UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR Complainant, v. METAL RECYCLING CO. Respondent.	OSHRC DOCKET NO. 92-0533

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 May 13, 1993. The decision of the Judge will become a final order of the Commission on June 14, 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 2, 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
Washington, D.C. 20036-3419

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: May 13, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-0533

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

James E. White, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
525 Griffin Square Bldg., Suite 501
Griffin & Young Streets
Dallas, TX 75202

Thomas L. Varkonyi, Owner
Metal Recycling Co.
2505 Texas Ave.
El Paso, TX 79901

Stanley M. Schwartz
Administrative Law Judge
Occupational Safety and Health
Review Commission
Federal Building, Room 7B11
1100 Commerce Street
Dallas, TX 75242 0791

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
ROOM 7B11, FEDERAL BUILDING
1100 COMMERCE
DALLAS, TEXAS 75242-0791

PHONE:
COM (214) 767-5271
FTS 729-5271

FAX:
COM (214) 767-0350
FTS 729-0350

SECRETARY OF LABOR,

Complainant,

v.

METAL RECYCLING COMPANY,

Respondent.

OSHRC DOCKET NO. 92-0533

APPEARANCES:

Michael H. Olvera, Esquire
Dallas, Texas
For the Complainant.

Thomas L. Varkonyi
El Paso, Texas
For the Respondent, *pro se*.

Before: Administrative Law Judge Stanley M. Schwartz

DECISION AND ORDER

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act").

The Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's facility, located in El Paso, Texas, on June 11, 1991.[1] As a

[1]OSHA obtained an anticipatory warrant prior to arriving at the facility based on a 1989 inspection in which entry had been denied. It is found that OSHA followed the proper procedures in this case, and that there were no improprieties in the manner in which the inspection came about or was conducted.

result, a serious citation with seven items was issued. Respondent contested the citation, and a hearing was held on December 15, 1992.[2]

Background

Respondent's business is the purchase and resale of scrap metals and other materials. The facility, roughly depicted in C-1, runs east and west along Texas Avenue and consists of two warehouse buildings joined by a common wall with a doorway. The west building has a basement and also has a storage yard on its west side which is surrounded by a chain link fence topped with barbed wire. The east building has a second floor office area, as well as a loading dock on its east side which is enclosed by another chain link fence topped with barbed wire. At the time of the inspection, Respondent had only three employees; one was a secretary who worked in the office, and the other two were engaged in receiving, sorting and selling scrap materials. During the hearing, the Secretary stipulated to Respondent's dire financial situation and noted his primary concern was with the abatement of the cited conditions. (Tr. 240).

Item 1 - 29 C.F.R. § 1910.24(b)

The standard provides, in pertinent part, as follows:

> Fixed stairs shall be provided for access from one structure level to another where operations necessitate regular travel between levels.

Thomas Nystel, the OSHA industrial hygienist who inspected the facility, testified that the metal steps placed against the east loading dock, as shown in C-2, were not fastened to the dock or the concrete-covered ground below; he measured the steps to be about 40 inches high, and saw them used by employees Lawrence Tucker and Richard Reynolds.[3] (Tr. 13-15; 23; 27-34). Thomas Varkonyi, the company's owner, testified the steps were not

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[2]At the beginning of the hearing, the Secretary withdrew items 2(d), 3(a), 3(b), 7(a) and 7(b), which alleged violations of 29 C.F.R. §§ 1910.37(k)(2), 1910.120(p)(1), 1910.120(p)(8)(i), 1910.1200(f)(5)(ii) and 1910.1001(g)(1)(ii), respectively. The Secretary also amended items 4(a) and 5 to allege nonserious violations with no penalties. (Tr. 6-11).

[3]Neither of these individuals presently works for Respondent; however, Reynolds, who testified at the hearing, stated he used the stairs more than once a day and sometimes used them to transport boxes. (Tr. 179-84).

his and that a construction company which had worked on the property had put them there for its own employees to use and then left them there. He also testified that the steps, which were solid steel and weighed 150 to 200 pounds, were difficult to move. (Tr. 104-09).

Respondent's contention in regard to this item is that the steps did not belong to it. However, it is well settled that an employer is liable for a hazardous condition to which its employees are exposed, even if it did not create the condition. It is clear from the record the steps violated the standard, and Varkonyi himself stipulated they represented a serious fall hazard and that his employees used them. (Tr. 34-35; 109; 181-82). This item is accordingly affirmed as a serious violation.

Turning to the assessment of an appropriate penalty, I note the gravity of the condition was low due to the solid construction and weight of the steps, their relatively low height and their apparently occasional use. I note also that the Secretary, as noted *supra*, stipulated to Respondent's dire financial condition and stated that his primary concern was the abatement of the cited conditions. For these reasons, I conclude that the assessment of a $50.00 penalty is appropriate for this item.[4]

Item 2(a) - 29 C.F.R. § 1910.36(b)(4)

The standard provides, in pertinent part, as follows:

> In every building or structure exits shall be so arranged and maintained as to provide free and unobstructed egress from all parts of the building or structure at all times when it is occupied.

Thomas Nystel testified the door shown in C-3, which was on the south side of the west building, as depicted in C-1, was locked, and that it was a hazard because of the accumulation of paper, cardboard and wood scrap in the building and the lack of any other nearby exits to a public way in case of fire. Nystel said the overhead door in C-2 next to the cited door could have served as an exit had it been open, but that such doors are generally not considered exits due to the effort required to open them. Nystel thought the overhead door was also locked, but did not check to see if it actually was. (Tr. 36-40; 43-44; 109-11; 120-22; 133-43).

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[4]Respondent's financial condition applies equally to the other penalties assessed in this case, *infra*.

Thomas Varkonyi testified the overhead door was 10 feet high and 10 feet wide, that it was opened whenever access to the loading dock was required, that it was operated by pulling a chain attached to a pulley, and that it could have been used as an exit in case of fire. (Tr. 120-21; 127-28; 138-40). Richard Reynolds testified the door was usually closed during the day, but that he had opened it from the inside a few times by pulling the chain. (Tr. 190-91).

Nystel's opinion that the overhead door was not an exit was based on his belief that it was locked and difficult to open. However, he did not check the door to determine if it was locked, and the testimony of Varkonyi and Reynolds indicates it was not and that in case of fire it could have been opened without undue effort by using the chain and pulley. I find the Secretary has not met his burden of proving a violation; therefore, this item is vacated.

Item 2(b) - 29 C.F.R. § 1910.36(b)(6)

The standard provides as follows:

> In every building or structure equipped for artificial illumination, adequate and reliable illumination shall be provided for all exit facilities.

The record shows that an exit sign near the door cited in item 2(a), *supra*, was equipped for artificial illumination but was not activated. Thomas Varkonyi testified the bulb in the sign was a photocell that only turned on when it was dark, and that during the day the overhead fluorescent lighting in the facility, as shown C-6 and C-10, was sufficient to illuminate the sign. He further testified that the sign had a bypass switch which could be used to test the bulb. Thomas Nystel did not dispute Varkonyi's testimony about how the sign worked, and indicated he could not recall the precise illumination in that area; however, in his opinion, the area was not well lit. (Tr. 45-46; 122-27).

It is clear from the foregoing that this citation item was based on Nystel's opinion that the lighting in the area of the exit light was inadequate. However, he indicated he had no definite recollection of the illumination level in that area. Varkonyi, on the other hand, was emphatic that the illumination in the area was sufficient. Based on the record, the Secretary has not established a violation of the standard. This item is accordingly vacated.

Item 2(c) - 29 C.F.R. § 1910.37(h)(1)[5]

The standard provides, in pertinent part, as follows:

> All exits shall discharge directly to the street, or to a yard, court, or other open space that gives safe access to a public way.

The record shows that an exit in the west building led to the west yard, which was filled with materials such as wood, cardboard and barrels containing cutting oil. The record further shows the west yard was surrounded by a chain link fence topped with barbed wire, and that the fence had a gate locked with a padlock. Thomas Nystel testified the condition was hazardous; the gate was blocked by the scrap materials in front of it, and its locked condition would require employees escaping into the yard in case of fire to climb over the fence and the barbed wire. Nystel further testified the materials in the yard were themselves combustible, and that employees trapped in the yard could suffer smoke inhalation, burns or even death. (Tr. 39-40; 43-51; 129-32; 142-43; C-1; C-4-5).

Respondent's contention in regard to this item is that employees could have gotten over the fence in case of fire. (Tr. 129-32). However, that escape was possible does not detract from the serious nature of the hazard, which is clearly demonstrated by the record. This item is accordingly affirmed as a serious violation, and, based on this item's similarity to items 2(e) and 2(f), *infra*, a penalty of $50.00 is assessed.

Item 2(e) - 29 C.F.R. § 1910.176(a)

The standard provides, in pertinent part, as follows:

> Aisles and passageways shall be kept clear and in good repair, with no obstruction across or in aisles that could create a hazard. Permanent aisles and passageways shall be appropriately marked.

Thomas Nystel testified that an aisleway leading from an area in the east building where he saw an employee operating some scales was blocked by an accumulation of materials. He identified C-6 as a photo of the condition, indicated the location of the scales with an arrow, and noted the passageway was in front of and to the right of the cardboard

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[5]Although alleging a violation of 1910.37(b)(1), it is clear from the language of the citation the Secretary's intent was to allege a violation of 1910.37(h)(1). The citation is accordingly amended.

boxes in C-6; he also identified C-7 as a photo of a workbench near the scales. Nystel further testified that access to one of the stairways going to the basement in the west building was blocked by equipment and materials, and that employee Lawrence Tucker told him he had carried materials into the basement for storage; he identified C-9 and C-10 as photos of the condition, and indicated the stairway with an arrow on C-9. Nystel said both conditions were hazardous because employee access to exits could have been impeded in case of fire. (Tr. 51-60; 143-46).

Respondent's contention is that it is not a typical warehouse, that its business requires the accumulation of scrap materials, and that they were stacked as neatly as possible under the circumstances. (Tr. 146-48; 151). However, even taking into account the nature of the business, it is clear the cited areas violated the standard and created a serious hazard. This item is affirmed as a serious violation, and a penalty of $50.00 is assessed.

Item 2(f) - 29 C.F.R. § 1910.176(c)

The standard provides, in pertinent part, as follows:

> Storage areas shall be kept free from accumulation of materials that constitute hazards from tripping, fire, explosion, or pest harborage.

Thomas Nystel testified there was essentially an accumulation of combustible scrap materials and debris throughout the entire facility, which created a fire hazard. He opined that the facility was too small for the amount of materials it held, which in itself created a hazard, and that the disorderly manner in which materials were stored added to the hazard. Nystel said the condition could have been abated by moving some materials out of the facility, by keeping materials in smaller, more orderly piles, and by using metal storage containers instead of cardboard boxes. (Tr. 60-68).

Nystel's testimony is supported by items 2(c) and 2(d), *supra*, and by various of the photos he took of the facility, *i.e.*, C-4-6, C-9-10, and C-12-14. Moreover, Respondent itself stipulated to the combustible nature of the stored materials, and also acknowledged that parts of the facility were overly filled. (Tr. 64-65; 150). Respondent's contention regarding this item would appear to be the same as the one set out in the previous item. That

contention is rejected for the same reasons noted above. This item is affirmed as a serious violation, and a penalty of $50.00 is assessed.

Item 4(a) - 29 C.F.R. § 1910.132(a)

The standard provides as follows:

> Protective equipment ... shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of ... chemical hazards ... encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

The record shows that employee Richard Reynolds was handling used batteries while wearing leather gloves, which, while providing some protection, are not acid resistant and could have resulted in battery acid contacting his skin. (Tr. 23-24; 68-70; 154; 184-87; 206-07; C-15). Respondent contends it provided both leather and rubber gloves and instructed employees to use them when necessary, and that Reynolds' failure to use rubber gloves was unpreventable employee misconduct. (Tr. 70-71; 154-56; 194; 198; 205). To prove this affirmative defense, an employer must show it both established and adequately communicated work rules designed to prevent the violation and that it made efforts to discover violations and enforced the rules when it detected violations. *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1979 CCH OSHD ¶ 23,664 (No. 76-1538, 1979).

Reynolds' testimony tends to show Respondent did, in fact, provide rubber gloves for employee use. (Tr. 186-87; 206-07). His testimony also shows he read and signed R-1, Respondent's company rules, upon hire. (Tr. 194-206). Rule 10 states as follows:

> Safety on the job is taken seriously! You will be provided with hardhats, gloves, overalls, eye protectors, dust masks, etc. It is your responsibility to make sure you wear the equipment when necessary. When finished using any safety equipment, you must return it to its proper place in a clean, ready to use condition. Worn or damaged safety equipment must be turned into the office for immediate replacement. No Exceptions, No Excuses!!

Notwithstanding the foregoing, Respondent presented no evidence of a work rule requiring employees to wear rubber gloves when handling batteries, and Reynolds testified he had never been told to do so. (Tr. 186-87). Reynolds also testified he had never been disciplined for not using safety equipment. (Tr. 209-10). Respondent has not demonstrated

the condition was the result of unpreventable employee misconduct; accordingly, this item is affirmed, as amended, as a nonserious violation with no penalty.

Item 4(b) - 29 C.F.R. § 1910.133(a)(1)

The standard provides as follows:

> Protective eye and face equipment shall be required where there is a reasonable probability of injury that can be prevented by such equipment. In such cases, employers shall make conveniently available a type of protector suitable for the work to be performed, and employees shall use such protectors. No unprotected person shall knowingly be subjected to a hazardous environmental condition. Suitable eye protectors shall be provided where machines or operations present the hazard of flying objects, glare, liquids, injurious radiation, or a combination of these hazards.

The record shows that Richard Reynolds had placed a used battery on a battery charger and was proceeding to charge it without wearing any eye or face protection; according to Thomas Nystel, the battery could have exploded and resulted in corrosive material contacting Reynolds' eyes and face and causing serious injury, especially to the eyes. (Tr. 23-24; 71-74; 181-88).

Respondent's contention is that it provided eye and face protection and instructions about using it, and that Reynolds' failure to use protection was unpreventable employee misconduct. (Tr. 72-73). However, the criteria for establishing this defense are set out in the preceding discussion, and Respondent presented no evidence of a work rule requiring employees to use eye and face protection when charging batteries. Moreover, Reynolds testified that no eye protection was provided, although he noted that gloves and a "shroud" were provided to protect against spills and that the company secretary had told him to use eye protection when moving barrels containing liquid. Reynolds also testified he had never been disciplined for not wearing safety equipment. (Tr. 186-87; 209-10). Respondent has not demonstrated the condition was the result of unpreventable employee misconduct, and this item is affirmed as a serious violation.

In regard to an appropriate penalty for this item, Reynolds testified he charged batteries only "a couple of times" during the four to five months he worked for Respondent.

(Tr. 180; 184-85). Having considered the statutory factors, it is concluded that a penalty of $50.00 is appropriate for this item.

Item 4(c) - 29 C.F.R. § 1910.151(c)

The standard provides as follows:

> Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

The record shows the battery charger was in the northeast area of the east building and about 30 feet from the restroom located in the southeast corner of the west building; there was a sink in the restroom, and a shower facility and a water fountain in the same area. Thomas Nystel opined none of these was suitable as an eyewash facility. He also indicated the water facilities were too far away, and noted an employee would have to go around a corner and through a doorway to reach them; however, he said the path between the facilities and the charger was free of debris. (Tr. 74-77; 160-62; 219-20; C-1).

The Commission has held that a standard shower may be a suitable eyewash facility, and, moreover, that water facilities within a reasonable distance of the work area comply with the standard. *E.I. du Pont de Nemours & Co., Inc.*, 10 BNA OSHC 1320, 1982 CCH OSHD ¶ 25,883 (No. 76-2400, 1982); *Gibson Discount Center*, 6 BNA OSHC 1526, 1978 CCH OSHD ¶ 22,669 (No. 14657, 1978). While the facilities in this case were adequate, their 30-foot distance from the charger was not reasonable, particularly since employees would have to go around a corner and through a doorway to reach them. This item is affirmed as a serious violation, and, based on the factors above, a $50.00 penalty is assessed.

Item 5 - 29 C.F.R. § 1910.157(g)(1)

The standard provides as follows:

> Where the employer has provided portable fire extinguishers for employee use in the workplace, the employer shall also provide an educational program to familiarize employees with the general principles of fire extinguisher use and the hazards involved with incipient stage fire fighting.

Respondent does not dispute the applicability of the standard, but contends it provides the required training. In support of this contention, it presented the testimony of

a recently-hired employee who stated he had been trained in fire extinguisher use and had signed R-4, a certificate to that effect. (Tr. 211-15). However, Thomas Nystel testified the employees at the time of the inspection told him they had not been trained in fire extinguisher use. (Tr. 78-79). Moreover, Richard Reynolds testified that he had received no fire extinguisher training and that he could not recall signing a document like R-4. (Tr. 188; 202). Based on the record, it can only be concluded Respondent did not provide the required training at the time of the inspection. This item is affirmed, as amended, as a nonserious violation with no penalty.

Item 6 - 29 C.F.R. § 1910.305(g)(2)(ii)

The standard provides, in pertinent part, as follows:

Flexible cords shall be used only in continuous lengths without splice or tap.

Thomas Nystel testified that an extension cord being used to power an electric fan was spliced at both ends. He identified C-18 as a photo of the cord on a reel showing the main body of the cord spliced to the female end, which was a different color than the rest of the cord. Nystel noted the black electrical tape used for the splice was unraveling, and that the cord was hazardous; current could leak through the splice, which, upon contacting an employee, could cause electrical burns or death. (Tr. 80-84; 168-72).

Respondent contends the taped area was not a splice but a means of holding the cord on the reel. (Tr. 170-71). This contention is rejected, since Nystel unequivocally testified he examined the cord closely and that it was definitely spliced. (Tr. 80-82; 170-71). Alternatively, Respondent contends the splice was not hazardous as it had several layers of electrical tape around it. (Tr. 172-75). However, Nystel's testimony, which was credible and convincing, was that the tape was unraveling and that the splice was a serious hazard. (Tr. 81; 172). This item is affirmed as a serious violation, and a penalty of $100.00 is assessed.

Conclusions of Law

1. Respondent, Metal Recycling Company, is engaged in a business affecting commerce and has employees within the meaning of § 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. §§ 1910.24(b), 1910.37(h)(1), 1910.151(c), 1910.176(a), 1910.176(c), 1910.133(a)(1) and 1910.305(g)(2)(ii).

2. Respondent was in nonserious violation of 29 C.F.R. §§ 1910.132(a) and 1910.157(g)(1).

3. Respondent was not in violation of 29 C.F.R. §§ 1910.36(b)(4), 1910.36(b)(6), 1910.37(k)(2), 1910.120(p)(1), 1910.120(p)(8)(i), 1910.1001(g)(1)(ii), and 1910.1200(f)(5)(i).

Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Items 1, 2(c), 2(e), 2(f), 4(b), 4(c) and 6 of citation number 1 are AFFIRMED as serious violations. A penalty of $50.00 is assessed for each of these items, except for item 6, for which a penalty of $100.00 is assessed.

2. Items 4(a) and 5 of citation number 1 are AFFIRMED as nonserious violations, and no penalties are assessed.

3. Items 2(a), 2(b), 2(d), 3(a), 3(b), 7(a) and 7(b) of citation number 1 are VACATED.

Stanley M. Schwartz
Administrative Law Judge

Date: MAY -3 1993