United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR
Complainant,
v.
A & B TOPS
Respondent.

Phone: (202) 606-5100
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OSHRC DOCKET
NO. 95-1370

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 January 19, 1996. The decision of the Judge will become a final order of the Commission on February 20, 1996 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 February 8, 1996 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
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Review Commission
1120 20th St. N.W., Suite 980
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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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: January 19, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 95-1370

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket No. 95-1370
A & B TOPS, Respondent.	:	(EZ)

APPEARANCES:

Maureen Cafferkey, Esquire
Office of the Solicitor
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Cleveland, Ohio
For Complainant

Mr. Alan Savoy
President
A & B Tops
Akron, Ohio
For Respondent *Pro Se*

DECISION AND ORDER

A & B Tops (Tops), a sole proprietorship, manufactures and installs kitchen counter tops as a residential subcontractor in Ohio. Tops is a small employer with one to two employees. Its plant is located at 1902 Manchester Road, Akron, Ohio. Alan Savoy, the owner, testified that the company has been in business for five years and he has been sole owner for the past two years (Tr. 161). Tops admits that it is an employer engaged in a business affecting commerce within the meaning of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651, *et seq.)*, hereafter called the "Act."

On June 29, 1995, the Occupational Safety and Health Administration (OSHA) received an employee complaint alleging that Tops failed to provide personal protective equipment, hazard communication training, safety guards on power tools, proper ventilation, and material safety

data sheets (Exh. C-1; Tr. 113). The complaint alleged conditions similar to conditions cited in an uncontested serious citation issued by OSHA in December 1994 (Tr. 110, 145-146).

The complaint inspection was assigned to Compliance Officers Thomas Henry and Michael Pappas. Henry had made the December 1994 inspection (Tr. 111). Upon arriving at Tops, the compliance officers were denied entry by Savoy. Thereupon, OSHA filed an application for an inspection warrant which was signed by U. S. Magistrate James Gallas on July 12, 1995 (Exh. C-1). The warrant limited the inspection to the conditions alleged in the employee's complaint.

Upon issuance of the inspection warrant, Henry and Pappas returned to Tops and inspected the plant on July 12, 1995. Savoy was present throughout the inspection. As a result of the inspection, Tops was cited for serious violations of 29 C.F.R. §§ 1910.37(q)(1), 1910.212(a)(5), 1910.304(f)(5)(v), and 1910.305(g)(1)(i). Total proposed penalties were $3,200.

Tops timely contested the citation. On October 6, 1995, the case was designated an E-Z trial proceeding pursuant to Commission Rule 200, 29 C.F.R. §2200.200, *et seq*. Accordingly, based on the prehearing conference, the parties stipulated agreed facts and issues which were incorporated in the court's order dated October 19, 1995.

The E-Z trial hearing was held on November 3, 1995, in Akron, Ohio. The parties were unable to further narrow the issues.

PRELIMINARY ISSUES

I. Inspection Warrant Was Based on Probable Cause

The inspection warrant in this case was issued based on a complaint filed by an employee. A copy of the complaint was attached to the warrant application (Exh. C-1). Tops challenges the warrant on the belief that the person who filed the complaint may not have been an employee (Tr. 105). In support of its claim, Tops notes that none of the conditions alleged in the complaint were found during the OSHA inspection (Tr. 142). At the hearing, Tops' request for the identity of the complainant was denied.

The name of the person who files a complaint with OSHA alleging possible violative conditions is protected on the basis of the informer's privilege. The Commission has long

recognized the informer's privilege. *Massman-Johnson (Luling)*, 8 BNA OSHC 1369, 1980 CCH OSHD ¶ 24,436 (No. 76-1484, 1980). As in this case, the privilege has been given to a person whose complaint of alleged hazardous conditions initiated the Secretary's inspection. *Quality Stamping Products, Inc.*, 7 BNA OSHC 1285, 1979 CCH OSHD ¶ 23,520 (No. 78-235, 1979). In requesting the person's identity, Tops presented no evidence justifying disclosure. The mere assertion that the person may not be an employee is not sufficient. In balancing the Government's policy to receive confidential information and protect the identity of the informant with Tops' right to a fair trial, the court concludes that the complainant's identity in this case is unnecessary to a determination of probable cause.

The employer challenging the reasonableness of an inspection warrant has the burden of proving that the inspection failed to conform to the requirements of the Fourth Amendment. *Sarasota Concrete Company*, 9 BNA OSHC 1608, 1612, 1981 CCH OSHD ¶ 25,360, p. 31,531 (No.78-5264, 1981), *aff'd*, 693 F.2d 1061 (11th Cir. 1982). Unlike inspections based on a neutral administrative plan, the Review Commission, in reviewing a complaint inspection, whether from an employee or another source, must assure the inspection bears a reasonable relationship to the violations alleged in the complaint and that the information before the U. S. Magistrate did not contain any purposeful misrepresentation or reckless disregard for the truth. The Commission's review is limited to the information contained in the warrant application.

In this case, the U.S. Magistrate limited the inspection warrant to the conditions alleged in the complaint. Tops' questioning the identity of the complainant fails to show harassment or an abuse of discretion. An employer's mere allegation that the employee filing the complaint did so to harass the employer is not sufficient to invalidate the inspection warrant. *Reich v. Kelly-Springfield Tire Co.*, 13 F.3d 1160 (7th Cir. 1994). Even the improper motivation on the part of a complainant in filing a complaint is not in itself sufficient grounds for invalidating an OSHA inspection. *Quality Stamping Products*, 7 BNA OSHC 1285, 1289, 1979 CCH OSHD ¶ 23,520, p. 28,504-05 (No.78-235, 1979). Here, Tops merely questions the identity of the complainant. It does not allege or show harassment. Also, the Secretary has the right to inspect worksites even though the inspection was in response to other than an employee complaint. *See Adams Steel Erection, Inc.*, 13 BNA OSHC 1073, 1986-87 CCH OSHD ¶ 27,815 (No. 77-3804,

1987) (an anonymous complaint). The issue is not who filed the complaint. Rather, the issue is whether there is a reasonable basis to assume the alleged conditions in the complaint exist at the workplace. In this case, since the alleged conditions were similar to conditions previously cited, the U. S. Magistrate had a reasonable basis to assume the alleged conditions continued to exist (Tr. 114). The fact the conditions were not found during the inspection does not show a lack of probable cause to initiate the inspection. There is no allegation or evidence that OSHA failed to provide the Magistrate with all relevant information or made any misrepresentations of fact. There is no showing that OSHA's application contained deliberate falsehood or reckless disregard for the truth. Therefore, OSHA satisfied the probable cause requirements of the Fourth Amendment.

Further, based on the scope of the employee's complaint, which included conditions in all areas of Tops' plant, there is no showing that OSHA acted improperly in inspecting any potential violative conditions which were in plain view. The conditions cited during the inspection were conditions clearly observable such as lack of an exit door sign, an unguarded window fan, missing grounding prongs, and a frayed electrical cord. *See National Engineering & Contracting Co. v OSHRC,* 928 F.2d 762 (6th Cir. 1991). Thus, the conditions observed bear a reasonable relationship to the violations alleged in the complaint.

Accordingly, the record establishes that the inspection of Tops was conducted in conformance with the requirements of the Fourth Amendment.

II. OSHA Complied With 29 C.F.R. § 1903.6.

Tops argues that it should have received advance notice of the inspection because OSHA knew that Savoy generally worked away from the plant (Tr. 134-136). Tops notes that 29 C.F.R. §1903.6 provides as an exception to the rule against advance notice, "where necessary to assure the presence of representatives of the employer . . . needed to aid in the inspection." Savoy, as owner, was clearly the employer representative.

However, the record in this case fails to show that the exception to advance notice was necessary or required. Savoy was present at the plant at the time OSHA initially attempted to make the inspection, as well as throughout the actual inspection pursuant to the inspection

warrant (Tr. 18, 20, 137). Therefore, there was no need to notify Savoy prior to the inspection. Also, the court notes that section 17(f) of the Act, 29 U.S.C. § 666(f), specifically prohibits, under criminal sanctions, advance notice. Thus, any exception must be narrowly construed.

Accordingly, §1903.6 exceptions were not applicable to this case and advance notice was not required.

ALLEGED VIOLATIONS

I. Elements Necessary to Prove a Violation

In general, to prove a violation of a standard, the Secretary of Labor must prove by a preponderance of the evidence that (1) the cited standard applies; (2) there was noncompliance with the terms of the standard; (3) there was employee exposure or access to the hazard created by the noncompliance; and (4) the employer knew or with the exercise of reasonable diligence could have known of the condition. *Kasper Electroplating Corp.*, 16 BNA OSHC 1517, 1521, 1993 CCH OSHD ¶ 30,303 (No. 90-2866, 1993); *Seibel Modern Manufacturing and Welding Corp.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442 (No. 88-821, 1991).

Additionally, in order to establish a "serious" violation under § 17(k) of the Act, 29 U.S.C. § 666(k), the Secretary must prove that there is a substantial probability that death or serious physical harm could result from a hazardous condition. In determining substantial probability, the issue is not whether an accident is likely to occur. Rather, the Secretary must show that "an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident." *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1324, 1991 CCH OSHD ¶ 29,498 p. 39,804 (No. 89-2253, 1991); *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157, 1989 CCH OSHD ¶ 28,501, p. 37,772 (No. 87-1238, 1989).

If a violation is established, the employer has the burden of establishing any affirmative defenses. In this case, Tops alleges employee misconduct as to several of the alleged violations. In order to establish unpreventable employee misconduct, the employer must show that the action of its employee represented a departure from a work rule that the employer has uniformly

and effectively communicated and enforced. *Mosser Construction Co.*, 15 BNA OSHC 1408, 1414, 1991 CCH OSHD ¶ 29,546, p. 39,905 (No 89-1027, 1991).

If a violation is found, § 17(j) of the Act, 29 U.S.C. § 666(j), directs the Commission, in determining an appropriate penalty, to consider the gravity of the violation, the good faith of the employer, the size of the employer, and the employer's history of violations. The gravity of the violation is usually the factor of greatest significance in penalty assessment. *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2178, 1993 CCH OSHD ¶ 29,962, p. 41,011 (No. 87-922, 1993); *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1003, 1971-73 CCH OSHD ¶ 15,032, p. 20,044 (No. 4, 1972).

II. Item 1 - Alleged Serious Violation of § 1910.37(q)(1)

The citation alleges that "on the west side of the assembly area, the exit doors were not posted with an EXIT sign" in violation of § 1910.37(q)(1)[1]. Tops does not dispute that the double doors in the assembly room leading to the parking area did not have an exit sign. However, it does question whether an exit sign is necessary. In support, Tops notes that Henry failed to cite the condition during his prior inspection. Also, Tops asserts that its local fire bureau does not require an exit sign in the assembly room.

Savoy describes Tops' plant as a rectangular building measuring 32 feet by 90 feet, with approximately 2,800 square feet of space (Tr.163, 165). The plant consists of three rooms: the assembly room where the counter tops are assembled, the spray room where the counter tops are painted, and a storage room which is used to primarily to store personal items (Tr. 164). The three rooms are separated by walls with large openings instead of doors (Tr. 162). Tops' employees are expected to work in all rooms of the plant (Tr. 162, 164). The plant has two exits to the outside: the one at issue from the assembly room, and a second exit from the storage room

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[1] Section 1910.37(q)(1) provides that "exits shall be marked by a readily visible sign. Access to exits shall be marked by readily visible signs in all cases where the exit or way to reach it is not immediately visibly to the occupants." "Exit" is defined at § 1910.35(c) as " . . . that portion of a means of egress which is separated from all other spaces of the building . . . to provide a protected way of travel to the exit discharge."

which has an exit sign (Tr. 194). The exit doors in the assembly room are the normal means for entering and leaving the plant (Exh. C-6: Tr. 145, 165). Henry testified that the wooden counter tops, partial wooden floor, sawdust, electrical tools and the flammable materials such as mineral spirits, solvents, and wood finishes provided sources for fire (Exh. C-15; Tr. 28-29).

Savoy testified that the local fire bureau did not require an exit sign at the doors in the assembly room. In support, Savoy presented a "Notice of Violation of Akron Code 93" issued by the fire bureau in October 1994 which did not cite Tops for failing to have an exit sign (Exh. R-3). Also, the BOCA National Building Code which was apparently given to Savoy by the fire bureau, exempts exit signs from doors which are "obviously and clearly identifiable as exits" (Exh. R-4). According to Savoy, the fire bureau found that the doors in the assembly room were identifiable as an exit and therefore an exit sign was not necessary (Tr. 165).

Despite the finding by the local fire bureau, OSHA's standard is clear and unambiguous in its requirement that "exits shall be marked by a readily visible sign." Section 1910.37(q)(1) does not provide an exception for exit doors that are an obvious and clearly identifiable exit (Tr. 80). Also, an employer can not rely on OSHA's failure to cite during an earlier inspection or on another agency's rules and regulations as a basis for claiming lack of knowledge or justification for noncompliance. *Wheeling-Pittsburgh Steel Corp.*, 16 BNA OSHC 1780, 1782, 1994 CCH OSHD ¶ 30,445 (No. 91-2524, 1994). Therefore, Tops' failure to have an exit sign as required by §1910.37(q)(1) is established.

However, the violation is considered as "other than serious." The record does not establish a substantial probability for death or serious harm. Henry's failure to note the condition in his December 1994 inspection and the local fire department's determination that the condition did not require an exit sign indicate that there was no serious hazard. Also, while Tops' failure to have an exit sign constituted a violation of the standard, it was not shown that noncompliance increased the employees' risk to serious physical harm more than if Tops had an exit sign posted. It is noted that Savoy immediately posted the exit sign during the inspection (Tr. 195).

Accordingly, an "other" than serious violation of §1910.37(q)(1) with no penalty is affirmed.

III. Item 2 - Alleged Violation of § 1910.212(a)(5)

The citation alleges that "in the assembly area, a fan 5' 2" from the floor did not have a guard over the blades" in violation of §1910.212(a)(5).[2] The fan, which was described as a normal household fan, was placed in a window to blow air on the employee working in the assembly room (Exh. C-8; Tr. 170). It was a hot summer and the fan was running during the inspection (Tr. 36, 173). It is uncontroverted that the fan's blades were not guarded and it was less than seven feet from the ground (Exh C-8). Also, the record shows that the fan was placed in proximity to where the employee was working in the assembly room (Tr. 147). According to Savoy, the fan was moved to the window a couple weeks before the inspection (Tr. 173).

While not arguing that the blades were unguarded, Tops does question whether the fan's blades presented a hazard to employees and, if found to be a violation, whether the condition was caused by unpreventable employee misconduct. Savoy testified that the fan was securely mounted to a wooden post in the window and the blades could not be reversed (Tr. 170). To show the lack of a hazard, Savoy, during the inspection, put his hand into the blades stopping the fan and causing himself no injury (Tr. 86).[3] Based on Savoy's demonstration, Henry initially considered the unguarded fan as an "other" than serious violation. He apparently noted on his OSHA 1B form that the blades could be touched with little harm (Tr. 92, 97). Subsequently however, Henry cited the fan as a serious violation based on the belief the fan's blades could be reversed (Tr. 98). Instead of being exposed to the trailing edge of the blades when the fan is bringing air into the room, the employee would be exposed to the blades' "cutting edge" if the blades ran in reverse which take air out of the room (Tr. 87). If the blades were reversed, Savoy agrees the fan could be dangerous (Tr. 170).

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2 Section 1910.212(a)(5) provides that "when the periphery of the blades of a fan is less than seven (7) feet above the floor or working level, the blades shall be guarded. The guard shall have openings no larger than one-half (½) inch."

3 The court is concerned about Savoy's attitude towards safety. He described himself as a "reckless spirit who takes chances" (Tr. 175). This reckless attitude was demonstrated during the inspection when he stuck his hand in the fan and placed his tongue into the damaged area of an electrical cord (Tr. 86, 183). Fortunately, he was not injured. However, this behavior reflects an unhealthy attitude towards safety in the workplace.

Here, the record establishes without dispute that the fan's blades were not guarded. Also, it is uncontroverted that the fan was less than 7 feet above the ground and an employee was working in close proximity of the fan (Tr. 37). Therefore, a violation of §1910.212(a)(5) has been shown.

However, because of the location of the fan at the window, and based on Henry's initial determination that the blades could be touched with little harm, the violation is "other" than serious. Savoy's testimony that the fan was securely mounted and the blades could not be reversed is given greater weight. Henry made no visual examination of the fan to see if the fan was secured or if the blades could be reversed (Tr. 36). His opinion was based on reviewing his photographs after returning to his office (Tr. 98). Thus, the record does not establish a substantial probability for death or serious harm.

As for an affirmative defense, the record fails to show unpreventable employee misconduct. Tops failed to present evidence of a work rule or that the employee violated any specific work rule. Also, Savoy was aware the fan had been moved to the window. He testified that it had been in the window a couple of weeks prior to the inspection (Tr. 173). If Savoy was aware of the fan's condition, his knowledge is evidence that if a work rule existed, it was not being enforced by Tops.

Accordingly, an "other" than serious violation of § 1910.212(a)(5) with no penalty is affirmed.

IV. Item 3 - Alleged Violation of § 1910.304(f)(5)(v)

The citation alleges that "in the shop area, the following hand tools were not properly grounded: (a) 10" Delta miter saw, Serial Number K9348, (b) Delta 10" saw, Serial Number K9202, and a Porter Cable Router, Serial Number 022621" in violation of § 1910.304(f)(5)(v).[4]

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[4] Section 1910.304(f)(5)(v) provides that "under any of the conditions described in paragraphs (f)(5)(v)(A) through (f)(5)(v)(C) of this section, exposed non-current-carrying metal parts of cord- and plug-connected equipment which may become energized shall be grounded." Under paragraphs (f)(5)(v)(B)(3), such equipment includes "hand-held motor-operated tools."

Serial Number 022621" in violation of §1910.304(f)(5)(v).[5] Henry testified that he observed the cited hand tools with their grounding prongs missing (Exhs. C-10, C-11, C-12; Tr. 42). Tops does not dispute that the grounding prongs for these three hand-held tools were missing. Instead, Tops argues that the miter saw (#K9348) was exclusively used by Savoy, the owner; the other miter saw (#K9202) was purchased without the grounding prong; and the router was inoperable at the time of the inspection (Tr. 174, 177, 179-180).

Henry testified that he did not see the two miter saws or router in operation (Tr. 43). He did not even see the miter saw (#K9348) or the router plugged in (Tr. 158-159). However, he determined that the tools were being used and were available for use based on seeing sawdust on the saws and router. Also, there was no indication that the tools had been taken out of service (Tr. 44). Further, Savoy stated during the inspection "that the saw was used this week" (Tr. 43).

Based on the record, the evidence fails to establish that the miter saw (#K9348) was used by Tops' employees. The uncontradicted testimony shows that the saw was exclusively used by Savoy, the owner and employer (Tr. 174). As the employer, a violation can not be based on his exposure. *See Ralph Taynton, d.b.a. Service Specialty Co.*, 1992 CCH OSHD ¶ 29,830 (No. 91-1709, 1992, J. Burroughs). Therefore, in that no exposure to employees was established, a violation as to the miter saw (#K9348) is vacated.

As for the other miter saw (#K9202), the record establishes a violation. The saw was plugged in when Savoy unplugged it to show Henry the missing grounding prong (Tr. 64). Savoy testified that the saw was purchased two years ago without the grounding prong (Tr. 177). Even if purchased without a grounding, Tops is not excused from its responsibility. The Act does not relieve an employer from providing a safe workplace. Commission precedent is well settled that an employer is liable for violative conditions to which its employees are exposed, even if the employer did not create the hazard. Savoy, by showing the missing ground prong, was aware of the condition. It is irrelevant that he may not have known the condition violated an OSHA standard. Also, the record indicates that Tops should have detected that the grounding prong was

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[5] Section 1910.305(g)(1)(I) provides, in part, that "flexible cords and cables shall be approved and suitable for conditions of use and location."

missing from seeing an empty hole in the plug where the prong should have been (Tr 67-68). Further, the manufacturer's operating manual which came with the saw would have shown the grounding prong (Exh. C-13). Savoy testified that he had looked at the manual (Tr. 177). Thus, a violation as to the miter saw (#K9202) is established.

Regarding the router, the evidence shows that it was inoperable. Henry failed to test the router (Tr. 56). Tops presented a receipt showing repair work on the router after the inspection for frozen bearings (Exh. R-6). Also, the photograph taken by Henry shows the router sitting next to a newer router. According to Savoy, the new router was purchased prior to the inspection (Tr. 179-180). The record establishes that the router with the missing prong "ceased functioning in April 1995" (Exh. C-12, Tr. 179-180). This was prior to the OSHA inspection. Henry could not establish how long the grounding prong was missing or if an employee was exposed to the hazard (Tr. 60). Therefore, a violation as to the router is vacated.

In finding a violation as to the miter saw (#K9202), the violation is considered serious and a penalty of $300 is deemed reasonable. By pointing out the ungrounded plug to Henry, Savoy demonstrated his knowledge of the violative condition. Also, although the saw's handle was plastic, the operator's hands would remain in close proximity to the metal parts during operation. If the metal parts became energized, a possible shock hazard could result in serious physical harm (Tr. 179). In establishing an appropriate penalty, the record reflects that one employee regularly used the saw. As stated by Savoy, the saw was without grounding for two years. Thus, the severity is considered high. No credit is given for history based on a prior serious citation or for good faith based on a lack of written safety programs and Savoy's verbally abusive attitude during the inspection (Tr. 32, 149-151). However, credit is given for size in that Tops is a small employer with one employee during the inspection (Tr. 140).

Accordingly, as to the miter saw (#K9202), a serious violation of § 1910.304(f)(5)(v) with a $300 penalty is affirmed.

V. Item 4 - Alleged Violation of § 1910.305(g)(1)(I)

The citation alleges that "in the shop area, the electrical cord was split and damaged in two different areas on an electrical belt sander, Serial Number 123813" in violation of §1910.305(g)(1)(I).[6] Henry testified that the flexible electrical cord used to run the belt sander was frayed and had three cuts (not two as indicated in the citation) in the outer insulated sheathing, exposing the three conductors which were separately insulated (Exh. C-14; Tr. 48). The electrical cord was double insulated with no visible breaks in the insulation around the conductors (Tr. 49-50). Henry did not observe the sander operating or plugged in (Tr. 123). However, he testified that he saw sawdust in the damaged areas. Therefore, Henry concluded that the sander was being used and was available for use (Tr. 124). Savoy agreed that the cord was frequently damaged because the sander would accidently hit the cord during operation (Tr. 49, 185).

While not arguing the violative condition, Tops does question whether the damaged cord presented a hazard to employees. There were no apparent cracks in the insulation around each conductor. To show the lack of a hazard, Savoy during the inspection placed his tongue in the damage area of the cord without incident (Tr. 183).

The standard requires that the cord must be suitable for conditions of use and location. In this case, the cuts in the cord's outer insulation made the cord not suitable for use. *See McAnally Frame and Trim Co.*, 15 BNA OSHC 1949, 1991-93 CCH OSHD ¶ 29,823 (No. 91-3009, 1992, J. Salyers). Therefore, the record establishes a violation of § 1910.305(g)(1)(I).

However, the violation is other than serious with no penalty. As a double insulated cord, there is no evidence of damage to the inner insulation around each conductor. There were no bare wires observed. Thus, the record fails to establish the substantial probability for serious injury. Also, according to a statement from the operator, the cord was damaged the morning of the inspection (Exh. R-5; Tr. 186).

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6 Section 1910.305(g)(1)(I) provides, in part, that "flexible cords and cables shall be approved and suitable for conditions of use and location."

Tops alleges employee misconduct. However, Tops failed to show that there was a specific work rule or that it was violated. The record in this case does not show that Tops maintained any specific safety program (Tr. 150). Also, Savoy referred to the operator as a foreman (Tr. 172, 192). If the foreman is considered a supervisor, there is a prima facie evidence that any work rules, if they existed, were not effectively enforced. *Archer Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017, 1991 CCH OSHD 29,317, p. 39,378 (No. 87-1067). In the *Archer Western* case, the Commission stated that "where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisors' duty to protect the safety of employees under his supervision . . . . A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." Thus, employee misconduct has not been established by Tops.

Accordingly, an "other" than serious violation of § 1910.305(g)(1)(I) is affirmed with no penalty.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

1. Item 1 - an "other" than serious violation of §1910.37(q)(1), is affirmed with no penalty assessed.

2. Item 2 - an "other" than serious violation of § 1910.212(a)(5), is affirmed with no penalty assessed.

3. Item 3 - a serious violation of § 1910.304(f)(5)(v), is affirmed with a $300 penalty assessed.

4. Item 4 - an "other" than serious violation of § 1910.305(g)(1)(I), is affirmed with no penalty assessed.

/S/ KEN S. WELSCH

KEN S. WELSCH
Judge

Date: December 12, 1995