



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

OSHRC DOCKET
NO. 92-0731

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 April 28, 1993. The decision of the Judge will become a final order of the Commission on May 28, 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 May 18, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.
Ray H. Darling, Jr.
Executive Secretary

Date: April 28, 1993

DOCKET NO. 92-0731

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,

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v.

OTIS ELEVATOR COMPANY,

Respondent.

OSHRC Docket No. 92-0731

Appearances:

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Office of the Solicitor
U.S. Department of Labor
For Complainant

W. Scott Railton, Esq.
Reed, Smith, Shaw & McClay
McLean, Virginia
For Respondent

Before: Administrative Law Judge Richard W. Gordon

DECISION AND ORDER

This proceeding arises under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C., *et. seq.*, ("Act"), to review citations issued by the Secretary pursuant to § 9(a) of the Act and a proposed assessment of penalty thereon issued pursuant to § 10(c) of the Act.

BACKGROUND

On December 20, 1991, Compliance Officer John Yanovitch conducted a general scheduled inspection of a worksite located at Middlesex Community College in Bedford, MA; the project involved the addition of several new buildings to the college (Tr. 9-10). Upon his arrival at the site at 7:00 AM that day, Mr. Yanovitch met with the general contractor who, at Mr. Yanovitch's request, contacted all of the subcontractors working at the site and asked them to report to the trailer for an opening conference (Tr. 10-12).

After the opening conference, Mr. Yanovitch began his walk-around inspection accompanied by the general contractor's superintendent (Tr. 12). He entered the first newly constructed building nearest to the trailer and immediately encountered two men working in an area near two elevator shafts (Tr. 12-15, 64). Mr. Yanovitch approached the workers, who identified themselves as Otis Elevator Company ("Otis") employees (Tr. 13). Otis was installing five elevators in five of the buildings at the worksite (Tr. 107, 131).

Realizing that Otis had not been contacted to attend the opening conference held earlier, Mr. Yanovitch held one then with Patrick Moore, one of the Otis employees who identified himself as the mechanic in charge (Tr. 13-14, 85). He then proceeded to inspect the work area, which primarily consisted of two, side-by-side elevator shafts (Tr. 14-15). It is undisputed that during the inspection, Mr. Yanovitch discovered that the plugs of two extensions cords and a device known as a capstan, instruments belonging to Otis and present at the worksite, were missing grounding pins (Tr. 16, 75-76, 119-21; Exhibits C-1 and C-2). Mr. Yanovitch brought the missing pins to Mr. Moore's attention, then held a closing conference (Tr. 17-20).

As a result of the inspection, Otis was issued a citation on January 22, 1992 alleging a violation of 29 C.F.R. § 1926.404(f)(6) which states:

The path to ground from circuits, equipment, and enclosures shall be permanent and continuous.¹

A penalty of \$700.00 was proposed. Otis filed a timely notice of contest and a hearing was held on December 22, 1992 in Boston, MA.

DISCUSSION

I. Did the Secretary establish a violation of the cited standard?

A. The Capstan

According to Mr. Yanovitch, the capstan he observed in front of one of the elevator shafts was plugged into a metal knockout box and was not fastened to the ground (Tr. 15, 45-46). Mr. Moore testified, however, that he had just finished fastening the capstan to the floor when Mr. Yanovitch arrived at the work area and it was *not* plugged in at that time

¹ The citation also alleged a violation of § 1926.403(i)(2)(ii), but the Secretary withdrew the item in his complaint filed on May 11, 1992.

(Tr. 73-75, 121-22). It does seem odd that the capstan would have been plugged in, but not yet attached to the ground as Mr. Yanovitch suggests. Indeed, the effective use of such a winch device depends upon its being securely fastened to the ground and it seems unlikely that the capstan would be energized *before* it was even attached (Tr. 17). Moreover, as pictured in Exhibit C-2, the position of the nuts on the bottom plate suggest that the capstan was indeed fastened to the ground; in fact, Mr. Moore contends that the wrench which appears in the picture is the one he had just used to tighten the nuts (Tr. 35-36, 90-91).

It also seems doubtful that the device was actually plugged in when Mr. Yanovitch observed it. The OSHA 1B notes completed by Mr. Yanovitch in connection with this alleged violation indicate only that the two extension cords were energized; there is no similar statement regarding the status of the capstan (Exhibit R-2). In addition, although Mr. Moore and Mr. Yanovitch differed in their assessment of the capstan plug's cord length (six inches versus one foot), the "pigtail" cord pictured in Exhibit C-2 simply does not appear long enough to extend to a metal box that does not even appear in the frame of the picture (Tr. 93-94, 121). Moreover, Mr. Moore testified that if the cord had been plugged in, the capstan would have begun to run unless a foot pedal were attached to control the motor; according to Mr. Moore, the foot pedal had not been removed from the gang box and the equipment was not operating when Mr. Yanovitch arrived at the work area (Tr. 121-22).

Mr. Yanovitch also testified that Mr. Moore told him that the capstan had been used at the site the previous day to raise guardrails in the elevator shafts for installation (Tr. 15-16, 20-21, 58). Mr. Moore, on the other hand, testified that he and Jim Harding, the other Otis mechanic assigned to this project, spent the previous day at the site unloading and distributing materials for the elevator installations; the actual installation work, he alleges, did not begin until later in the day on December 20th (Tr. 73-75, 86, 91-92, 104, 110-11; Exhibit R-4).² The fact that the capstan appears to have been fastened to the floor and unplugged at the time of the inspection lends credence to Mr. Moore's testimony regarding

² Mr. Harding, who was apparently laid off by Otis prior to January 28, 1992, was not called to testify at the hearing by either party (Tr. 150-51).

the capstan's use. Indeed, the Otis time sheets for this project confirm that Mr. Moore and Mr. Harding spent Wednesday and Thursday, December 18th and 19th, unloading and distributing materials for the job; they apparently did not begin the first elevator installation until December 20th (Tr. 103-04, 107-10; Exhibit R-4). Thus, while I do not question Mr. Yanovitch's overall credibility as a witness here, the record simply does not bear out his undocumented recollection that the capstan had been used at this site on the previous day.

As noted, it is undisputed that the grounding pin on the capstan's plug was missing at the time of the inspection. Mr. Yanovitch credibly testified to the hazards which may occur as the result of a such a defect (Tr. 37-39). Indeed, should the worksite's ground fault circuit interrupter ("GFCI") system fail, the grounding pin serves to protect an employee from possible electric shock or burns if the equipment he is using short circuits. This hazard exists regardless of the fact that the capstan had apparently not yet been used by either Mr. Moore or Mr. Harding at the site. Despite Mr. Moore's assurances that he would have noticed the missing pin when he eventually went to plug in the capstan and would not have used the equipment in that condition, the equipment was certainly *available* for use by *either* employee. *Palmer Christiansen Co.*, 4 BNA OSHC 1020, 1975-76 CCH OSHD ¶ 20,517 (No. 3108, 1976) (violation affirmed where tools whose plugs were missing grounding pins were "available for use" by employees). See also *Brooklyn Welding Corp.*, 14 BNA OSHC 1622, 1624, 1987-90 CCH OSHD ¶ 28,855, pp. 28,855 (No. 88-1852, 1990); *Bechtel Power Co.*, 7 BNA OSHC 1361, 1364 & 1366, 1979 CCH OSHD ¶ 23,575, pp. 28,575 & 28,577 (No. 13832, 1979). Furthermore, the plug with the missing pin was in plain view as it dangled from the capstan on its short "pigtail" cord and could have easily been discovered by Mr. Moore as he was attaching the device to the ground. The Secretary, therefore, has established a violation of the cited standard with regard to this equipment.

B. The Extension Cords

Mr. Yanovitch testified that while inspecting the Otis work area, he unplugged two extension cords from a yellow box and noted that the grounding pins were missing from both cords (Tr. 15-17, 31-34, 44-45, 50; Exhibit C-1). At the hearing, Mr. Moore was unable to identify whether these cords came from his gang box or Mr. Harding's; he also did not know who had actually plugged them into the yellow box (Tr. 76-77, 83). According to Mr.

Yanovitch, there was nothing plugged into the extension cords themselves, but Mr. Moore testified that two lamps were plugged into the cords (Tr. 57-58, 76, 96-99).

Otis argues that it has not violated the cited standard because the cords had a “permanent and continuous” path to ground. Otis bases its argument on the fact that the cords were plugged into a GFCI box and the site was equipped with a GFCI system (Tr. 39, 127). Without grounding pins in the plugs of these cords, however, the path running between these circuits to ground was *not* “permanent and continuous”. See *Guardian Roofing Systems Inc.*, 14 BNA OSHC 1359, 1360, 1987-90 CCH OSHD ¶ 28,720, pp. 38,247 (No. 88-0370, 1989) (violation of § 1926.404(f)(6) affirmed where employees were using extension cord which lacked a ground pin). Indeed, as Mr. Yanovitch testified, GFCI systems can fail and the presence of a grounding pin ensures that a short in any equipment plugged into the extension cord or in the cord itself will be absorbed by the pin and directed away from the employee (Tr. 38-39).

As noted, it is not clear whether the extension cords were actually being utilized at the time of the inspection. While Mr. Yanovitch contends that the cords were available for any kind of use, Mr. Moore argues that they were only used to operate two lamps in the Otis work area. In either case, however, like the capstan, the defective cords were certainly *available* to both Mr. Moore and Mr. Harding for use in operating any kind of electrical tool or instrument. If lamps were plugged into these cords at the time of the inspection as Mr. Moore suggests, they clearly could have been unplugged at any time by either employee, particularly if as the day passed, lighting was no longer necessary; the defective cords would then have been free to power other tools (Tr. 97-98). Moreover, if the cords truly were used only to operate the lamps described by Mr. Moore, a potential hazard existed with regard to at least the one lamp which lacked any kind of protective shield, leaving the bulb exposed (Tr. 98-100).³

The missing grounding pins on these cords exposed the two Otis employees to the same kinds of hazards discussed *supra* with regard to the capstan: potential electric shock or burns. Clearly, either Mr. Moore or Mr. Harding took these cords from their gang box

³ The second lamp was apparently protected by a plastic shield (Tr. 99).

and plugged them into the yellow box in their defective condition; with little effort, therefore, the missing grounding pins could have been discovered. As a result, the Secretary has established a violation of the cited standard with regard to the two extension cords.

II. Has Otis proven an affirmative defense of unpreventable employee misconduct?

In order to establish unpreventable employee misconduct, an employer must show that the conduct was “a departure from a uniformly and effectively communicated and enforced workrule”. *Archer-Western Contrac. Ltd.*, 15 BNA OSHC 1013, 1017, 1991 CCH OSHD ¶ 29,317 (No. 87-1067, 1991) (“*Archer-Western*”). Specifically, the employer must prove that,

“it had established a work rule designed to prevent the violation, adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated.”

Pride Oil Well Serv., 15 BNA OSHC 1809, 1816 (No. 87-692, 1992). It should be noted that proof of unpreventable employee misconduct is more rigorous where the conduct of an employee designated to a supervisory role is at issue. *Archer-Western* at 1017. In fact, “a supervisor’s involvement in the misconduct is strong evidence that the employer’s safety program was lax.” *Id.*

Otis contends that both Mr. Moore and Mr. Harding violated specific safety work rules of which they were well aware when they used defective equipment at this worksite. Citing to excerpts from the 1986 edition of the “Elevator Industry Field Employees’ Safety Handbook” (“Handbook”), Otis convincingly argues that its work rules address the hazards posed by the use of equipment whose plug is missing a grounding pin (Exhibit R-8 at 23-25).⁴ These rules generally forbid the use of power tools which are defective and require employees to make sure when using electrically-powered tools that they are grounded; a separate rule governing extension cords requires that they “conform to OSHA standards and

⁴ Although the cover of the Handbook indicates that it belongs to *Armor Elevator Company*, Mr. Moore identified its contents as identical to Otis’ Handbook and the Secretary raised no objections to its admission into evidence (Tr. 123, 126).

be Company approved” (Exhibit R-8 at 23-24). Another work rule specifically prohibits the removal of or tampering with three-prong grounding plugs (Exhibit R-8 at 23-24).

These work rules, according to Otis, were effectively communicated to employees through the operation of a comprehensive safety program directed by a safety committee made up of Otis employees, an organization of which Mr. Moore had just become a member (Tr. 133-34). Apparently, safety issues are frequently discussed with Otis employees at various types of safety meetings and combined, Mr. Moore and Mr. Harding attended three such meetings, two of which specifically discussed electrical hazards, in the six months preceding their assignment to the Middlesex project (Tr. 134-46; Exhibits R-7, R-9, R-10 & R-11). In addition, Mr. Moore testified that he had received safety training at Otis, including an electrical safety course, and he understood that equipment whose plugs are missing grounding pins pose a potential hazard and should not be used (Tr. 77-78, 93, 118-19). Obviously, Otis has made a serious effort to communicate these rules to its employees. Whether these rules have been *effectively* communicated to Otis employees, however, is a separate question. Indeed, while Mr. Moore professed to understanding the hazards involved here, his testimony with regard to the Otis Handbook was tentative at best. When asked if he had a copy of the Handbook, Mr. Moore could only reply that he “probably” had one in his gang box and that it had “probably” been in there for a few years (Tr. 123-24). Also, he was unable to specifically recall if he had actually read the relevant work rule sections cited by Otis (Tr. 124). Certainly, if Otis’ program were effectively reaching its employees, Mr. Moore, an employee placed in a supervisory role, would have been more familiar with Otis’ written safety program than his testimony demonstrates. Furthermore, the record provides no information as to Mr. Harding’s actual knowledge of or familiarity with these work rules, primarily because he was not called to testify at the hearing. It is not known, for example, whether he possessed a copy of the Otis Handbook or whether he understood the work rules contained therein. Thus, while Otis has made some effort to communicate these rules to its employees, it is unclear exactly how *effective* those efforts are.

Otis further contends that its employees were adequately supervised with regard to safety matters by Mr. Marston, the Otis employee responsible for safety training and field

education who visits worksites at least once a week to conduct safety checks (Tr. 133, 146-48). Apparently, Mr. Marston visited the Middlesex worksite the week after the OSHA inspection was held (Tr. 87-88). Employer supervision, however, must also include taking all possible steps to prevent or avoid a violation and it is not clear that Otis has done so with regard to the capstan. See *Daniel Constr. Co.*, 10 BNA OSHC 1549, 1552, 1982 CCH OSHD ¶ 26,027 (No. 16265, 1982) (in proving unpreventable employee misconduct, employer must show that "it took all necessary precautions to prevent the violations"). See also *Archer-Western* at 1017 ("when the alleged misconduct is that of [a] supervisory employee, the employer must...establish that it took all feasible steps to prevent the [violation]").

Mr. Moore testified that he obtained the capstan in question from the Otis shop where equipment is emptied from employee gang boxes and placed on shelves for use; apparently, his own gang box had been emptied at some point and he needed to refill it for the Middlesex project (Tr. 80-82). He testified that he "visually looked at [the] capstan and it didn't look like it had any defective parts"; since it was on the shop's shelf, he assumed that the equipment had been checked by an Otis employee and found to be in good working order (Tr. 80-82). Indeed, the Otis Handbook indicates that equipment found to be defective should be tagged as such and returned to the shop (Exhibit R-8 at 23). There is no indication in the record that the capstan carried such a tag when Mr. Moore took it from the shop. Furthermore, according to Otis' assured grounding program, all cord connected equipment must be inspected for "external defects" such as missing grounding pins and an employer "may not make available or permit the use by employees of any equipment which has not met [these] requirements" (Tr. 139-40; Exhibit R-8 at 142). Had Otis taken any of these precautions as required by its own safety program, the capstan may not have been left in the shop untagged and available for use by employees seeking equipment.

Finally, Otis alleges that when violations of its work rules are discovered, employees are adequately disciplined as evidenced by the issuance of formal safety citations to both Mr. Moore and Mr. Harding with regard to the defective capstan (Tr. 150-51; Exhibit R-12). Although these written citations indicate that it was the "use" of the capstan which violated Otis' safety rules, Mr. Marston testified at the hearing that Mr. Moore and Mr. Harding were actually cited for failing to check the capstan to make sure it was "mechanically and

electrically sound" before taking it from the Otis shop (Tr. 150, 153; Exhibit R-12). This conduct, however, does not appear to violate any of the work rules cited by Otis with regard to electrical safety. Indeed, the work rules noted apply specifically to the use of such equipment; there is no mention of inspecting the equipment prior to removing it from the shop. In addition, it is unclear why Otis cited Mr. Harding for this violation when the record clearly indicates that it was Mr. Moore who obtained the capstan from the shop.

Furthermore, Otis did not issue citations to either employee with regard to the defective extension cords. According to Mr. Marston, citations were not issued because it was unclear exactly who the cords belonged to, Otis or the worksite. The ownership of the cords, however, does not change the fact that Otis employees were using the defective cords in violation of established work rules. In these instances, therefore, Otis' enforcement procedures were poorly implemented.

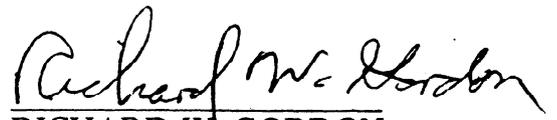
In sum, despite having established work rules to address the hazards at issue here, Otis has failed to prove that its communication of these rules to employees has truly been effective, that it has taken all feasible steps to discover and prevent violations of these rules, and that it has adequately enforced these rules by disciplining employees when violations are found. Otis, therefore, has failed to establish unpreventable employee misconduct. Accordingly, the citation is affirmed and the proposed penalty of \$700.00 is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

ORDER

1. Serious citation 1, item 2, alleging a violation of 29 C.F.R. § 1926.404(f)(6) is **AFFIRMED** and a penalty of \$700.00 is **ASSESSED**.


RICHARD W. GORDON
Judge, OSHRC

Dated: April 7, 1993
Boston, Massachusetts