UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET N.W.
4TH FLOOR
WASHINGTON D.C. 20006-1246

FAX.
COM (202) 634-4008
FTS 634-4008

SECRETARY OF LABOR,

Complainant,

v.

EDWARD JOY CO.,

Respondent.

OSHRC Docket No. 91-1710

DECISION

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

BY THE COMMISSION:

The Edward Joy Company ("Joy"), a heating and plumbing contractor, was one of several contractors engaged in rehabilitating apartments at a complex in Syracuse, New York. On April 25, 1991, Compliance Officer Thomas R. Rezsnyak of the Occupational Safety and Health Administration inspected the job site as part of a scheduled general inspection. During the course of his inspection, the compliance officer observed a 50-foot electrical extension cord connected to a drill. He tested the polarity of the extension cord and determined that the cord was wired in reverse polarity.

As a result of the inspection, Joy was cited for several violations of the Occupational Safety and Health Act ("the Act"), including Repeat Citation No. 2, Item 2, alleging a violation of 29 C.F.R. § 1926.404(a)(2), for the reversed polarity of the extension cord.[1]

[1] The cited standard provides as follows:

> **§ 1926.404 Wiring design and protection.**
> (a) *Use and identification of grounded and grounding conductors*[.]
> . . . .
> (2) *Polarity of connections*. No grounded conductor shall be attached to any terminal or lead so as to reverse designated polarity.

The Secretary proposed a $160 penalty for this item. She alleged that it was a repeat violation because there was a Commission final order against Joy for a violation of the same standard.

At the hearing, the compliance officer noted that Joy had admitted in its response to the Secretary's request for admissions that the 50-foot extension cord was wired in reverse polarity. The compliance officer testified that the hot and neutral wires were reversed on the cord's plug terminals, resulting in current remaining in the drill even with the drill's switch in the "off" position, and that this condition existed despite the drill's double insulation. The compliance officer acknowledged that since the drill was plugged into a ground fault circuit interrupter, the only injury that could result would be a minor electrical shock, and the violation would normally be considered other-than-serious. He testified that since Joy had been previously cited for violating the same standard, the violation was classified as a repeat violation.

In his decision, Administrative Law Judge Paul L. Brady found that the standard was violated because Joy admitted that the extension cord was wired in reverse polarity. He found that the proposed penalty of $160 was appropriate. However, the judge affirmed the violation of the standard as other-than-serious rather than repeat. In her petition for review, the Secretary takes exception to the judge's recharacterization of the violation. She notes that the judge did not provide any basis for concluding that the violation was other-than-serious, and that her evidence relating to the repeat characterization of the violation was unrebutted by Joy.

We have held that a violation is properly classified as repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979); *See also Kulka Constr. Management Corp.*, 15 BNA OSHC 1870, 1874, 1992 CCH OSHD ¶ 29,829, pp. 40,687-78 (No. 88-1167, 1992). Unless the standard at issue is a general standard, the Secretary establishes a prima facie case of similarity by showing that both violations are of the same standard. However, if the standard at issue is a general standard, then the Secretary would have the burden of proving that the two violations are substantially similar

in nature. *Potlatch*, 7 BNA OSHC at 1063, 1979 CCH OSHD at p. 28,172. Here, Joy does not dispute that it had previously been cited for violating the same standard and that the prior citation had become a final order. Because Joy has failed to rebut the Secretary's showing of similarity, we find Item 2 of Citation No. 2 repeated. We also find that the judge erred in not affirming the item as repeated.

ORDER

Accordingly, we reverse the judge's decision as to Citation No. 2, Item 2 and find that the violation of 29 C.F.R. § 1926.404(a)(2) is properly characterized as a repeat violation. We affirm the proposed penalty of $160.

Edwin G. Foulke, Jr.
Chairman

Donald G. Wiseman
Commissioner

Velma Montoya
Commissioner

Dated: January 21, 1993

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FTS (202) 634-4008

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 91-1710
EDWARD JOY COMPANY,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision and order by the Occupational Safety and Health Review Commission was issued on January 21, 1993. **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.

January 21, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 91-1710

NOTICE IS GIVEN TO THE FOLLOWING:

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

Patricia Rodenhausen, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
201 Varick St., Room 707
New York, NY 10014

Paul M. Sansoucy, Esquire
Bond, Schoeneck & King
One Lincoln Center
Syracuse, New York 13002

Paul L. Brady
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309-3119

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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET N.W.
4TH FLOOR
WASHINGTON D.C. 20006-1246

FAX
COM (202) 634-4008
FTS 634-4008

SECRETARY OF LABOR Complainant, v. EDWARD JOY COMPANY Respondent.	OSHRC DOCKET NO. 91-1710

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 September 16, 1992. The decision of the Judge will become a final order of the Commission on October 16, 1992 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 October 6, 1992 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
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

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

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

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: September 16, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-1710

NOTICE IS GIVEN TO THE FOLLOWING:

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

Patricia Rodenhausen, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
201 Varick, Room 707
New York, NY 10014

Paul M. Sansoucy, Esq.
Bond, Schoeneck & King
One Lincoln Center
Syracuse, NY 13202

Paul L. Brady
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309 3119

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

PHONE:
COM (404) 347-4197
FTS 257-4086

FAX:
COM (404) 347-0113
FTS 257-0113

SECRETARY OF LABOR,	:	
Complainant,	:	
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EDWARD JOY COMPANY,	:	
Respondent.	:	

Appearances:

Barnett Silverstein, Esq.
Office of the Solicitor
U. S. Department of Labor
New York, New York
For Complainant

Paul M. Sansoucy, Esq.
Bond, Schoeneck & King
Syracuse, New York
For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

This proceeding is brought pursuant to Section 10 of the Occupational Safety and Health Act of 1970 (Act) to contest two citations and proposed penalties issued by the Secretary of Labor (Secretary) pursuant to Section 9(a) of the Act.

Respondent Edward Joy Company (Joy) was engaged as a heating and plumbing contractor at the time of the inspection which gave rise to issuance of the citations. Joy was in the process of rehabilitating apartments known as the James-Geddes complex in Syracuse, New York.

Compliance Officer Thomas Rezsnyak conducted the inspection of the worksite where Joy employees worked under the supervision of plumbing foreman Henry Heiser and pipefitter foreman David Erwin.

In order to establish the violations alleged in this case, the Commission has held that it is necessary for the Secretary to show by a preponderance of the evidence that (1) the cited standard applies; (2) there was a failure to comply with the standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known of the condition with exercise of reasonable diligence. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 1981 CCH OSHD ¶ 25,578 (No. 78-6247, 1982); *Daniel International Corp.*, 9 BNA OSHC 2027, 1977-78 CCH OSHD ¶ 21,679 (No. 76-181, 1977).

The Alleged Violation of 29 C.F.R. 1926.404(b)(1)(ii)

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

The Secretary alleges that Joy employees used a cord/plug connected light, which was powered through an extension cord without an approved ground-fault circuit interrupter (GFCI). There is no dispute that the light was being used and was plugged into an extension cord without a GFCI. Also, the light had been borrowed by another sub-contractor and was not being used by Joy employees at the time of the inspection. Mr. Rezsnyak testified that two Joy employees had installed, or were going to install, pipe supports in the room where the light was used (Tr. 38). He noted that adjacent to the cord in question was another extension cord connected to power a drill motor that was plugged into a GFCI (Tr. 41). The inspector found that GFCIs were used by Joy employees in other areas on the jobsite (Tr. 30).

Mr. Heiser testified that Joy employees used GFCIs on all electrical equipment as part of company policy and that violation of such policy would result in termination of employment (Tr. 193).

The evidence in this case fails to establish the violation alleged. Clearly, Joy employees were preparing to work in the room where the borrowed extension cord was in use and the drill was present. However, it is not shown that the cord was "in use by employees" as required to establish a violation of the standard. The standard was not violated as alleged.

Alleged Repeat Violation of 29 C.F.R. 1926.59(g)(8)

The standard states as follows:

> (g) *Material safety data sheets* - (8) - The employer shall maintain copies of the required material safety data sheets for each hazardous chemical in the workplace, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s).

The citation alleges that:

> Employer did not maintain copies of the required Material Safety Data Sheets (MSDSs) for each hazardous material in the workplace and ensure that they are readily accessible to the employees in their work area during each work shift.
>
> . . . employees were using Crest Good Soldering Flux, Harris Stay Clean Soldering Flux and Lincoln Welding Rods.

There is no dispute that Joy employees were using the above items and that MSDSs were not readily available for the named products. Joy argues, however, that both brands of flux contain zinc chloride and petroleum, or zinc chloride petroleum and ammonium chloride. This is also true of the brands of welding rods which are composed of iron, titanium, manganese and various silicates and carbonates. The hazards, precautions and emergency aid procedures are the same for the different MSDSs.

The primary focus in this case has been on MSDSs for name brand soldering flux and welding rods, which in themselves have not been shown to present "a physical hazard or a health hazard." The standard, however, is concerned with MSDSs for each hazardous chemical in the workplace. While the available MSDSs did not apply to the brand names of the flux and rods at the site, the required MSDSs were maintained "for each hazardous chemical in the workplace," as contained in the flux and rods (Exhs. R-9, R-10).

In explaining why the citation was issued for the alleged violation, the inspecting officer stated "that the Material Safety Data Sheets that they produced for me were not, in

fact, those of the materials that they were using on the site" (Tr. 56). The standard does not relate to materials or name brand products, but solely to hazardous chemicals.

The Secretary has, therefore, failed to establish the required MSDSs were not maintained in accordance with the standard.

The second part of the standard requires the employer to ensure the MSDSs are readily accessible to employees. The Secretary asserts that the "readily accessible" requirement was also not met because an employee would not know if the same chemicals were in the product for treatment purposes (Tr. 56-57). The evidence fails to show that Joy employees were, in fact, without such knowledge. It does show, however, that the same chemicals were present in both brand name products and that treatment would likewise consist of the same procedures. The violation did not occur as alleged.

Alleged Repeat Violation of 29 C.F.R. 1926.404(a)(2)

The standard requires as follows:

> No grounded conductor shall be attached to any terminal or lead so as to reverse designated polarity.

The citation alleges that an extension cord powering a drill motor was wired in reverse polarity.

Rezsnyak testified that with the use of his tester, he determined the reverse polarity. He explained that the hot and neutral wires are reversed on the terminals, which in this case resulted in current remaining in the drill even with the switch in the "off" position. He indicated this condition existed even though the drill was double insulated (Tr. 62-63). The inspector acknowledged that because of the protection provided by the GFCI, only minor electrical shock would result (Tr. 79).

Joy admits that the extension cord was wired in reverse polarity (Tr. 77). The standard was, therefore, violated and an appropriate penalty must now be considered. Section 17(j) of the Act provides:

> The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

The determination of what constitutes an appropriate penalty is within the discretion of the Review Commission. *Long Manufacturing Co. v. OSHRC*, 554 F.2d 902 (8th Cir. 1977); *Western Waterproofing Co. v. Marshall*, 576 F.2d 139 (8th Cir. 1978). The gravity of the offense is the principal factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972). The Commission stated in *Secretary v. National Realty and Construction Co.*, 1 BNA OSHC 1049, 1971-73 CCH OSHD ¶ 15,188 (No. 85, 1971), that the elements to be considered in determining the gravity are: (1) the number of employees exposed to the risk of injury; (2) the duration of the exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury.

Upon consideration of the foregoing factors and acknowledgment by the Secretary that minor electrical shock could result, the proposed penalty of $160.00 is deemed appropriate.

Alleged Repeat Violation of 29 C.F.R. 1926.404(f)(6)

The standard requires as follows:

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

The citation alleges two instances, involving cord/plug connected lead light circuits, in which the standard was violated. In Building No. 312, it is alleged a ground pin was broken inside the plug end of an electric cord. Rezsnyak testified that through use of a continuity tester, he determined that the cord/plug lead light in Room No. 24 did not have a permanent and continuous path-to-ground. He explained that after connecting the continuity tester, its light flashed on and off indicating the circuit was not permanent and continuous. He stated if the path-to-ground was permanent, the light would remain on. His further investigation revealed that upon his "wiggling the ground pin, the light would go on and go off. . .," indicating the problem was in the connection of the pin (Tr. 83-85).

Joy's foremen Heiser and Erwin testified that when first tested, the continuity tester light came on. They agreed that only after movement of the pin by Rezsnyak did the light fail (Tr. 189-191, 201-202). Another witness, a foreman for an electrical contracting firm, testified that he observed Rezsnyak manipulate a pin during a prior inspection until the

tester light failed. He said his warning that the pin could break was not heeded (Tr. 106-108).

There is considerable discussion in the record of the inspector's conduct leading to the alleged violation. There is no reason, however, to conclude that Rezsnyak intentionally caused the pin to fail or acted improperly in conducting the inspection in this case. The evidence does indicate that the light on the tester came on until there was movement of the pin.

The alleged violation is, however, resolved on a different basis. Use of the lead light in Building No. 312 was previously discussed in this decision. The light was borrowed by another sub-contractor and was not being used by Joy employees, nor were they working in the room at the time of the inspection. The evidence fails to establish that Joy employees were exposed to a violative condition or that Joy knew of any such condition.

The Secretary also alleges that a violation of the standard occurred in Building No. 418 at the worksite. It is alleged that the cord/plug on a lead light had the ground pin missing from the plug end. There is no dispute that the lead light found in the meter room (Exh. C-1) belonged to Joy and that the ground pin was missing.

Foreman Erwin testified that a fitter and a welder had been working in the room several days before the inspection and had gone on vacation. He explained that tools and equipment are placed in the gang box after each day's work unless it is defective. In that case, it is left out to be picked up for repair (Tr. 202-204). The evidence does not show that the cord was used by Joy employees with the ground pin missing. Also, there is no evidence to refute Joy's contention that the lead light had been set aside for repair or that Joy employees had not worked in the room for several days.

The evidence fails to establish the violation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Section 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

(1) That Citation No. 1 alleging serious violation of 29 C.F.R. 1926.404(b)(1)(ii) is vacated;

(2) That Item 1 of Citation No. 2 for repeat violation of 29 C.F.R. 1926.59(g)(8) is vacated.;

(3) That Item 2 of Citation No. 2 for repeat violation of 29 C.F.R. 1926.404(a)(2) is affirmed as other than serious, and a penalty in the amount of $160.00 is hereby assessed;

(4) That Item 3 of Citation No. 2 for repeat violation of 29 C.F.R. 1926.404(f)(6) is vacated.

Paul L. Brady

PAUL L. BRADY
Judge

Date: September 10, 1992