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

R. E. REYNOLDS, INC.
Respondent.

OSHRC DOCKET
NO. 92-0156

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 25, 1993. The decision of the Judge will become a final order of the Commission on March 29, 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 17, 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
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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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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 25, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-0156

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. R. E. REYNOLDS, INC., Respondent.	OSHRC Docket No. 92-156

APPEARANCES:

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U. S. Department of Labor
Atlanta, Georgia
For Complainant

Mr. R. E. Reynolds
R. E. Reynolds Company
Winter Park, Florida
For Respondent *Pro Se*

Before: Administrative Law Judge Edwin G. Salyers

DECISION AND ORDER

On August 1, 1991, Compliance Officer Ron Anderson conducted an inspection of a worksite located at 2885 Bonnet Creek Road, Lake Buena Vista, Florida. Respondent, R. E. Reynolds, Inc. (Reynolds), was there engaged as the masonry subcontractor in the construction of a hotel and pool building for the Disney World enterprise. As a result of this inspection, respondent was issued under the provisions of the Occupational Safety and Health Act (29 U.S.C. § 651, *et seq.*) a serious citation consisting of four items, one "repeat"

citation and one "other" citation. Respondent filed a timely notice of contest and the matter was heard by the undersigned in Orlando, Florida.

Item 1 - Serious Citation No. 1

During the course of his inspection, Compliance Officer Anderson observed a flexible electric cord lying on the ground in an area adjacent to a pool building which was under construction. This cord is depicted in Exhibit C-2 and is clearly in the path of moving vehicles as evidenced by the numerous tire tracks visible in the photograph. While Anderson was observing this condition, a concrete delivery truck with an estimated weight of 95,000 pounds drove over the cord (Tr. 32, 118). Anderson verified that the cord was plugged into an outlet and was being used by respondent's employees to power a masonry saw. He also determined that the cord was equipped with a ground fault circuit interrupter (GFCI) and a circuit breaker (Tr. 37, 171) but attached no significance to this circumstance (Tr. 35-36). As a result of these observations by Anderson, respondent was cited for a violation of § 1926.405(a)(2)(ii)(I).[1]

The fact that the extension cord in question was not protected from damage is undisputed in the record, was conceded by respondent's president at the hearing (Tr. 9), and was admitted in respondent's answer to the Secretary's complaint (Answer, ¶ VII).

Respondent offers two arguments in support of its contention why this item should be vacated:

(1) Since the cord was lying in a sandy area, this circumstance would tend to "cushion" the cord against potential damage.

(2) The cord was equipped with both a GFCI and a circuit breaker which, in the event of damage to the cord, would protect against electrical shock.

The court has considered these arguments and finds the first argument without merit. There is no assurance that a cord, even if "cushioned" by sand, as alleged by respondent,

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[1] Section 1926.405(a)(2)(ii)(I) provides:

> (I) Flexible cords and cables shall be protected from damage. Sharp corners and projections shall be avoided. Flexible cords and cables may pass through doorways or other pinch points, if protection is provided to avoid damage.

will not be damaged under the circumstances revealed in this record. Anderson testified there is always a possibility on a construction site that foreign objects, *i.e.*, pieces of concrete block or other building materials, will be contained in the sand (Tr. 33) and create the potential for damage to the cord. This is especially true in situations where the cord is "continually being run over" by heavy trucks and other construction equipment as existed in this particular case. *Id.*

In a similar fashion, the fact that the cord was equipped with a GFCI and circuit breaker does not remove the cited condition from the ambit of the standard. The purpose of the standard is to protect the cord from damage. The use of the devices employed by respondent in no way protects a cord from damage.

It appears, however, the evidence in this case supports a conclusion that the use of a GFCI and a circuit breaker on the cord in question drastically reduced the potential hazard in this case. Respondent called as an expert witness James M. Powers, a master electrician employed by Tri-State Electrical Contractor as its safety director (Tr. 163). Powers has been an electrician for 41 years and was obviously well versed in electrical safety as practiced on construction sites (Tr. 164-165). Powers testified, based upon the undisputed facts that the cord in question was equipped with a GFCI and a circuit breaker, respondent's employees would not be exposed to the hazard of electrical shock even if the cord were damaged while in use. It was his opinion that the two protective devices would serve to kick out the power and eliminate the potential for injury (Tr. 169-170). Anderson appeared to agree with this conclusion provided the GFCI and circuit breaker were working normally (Tr. 38, 173) but offered his opinion, based upon his experience, that GFCIs and circuit breakers cannot always be relied upon to perform their proper function (Tr. 37-38, 172). Anderson admitted he did not test the devices employed on the cord and "had no reason to believe they were not working properly" (Tr. 38).

Upon consideration of the evidence, this court concludes the Secretary has established a violation of the cited standard, but the gravity of potential harm to employees is slight. This latter factor will be considered in determining an appropriate penalty.

Item 2 - Serious Citation No. 1

This item charges respondent with a violation of § 1926.500(b)(5)[2] for its alleged failure to protect employees from an unguarded pit. There is no dispute that an uncovered pit with dimensions of 5 feet by 3 feet and a depth of 5 feet 4 inches existed in Pool Building "A" where employees of respondent were installing masonry walls at the time of the Secretary's inspection (Tr. 42-43). Two sides of the pit were enclosed by the exterior walls of the building, but the two remaining sides were unguarded (Exh. R-2; Tr. 19, 42, 46).

Respondent contends that its employees were not exposed to this hazard since most of their work was performed on the opposite side of a wall under construction which separated them from the pit (Tr. 19). Robert J. Altenbach, respondent's foreman at the jobsite, so testified (Tr. 132) but conceded that it was necessary for employees to occasionally work on the side of the wall near the pit "to clean the floor" of mortar and debris (Tr. 133-134). Anderson described the work area around the pit as "small," approximately "30 feet square" (Tr. 42) and believed this circumstance made exposure of respondent's employees to the pit unavoidable. He observed respondent's employees moving freely in the area, and it was his opinion that any of these employees "could have been exposed to stepping into the pit" (Tr. 44). He described the consequences of such an occurrence as serious since fractures or severe lacerations could result (Tr. 45).

The evidence supports a conclusion that respondent's employees were exposed to the hazard presented by the unguarded pit, and this item will be affirmed.

Item 3 - Serious Citation No. 1

During the course of his inspection, Anderson noticed two instances of reinforcement bars (rebars) protruding vertically from concrete slabs. The ends of these rebars were not

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[2] Section 1926.500(b)(5) provides:

> (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 openings shall be protected on all exposed sides by removable standard railings.

capped to prevent the hazard of impalement in the event an employee working in close proximity should fall or trip (Exhs. C-3, C-4; Tr. 47-48). Anderson observed employees of respondent working and/or walking in the vicinity of these rebars (Tr. 50). As a result of these observations, respondent was charged with a violation of § 1926.701(b).[3]

Respondent maintains "that 99 percent" of the rebar at this jobsite was capped or covered and presented no hazard to its employees, but concedes that employees sometimes worked around exposed rebar since they must "remove the covers to perform their job" (Tr. 20).

During the course of the hearing, it became apparent that the circumstances described in Anderson's testimony and the circumstances raised by respondent in its defense, *i.e.*, that the caps must be removed to perform the work, involved two different situations (Tr. 95-102). The Secretary does not question respondent's assertion that caps must be removed from the rebar during the initial phases of wall construction when the masonry blocks must be placed over the rebar (*See* Exh. R-3; Tr. 100). At the time of Anderson's inspection, this phase of the masonry work had been completed. *Id.* The two instances cited by Anderson involved exposed rebar not located in the wall itself but in areas adjacent to the wall where respondent's employees were engaged in the final stages of construction. No reason was offered by respondent why this rebar could not have been capped. These conditions created hazards to respondent's employees and constituted violations of the cited standard.

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[3] Section 1926.701(b) provides:

> (b) *Reinforcing steel.* All protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement.

Item 4 - Serious Citation No. 1

This item charges respondent with a violation of § 1926.706(a)(1), which provides:

> (a) A limited access zone[4] shall be established whenever a masonry wall is being constructed. The limited access zone shall conform to the following:
>
> > (1) The limited access zone shall be established prior to the start of construction of the wall.

It is undisputed in the record that no limited access zone was established for the masonry wall constructed by respondent prior to the commencement of this construction or at anytime thereafter (Tr. 21, 52, 108-109).

Respondent's defense to this charge relates to its contention that the masonry wall in question was constructed with corners. These corners, which are erected simultaneously with the wall, give the wall structural integrity, according to respondent, and served to prevent the potential for wall collapse (Tr. 139-142). In essence, respondent is claiming no hazard was presented by the circumstances which existed at the time of the Secretary's inspection (Tr. 104). Anderson took exception to respondent's position and testified the walls were subject to collapse "until the roof structure is put in place" (Tr. 58).

The concrete and masonry standard is designed "to protect all construction employees from the hazards associated with concrete and masonry construction operations performed in the workplace," § 1926.700(a), one of which is the potential for a wall to overturn or collapse while under construction. The cited standard addresses that problem and mandates that a limited access zone "shall be established whenever a masonry wall is being constructed." At the hearing, respondent argued that subparagraph (a)(5) of the cited standard exempts walls which do not exceed 8 feet in height (Tr. 179-182). This subparagraph recites:

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[4] Section 1926.700(b)(4) defines this term as follows:

> *Limited access zone* means an area alongside a masonry wall, which is under construction, and which is clearly demarcated to limit access by employees.

> (5) The limited access zone shall remain in place until the wall is adequately supported to prevent collapse unless the height of wall is over eight feet, in which case, the limited access zone shall remain in place until the requirements of paragraph (b) of this section have been met. 29 C.F.R. § 1926.706(a)(5)

Since the wall in question was 7 feet 4 inches in height (Tr. 182), it is respondent's position that it was under no obligation to establish a limited access zone around the wall while it was being constructed.

The court has considered this argument but concludes respondent's interpretation is inconsistent with the overall purpose and intent of the standard which mandates that a limited access zone *be established* and *remain in place until the wall is adequately supported.* This language clearly requires a limited access zone during the initial stages of wall construction when the blocks are being stacked and cemented with mortar regardless of the height of the wall. It is logical to assume that, during this phase of construction and until the mortar dries and sets, the wall would not be "adequately supported" even though the wall includes corners on each end.[5] Accordingly, respondent's argument is rejected and this item will be affirmed.

Repeat Citation No. 2

This item charges respondent with a repeat violation of § 1926.59(e)(1), which provides in pertinent part:

> (e) *Written hazard communication program.* (1) Employers shall develop, implement, and maintain at the workplace, a written hazard communication program for their workplaces which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met . . . .

During the course of his inspection, Anderson requested Robert J. Altenbach, respondent's foreman, to produce the company's hazard communication program. Altenbach produced several material safety data sheets (MSDS) relating to chemicals in use

[5] Anderson testified that "a green masonry wall is not going to be supported even if it has corners on it until the mortar hardens somewhat" (Tr. 120).

on the jobsite but did not provide respondent's written hazard communication program, *i.e.*, a document which specifies how the company intends to implement its hazard communication program, lists the hazardous chemicals in use at the jobsite, etc. (Tr. 46, 58-59). Anderson later determined that respondent did, in fact, have such a program available in its office in Winter Park, Florida, but this office was located approximately twenty miles from the jobsite (Tr. 61, 63-64). Under these facts, the Secretary has established a violation of the cited standard. *Super Excavators*, 15 BNA OSHC 1313, 1991 CCH OSHD ¶ 29,015 (No. 89-2253, 1991).

The Secretary characterizes this violation as "repeat" since respondent was previously cited for a violation of the same standard following an inspection of respondent's operations in 1990 (Tr. 62). This previous citation was not contested and became a final order of the Review Commission by operation of law on July 11, 1990 (Exh. C-5). The Secretary's classification of this violation as "repeat" is proper in view of the foregoing facts. *D & S Grading Co., Inc. v. Secretary of Labor*, 899 F.2d 1145 (11th Cir. 1990).

"Other" Citation No. 3

This item charges respondent with a nonserious violation of § 1926.103(a)(2), which provides that an "approved" respiratory protection device will be provided to and used by employees when exposed to certain contaminants. In this case, Anderson observed an employee of respondent cutting concrete block with a masonry saw. Some dust was produced as a result of this cutting operation, but Anderson conducted no air sampling tests to identify the content of the dust. The employee using the saw was wearing a dust mask which was attached by a single strap (Exh. C-6; Tr. 65-67). Anderson testified there are no "approved" respiratory protective devices which are attached by a single strap (Tr. 70), and respondent's foreman agreed that the device in use was not an "approved" mask (Tr. 148). While Anderson considered this condition constituted a "technical violation" of the cited standard, he concluded it did not present a health risk and proposed a classification of "other" with no penalty assessed (Tr. 69). Respondent offered no evidence to counter the testimony of Anderson, and this item will be affirmed as proposed.

The remaining issue for resolution is an appropriate penalty to be assessed in the case. The Secretary proposes a penalty of $600 for each of the four items charged in serious Citation No. 1 and a $200 penalty for repeat Citation No. 3. In addressing the penalty question, Anderson allowed a 60 percent reduction based upon the size of the company but made no further reductions for good faith or history[6] (Tr. 40). He did, however, assess the gravity and probability factors as "low" for the purpose of keeping "the penalty as low as possible" (*Id.*) and considered his penalty assessment "a little bit lenient" (Tr. 41). As previously noted, this court has concluded some further reduction is appropriate with regard to item 1 of the serious citation, and this proposed penalty will be reduced to $300. The penalty proposals for the remaining items, including the proposal of $200 for the repeat citation, are considered appropriate and will be assessed.

The foregoing will constitute the findings and conclusions required by Rule 52 of the Federal Rules of Civil Procedure.

ORDER

It is hereby ORDERED:

(1) Serious Citation No. 1, items 1 through 4, are affirmed and a total penalty of $2,100 is assessed.

(2) Repeat Citation No. 2 is affirmed and a penalty of $200 is assessed.

(3) "Other" Citation No. 3 is affirmed with no penalty assessed.

/s/ Edwin G. Salyers
EDWIN G. SALYERS
Judge

Date: February 18, 1993

[6] Non-allowance for these two factors was predicated upon the fact that respondent had been issued previous citations within the past three years (Tr. 40).