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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>OTIS ELEVATOR COMPANY,<br><br>Respondent. | OSHRC Docket No. 90-2046 |

***DECISION***

Before: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

At issue in this case is whether an employer is required to equip an extension cord with a ground fault circuit interrupter ("GFCI") when the cord is connected to permanent wiring on a construction site. For the reasons that follow, we find that the extension cord was required to have a GFCI, affirm Otis' failure to have one as an other-than-serious violation, and reject Otis' claim that the violation was *de minimis*.

I.

On May 30, 1990, Otis was installing an elevator at a 2-story addition to a building in Fort Worth, Texas. A 100-foot 3-wire extension cord was connected to a 120-volt, 15- to 20-ampere receptacle that was part of the permanent wiring of the original building. The cord ran to the new structure's machine room, where a 3-way adapter connected to the cord's receptacle permitted Otis' employees to power a Bosch hammer drill, a Bosch ½-inch

drill motor, and a portable lamp.[1] Because neither a GFCI nor an assured equipment grounding conductor program ("AEGCP") was in use, Otis was issued a serious citation alleging a violation of 29 C.F.R. § 1926.404(b)(1)(i).[2] Administrative Law Judge E. Carter Botkin affirmed this citation item as an other-than-serious violation and did not assess a penalty.

II.

An employer may comply with the cited standard, § 1926.404(b)(1)(i), by using either a GFCI or an AEGCP. It is undisputed that Otis did not have an AEGCP. At issue is

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[1] The Secretary does not dispute the judge's finding that the two pieces of Bosch equipment were double insulated. The lamp had a metal cover with a 4-foot cord and 2-prong plug. It was of a clip-on design and was clipped onto a metal duct.

[2] Section 1926.404(b) provides, in pertinent part:

> **§ 1926.404 Wiring design and protection.**
> . . . .
> (b) *Branch circuits*--(1) *Ground-fault protection*--(i) *General.* The employer shall use either ground fault circuit interrupters as specified in paragraph (b)(1)(ii) of this section or an assured equipment grounding conductor program as specified in paragraph (b)(1)(iii) of this section to protect employees on construction sites. These requirements are in addition to any other requirements for equipment grounding conductors.
>
> (ii) *Ground-fault circuit interrupters.* All 120-volt, single-phase, 15- and 20-ampere receptacle outlets on construction sites, which are not a part of the permanent wiring of the building or structure and which are in use by employees, shall have approved ground-fault circuit interrupters for personnel protection. . . .
>
> (iii) *Assured equipment grounding conductor program.* The employer shall establish and implement an assured equipment grounding conductor program on construction sites covering all cord sets, receptacles which are not a part of the building or structure, and equipment connected by cord and plug which are available for use or used by employees.

whether the cited extension cord was a receptacle outlet[3] which was not a part of the permanent wiring of the building or structure and therefore required a GFCI. Although the language of the standard does not answer the question, the Secretary has explained in the preamble to the standard that "under the OSHA regulation for GFCI[']s, protection must be provided for the receptacle outlets on the end of extension cord sets even if the extension cords are supplied by permanent wiring." *Electrical Standards for Construction*, 51 Fed. Reg. 25,294, 25,310 (July 11, 1986). We conclude that this authoritative statement establishes that plugging the extension cord into the permanent wiring of the building does not, as Otis claims, make it a part of the permanent wiring.[4] *See Phelps Dodge Corp.*, 11 BNA OSHC 1441, 1444, 1983-84 CCH OSHD ¶ 26,552, pp. 33,920-21 (No. 80-3203, 1983), *aff'd*, 725 F.2d 1237 (9th Cir. 1984)(where standard is susceptible to different interpretations, the preamble is the best and most authoritative statement of the Secretary's legislative intent).

We find no merit in Otis' claims to the contrary. None of the OSHA interpretations cited by Otis are inconsistent with the Secretary's interpretation that the cited extension cord requires a GFCI.[5] OSHA Chicago Regional Instruction STD 3-9.1, *Subject: Ground Fault Circuit Interrupters Violations.* (October 26, 1981), states in paragraph II. E. that where only approved double-insulated portable tools and/or appliances are connected to plug- and cord-

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[3] Otis also argues that the cited extension cord did not have a "receptacle outlet." 29 C.F.R. § 1926.449 defines an "outlet" as "[a] point on the wiring system at which current is taken to supply utilization equipment," a "receptacle" as "a contact device installed at the outlet for the connection of a single attachment plug," and a "receptacle outlet" as "[a]n outlet where one or more receptacles are installed." The extension cord had a receptacle outlet, as defined by the standard, because it was a point on the wiring system where the single attachment plug of the three-way adapter is connected, to supply current to the Bosch tools and the portable light.

[4] Otis argues that an extension cord is not "temporary wiring." We do not need to further classify the extension cord as "temporary wiring" because the application of the standard does not require it. The standard addresses receptacle outlets that are "not a part of the permanent wiring of the building or structure."

[5] *Compare Georgia-Pacific Corp. v. OSHRC*, 25 F.3d 999, 1004 (11th Cir. 1994), where the court found that the phrase "obstructs forward view" found in the cited standard was unenforceably vague because the Secretary advanced several interpretations of what the phrase meant.

supplied electrical service, the requirements for GFCI's or an AEGCP do not apply, and no citation shall be issued. There is no evidence that the lamp Otis used was double insulated. Therefore, Otis could still have been cited under the Chicago Regional guidelines. It also does not address whether an extension cord is part of the permanent wiring of a structure, but is only an interpretation of when a citation shall be issued. The compliance officer's testimony that it was the policy of another region, OSHA Region VI, to cite if there was no exposure to conductive surfaces[6] is not a different interpretation of what the standard means, but a guide to when to apply the standard. A 1982 OSHA document titled "Clarification of Ground-Fault Protection Standard," cited by Otis, is actually consistent with the 1986 preamble. It also interprets the standard as applying to extension cords.[7]

III.

We also find no basis for classifying this violation as *de minimis*, as Otis argues.[8] A violation is *de minimis* if it has no direct or immediate relationship to safety or health. *Holly Springs Brick & Tile Co.*, 16 BNA OSHC 1856, 1861, 1994 CCH OSHD ¶ 30,468, p. 42,078 (No. 90-3312, 1994). Otis has failed to establish that the absence of a GFCI would increase the risk of injury so slightly that the relationship of the violation to safety and health was not direct or immediate. *Donovan v. Daniel Constr. Co.*, 692 F.2d 818, 822 (1st Cir., 1982). The

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[6] Otis' employees were working on a dry concrete floor. Otis' expert witness testified that dry concrete is conductive. Therefore, contrary to Otis' assertion, Otis could be cited under the compliance officer's interpretation of Region VI's policy.

[7] Although Otis cites the interpretations of its expert witness regarding whether an extension cord is covered by the standard, the existence of other interpretations does not make the Secretary's interpretation unenforceably vague. *See CBI Services, Inc.*, 15 BNA OSHC 2046, 2050, 1991-93 CCH OSHD ¶ 29,924, p. 40,860 (No. 90-1719, 1992) (existence of other definitions of term "confined space" does not of itself make the Secretary's interpretation of the term vague).

[8] The Secretary also argues that the Commission is without statutory authority to classify a violation as *de minimis*. However, this argument was rejected by the Commission in *Holly Springs Brick & Tile Co.*, 16 BNA OSHC 1856, 1861, 1994 CCH OSHD ¶ 30,468, p. 42,078 (No. 90-3312, 1994), where we held that the Commission has the authority to reclassify a violation as *de minimis*.

record establishes the possibility that the cord could be damaged. As Otis' construction mechanic testified, Otis' employees "always pick up people's cords, because you don't want to roll -- you don't want to break their cords up." He also testified that the other mechanics on the jobsite would only "more or less" pick up the extension cords. A GFCI would protect employees from electric shock caused by a damaged cord or other defective electrical equipment. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1994 CCH OSHD ¶ 30,148, p. 41,474 (No. 91-862, 1993). We therefore conclude that Otis' failure to have a GFCI does have a direct relationship to employee safety.

IV.

The Secretary has not asked the Commission to disturb the judge's characterization of the violation as other-than-serious with no penalty assessed. Accordingly, we affirm the judge's decision finding an other-than-serious violation of the cited standard with no penalty assessed.

It is so ordered.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Velma Montoya
Commissioner

Dated: April 4, 1995

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| Complainant, | : | |
| v. | : | Docket No. 90-2046 |
| OTIS ELEVATOR COMPANY, | : | |
| Respondent. | : | |

## NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on April 4, 1995. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

April 4, 1995
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 90-2046

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SECRETARY OF LABOR
Complainant,
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OTIS ELEVATOR CO.
Respondent.

OSHRC DOCKET
NO. 90-2046

# 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 June 22, 1993. The decision of the Judge will become a final order of the Commission on July 22, 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 July 12, 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
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Review Commission
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Washington, D.C. 20036-3419

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: June 22, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 90-2046

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APPEARANCES:

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For the Respondent.

Gregory J. Garner, Esquire
Hartford, Connecticut
For the Respondent.

Before: Administrative Law Judge E. Carter Botkin

## DECISION AND ORDER

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

The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a construction site in Fort Worth, Texas, on May 30, 1990, where two employees of Respondent ("Otis") were installing an elevator. As a result of the inspection, Otis was issued a serious citation alleging violations of 29 C.F.R. §§ 1926.404(b)(1)(i) and 1926.405(a)(2)(ii)(J). Otis contested the citation, and a hearing was held on April 2, 1991.

Background

The project under construction was a two-story addition to an already-existing Texas State Highway Department building. At the time of the inspection the addition was roofed, its outside walls and doors were up, and its interior, including the concrete floors, was dry. The windows were in on the second floor, and sheetrock was being installed on that level; windows were being put in on the first floor, which was about 6 feet underground, and electricians were working on both levels. The Otis employees, who had been at the site for about a week, were working on the first level; Larry Corley was the mechanic in charge, and Tony Cimino was his helper. (Tr. 7-12; 20; 28-30; 70-71; 114-17; 126-30; 147-49; 168).

On the morning of May 30, Corley had connected a 100-foot three-wire extension cord to a duplex receptacle located on the exterior of the second floor of the older building; he ran the cord along the second floor of the new structure and down through a hoistway to Cimino, who took it into the machine room controlling the elevator to power the Bosch hammer drill, the Bosch half-inch drill motor and the portable light he was using that day. The male end of the extension cord plugged into the receptacle had three prongs, one of which was a ground prong, and the female end had a three-way adapter plugged into it so that all three pieces of equipment could be used.[1] (Tr. 12-24; 44-46; 50; 60-61; 67-70; 117-36; 141-46; 158-62; 167-69; R-3-4; R-6).

Item 1 - 29 C.F.R. § 1926.404(b)(1)(i)

The subject standard provides as follows:

> The employer shall use either ground fault circuit interrupters as specified in paragraph (b)(1)(ii) of this section or an assured equipment grounding conductor program as specified in paragraph (b)(1)(iii) of this section to protect employees on construction sites. These requirements are in addition to any other requirements for equipment grounding conductors.

Paragraph (b)(1)(ii) provides, in pertinent part, as follows:

> (ii) *Ground-fault circuit interrupters.* All 120-volt, single-phase, 15- and 20-ampere receptacle outlets on construction sites, which are not a part of the

[1]Although R-3 and R-4 depict the cord with a missing male plug, it is clear from the record that the male plug on the cord at the time of the inspection did, in fact, have a ground prong.

permanent wiring of the building or structure and which are in use by employees, shall have approved ground-fault circuit interrupters for personnel protection.

Paragraph (b)(1)(iii) provides as follows:

(iii) *Assured equipment grounding conductor program.* The employer shall establish and implement an assured equipment grounding conductor program on construction sites covering all cord sets, receptacles which are not a part of the building or structure, and equipment connected by cord and plug which are available for use or used by employees. This program shall comply with the following minimum requirements:

(A) A written description of the program, including the specific procedures adopted by the employer, shall be available at the jobsite for inspection and copying by the Assistant Secretary and any affected employee.

(B) The employer shall designate one of more competent persons (as defined in § 1926.32(f)) to implement the program.

(C) Each cord set, attachment cap, plug and receptacle of cord sets, and any equipment connected by cord and plug, except cord sets and receptacles which are fixed and not exposed to damage, shall be visually inspected before each day's use for external defects, such as deformed or missing pins or insulation damage, and for indications of possible internal damage. Equipment found damaged or defective shall not be used until repaired.

(D) The following tests shall be performed on all cord sets, receptacles which are not a part of the permanent wiring of the building or structure, and cord- and plug-connected equipment required to be grounded:

(1) All equipment grounding conductors shall be tested for continuity and shall be electrically continuous.

(2) Each receptacle and attachment cap or plug shall be tested for correct attachment of the equipment grounding conductor. The equipment grounding conductor shall be connected to its proper terminal.

(E) All required tests shall be performed:

(1) Before first use;

(2) Before equipment is returned to service following any repairs;

(3) Before equipment is used after any incident which can be reasonably suspected to have caused damage (for example, when a cord set is run over); and

(4) At intervals not to exceed 3 months, except that cord sets and receptacles which are fixed and not exposed to damage shall be tested at intervals not exceeding 6 months.

(F) The employer shall not make available or permit the use by employees of any equipment which has not met the requirements of this paragraph (b)(1)(iii) of this section.

> (G) Tests performed as required in this paragraph shall be recorded. This test record shall identify each receptacle, cord set, and cord- and plug-connected equipment that passed the test and shall indicate the last date it was tested or the interval for which it was tested. This record shall be kept by means of logs, color coding, or other effective means and shall be maintained until replaced by a more current record. The record shall be made available on the jobsite for inspection by the Assistant Secretary and any affected employee.

The citation alleges that Otis used neither a ground fault circuit interrupter ("GFCI") nor an assured equipment grounding conductor program ("AEGCP") to protect its employees during their use of the Bosch hammer drill and Bosch drill motor. Otis does not dispute that it did not use either a GFCI or an AEGCP at the site. It contends, however, that it was in compliance with paragraph (b)(1)(ii) because the duplex receptacle into which the extension cord was plugged was part of the permanent wiring of the building.[2] The Secretary's position is that a GFCI or AEGCP was nevertheless required because the extension cord was temporary wiring which was exposed to damage and the end of the cord into which the tools were plugged was a receptacle.[3]

In support of its contention, Otis notes the language of paragraph (b)(1)(ii). It also notes various definitions set out in section 1926.449, which, according to Otis, demonstrate that the receptacle outlets referred to in paragraph (b)(1)(ii) cannot mean the attachment plugs on extension cords. Standing alone, paragraph (b)(1)(ii) could arguably be interpreted as Otis asserts. However, the standard must be read in its entirety to derive its meaning.

The standard, as written, requires employers to comply with either paragraph (b)(1)(ii) or (b)(1)(iii) to protect employees on construction sites. Paragraph (b)(1)(ii) requires receptacle outlets which are not a part of the permanent wiring of the building and which are in use by employees to have GFCI's, while paragraph (b)(1)(iii) requires an AEGCP covering "all cord sets, receptacles which are not a part of the building or structure,

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[2]Both Larry Corley and Charles Moore, the OSHA compliance officer ("CO") who inspected the site, testified the receptacle was part of the permanent wiring of the original building, and that it was a 120-volt, 15- to 20-ampere receptacle. (Tr. 20-21; 50-51; 69-70; 124-25; 131).

[3]Although the Secretary did not file a post-hearing brief in this matter, his position is stated on the record. (Tr. 97-99).

and equipment connected by cord and plug which are available for use or used by employees." Significantly, (b)(1)(iii) specifically applies to "[e]ach cord set, attachment cap, plug and receptacle of cord sets, and any equipment connected by cord and plug, except cord sets and receptacles which are fixed and not exposed to damage." Read in its entirety, it is apparent the standard applies to all cord sets exposed to damage at a construction site, regardless of the power source to which they are connected.

Otis nonetheless asserts that the Secretary's interpretation of the standard is unreasonable and that his enforcement has been inconsistent. In support of this assertion, Otis points to R-1, Instruction STD 3-9.1 issued by OSHA Region V in Chicago in 1981, which states at section II.E. that the GFCI and AEGCP requirements will not apply and no citation will issue where only approved double-insulated portable tools are connected to plug- and cord-supplied electrical service. Otis also points to the testimony of Norman Byers, a self-employed electrical engineer with many years of experience in electrical and electronic systems. Byers testified that he was familiar with the National Electrical Code ("NEC") and with the OSHA standards, that the OSHA standards were derived from the NEC, that the subject standard was the same as NEC Article 305, and that in his opinion there was no violation at the site because the cord was connected to a permanent power source in compliance with the NEC. (Tr. 186-95; 199-211; R-7).

The thrust of Respondent's assertion is that it did not have notice of the Secretary's interpretation of the standard. I disagree. Although the initial standard incorporated by reference the 1971 NEC, the amended standard issued in 1976 specifically adopted the language currently set out at 1926.404(b)(1)(i)-(iii) instead of that in the NEC.[4] 41 Fed Reg. 55,696, 55,702-04 (1976). OSHA revised the standard again in 1986, but made no changes to the language of 1926.404(b)(1)(i)-(iii). In discussing that section in the preamble,

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[4]The NEC provision stated that "[a]ll 15- and 20-ampere receptacle outlets on single-phase circuits for construction sites shall have approved ground-fault circuit protection for personnel." 41 Fed Reg. 55,696 (1976).

OSHA noted the differences between its standard and the analogous 1984 NEC provisions.[5] In particular, OSHA noted its AEGCP requirements were more stringent than those of the NEC, and that the NEC's GFCI requirements applied only to temporary wiring. Significantly, OSHA specifically stated that "under the OSHA regulation for GFCIs, protection must be provided for the receptacle outlets on the end of extension cord sets even if the extension cords are supplied by permanent wiring."[6] 51 Fed Reg. 25,310 (1986). Based on this statement, it is clear Otis had fair notice of the Secretary's interpretation of the standard.[7] Its position is therefore rejected.

Although the foregoing establishes a violation of the standard, Otis contends its failure to use a GFCI or an AEGCP should be characterized as *de minimis*. In this regard, Corley testified he had replaced both the male and female plugs on the cord two to three years before the inspection, that he tested its continuity with a meter after doing so, and that he checked it for damage every time he used it and retested its continuity every three to four months.[8] (Tr. 16-19; 119-22; 144-46). The CO testified the cord was not damaged, and that while he did not test it he was satisfied it was continuous. (Tr. 65-68).

Corley further testified that both of the Bosch tools were double insulated because they had two leads, or prongs, instead of three, and plastic exteriors other than where the

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[5]NEC Article 305 is entitled "Temporary Wiring." Section 305-4(a) provides that "[a]ll 125-volt, single-phase, 15- and 20-ampere receptacle outlets which are not a part of the permanent wiring of the building or structure and which are in use by employees shall have ground-fault circuit-interrupter protection for personnel." Section 305-4(b) is an abbreviated version of the AEGCP requirements of 1926.404(b)(1)(iii). *See* National Fire Protection Assn., *The National Electrical Code Handbook*, 1984 Code 240-41 (1983) (*"NEC Handbook"*).

[6]Also significant is the editorial note following NEC section 305-4(a), which states that "[r]eceptacle outlets that are a part of the permanent wiring of the building are not required to have GFCI protection. However, it is intended that they be used with portable GFCIs or meet the provisions of Section 305-4(b)." *NEC Handbook* at 240.

[7]This is so notwithstanding R-1, which was issued in 1981.

[8]Corley has been a construction mechanic with Otis for ten years, during which time he also passed a mechanic's exam after taking a number of courses, including classes in basic electricity, circuit tracing and wiring; prior to joining Otis, Corley worked as a carpentry subcontractor for eight years. (Tr. 105-14).

bit went.[9] He identified R-6 as a photo of the hammer drill, which he had with him, and R-5 as its operating manual. He noted the model numbers on R-5 and the tool itself, as well as the "double insulated" notation on the front of R-5.[10] Corley said he no longer had the Bosch drill motor because it had been stolen at a job he had been on in January 1991. He also said the Bosch tools were of good quality, that he had been using them for at least two years at the time of the inspection, and that he had examined them for damage just about every time he used them and had never observed anything wrong with them. (Tr. 13-15; 149-67).

Norman Byers testified he had disassembled and examined the hammer drill, and that he concluded it was double insulated; he further concluded, based on Corley's testimony, that the drill motor was probably also double insulated. Byers noted that such tools greatly reduce the risk of electrical shock because of the insulation they provide in the event of a short. He opined that the situation at the site was not hazardous because the tools were double insulated and the area was dry. (Tr. 211-16).

Based on the foregoing, it is found that the extension cord was undamaged and grounded, and that the Bosch tools were double insulated.[11] Otis bases its assertion that the violation was *de minimis* on R-1, which, as noted above, was issued in 1981 and states that the GFCI and AEGCP provisions will not apply where only double-insulated tools are used. 1926.404(f)(7)(iv)(C)(6), the current equivalent to the portable tool exception set out in R-1, states in pertinent part that:

> Listed or labeled portable tools and appliances protected by a system of double insulation, or its equivalent, need not be grounded. If such a system is employed, the equipment shall be distinctively marked to indicate that the tool or appliance utilizes a system of double insulation.

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[9]Corley had put a plug with a ground prong on the hammer drill about two years before because the original plug had been damaged, but the ground prong was not hooked up because the tool had only two leads. (Tr. 13-14; 150; 166).

[10]The undersigned observed at the hearing that the plate on the tool had the same model number and information as that on the front of R-5. (Tr. 156).

[11]While the CO testified the tools were not double insulated, he gave no reason for his belief other than his having seen the tools. (Tr. 46-48; 74-75). Corley and Byers, on the other hand, gave convincing reasons to support their testimony, as set out above.

The foregoing reads essentially the same as the exception set out in R-1. However, Commission precedent is well settled that it is the employer's burden to demonstrate the applicability of an exception. R-1 was issued in 1981, well before the present standard. Otis presented nothing to show R-1 was still in effect, and the CO, who had been with OSHA for eleven years at the time of the hearing, testified it was not the policy in his region. (Tr. 37; 91). Moreover, the exception applies only to portable tools. The subject standard, on the other hand, applies to receptacles, cord sets and cord-connected equipment, and requires GFCI's or an AEGCP *in addition to* any other provisions for equipment grounding conductors. Even assuming *arguendo* that the exception exempted the Bosch tools from the GFCI and AEGCP requirements, the extension cord set, which itself would have presented a hazard if it had become damaged and an employee had contacted it, was not exempted. Accordingly, that the tools were double insulated is no basis for characterizing the violation as *de minimis*. That the extension cord was undamaged and grounded likewise provides no basis for a *de minimis* classification, since it is clear that Corley's procedures did not meet all of the AEGCP requirements. However, the violation is nonetheless classified as nonserious, for the following reasons.

The CO considered the violation serious primarily because of his belief the tools were not double insulated and the extension cord was not designed for hard usage. (Tr. 43-55; 59-60; 68; 74-75; 91-92). However, the foregoing shows the tools were, in fact, double insulated. Further, the cord was undamaged and grounded, and the discussion *infra* concludes it was appropriate for hard usage, making it less subject to damage. Based on the record, the Secretary has not shown the cited condition was a serious hazard. This citation item is therefore affirmed as nonserious, and no penalty is assessed.

Item 2 - 29 C.F.R. § 1926.405(a)(2)(ii)(J)

Charles Moore testified the extension cord used at the site was not designed for hard usage; it was flat and had no markings to identify it as approved for hard usage, and in his experience, approved cords are labeled to show they are for hard or extra-hard usage. Moore noted the standard did not define the term "hard usage" but that it gave examples

of such cords. His opinion was that the cord could have become damaged and exposed the employees to shock or electrocution. (Tr. 43-55; 59-68; 91-92).

Moore further testified the portable lamp plugged into the extension cord was not designed for hard usage; its two-wire cord was ungrounded and very light, and it was not marked to show it was for hard usage. Moore said the lamp could have been purchased in a hardware store, and that he rarely saw that type on construction sites. He also said the lamp could have caused serious injury or death. (Tr. 45-46; 56-62; 66).

Larry Corley testified he bought the twelve-gauge extension cord about four years before the inspection at an electrical supply or lumber store, that he had purchased it for construction use, and that he had used it just about every day prior to the inspection; he had used the same type of cord throughout his work experience, and based on that experience he believed it was a good, heavy-duty cord fit for hard usage. Corley noted he preferred flat cords because they were less prone to damage if something rolled over them. He also noted there were no markings on the cord to indicate it was for hard usage, but that he had seen such markings on cords before. (Tr. 21-26; 120-21; 141-42).

Corley described the portable lamp as a clip-on device with a metal cover and a two-wire 4-foot cord, and noted it had been attached to a metal duct 1 to 2 feet above where Cimino had been working. He said he bought the lamp in a hardware store, that he saw such lamps on construction sites all the time, and that he had not seen that particular type of lamp with three prongs. He also said the lamp was fairly new and in good shape, that he had tested it with his meter, and that he inspected it every time he used it. His opinion was that the lamp's use at the site did not present a hazard. (Tr. 22-24; 28; 168-71).

The subject standard provides as follows:

> Extension cord sets used with portable electric tools and appliances shall be of three-wire type and shall be designed for hard or extra-hard usage. Flexible cords used with temporary and portable lights shall be designed for hard or extra-hard usage.
>
> NOTE: The National Electrical Code, ANSI/NFPA 70, in Article 400, Table 400-4, lists various types of flexible cords, some of which are noted as being designed for hard or extra-hard usage. Examples of these types of flexible cords include hard service cord (types S, ST, SO, STO) and junior hard service cord (types SJ, SJO, SJT, SJTO).

Otis contends the extension cord did not violate the standard because the standard does not define hard or extra-hard usage, and the types of cords listed in the note are not exclusive but rather examples of acceptable kinds of cords. I agree. As Otis points out, OSHA noted in the preamble to the 1986 standard that it did not want the provision to be unnecessarily restrictive, and that the note was added to give guidance as to the types of cords to be used. 51 Fed Reg. 25,314 (1986). Further, there is no requirement in the cited standard that a cord's designation be indicated on the cord itself. Finally, Corley's testimony about the cord's fitness for construction use was persuasive, and the CO himself admitted in the preceding discussion that it was not damaged, even though it was four years old and had been used extensively. This portion of the citation item is therefore vacated.

In regard to the portable lamp, Otis contends the standard does not apply to this type of lamp. Although I disagree with this contention, I nevertheless conclude the lamp did not violate the standard. The CO determined the lamp's cord was not designed for hard usage primarily because it did not have a ground wire and was not marked to indicate it was approved for such use. However, the second sentence of the standard, which is the portion that applies to the lamp, has no ground wire requirement, from which it can only be concluded not all hard-usage flexible cords have ground wires. Moreover, as noted *supra*, that the cord was not marked to show it was designed for hard usage does not, without more, establish the cord was not suitable for such use. Based on the record, the Secretary has not met his burden of proving a violation; accordingly, this portion of the citation item is also vacated.

## Findings of Fact

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear above. *See* Rule 52(a) of the Federal Rules of Civil Procedure. Proposed findings of fact or conclusions of law that are inconsistent with this decision are DENIED.

## Conclusions of Law

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

2. Respondent was in nonserious violation of 29 C.F.R. § 1926.404(b)(1)(i).

3. Respondent was not in violation of 29 C.F.R. § 1926.405(a)(2)(ii)(J).

## Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Item 1 of serious citation number 1 is AFFIRMED as a nonserious violation, and no penalty is assessed.

2. Item 2 of serious citation number 1 is VACATED.

E. Carter Botkin
Administrative Law Judge

Date: **June 14, 1993**