b alleges a serious violation of 29 C.F.R. § 1926.28(a), which requires the employer to ensure that employees wear appropriate PPE.[5] To prove a violation of section 1926.28(a), the Secretary must demonstrate that employees were exposed to the hazardous condition, that some other section of Part 1926 indicated the need for the particular PPE, and, finally, that the employer failed to require the wearing of the prescribed equipment. *See Bratton Corp.*, 14 BNA OSHC 1893, 1897 (No. 83-132, 1990). *See also*, *Andrew Catapano Enter., Inc.*, 17 BNA OSHC 1776, 1783 (No. 90-0050 *et al*., 1996); *Pace Constr. Corp.*, 14 BNA OSHC 2216, 2217-20 (No. 86-758, 1991). The Secretary has established that other sections of Part 1926 indicated a need for appropriate PPE. These sections, 29 C.F.R. §§ 1926.95, 1926.100 and 1926.102, require appropriate PPE for eyes, face, head and extremities, as well as protective clothing. In addition, I find it reasonable to infer from the weight of the evidence that Respondent failed to require its employees to wear PPE. The language of the standard clearly states that employers are responsible for requiring the wearing of appropriate PPE to reduce hazards to employees. Here, Mr. Bigelow's testimony indicates that Respondent relied on employees to request PPE.[6] (Tr. 136, 139-41.) However, even if employees requested it, Respondent could not have provided some of the required PPE, such as face shields and protective clothing, because Respondent did not have it available either on site or in the office. (Tr. 140.) Furthermore, the testimony of Mr. Ruggles and Mr. Brooks supports a

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[5]29 C.F.R. § 1926.28(a) provides as follows: The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

[6]Respondent does not even attempt to rebut the evidence that it failed to require the use of appropriate PPE by pointing to safety rules or other steps taken to satisfy the standard; thus, one can only assume that no such rules existed. Even if Respondent had had such rules, the decision to wear PPE cannot be left up to the employee's discretion. *See, e.g.*, *Pace*, 14 BNA OSHC at 2218 (citing *American Bechtel, Inc.*, 6 BNA OSHC 1246, 1248 (No. 11340, 1977)).

finding that Respondent took no affirmative steps to ensure that its employees wore appropriate PPE. (Tr. 16, 37.)

Finally, the Secretary has shown that Respondent's employee was exposed to a hazardous condition warranting the use of PPE. It is clear that Respondent's employee, who was injured while working on a live electrical circuit, was not wearing appropriate PPE, including protective clothing, a face shield, insulated gloves and a hard hat. (Tr. 16-30, 37, 65-66, 78.) I find that a reasonable person would recognize the hazard of not wearing appropriate PPE when working on a live electrical circuit of 480 volts. It is certainly a recognized hazard warranting the use of PPE within the industry, as the Secretary's expert witness testified. (Tr. 97, 110, 117, 128-29.) I further find that Respondent could have known of the cited condition with the exercise of reasonable diligence. Mr. Morneault, the supervisor at the site, was responsible for ordering the necessary tools and equipment for the job. (Tr. 141-42.) In addition, Mr. Morneault himself assigned Mr. Ruggles to work on the energized system without ordering appropriate PPE from the office. (Tr. 16.) Finally, I find that this violation was correctly classified as serious in that the cited condition could have resulted in serious physical harm or death. Based on the foregoing, Item 1b is affirmed as a serious violation.

In Citation 1, Item 1c, the Secretary alleges a serious violation of 29 C.F.R. § 1926.416(a)(1), which prohibits employees from working in close proximity to an electric power circuit unless the circuit is de-energized or grounded effectively.[7] It is undisputed that the cited standard applies, and Respondent has failed to rebut the evidence that Mr. Ruggles was permitted to work in close proximity to an electric power circuit without protection from electric shock. The testimony of Mr. Ruggles, the CO and the OSHA expert all confirm that the work assigned could not be performed while the electric circuit box was de-energized. (Tr. 18-25, 77, 96-97, 115-16; C-27-28.) Further, all the evidence of record indicates that Respondent did not provide Mr. Ruggles with insulation or any other means to protect him from electric shock. (Tr. 16-30.) It is also undisputed that Mr. Ruggles was exposed and injured as a result of the cited condition, and his testimony that the supervisor rejected his suggestion of de-energizing the system supports a finding that Respondent had actual

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[7] 29 C.F.R. § 1926.416(a)(1) provides as follows: No employer shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it effectively by insulation or other means.

knowledge of the violative condition. (Tr. 16.) Regardless, even without actual knowledge, Respondent could have known of the hazardous condition with the exercise of reasonable diligence. Clearly, exposure to energized electric power circuits without any protection could lead to serious physical harm or death. Therefore, I affirm Item 1c as a serious violation.

In Citation 1, Item 2a, the Secretary alleges a serious violation of 29 C.F.R. § 1926.453(b)(2)(v), which requires an employee to wear a safety belt with attached lanyard when working on an aerial lift.[8] Respondent does not contest the alleged violation, but it does contest the penalty.[9] (R. Brief, p.11). This item is accordingly affirmed as a serious violation.

Citation 1, Item 2b alleges a serious violation of 29 C.F.R. § 1926.453(b)(2)(ix), which requires aerial lifts to be equipped with lower controls capable of overriding the upper controls.[10] I find that the cited standard applies, and the evidence of record supports a finding that Respondent violated the terms of the standard. It is undisputed that the key necessary for operating the lower controls on the aerial lift was missing. (Tr. 28, 33-34.) It is also undisputed that an employee was exposed to the violative condition. (Tr. 28, 33-35.) Respondent argues that because it did not know the key was missing, it did not have the requisite knowledge. Although Respondent may not have had actual knowledge of the condition, Respondent could have known of it with the exercise of reasonable diligence. The aerial lift was in plain view of Respondent's supervisor, and a simple inspection would have alerted Respondent of the missing key. I find that the cited condition could have resulted in serious physical harm or death. In view of the record, I affirm Item 2b as a serious violation.

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[8]29 C.F.R. § 1926.453(b)(2)(v) provides that: A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift. Note to paragraph (b)(2)(v): As of January 1, 1998, subpart M of this part (Sec. 1926.502(d)) provides that body belts are not acceptable as part of a personal fall arrest system. The use of a body belt in a tethering system or in a restraint system is acceptable and is regulated under Sec. 1926.502(e).

[9]*See infra* for penalty determination.

[10]29 C.F.R. § 1926.453(b)(2)(ix) provides: Articulating boom and extensible boom platforms, primarily designed as personnel carriers, shall have both platform (upper) and lower controls. Upper controls shall be in or beside the platform within easy reach of the operator. Lower controls shall provide for overriding the upper controls. Controls shall be plainly marked as to their function. Lower level controls shall not be operated unless permission has been obtained from the employee in the lift, except in case of emergency.

In Citation 1, Item 2c, the Secretary alleges a serious violation of 29 C.F.R. § 1926.454(a), which requires training for employees working on scaffolds.[11] Respondent argues that this standard does not apply to aerial lifts because 29 C.F.R. § 1926.450(a) specifically provides that "[t]he criteria for aerial lifts are set out exclusively in § 1926.453." Although Respondent has stated correctly the quoted portion of section 1926.450(a), I disagree with Respondent's interpretation. In my opinion, the purpose of the quoted portion of section 1926.450(a) is to make a distinction between the technical requirements (*i.e.*, the use and construction requirements) for aerial lifts, as set out in section 1926.453, and for other scaffolds, as set out in sections 1926.451 and 1926.452. This interpretation is supported by the first sentence of the general requirements standard for scaffolds, section 1926.451, which also states that "[t]his section does not apply to aerial lifts, the criteria for which are set out exclusively in § 1926.453." The training standard, section 1926.454, has no similar provision explicitly excluding aerial lifts, but instead states specifically that the training requirements include areas covered by "[a]ny other pertinent requirements of this subpart." Thus, the training requirements, in my view, apply to all scaffolds, including aerial lifts.[12] I find, therefore, that section 1926.454(a) does in fact apply to the aerial lift in this case.

The Secretary has established the other elements of her burden of proof for the alleged violation. Mr. Ruggles' statements to the CO, and the statements of other employees, support a finding that Respondent did not train its employees in using the aerial lift as required by the standard. (Tr.14, 58.) It is undisputed that an employee was exposed to the cited condition, and Respondent

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[11]29 C.F.R. § 1926.454(a) provides that: The employer shall have each employee who performs work while on a scaffold trained by a person qualified in the subject matter to recognize the hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards. The training shall include the following areas, as applicable: (1) The nature of any electrical hazards, fall hazards and falling object hazards in the work area; (2) The correct procedures for dealing with electrical hazards and for erecting, maintaining, and disassembling the fall protection systems and falling object protection systems being used; (3) The proper use of the scaffold, and the proper handling of materials on the scaffold; (4) The maximum intended load and the load-carrying capacities of the scaffolds used; and (5) Any other pertinent requirements of this subpart.

[12]This conclusion is supported by the preamble to section 1926.453, which specifically states that "this type of equipment [aerial lift] is a scaffold" that should be addressed by Subpart L. 61 Fed Reg. 46,095 (August 30, 1996). To find that the training requirements for scaffolds do not apply to aerial lifts would clearly be contrary to the purposes of Subpart L.

could have discovered the violative condition with the exercise of reasonable diligence. Respondent's on-site supervisor directed Mr. Ruggles to use the lift to perform his assigned task, and he could easily have discovered that Mr. Ruggles was not properly trained. Based on the foregoing, this citation item is affirmed as a serious violation.

Penalty Assessment

The classification for Citation 1, Items 1 and 2 is affirmed. The Secretary has proposed a total penalty of $1,500.00 for Items 1a, 1b and 1c and a total penalty of $750.00 for Items 2a, 2b and 2c. Pursuant to section 17(j) of the Act, 29 U.S.C. § 666(j), the Commission must give due consideration to four factors in assessing penalties: (1) the size of the employer's business, (2) the gravity of the violation, (3) the employer's good faith, and (4) the employer's prior history of OSHA violations. The gravity of the violation is generally the principal element in penalty assessment. *See, e.g., Trinity Indus., Inc.*, 15 BNA OSHC 1481 (No. 88-2691, 1992), and cases cited therein. Upon considering these factors, I conclude that the proposed penalties are appropriate. The penalties as proposed are accordingly assessed.

ORDER

Based upon the foregoing decision, the disposition of the citation items, and the penalties assessed therefore, is as follows:

Citation 1	**Standard**	**Disposition**	**Classification**	**Civil Penalty**
Item 1a	section 5(a)(1)	Affirmed	Serious	$1,500.00
Item 1b	§ 1926.28(a)	Affirmed	Serious	(See Item 1a)
Item 1c	§ 1926.416(a)(1)	Affirmed	Serious	(See Item 1a)
Item 2a	§ 1926.453(b)(2)(v)	Affirmed	Serious	$750.00
Item 2b	§ 1926.453(b)(2)(ix)	Affirmed	Serious	(See Item 2a)
Item 2c	§ 1926.454(a)	Affirmed	Serious	(See Item 2a)
Total Penalties Assessed:				**$2,250.00**

/s/

G. MARVIN BOBER
ADMINISTRATIVE LAW JUDGE

Dated: 23 July 2001
Washington, D.C.