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# OCCUPATIONAL SAFETY & HEALTH REPORTER

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THE BUREAU OF NATIONAL AFFAIRS, INC.


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## SECRETARY OF LABOR v. SIMPSON, GUMPERTZ & HEGER INC.

**U.S. Court of Appeals for the First Circuit**

Decision affirming, on other grounds, Occupational Safety and Health Review Commission's dismissal of citation against employer (15 OSHC 1851).

SECRETARY OF LABOR, Petitioner v. SIMPSON, GUMPERTZ & HEGER INC., and OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, Respondents, Docket No. 92-2237, Aug. 20, 1993.

Bruce Justh, U.S. Department of Labor, Washington, D.C., for petitioner.

David J. Hatem, Boston, Mass., for Simpson, Gumpertz & Heger Inc.

Before Breyer, Chief Judge; and Selya and Stahl, Circuit Judges.

### STANDARDS

**Construction—Design Engineers—Applicability—Employees ▸5.103 ▸110.0761 ▸140.055 ▸85.01**

Secretary of labor's interpretation that engineering firm can be held liable under OSHA construction standards even though it did not have any employees at construction site is unreasonable; accordingly, summary judgment in favor of engineering firm is affirmed.

*Full Text of Decision*

STAHL, *Circuit Judge.* In this appeal, the Secretary of Labor ("the Secretary") challenges a decision of the Occupational Safety and Health Review Commission ("the Commission") granting summary judgment[1] in favor of appellee Simpson, Gumpertz & Heger, Inc. ("SGH"). We affirm.

### *I.*
### *Standard of Review*

We review the Commission's decision to determine whether its factual findings are supported by substantial evidence in the record, 29 U.S.C. § 660(a), and whether its legal conclusions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). *See also National Eng'g & Contracting Co.* v. *Occupational Safety & Health Admin.*, 928 F.2d 762, 767 [14 OSHC 2162] (6th Cir. 1991). In making these determinations, we must be mindful " 'that an agency's construction of its own regulations is entitled to substantial deference.' " *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, —, 111 S. Ct. 1171, 1175 [14 OSHC 2097] (1991) (quoting *Lyng* v. *Payne*, 476 U.S. 926, 939 (1986) ). Where the meaning of a regulation is ambiguous, the reviewing court should give effect to the agency's reasonable interpretations, i.e., interpretations which " 'sensibly conform[] to the purpose and wording of the regulation[] . . . . ' " *Id.* at —, 111 S. Ct. at 1175 (citation omitted) (quoting *Northern Indiana Pub. Serv. Co.* v. *Porter County Chapter of Izaak Walton League of America, Inc.*, 423 U.S. 12, 15 (1975) ). In contrast, no deference is warranted where the agency's interpretation is inconsistent with the wording of the regulation. *Id.* at —, 111 S. Ct. at 1180 ("[W]e emphasize that the reviewing court should defer to the Secretary only if the Secretary's interpretation *is* reasonable.") (emphasis in original).

### *II.*
### *Factual Background*

Viewing the record in a light most favorable to the Secretary, we summarize the relevant facts. The events surrounding this litigation arise out of the construction of the Fuller Laboratories Building ("the project") at Worcester Polytechnic Institute ("WPI") in Worcester, Massachusetts. Sometime in 1987, WPI, the owner of the project, hired Payette Associates, Inc. ("Payette"), an architectural firm, to serve as project architect. In June 1987, SGH, an engineering firm located in Arlington, Massachusetts, contracted with Payette to perform certain structural engineering services in connection with the project. The general contractor for the project was Francis Harvey & Sons, Inc. ("Harvey").

The building structure was to consist of five floors of poured concrete placed over a base of steel and temporary metal decking. As general contractor, Harvey was responsible for generating a set of "shop drawings" for the metal decking indicating, *inter alia*, any shoring necessary to support the decking during the pouring of the concrete. As design engineer, SGH had a duty to review the shop drawings submitted by Harvey for conformance with the project's design concepts and contract specifications.[2]

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[1] The Commission's Rules of Procedure incorporate by reference Fed. R. Civ. P. 56. *See* 29 C.F.R. § 2200.61 (1992).

[2] With the exception of a few provisions added by the parties, SGH's contract with Payette consisted entirely of the standard form language contained in a

On or about July 9, 1988, Harvey submitted the shop drawings of the metal decking to SGH for review. In reviewing those shop drawings, SGH made various notations on the drawings indicating potential trouble spots. One such notation suggested that additional shoring be placed in the area adjacent to the building's elevator shaft.

According to the shop drawings, an area on floor 2 of the building was to be composed of metal decking, four and three-quarters inches of concrete, a layer of insulation, and another three inches of concrete topping ("the multi-layered area"). The drawings did not indicate, however, the amount of time that should elapse between the first and second pours of concrete in this area. SGH made no notations or revisions concerning the indicated shoring of the metal decking in the multi-layered area.

On December 13, 1988, Harvey's superintendent, Mr. Dwight Mitchell, began pouring the first layer of concrete in the multi-layered area. He planned to pour the first layer of concrete, place the layer of insulation, and pour the second layer of concrete topping in one day. After the first layer of concrete was poured in the multi-layered area, Mitchell noticed that a section of the metal decking in a different area of floor 2 was beginning to sag. Concerned about the amount of deflection, Mitchell telephoned Paul Kelley, SGH's project manager, at Kelley's office in Arlington, Massachusetts. Mitchell informed Kelley of the deflection he had observed and explained his plan for completing the floor that day. When told that the amount of deflection was approximately three- eighths to one-half inch, Kelley stated that that amount of deflection was "normal."

Mitchell then mentioned the multi-layered area, and Kelley asked him how he planned to proceed. Mitchell explained that he intended to pour both layers of concrete in one day. According to Mitchell, Kelley "thought for a minute" and told him "I don't see any problem with it . . . ." Mitchell testified that, as a result of this conversation, he "felt assured that it was all safe to just go ahead as we had planned on doing . . . ."

At some time after this conversation, Mitchell began pouring the second layer of concrete in the multi-layered area. The metal decking in the multi-layered area, however, was not properly shored and could not support the weight of both layers of wet concrete. As a result, the metal decking in that area collapsed, injuring five workers. Importantly, SGH had no employees at the worksite.[3] On March 13, 1989, the Secretary issued a citation to SGH pursuant to 29 C.F.R. § 1926.703(a)(1),[4] for failure to shore adequately a lateral load. The Secretary proposed a $1000 penalty for the alleged violation. SGH contested the citation in a letter to the Department of Labor dated April 12, 1989. On June 7, 1989, the Secretary then filed a complaint against SGH before the Commission, requesting that the citation and proposed penalty be affirmed.

On September 24, 1990, SGH filed a motion for summary judgment, arguing that the citation should be vacated. On November 27, 1990, the administrative law judge ("ALJ") heard oral argument, and on February 26, 1991, granted the motion and vacated the citation. Subsequently, on April 11, 1991, the Secretary filed a petition for review before the Commission. The Commission heard oral argument on May 28, 1992, and on August 28, 1992, issued a lengthy decision affirming the ALJ. This appeal followed.

## *III.*
## *Discussion*

Congress enacted the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("OSHA"), to "assure so far as

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document published by the American Institute of Architects. SGH's contract specified, *inter alia*, that SGH would not be responsible for the "construction means, methods, techniques, sequences or procedures, for safety precautions and programs in connection with the [w]ork . . . ." Rather, the contract assigns those duties to the general contractor: "The [c]ontractor shall supervise and direct the [w]ork, using his best skill and attention. He shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the [w]ork under the [c]ontract."

[3] The record reveals that SGH employees visited the construction site on a periodic basis to conduct inspections and attend meetings.

[4] 29 C.F.R. § 1926.703(a)(1) provides:

> § 1926.703 Requirements for cast-in-place concrete.
> (a) General requirements for formwork.
> (1) Formwork shall be designed, fabricated, erected, supported, braced and maintained so that it will be capable of supporting without failure all vertical and lateral loads that may be reasonably anticipated to be applied to the formwork. Formwork which is designed, fabricated, erected, supported, braced and maintained in conformance with the Appendix to this section will be deemed to meet the requirements of this paragraph.

The Secretary also issued a citation to SGH pursuant to 29 C.F.R. § 1926.703(a)(2) for failure to have the plans for formwork, including all revisions, available at the jobsite. The Secretary has, however, withdrawn this citation.

possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources[.]" 29 U.S.C. § 651(b). To that end, OSHA placed primary responsibility on employers, those individuals who oversee and control the work environment, to achieve compliance with its standards and insure a safe workplace. *See* S. Rep. No. 1282, 91st Cong., 2d Sess. 9 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5177, 5186 ("Employers have primary control of the work environment and should insure that it is safe and healthful.").

Pursuant to OSHA, an employer's duties flow from two sources. First, OSHA imposes a general duty upon each "employer"[3] to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees[.]" 29 U.S.C. § 654(a)(1). Second, OSHA imposes a specific duty upon employers to abide by the occupational safety and health standards promulgated by the Secretary. *See* 29 U.S.C. § 654(a)(2).[4]

The Secretary has promulgated occupational safety and health standards, otherwise known as "general industry standards." *See* 29 C.F.R. Part 1910 (1992). The Secretary has also enacted industry-specific standards, which, as authorized by the Act, *see* 29 U.S.C. § 652(10), are borrowed from previously enacted federal statutes and regulations. 29 C.F.R. § 1910.12-.16 (1992).

Indeed, shortly after the Act became effective, the Secretary summarily adopted a group of federal standards for the construction industry that had previously been promulgated under the Construction Safety Act of 1969, 40 U.S.C. § 333. *See* 29 C.F.R. Part 1926 (1992). 29 C.F.R. § 1910.12(a) defines the regulatory universe to which these construction standards apply:

> The [Construction Safety Act] standards prescribed in part 1926 of this chapter are adopted as occupational safety and health standards under section 6 of Act and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work. Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph.

In the proceedings below, the parties characterized the dispositive issue in the case as whether SGH's employees were engaged in "construction work" as defined by the regulation.[7] Relying upon previous Commission precedent, *see Skidmore, Owings & Merrill*, 5 BNA OSHC 1762 (1977), the Commission held that design professionals could only be found liable under Part 1926 to the extent that they exercise "substantial supervision" over the "actual construction." The Commission found that SGH's actions could not, even when viewed in a light most favorable to the Secretary, constitute "substantial supervision." It therefore affirmed the ALJ's decision to grant SGH's motion for summary judgment.

After carefully reviewing the record, we agree that SGH was entitled to summary judgment. However, we base our conclusion on grounds different than those relied upon below. *See Resare v. Raytheon Co.*, 981 F.2d 32, 44–45 n.30 (1st Cir. 1992) (noting that we are free to affirm decision below "'on any ground supported in the record even if the issue was not pleaded, tried or otherwise referred to in the proceedings below'") (quoting *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 783 n.8 (1st Cir. 1990)).

The Secretary maintains that SGH can be found liable under Part 1926 even though it had *no* employees at the construction site. In light of the plain meaning of 29 C.F.R. § 1910.12(a), we find such an interpretation unreasonable.

Section 1910.12(a) requires "each employer" to "protect the employment and *places of employment of each of his employees* . . . ." (emphasis added). The dispositive question, in our opinion, is whether the construction site at WPI was a "place[] of employment" which SGH had a duty under OSHA to protect. The record reveals that SGH employees were not on the jobsite on a daily or even weekly basis. SGH did not have an office or a trailer at the site. On the date of the accident, there were no SGH employees on the site, and when the conversation took place between Kelley and Mitchell on that morning, Kelley was at his office in Arlington, Massachusetts. Under these circumstances, we do

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[3] As defined in 29 U.S.C. § 652(5), an "employer" is "a person engaged in a business affecting commerce who has employees . . . ."

[4] 29 U.S.C. § 654(a)(2) provides that "[e]ach employer . . . shall comply with occupational safety and health standards promulgated under this chapter."

[7] The phrase "construction work" is defined as "work for construction, alteration, and/or repair, including painting and decorating." 29 C.F.R. § 1910.12(b).

not think that the WPI construction site is a "place[] of employment" which SGH had a duty under OSHA to protect.[8]

In our opinion, adoption of the Secretary's interpretation would expand the meaning of the phrase "places of employment" beyond any reasonable boundaries. For example, suppose that a construction equipment leasing company sends an employee to the site to inspect or perform maintenance upon a piece of its leased equipment, and that the employee gives gratuitous advice to the user of the equipment which allegedly causes an on-site accident. Under the Secretary's interpretation, the leasing company could be liable under an OSHA provision directing that it provide a safe working environment for *its own* employees. Simply put, we cannot, given the plain language of the regulation and the dictates of common sense, accept such an expansive notion of liability.[9]

Finally, we have not found, nor has the Secretary cited, any cases supporting the Secretary's interpretation of the phrase "places of employment." Indeed, in every case cited by the Secretary, the employer had employees at the actual construction site. Providing as much deference as possible to the Secretary's interpretation, we still do not see how one could reasonably read the Department's regulation as he has done. If the Secretary believes broader liability is appropriate, the solution is simply to amend the regulation so that it includes places where the employer's own employees have never worked—assuming, of course, he has the authority to do so under OSHA (a matter on which we express no view). It is not to ignore the regulation's present, more restrictive, language. The Commission's decision is ***affirmed***.

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## SECRETARY OF LABOR v. CONSOLIDATED CONSTRUCTION INC.

**Occupational Safety and Health Review Commission Judge**

SECRETARY OF LABOR, Complainant v. CONSOLIDATED CONSTRUCTION INC., Respondent, OSHRC, Docket No. 89-2839, June 7, 1993.

Tedrick Housh, U.S. Department of Labor, Kansas City, Mo., for complainant.

Kenneth D. Robinson, Boulder, Colo., for respondent.

Administrative Law Judge Benjamin R. Loye.

### REMEDIES

**Attorney's Fees—Equal Access To Justice Act—Reasonableness ▸70.80**

Hours submitted by employer's attorney for time spent for trial preparation and post-hearing activities are deemed to be excessive, and, therefore, reasonable hours are determined by administrative law judge; using these figures, reasonable attorneys' fees, using lodestar method, along with costs, are awarded to employer, pursuant to Equal Access to Justice Act.

*Digest of Judge's Report*

[*Digest*] The sole issue is the amount of attorneys' fees and costs to be awarded to Consolidated Construction Inc. under the Equal Access to Justice Act. This matter was remanded from the Occupational Safety and Health Review Commission with instructions to determine the reasonableness of Consolidated's fee petition and to award the company fees, to the extent the expenses were incurred during or after the May 14, 1990, hearing.

The citation litigated at the hearing alleged a serious violation of 29 CFR 1926.651(c), with a proposed $810 penalty (14 OSHC 2205).

To arrive at an appropriate award, a "lodestar" must be determined: an hourly fee multiplied by the reasonable hours expended. The complexity and novelty of the issues involved must be considered, as well as other factors such as the prevailing rate for similar services, and the value of the services provided. The judge must then weigh the petitioner's submission of hours expended against his own knowledge and experience of the time the case is likely to have required.

Although the law governing the case was not complex, a seven-day trial, resulting in over 400 pages of transcript, was needed to resolve a factual dispute between the Occupational Safety and Health Administration's compliance officer and Consolidated's experts regarding the danger of moving ground in the cited excavation.

Consolidated has documented attorney and expert witness fees of over $55,000. Of

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[8] We should make perfectly clear that SGH might well have breached some other legal duty in assuring Harvey's crew that it was safe to pour the concrete. We express no view on this point. Our holding, rather, is a narrow one: that OSHA regulation 29 C.F.R. § 1910.12(a), did not require SGH to maintain a safe construction site at WPI.

[9] We also note that the Secretary's interpretation might have the perverse result of causing an employer to discourage his/her employees from making on-site safety inspections for fear of being subjected to OSHA liability.

that amount, $17,885.46 were incurred after May 14, 1990. This amount is considered excessive compared to what is deemed necessary to adequately defend against the citation.

Sixty hours is deemed a reasonable amount of time to spend for a hearing, transcript review, and for post-hearing brief preparation for a 29 CFR 1926.651(c) violation. A lodestar of 60 hours multiplied by $75 per hour, for a total of $4,500, is assigned. Itemized costs and expenses of $1,623.09 are allowed. Expert witness fees of 48 hours at $80 per hour, or $3,840, are considered reasonable. Therefore, a total of $9,963.09, in trial and post-trial fees is awarded.

Additionally, the time spent preparing the EAJA application is also compensable, but the time spent must be deemed reasonable. Consolidated's attorney submitted a four-page EAJA application and a supporting memorandum, reiterating the trial evidence, which had already been set forth in Consolidated's post-hearing brief. The petition-for-review-of-the-denial-of-the-initial application also mainly summarized the evidence. Consolidated's attorney also submitted a supplemental itemization of costs pursuant to the preparation of these pleadings. Consolidated's attorney states that it spent 89.9 hours and $445.19 in costs.

This court holds that the hours submitted exceeded what was necessary to adequately prepare this issue, and finds 50 hours to be reasonable. A total of $3,750 in fees, and $445.19 in costs, will be awarded.

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## SECRETARY OF LABOR v. NATIONAL ENGINEERING & CONTRACTING CO.

**Occupational Safety and Health Review Commission Judge**

SECRETARY OF LABOR, Complainant v. NATIONAL ENGINEERING & CONTRACTING CO., Respondent, OSHRC Docket No. 92-1745, June 7, 1993.

Janice L. Thompson, U.S. Department of Labor, Cleveland, Ohio, for complainant.

Kent W. Seifried, Newport, Ky., for respondent.

Administrative Law Judge Nancy J. Spies.

### INSPECTION

**1. Validity Of Warrant—No Vindictive Prosecution ▸35.14 ▸35.05**

Employer's subpoena for OSHA compliance officer who applied for inspection warrant was properly quashed because warrant application was valid and employer failed to establish that there were reasons to go beyond "four corners" of application; furthermore, employer's vindictive prosecution defense is rejected because it was not raised until post-hearing brief and employer failed to establish that inspecting OSHA compliance officer or agency had any motive for being vindictive.

### NOTICE OF CONTEST

**2. Review Commission Receipt—Timeliness—Complaint—Timeliness ▸55.103 ▸40.073**

Secretary of labor's compliance with Occupational Safety and Health Review Commission's rule to forward notice of contest within 15-working days satisfied OSH Act's requirement for secretary to "immediately advise" commission, and fact that secretary filed his complaint two days late is excused because it was due to clerical error and employer suffered no prejudice; accordingly, employer's motions to dismiss case are rejected.

### ELECTRICAL HAZARDS

**3. Facsimile/Telephone Machine—Failure To Ground ▸245.06**

Even though facsimile/telephone machine had plastic exterior and was equipped with three-prong plug, use of "cheater" plug interrupted path to ground in violation of 29 CFR 1926.404(f)(6); therefore, serious citation item is affirmed but reclassified as other-than-serious.

**4. Flexible Cord—Lack Of Strain Relief—Failure To Tag ▸245.151**

Fact that primary insulation as well as outer insulation were pulled away from flexible cord's wires near female plug end established that cord lacked strain relief in violation of 29 CFR 1926.405(g)(2)(iv); and employer's failure to tag-out or remove cord, which was lying in middle of bridge where employees were working, established violation of 29 CFR 1926.20(b)(3).

### STEEL ERECTION

**5. Rebar—Failure To Guard ▸260.08**

Even though employee was working on same level as unguarded rebar, fact that he

could fall into 30-inch high rebar established serious violation of 29 CFR 1926.701(b).

*Digest of Judge's Report*

[*Digest*] National Engineering & Contracting Co. was the general contractor for a construction project which replaced an interstate bridge in Cleves, Ohio. National was inspected by the Occupational Safety and Health Administration, and was cited for four alleged serious violations of the Occupational Safety and Health Act.

Before consideration of the alleged violations, National raised several preliminary issues.

[1] National argued that the warrant OSHA obtained prior to inspecting its work site was invalid and unconstitutional, and the company sought to have the complaint dismissed, or to suppress evidence gained during the inspection. National also argued that as part of its challenge of the warrant, it should have been able to inquire into matters beyond the "four corners" of the warrant.

The warrant was obtained by an OSHA compliance officer who did not conduct the inspection, but was later subpoenaed by National. The secretary of labor moved to quash the subpoena, arguing that challenges to the validity of a search warrant are limited to review of the materials submitted to the magistrate. Unless that evidence was intentionally or recklessly tainted by fraud or misrepresentation, inquiry beyond the "four corners" of the warrant is not permitted, the secretary argued.

Because National failed to show that the application to the magistrate was false, it was unable to inquire into matters that went beyond the "four corners" of the warrant, and National's subpoena of the OSHA compliance officer was therefore properly quashed.

The anticipatory warrant was obtained in accordance with 29 CFR 1903.4, upon the secretary's showing of probable cause. An anticipatory warrant may be sought even when there is no absolute certainty that it will be needed. Under 29 CFR 1903.4, OSHA needs only to include a statement of a past practice by the employer of refusing warrantless inspections.

The secretary established probable cause through application of his administrative plan for programmed inspections. This plan has withstood previous judicial scrutiny. It is unnecessary to rule on the secretary's alternate arguments for justifying entry onto the work site. The warrant was validly obtained and issued.

Specifically, despite National's argument to the contrary, the warrant application did state that the area director and the regional solicitor had determined that a warrant was necessary.

Furthermore, National argued that the compliance officer who submitted the application lacked personal knowledge about the random selection process used by the University of Tennessee, under contract with OSHA, to select employers for random inspections. However, such personal knowledge is not necessary to validate the warrant. The compliance officer's reasonable acceptance that the university randomly selected work sites for inspection is sufficient and was not specifically challenged by National.

The company also challenged the application's statement that the work site had not previously been inspected. This was a true statement. National's alleged confusion regarding a discrepancy in the inspecting compliance officer's notes appears disingenuous and would not be sufficient to go beyond the warrant's application.

Finally, the company argued that the application misstated that the company had a policy of forbidding OSHA inspections without an inspection warrant. National's written policy along with the agency's knowledge that the company had in some, if not all, instances required a warrant prior to entry was sufficient for OSHA's characterization of National's policy.

National attempted to raise the defense of vindictive prosecution for the first time in its post-hearing brief. However, an amendment to National's answer to add the defense was not appropriate. Therefore, the defense was stricken as fully explained in an order dated March 2, 1993.

Vindictiveness results where there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or a punitive animus towards a defendant because it exercised a specific legal right. National argued the legal right it exercised was its constitutional right to a pre-inspection warrant.

To prove its defense, National relies upon the testimony of a former National employee, who said he saw the inspecting OSHA compliance officer videotaping a new saw with a nicked cord. The employee said he uttered a profanity, then told the compliance officer that the saw was only three days old, and asked the compliance officer to "[g]ive us a break." According to the employee, the compliance officer responded, "I am going to nail this [expletive deleted] company for everything I can."

For the reasons expounded below, the comment alleged to have been made by the OSHA compliance officer is not deemed to be credible.

In weighing credibility, surrounding circumstances were considered. If the compliance officer had truly intended to "nail" the company "for everything I can," then he would have cited National for the nicked cord, but this item was not cited. The compliance officer is a trained investigator who has conducted over 1,300 OSHA inspections. National alleged no other comments or incidents of unprofessional conduct by the compliance officer.

Since the compliance officer's purported animus would arise from National's insistence on a warrant, the compliance officer's actions in serving the warrant are examined here. The compliance officer sought to avoid using the anticipatory warrant, and accommodated National's requests for delays over a three-hour period both before and after he served the anticipatory warrant. He had no objections to continuing to wait a reasonable time.

His demeanor as a witness was completely compatible with the accommodating course he pursued prior to beginning the inspection. These are not the signs of a vindictively motivated investigator.

The employee's demeanor was also observed. Although he claimed to have been deeply shocked by the alleged statement, he initially told no one from National. He first brought up the alleged comment when he spoke to National's attorney after receiving a subpoena from the secretary to testify in the case. He did not report the alleged comment to the secretary's counsel, although a complaint to the compliance officer's agency would have been appropriate.

It is less likely that the compliance officer's profanity would deeply shock the employee, since the employee testified to using profanity first. Also, the employee's memory of other details of his conversation with the compliance officer was foggy, which brings into question why the compliance officer's statement would be something "you don't forget."

While the former employee does not currently work for National, this does not necessarily negate a motive to fabricate such a statement. As the former employee explained in how he heard of the job at National from a friend, in his trade, one obtains work by soliciting it. He is currently unemployed. He may have hoped that by helping National in this case, he would have future good will with the company.

Based upon the observed demeanor of both witnesses and the circumstances surrounding the alleged comment, no credibility is given to the comment, and National's defense of vindictive prosecution fails.

Furthermore, the fact that the handling of evidence in this case by the compliance officer and OSHA was shoddy—taped over and miscopied videotapes and lost photographic film—does not by itself establish that OSHA was vindictive toward National.

The fact that the secretary earlier withdrew three citation items also does not indicate vindictiveness. Withdrawal of the citation items meant that National did not have to defend itself against the allegations. It is not unusual for citation items to be withdrawn as a result of a settlement or litigation.

Finally, there was nothing in the compliance officer's calculation of proposed penalties to establish vindictiveness. The compliance officer used an OSHA computer printout for National to determine its past history credit. While the compliance officer did not check to see whether all the violations listed were final orders, any final order violation would have resulted in the same percentage credit being given to National. Therefore, it was not necessary to determine whether all the violations were final orders.

[2] Next, National argued that the transmittal of its notice of contest to the Occupational Safety and Health Review Commission was not sufficiently timely, and, therefore, the case should be dismissed. OSHRC Rule of Procedure 2200.33 gives the secretary 15 working days after receiving a notice of contest to notify the commission.

While the evidence established that the secretary transmitted the company's notice of contest after 13 days, National argued that the transmittal was not as soon as intended by the "immediately advise" language of Section 10(c) of the OSH Act. The commission is authorized by the act to enact regulations to promote the orderly transaction of its proceedings.

The commission's rule giving the secretary 15-working days is a reasonable interpretation of the statute's requirement to "immediately advise." The secretary was in compliance with the commission's procedural rule. National's challenge is, therefore, rejected.

As a final preliminary issue, National moved for dismissal, based upon the fact that the secretary filed his complaint two days late.

An OSHA clerical employee intended to transmit the notice of contest to the review

commission on June 24, 1992, but it was inadvertently mailed between June 17 and June 19, and received on June 22. The complaint was mailed on July 24. National does not allege it suffered any prejudice as a result of this two-day delay. Since the delay was caused, not by contumacious conduct, but by inadvertent clerical error, National's motion for dismissal is denied.

At the close of the secretary's case, National moved for a directed verdict. The motion was considered as one made under Rule 41(b) of the Federal Rules of Civil Procedure, and was preliminarily denied. National declined to present evidence and rested. The decision reached in this case reflects the state of the record. The secretary's case was not overwhelming.

**[3]** National was cited for an alleged serious violation of 29 CFR 1926.404(f)(6), which requires that the path to ground from circuits, equipment, and enclosures shall be permanent and continuous.

The secretary alleged that the violation occurred when National used an improperly grounded facsimile/telephone machine.

National's employees used the fax/telephone unit in its job trailer. The equipment had a three-pronged plug, and the third prong was the grounding pin. A three-pronged receptacle was available in National's trailer for the unit. The circuit was energized at 110 volts.

A two-pronged "cheater," or adapter plug, which allows a three-pronged plug to be plugged into a two-holed outlet, was used. While National disputed the existence of a hazard, the existence of a standard presumes that a hazard is present when the terms of the standard are not met. Although the exterior of the machine was plastic—thereby preventing a shock in the event of a short—the compliance officer said a shock might be possible when paper was being changed or unjammed.

National said that employees could have unplugged the unit before opening it, and thus would not be shocked, and argued that the secretary failed to prove that employees would leave the unit energized when unjamming or changing the paper or fixing the machine. However, National had the burden of establishing that employee training or some special mechanical means would prevent the unit from being energized when performing these tasks, and this burden was not met.

Furthermore, the hazard could have been discovered through the exercise of reasonable diligence. A visual inspection of the plugged unit would have readily disclosed its condition.

The violation is affirmed, but classified as other-than-serious, because there was no showing of a substantial probability that death or serious physical harm could result from the violative condition. No penalty is assessed.

**[4]** National was cited for an alleged serious violation of 29 CFR 1926.405(g)(2)(iv), which requires flexible cords to be connected to devices and fittings so that strain relief is provided which will prevent pull being directly transmitted to joints and or terminal screws.

National used generators to provide temporary power on the bridge project, and employees used extension cords to power tools from the generators. At the time of the inspection, a 50-foot extension cord, with the outer insulation pulled away at the plug end, was coiled in the center of the bridge.

The cord's outer insulation was pulled away from the female plug end. Internal wires were exposed from one to one-half inch before the cord was connected to the plug. Each of the internal wires was directly connected into the plug. The cord was not being used.

The compliance officer testified that he observed no strain relief for the terminal screws in the female plug. The compliance officer at first estimated the cord was 50 feet from the nearest work station, but later said it was 100 feet from where work was being performed.

National argued that although the plug was pulled away from the outer insulation of the cord, this did not show a lack of strain relief, and said the plug itself served as a flexible connecting device and strain relief. National also argued that because the connectors were tight, the wires were not pulling loose from the terminal screws, and noted that there would probably be sufficient slack in the cord to prevent it from being pulled.

However, with the primary insulation pulled away, it is obvious that there was no strain relief mechanism attached outside of the plug. National has not provided factual evidence that there may have been strain relief in the plug. Without strain relief, it becomes more likely that the wires could be pulled loose. Whether the cord is of sufficient length to give slack on the line is not meaningful. Strain relief is required.

Employee exposure may be shown if employees had access to the violative conditions, and here, because the extension cord in question was coiled in the middle of the bridge about 100 feet from the workstation, the cord was available for use. Employees might logically be expected to use the cord,

and National presents no information which might militate against that conclusion. National alleges that the cord was removed from its place of operation and isolated from use, but presents no supporting facts.

The violation is affirmed but reclassified as other-than-serious. No penalty is assessed.

National was also cited for an alleged serious violation of 29 CFR 1926.20(b)(3), which provides, in pertinent part, that the use of any machinery, tool, material, or equipment which is not in compliance with OSHA standards is prohibited, and must either be identified as unsafe by tagging, or be physically removed.

The extension cord discussed above did not have strain relief and was defective. It was available for employee use. Although National argued that the cord was cast "off to the side" and isolated from use, this statement was not supported. The defective cord was not tagged, removed, or otherwise taken from service.

The violation is affirmed and is also reclassified as other-than-serious. The evidence presented by National in its defense against the two previous citation items established that there was a reduced likelihood that an accident would result in serious injury or death. No penalty is assessed.

[5] Finally, the secretary alleged a serious violation of 29 CFR 1926.701(b), which requires all protruding reinforcing steel, onto and into which employees could fall, to be guarded to eliminate the hazard of impalement.

At the northeast corner of the bridge, reinforcing steel protruded from what would become a concrete parapet wall on the bridge. A National employee worked at the same level where the rebar protruded. The rebar consisted of 12 pieces of vertical steel, each 30 inches high and one-half inch in diameter. The rebar was arranged in two rows, two in front and 10 behind. Beside the rebar was a short stack of lumber.

The compliance officer observed an employee walk over to the wood and pick up a piece of lumber. While at the wood pile, he was as close as one foot to the rebar. The rebar was not capped or otherwise guarded. The secretary alleged the employee was exposed to an impalement hazard when he bent over to get the wood. The compliance officer defined "impalement" to include a person walking into or falling on rebar which would penetrate some part of the body.

National argued that the standard does not apply. A fall into the rebar from the same plane would result only in cuts or scratches, not in impalement, which, according to the compliance officer's definition, requires penetration of some part of the body. National argued the secretary presented no evidence that impalement could occur, and noted the typical hazard with rebar occurs when an employee is working above the rebar from heights.

The secretary asserted that the standard is intended to cover impalement even if the employee is not "above" the protruding steel. Arguing that the standard establishes the hazard, the secretary contended it is National's burden to prove impalement could not occur.

In assessing the parties' arguments, the language of the standard is controlling. The standard addresses "all protruding reinforcing steel, onto *and into which* employees could fall." [Emphasis added.] The "into which" language addresses situations where, as here, an employee can fall from the same level as the protruding rods. Once the secretary establishes that an employee "could" realistically fall into the rebar, the wording of the standard supports the presumption of a hazard of impalement. The secretary need not present facts establishing, for example, the force anticipated from the weight of a person's fall or the force needed for rebar to penetrate the body. Because the employee was as close as one foot to some of the rebar, he could realistically fall into the rebar. National did not rebut that showing, and failed to establish that impalement could not occur if the employee fell. National violated the standard.

The anticipated injury from a relatively short fall into one-half inch diameter rods is penetration of a body part, which is considered serious.

In assessing the appropriate penalty, National's size, past history, and good faith were considered. The gravity of the offense is the principal factor to take into account.

The gravity of the violation is not high. The work site was orderly and clean, no tripping or slipping hazards are noted, and the rebar was painted a bright color and was easily visible. The fall of the employee, who was five feet and seven inches tall, into 30-inch high rebar, while causing serious injury, would not likely result in death. Additionally, the spacing between the rebar further reduced the likelihood of an accident.

The violation is affirmed as serious. A penalty of $400 is assessed.

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## SECRETARY OF LABOR v. OHIO PIZZA PRODUCTS SUPPLY CO. d/b/a PRESTO AMERICA'S FAVORITE FOOD

**Occupational Safety and Health Review Commission Judge**

SECRETARY OF LABOR, Complainant v. OHIO PIZZA PRODUCTS SUPPLY CO. d/b/a PRESTO AMERICA'S FAVORITE FOOD, Respondent, OSHRC Docket No. 92-2053, June 7, 1993.

Benjamin T. Chinni, U.S. Department of Labor, Cleveland, Ohio, for complainant.

Gary W. Auman, Dayton, Ohio, for respondent.

Administrative Law Judge Nancy J. Spies.

### MACHINE GUARDING

**Dough Sheeter—Failure To Guard Ingoing Nip Point—No Unpreventable Employee Misconduct—Serious Violation ▸235.0334 ▸110.234 ▸115.10**

Injuries to hands of two employees established that dough sheeter was inadequately guarded to prevent them from placing their hands into ingoing nip points created by machine's rollers in violation of 29 CFR 1910.212(a)(1), and employer's warnings to workers not to place their hands under guards is inadequate to establish unpreventable employee misconduct defense because work rule was not effectively communicated or enforced; accordingly, willful citation alleging violation is affirmed but reclassified as serious.

*Digest of Judge's Report*

[*Digest*] Ohio Pizza Products Supply Co., doing business as Presto America's Favorite Food, was inspected by a compliance officer of the Occupational Safety and Health Administration at its Dayton, Ohio, facility.

The secretary of labor charges that Presto willfully violated 29 CFR 1910.212(a)(1), which requires that one or more methods of machine guarding be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips, and sparks.

Presto has a series of machines used to make pizza shells. The dough is first put into a divider machine, where it is separated into dough balls of different sizes. After being divided, the dough balls are put into a proofer machine, which heats and softens the dough. The dough is then dropped down a chute and onto a conveyor belt, which carries the dough balls into the dough sheeter machine. The dough sheeter flattens the balls. The dough is then given its final shape, wrapped, and stacked. The size of the dough balls depended upon the order being run.

The instant case stemmed from a citation issued less than one year earlier for a violation of the same standard. At that time, Presto's dough sheeter was 50- to 70-years old.

Presto first attempted to abate the violation by modifying the guard on the dough sheeter, but later purchased a new dough sheeter. The machine cost approximately $14,000. The Jagum Double Sheeter consists of two separate units, each with its own electrical system. Presto set up one unit by the proofer machine, next to the conveyor, which carried the dough balls to the sheeter's first set of rollers. The dough is then conveyed to a second set of rollers for a final flattening.

Within days of the installation of the new dough sheeter, a bakery employee's hand was mashed as he attempted to nudge a dough ball under the guard and through the rollers. Approximately two weeks later, another employee's hand was caught in the sheeter's rollers as she attempted to push a dough ball under the guard and through the rollers. Both employees needed medical attention for their hand injuries.

The OSHA compliance officer returned to Presto after learning of the two accidents, and issued the willful citation that is under consideration here. The compliance officer testified that the guards on the sheeter were inadequate to protect Presto's employees from the hazard created by the ingoing nip points on the rollers.

The first set of rollers on the sheeter was guarded on top by a set of metal bars, which were 1 3/4 inches apart. The opening from the conveyer belt, through which the dough balls passed, to the bottom of the guard, was 2 7/8 inches high. The distance from the front of the guard to the ingoing nip point created by the rollers was also 2 7/8 inches. The smaller dough balls passed easily under the guard, but the larger dough balls sometimes became stuck.

The gaps between the bars guarding the second set of rollers was 1 3/4 inches wide. The ingoing nip point of the second set of rollers was five inches from the end of the guard.

The guards on the sheeter were electronically interlocked. If the guards were lifted slightly, the machine would shut down.

The secretary argued that the dimensions of the guards in relation to the ingoing nip points of the sheeter establishes that the sheeter was inadequately guarded.

By the second day of the OSHA inspection, the employer had set up a temporary guard using cardboard and tape, but the compliance officer found the guard failed to abate the hazard, because employees still had access to the ingoing nip points of the sheeter.

Presto argued that it dealt with the hazard created by the sheeter by providing workers with a wooden paddle to push through jammed dough balls. But Presto's former bakery department manager stated that the paddle was not used. Additionally, a wooden paddle does not meet the cited standard's guarding requirements.

To show a violation of the standard, the secretary must show, by a preponderance of the evidence, that the cited standard applies, its terms were not met, the employees had access to the violative condition, and that the employer either knew, or could have known with the exercise of reasonable diligence, about the violation.

The standard is held to have been violated in the case of Presto's bakery. The citation is affirmed for the following reasons: the cited standard applies to the sheeter machine, Presto's employees were not protected from the hazard created by the sheeter's ingoing nip points, the hand injuries illustrate the fact that employees had access to the ingoing nip points, and Presto was aware that its employees had been injured and the manner in which the accidents occurred.

Presto asserted the affirmative defense of unpreventable employee misconduct. The company must show that the action of its employee was a departure from a uniformly and effectively communicated and enforced work rule.

Presto argued that it warned bakery employees not to put their hands in the sheeter. Presto's vice president and director of purchasing testified that after the first accident, employees were warned not to put their hands in the machine, and were told that if something were stuck, they should turn off the machine, raise the lid, and take the piece out.

The bakery department's assistant manager agreed that employees were warned not to put their hands in the machine, and that Presto had posted signs to that effect. She described an eight-step process she used when the sheeter was jammed, which included turning off the machines, de-energizing them, and raising the guards.

However, Presto's unpreventable employee misconduct defense was damaged by the testimony of Presto's bakery department manager. She testified that she saw several employees nudge dough balls under the guard with their hands, and that she herself engaged in this practice. The manager had no knowledge of OSHA standards in general or the machine guarding standard in particular.

This court believes that employees disregarded Presto's warning not to use their hands because, despite the company's attempt to downplay the importance of its production quota, the employees believed that production was of concern to Presto. Additionally, the warning was not enforced.

The bakery department's assistant manager testified that in the first two weeks of use, the sheeter jammed on approximately every tenth or twelfth dough ball. Since the proofer produces a dough ball about once every six seconds, when large size dough balls were running, the sheeter would jam about once each minute. Rather than endure the eight-step process the assistant manager described as frequently as each minute, employees took the easier course, which was to simply push the dough balls under the guard. Furthermore, the prescribed unjamming process took about one minute to complete. Thus, it is not surprising that Presto's employees ignored the warning.

Additionally, the warning was not enforced. The company's bakery manager herself violated the safety warning. Presto's president, who appointed himself safety director after the first OSHA inspection, stated that he rarely went into the bakery department.

Therefore, Presto's unpreventable employee misconduct defense must fail. The evidence shows that Presto's "rule" against employees sticking their hands in the sheeter was routinely violated, with no apparent consequences, meaning that it was not effectively communicated or enforced.

The actions of Presto's employees was neither unforeseeable nor idiosyncratic. Their action was a natural automatic reaction to the sheeter's recurring jamming.

Presto also argued that the jamming problem only occurred over the first two weeks of the sheeter's use, and that after that, the problem was corrected by raising the guard. However, there is no grace period under OSHA law. The secretary has established that Presto violated 29 CFR 1910.212(a)(1).

The final consideration is whether Presto's violation was willful or serious. The secretary drew attention to the employer's state of mind when the violation occurred, and argued that Presto failed to modify the sheeter even after two employees were injured in the same manner.

Additionally, the record indicates that Presto has misperceptions of when the OSH Act applied to its operations. The act ap-

plies to employers with one or more employees, and was applicable to Presto on the day it began operating in 1972. However, the testimony of Presto's president indicates that he believed the act applied to companies with 50 or more employees. He stated that initially he believed the OSHA inspection was in response to an October 1991 inquiry to Presto's congressman about the applicability of the act and the family leave bill to the company.

The record also shows that Presto's attitude toward employee safety was lax. The testimony of Presto's president indicated that he viewed employee accidents as personal affronts. He stated that he felt "betrayed" that someone had found a way to violate the guards. He also testified that he was "angry" when the first employee had been injured because the company had tried to provide a safe workplace and the employee was being "careless," thereby causing the accident.

The president did not take any steps to modify the guards following the two accidents. His reaction to the accidents was not concern for the safety of the employees but rather anger at the workers for injuring themselves, in his view.

Despite all this, it is not a basis for a finding of a willful violation. Presto did show some willingness to abate the violations found during the initial inspection, as evidenced in the fact that the company was willing to buy a new sheeter.

The company's problems came from relying too much on the manufacturer's safety features, and not paying enough attention to how the machine was being operated. The company believed that the guards were adequate and that employees could be protected by issuing a warning.

Accordingly, Presto's violation is found to be serious, and a penalty of $2,100 is assessed.

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## SECRETARY OF LABOR v. METAL RECYCLING CO.

**Occupational Safety and Health Review Commission Judge**

SECRETARY OF LABOR, Complainant v. METAL RECYCLING CO., Respondent, OSHRC Docket No. 92-0533, June 14, 1993.

Michael H. Olvera, U.S. Department of Labor, Dallas, Texas, for complainant.

Thomas L. Varkonyi, El Paso, Texas, for respondent.

Administrative Law Judge Stanley M. Schwartz.

### STAIRWAYS

**1. Fixed Stairs—Failure To Provide ▸205.111**

Even if employer did not own metal steps that were not fastened to loading dock or ground below, fact that employees used steps established serious violation of 29 CFR 1910.24(b), for failure to provide fixed stairs for access from one structure to another where operations necessitate regular travel between levels.

### MEANS OF EGRESS

**2. Emergency Exit—Failure To Keep Unobstructed—Lack Of Illumination ▸200.083**

Employer established that overhead door next to locked exit in building could have been used as exit in emergency, and that exit sign over locked exit was equipped with photoelectric cell to turn on sign during darkness and that general illumination in building during day was sufficient to illuminate sign; accordingly, serious citation items alleging violations of 29 CFR 1910.36(b)(4) (free and unobstructed means of egress), and 29 CFR 1910.36(b)(6) (lack of adequate and reliable illumination for exits) are vacated.

**3. Failure To Discharge To Safe Access ▸200.081**

Exit that discharged into yard containing combustible scrap materials and surrounded by locked fence topped with barbed wire was not exit that discharged directly to safe access to public way as required by 29 CFR 1910.37(h)(1); accordingly, serious citation item is affirmed.

### AISLES & PASSAGEWAYS

**4. Failure To Keep Clear—Storage Area— Failure To Keep Clear ▸205.02 ▸200.043**

Accumulated combustible scrap materials blocked aisleway in area in which employee worked and stairway used to gain access to basement in serious violation of 29 CFR 1910.176(a), and materials were located throughout facility, including storage area, in serious violation of 29 CFR 1910.176(c); employer's argument that nature of its business required accumulation of scrap materials is rejected.

**PERSONAL PROTECTIVE EQUIPMENT**

**5. Eye, Face, And Hand Protection—Failure To Provide—Used Batteries—No Unpreventable Employee Misconduct ▸250.04 ▸250.19 ▸110.234**

Evidence established that employee handling used batteries was not wearing eye, face, or hand protection, and employer's argument that violations were result of unpreventable employee misconduct because it provided such equipment is rejected because employer had no specific work rules requiring use of such equipment; accordingly, citation items alleging violations of 29 CFR 1910.132(a) (gloves), and 29 CFR 1910.133(a)(1) (eye and face protection) are affirmed.

**MEDICAL FACILITIES**

**6. Eyewash Facility—Adequacy—Distance ▸200.18**

Although restroom with sink and nearby shower and water fountain in same area may have constituted suitable eyewash facilities, fact that they were located 30 feet away from battery charger established serious violation of 29 CFR 1910.151(c).

**FIRE PROTECTION**

**7. Fire Extinguishers—Lack Of Employee Training ▸215.041**

While newly hired employee testified that he had been trained in use of portable fire extinguishers as required by 29 CFR 1910.157(g)(1), testimony of another employee established that no training had been provided at time of OSHA inspection; accordingly, violation is affirmed as non-serious.

**ELECTRICAL HAZARDS**

**8. Flexible Cords—Splices ▸245.151**

OSHA industrial hygienist's testimony that his close examination of extension cord revealed that cord had been spliced to female end and that electrical tape around splice was unraveling established serious violation of 29 CFR 1910.305(g)(2)(ii).

*Digest of Judge's Report*

[*Digest*] The Occupational Safety and Health Administration inspected Metal Recycling Co.'s facility in El Paso, Texas, in 1991.

Metal's business is the purchase and resale of scrap metals and other materials. At the time of the inspection, Metal had three employees. One worked in the office and the other two were engaged in receiving, sorting, and selling scrap materials. During the hearing, the secretary of labor stipulated to the company's dire financial situation, and noted that his primary concern was the abatement of the cited conditions.

[1] The first item of the serious citation alleged a violation of 29 CFR 1910.24(b), for failure to provide fixed stairs for access from one structure to another where operations necessitate regular travel between levels.

The OSHA industrial hygienist who conducted the inspection testified that against the loading dock there were placed metal steps, which were not fastened to the dock or the concrete-covered ground below. He measured the steps to be 40 inches high and saw Metal's employees using the steps.

Metal argued that the steps did not belong to the company. The steps had been placed there by a construction company, which had worked on the property, the company said.

Even if the steps did not belong to Metal, the employer is liable for their hazardous conditions because of its employees' exposure to the hazard. It is clear that the steps violated the standard. Metal's owner stipulated that the steps represented a serious fall hazard and that his employees used them.

Accordingly, this serious citation item is affirmed. A penalty of $50 is assessed.

[2] The second item of the serious citation alleged a violation of 29 CFR 1910.36(b)(4), for failure to provide a free and unobstructed means of egress from every building.

The industrial hygienist testified that a door on the south side of the west building was locked and blocked by the accumulation of paper, cardboard, and wood scrap. He said there were no other nearby exits to a public way in case of a fire.

He added that the overhead doorway next to the cited door could serve as an exit had it been open, but that such doors are generally not considered exits because of the effort needed to open them. The industrial hygienist stated that he believed that the overhead door was also locked but did not check to see if it actually was.

Metal's owner testified that the overhead door was 10 feet high and 10 feet wide. The door, he said, was opened whenever access to the loading dock was required, and was opened by pulling a chain attached to a pulley. He stated that the door could be used as a fire exit.

An employee also testified that while the door was usually closed during the day, he had opened it several times from the inside by pulling the chain.

Their testimony established that, contrary to the industrial hygienist's belief, the door was not difficult to open in the event of an emergency. They also established that the door was not normally locked during the day.

Accordingly, this serious citation item is vacated.

The serious citation also alleged a violation of 29 CFR 1910.36(b)(6), for failure to provide adequate and reliable illumination for all exits in every building equipped for artificial illumination.

The exit sign for the door cited above was equipped for artificial illumination, but it was not turned on at the time of the inspection.

The owner testified that the sign was equipped with a photocell that turned on only when it was dark, and that during the day, the facility was illuminated by overhead fluorescent lighting. He stated that this lighting was sufficient to illuminate the sign. He added that the sign was equipped with a bypass switch to test the bulb.

While the industrial hygienist did not dispute the owner's testimony regarding how the sign worked, he stated that in his opinion the area was not well lit. However, he could not give any definite recollection of the illumination level in the sign's area.

Accordingly, this serious citation item is also vacated.

[3] The serious citation also alleged a violation of 29 CFR 1910.37(h)(1), for failure to have an exit discharge directly to a safe access to a public way.

An exit from the west building led to the west yard, which was filled with materials such as wood, cardboard, and barrels containing oil. The yard was surrounded by a chain link fence topped with barbed wire, and locked with a padlock.

Metal argued employees could have gotten over the fence in case of a fire. The fact that escape was possible does not detract from the serious nature of the hazard. The industrial hygienist testified that the gate was blocked by the scrap materials, and that the materials themselves were combustible. Employees trapped in the yard could suffer smoke inhalation, burns, and even death, he said.

Accordingly, this serious citation item is affirmed. A penalty of $50 is assessed.

[4] The serious citation also alleged a violation of 29 CFR 1910.176(a), for failure to keep aisles clear and in good repair.

The industrial hygienist 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. A photograph supported his testimony.

The industrial hygienist also testified that one of the stairways going to the basement in the west building was blocked by equipment and materials. He stated that one the Metal's employees told him that he used the stairway to carry materials into the basement for storage.

In both cases, the industrial hygienist said, the conditions were hazardous because employee access to exits could have been impeded in case of fire.

Metal argued 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. Nevertheless, even after taking into account the nature of Metal's business, it is clear that the cited areas violated the standard.

Accordingly, the serious citation item is affirmed.

The serious citation also alleged a violation of 29 CFR 1910.176(c), for failure to keep storage areas free from accumulation of materials.

The industrial hygienist testified that the accumulation of combustible scrap materials and debris existed throughout the facility, creating a fire hazard. He opined that the facility was too small for the amount of materials it held. He suggested that the condition could be 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.

The employer essentially argued again that its business required such accumulation. For the reasons stated above, this argument is rejected.

Accordingly, the serious citation item is affirmed. A penalty of $50 is assessed.

[5] Metal was also charged with an alleged serious violation of 29 CFR 1910.132(a), for failure to provide protective equipment when necessary by reason of chemical hazards.

An employee handled used batteries while wearing leather gloves. While they provided some protection, the gloves were not acid resistant.

Metal argued that it provided both rubber and leather gloves. The employee's failure to wear rubber gloves was the result of unpreventable employee misconduct, the company argued.

However, while the company had a work rule stating that employees should wear the proper safety equipment, Metal did not have a specific work rule requiring the use of rubber gloves while handling batteries. The cited employee also testified that he had never been told to wear rubber gloves while handling batteries.

Accordingly, Metal's defense is rejected. The citation item is affirmed as non-serious. No penalty is assessed.

The serious citation also alleged a violation of 29 CFR 1910.133(a)(1), for failure to provide protective eye and face equipment when necessary.

The employee handling used batteries did not wear any eye or face protection. The industrial hygienist testified that a battery could have exploded, causing corrosive material to contact the employee's eyes and face.

Again, the company argued that it provided eye and face equipment, and that the employee's failure to use the equipment was the result of unpreventable employee misconduct. Metal, however, failed to establish that it had a specific work rule requiring employees handling used batteries to wear eye and face equipment.

The cited employee also testified that no eye protection was provided. He noted that gloves and a "shroud" were provided, and that the company secretary had told him to wear eye protection while moving barrels containing liquid. The employee stated that he had never been disciplined for failing to wear protective equipment.

Accordingly, this serious citation item is affirmed. A penalty of $50 is assessed.

[6] The next item of the serious citation alleged a violation of 29 CFR 1910.151(c), for failure to have suitable facilities for quick drenching of the eyes and body where corrosive materials are used.

The battery charger was located in the northeast area of the east building, 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 and water fountain were in the same area.

The industrial hygienist testified that none of these facilities were suitable as an eyewash facility. He also stated that the facilities were too far away, and noted that an employee would have to go around a corner and through a doorway to reach them.

While the facilities in this case may have been suitable eyewash facilities, their distance from the batter charger was not reasonable, especially considering the path an employee would have to take to reach them.

Accordingly, this serious citation item is affirmed. A penalty of $50 is assessed.

[7] The serious citation also alleged a violation of 29 CFR 1910.157(g)(1), for failure to provide portable fire extinguishers and employee training on their proper use.

Metal argued that it provided the required training. A newly hired employee testified that he had been trained in fire extinguisher use and had signed a certificate to that effect.

However, the industrial hygienist testified that during the inspection employees told him they had not been trained in fire extinguisher use. Furthermore, an employee testified that he had not received any such training and had not signed any certificate.

Accordingly, the serious citation item is affirmed as a non-serious violation with no penalty assessed.

[8] The final item of the serious citation alleged a violation of 29 CFR 1910.305-(g)(2)(ii), which requires that flexible cords be used only in continuous lengths without splice or tap.

The industrial hygienist testified that an extension cord used to power an electric fan had been spliced at both ends. He identified a photograph that showed the cord on a reel with the main body spliced to a female end, which was a different color than the rest of the cord. The industrial hygienist noted that the black electrical tape used for the splice was unraveling, and that the cord was hazardous.

Metal argued that the taped area was not a splice but a means of holding the cord on the reel. This contention is rejected in light of the industrial hygienist's testimony that he closely examined the cord and that it was spliced.

Alternatively, Metal argued that the splice was not hazardous because it had several layers of electrical tape around it. However, the industrial hygienist's testimony is found to be credible, and he stated that the tape was unraveling and that the splice was hazardous.

Accordingly, this serious citation item is affirmed. A penalty of $100 is assessed.

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## SECRETARY OF LABOR v. BETA CONSTRUCTION CO.

**Occupational Safety and Health Review Commission Judge**

SECRETARY OF LABOR, Complainant v. BETA CONSTRUCTION CO., Re-

spondent, OSHRC Docket No. 92-2642, June 21, 1993.

Richard W. Rosenblitt, U.S. Department of Labor, Philadelphia, Pa., for complainant.

Michael Allen, director of human resources, and Daniel Gordon, vice president, Beta Construction Co., Capitol Heights, Md., for respondent.

Administrative Law Judge Michael H. Schoenfeld.

## ILLUMINATION

**Lights—Inadequacy Of—General Contractor Liability ▸200.11 ▸110.5071**

Cited employer which was general contractor responsible for work site where subcontractor was removing material from roof in inadequate light in violation of 29 CFR 1926.56(a) is liable; accordingly, other-than-serious citation is affirmed.

*Digest of Judge's Report*

[*Digest*] An Occupational Safety and Health Administration industrial hygienist inspected Beta Construction Co.'s work site in Washington, D.C. The company was the general contractor at the site where the roof on the headquarters of the Department of Housing and Urban Development was being removed and replaced.

As a result of the inspection, Beta was charged with an other-than-serious violation of 29 CFR 1926.56(a), for failure to illuminate construction areas with at least the minimum amount of light listed in Table D-3.

Occupational Safety and Health Review Commission precedent clearly establishes that general contractors may be held liable on multi-employer construction sites where the general contractor could reasonably be expected to prevent or to detect and abate the violation by reason of its supervisory capacity over the entire work site, even though none of its own employees is exposed to the hazard.

In this case, Beta had a superintendent present on the roof during the night time hours when its subcontractor, ABTEC Inc., was removing roofing materials under inadequate lighting conditions.

Beta supplied the lights for the night time work and most likely regularly assisted in setting up the lights before the beginning of the night shift. The lights were stored under Beta's control when not in use.

The industrial hygienist who conducted the inspection had been trained in and had experience in light measurement and was using equipment which had been properly calibrated and tested before use. He measured the illumination in ABTEC's work area to be 1.95 foot-candles, less than the minimum 5 foot-candles required by Table D-3.

The violative condition of darkness was readily visible and obvious. Beta, as general contractor and through its contracts, had the personnel and expertise to abate the hazard. In at least some of the areas, it was so dark, there was virtually no reading on the light meter. Even a casual inspection of the work area would have alerted a competent superintendent that the lighting was poor or almost non-existent.

Whether or not Beta's own employees were exposed to the hazard, the company was responsible for the condition in its position as the general contractor. The company also had knowledge, or could have had knowledge through the exercise of reasonable diligence, of the obvious violative condition.

Beta's argument that it was allowed to and did delegate to its subcontractor responsibility for the proper performance of the job is rejected. Even if true, the company's argument is insufficient to absolve Beta of its responsibilities imposed by the Occupational Safety and Health Act on general contractors.

Also rejected is Beta's argument that its superintendent could not supervise ABTEC's work because he is not licensed in asbestos removal and he was not permitted within 50 feet of the asbestos removal work being done. It is undisputed that the roofing material contained asbestos, and that ABTEC was a licensed asbestos removal contractor. Nevertheless, the lack of lighting was easily observable according to the inspecting officer.

Finally, Beta's allegations regarding improprieties in the manner of inspection, closing conference, telephone conference, and informal conference are rejected because the company has not shown any resulting prejudice. For the same reason, the company's other allegations of improprieties, such as a delay in issuance of the citation, are also rejected.

The company's allegations that it is entitled to inferences regarding the inadequacy of the light measuring equipment is rejected. All material properly discoverable had been produced by the secretary. Beta had the opportunity to examine this material. At no point after its review of the material did Beta allege that materials requested for its examination were not produced.

Accordingly, the other-than-serious citation is affirmed. A penalty of $250 is assessed.