United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. KOKOSING CONSTRUCTION CO., INC. Respondent.	OSHRC Docket No. 04-1665

APPEARANCES:

Lauren S. Goodman, Attorney; Daniel J. Mick, Counsel for Regional Trial Litigation; Ann S. Rosenthal, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor; Howard M. Radzely, Solicitor; U.S. Department of Labor, Washington, DC
For the Complainant

Keith L. Pryatel, Esq., Kastner Westman & Wilkins, LLC
For the Respondent

DECISION

Before: RAILTON, Chairman, ROGERS and THOMPSON, Commissioners.

BY THE COMMISSION:

Kokosing Construction Company, Inc. (Kokosing) is a construction contractor based in Ohio. On September 7, 2004, while installing an underground sewer line outside Cincinnati, Kokosing's Working Foreman Brad Rice and Laborer Jason Hurd attempted to pull a braided wire rope choker out from underneath several energized 480-volt electrical cords and water discharge hoses. When Rice and Hurd picked up the wire choker, a burr protruding from the choker pierced one of the electrical cords, energizing the choker and shocking both men. Hurd required CPR and was taken to the hospital. Both employees recovered.

After investigating the incident, OSHA issued Kokosing a citation for a serious violation of 29 C.F.R. § 1926.403(i)(2)(ii)[1] and proposed a penalty of $1,875. Administrative Law Judge Stephen J. Simko granted the Secretary's motion to amend the citation to allege, in the alternative, a violation of 29 C.F.R. § 1926.405(a)(2)(ii)(I).[2] After a hearing in the case, which was designated as EZ Trial pursuant to the Commission's Rules of Procedure, 29 C.F.R. § 2200.200 *et seq.*,[3] the judge affirmed the citation to the alternative standard and assessed the proposed penalty.[4]

At issue on review is whether the judge erred in granting the Secretary's motion to amend the citation to allege an alternative standard, and whether the judge erred in concluding that the Secretary established Kokosing's knowledge of the violation. For the following reasons, we affirm.

I. The Secretary's Motion to Amend

Kokosing argues that the judge erred in granting the Secretary's motion to amend her complaint, which was filed 14 days before the hearing was scheduled to commence. According to Kokosing, the principles governing amendments should be more stringent in EZ Trial cases than in traditional cases. We disagree.

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[1] This provision states:

> In locations where electric equipment would be exposed to physical damage, enclosures or guards shall be so arranged and of such strength as to prevent such damage.

[2] This provision states:

> Flexible cords and cables shall be protected from damage. Sharp corners and projections shall be avoided. Flexible cords and cables may pass through doorways or other pinch points, if protection is provided to avoid damage.

[3] We note that this case arose before the Commission's Rules of Procedure governing EZ Trial were amended and the procedure was renamed "Simplified Proceedings." *See* 70 Fed. Reg. 22,785 (May 3, 2005).

[4] At the hearing, the Secretary withdrew the portion of the citation alleging a violation of section 1926.403(i)(2)(ii).

A judge's ruling on a motion to amend a citation is reviewed for abuse of discretion. *Bland Constr. Co.*, 15 BNA OSHC 1031, 1041, 1991-93 CCH OSHD ¶ 29,325, p. 39,401 (No. 87-992, 1991). Pre-hearing amendments in Commission proceedings – including those designated as EZ Trial – are governed by Federal Rule of Civil Procedure 15(a), which states that leave to amend "shall be freely given when justice so requires." *See* 29 U.S.C. § 661(g) ("Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure"); 29 C.F.R. § 2200.2(b) (same); 29 C.F.R. § 2200.211 (EZ Trial regulations; adopting, inter alia, 29 C.F.R. § 2200.2(b)) ; *Brown & Root, Inc.*, 8 BNA OSHC 1055, 1058, 1980 CCH OSHC ¶ 24,275, 29,568-69 (No. 76-3942, 1980) (motions to amend in Commission are governed by Fed. R. Civ. P. 15). We see nothing in the Commission's procedural rules or past precedent to suggest that the application of Rule 15(a) is any different when the case in question arises under EZ Trial procedures.

This is not to say that there are no limits as to when the Secretary may amend the citation. Such motions will not be granted if the objecting party would be prejudiced by the amendment. *Brown & Root*, 8 BNA OSHC at 1058-59**,** 1980 CCH OSHD at 29,569. Further, as we have recently held, judges must ensure that the objecting party has sufficient time to prepare his case, and should grant a continuance where appropriate. *Reed Eng'g Group, Inc.*, 21 BNA OSHC 1290, 1291 (No. 02-0620, 2005) ("fair notice" must be given to non-moving party; this may be accomplished through granting continuance).

Here, Kokosing has neither argued that it was prejudiced by the Secretary's amendment, nor requested a continuance. While Kokosing claims that it would have "unquestionably prevailed" under the originally cited standard, this does not affect a determination of prejudice. *See Bland Constr. Co.*, 15 BNA OSHC at 1041, 1991-93 CCH OSHD at p. 39,401 (in determining prejudice, the question "is whether, in the time remaining until the hearing, or during a reasonable continuance of it, the employer can prepare its

defense."). It is undisputed that Kokosing never informed the judge in any way that it needed more time to prepare its case. *See Brown & Root*, 8 BNA OSHC at 1059, 1980 CCH OSHC at p. 29,569 (upholding grant of Secretary's motion to amend; employer did not indicate how it had been prejudiced; any possible prejudice could have been cured by continuance; and employer did not request continuance). Under these circumstances, we see no basis on which to find that the judge abused his discretion in granting the Secretary's motion to amend.

II. Knowledge

The Secretary satisfies her burden of showing knowledge by establishing that the cited employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164, 1993-95 CCH OSHD ¶ 30,041, p. 41, 216 (No. 90-1307, 1993), *aff'd*, 19 F.3d 643 (3rd Cir. 1994) (unpublished table decision). The actual or constructive knowledge of the employer's foreman or supervisor can generally be imputed to the employer. *Jersey Steel Erectors*, 16 BNA OSHC at 1164, 1993-95 CCH OSHC at 41,216. *See also Donovan v. Capital City Excavation Co. Inc.*, 712 F.2d 1008 (6th Cir. 1983) (actions of company supervisors are imputed to company).

Here, Kokosing claims that the judge erred in finding that the company had actual knowledge of the violation based on foreman Rice's awareness that the wire choker was underneath and rubbing against the energized electrical cords, and also that the damaged eyes of the choker would eventually have come into contact with the electrical cord. Despite having this knowledge, the judge noted that Rice nonetheless instructed laborer Hurd to help him pull the choker out without stopping to evaluate the situation, de-energize the cords, or unstack the cables. The judge further noted that Rice "had no instruction on how to protect electrical cords from being cut," but knew it was Kokosing's policy to keep electrical cords and metal objects separate.

We find that the record establishes Kokosing had constructive knowledge of the cited

violation, but not actual knowledge. There is no evidence that when Rice instructed Hurd to help him move the choker, Rice was aware there was a burr protruding from the wire choker or that he knew the choker was actually damaged. Also, the Secretary introduced no evidence to support her contention on review that pulling any wire rope choker from underneath electrical cords constitutes a per se violation of section 1926.405(a)(2)(ii)(I).

We find, however, that under the circumstances present here, Rice could have known with the exercise of reasonable diligence that the cited condition presented a hazard. Just prior to the incident, Rice was standing in the trench handing electrical cords and hoses up to laborers at the top of the trench who placed the cords and hoses over the wire choker. When Rice emerged from the trench, he testified that he immediately recognized that the energized electrical cords being in contact with the metal wire choker created a hazardous condition. In fact, as noted, Rice had been specifically instructed by Kokosing to keep electrical equipment and metal objects of any kind apart at all times. *See also* 51 Fed. Reg. 25,294 (July 11, 1986) (electrical cords are "highly subject to damage in construction workplaces"). Knowing that this was a hazardous situation, reasonable diligence required Rice to consider how to avoid or minimize contact between the two materials, such as by placing a buffer between the wire choker and electrical cords, or at least deenergizing the electrical cords, before any attempts to separate them were made. *See, e.g., Pride Oil Well Service*, 15 BNA OSHC 1809, 1814, 1991-93 CCH OSHD ¶ 29,807, p. 40,584 (No. 87-692, 1992) (constructive knowledge proven by showing lack of reasonable diligence; reasonable diligence includes obligation to inspect work area, anticipate hazards, and take measures to prevent accidents).[5] Under these circumstances, we find that the Secretary established that Rice had constructive knowledge of

[5] Kokosing makes limited arguments in its brief on review that the company had exemplary safety programs and an excellent accident history. Whether these arguments are characterized as rebuttal to the Secretary's prima facie case or as proof of unpreventable employee misconduct, we find that Kokosing has failed to provide a sufficient basis to set aside the judge's finding of knowledge. *Pride Oil Well Serv.*, 15 BNA OSHC at 1815-16, 1991-93 CCH OSHD at 40,584-85.

the violative condition and that his knowledge can be imputed to Kokosing.

III. Characterization and Penalty

Kokosing contends that the citation should have been classified as other than serious because the electrical cords were equipped with protective features. A violation is serious "if there is a substantial probability that death or serious physical harm could result." Section 17(k), Occupational Safety and Health Act (Act), 29 U.S.C. § 666(k). The record here shows that the violation could result in serious electrical shock or burns, or electrocution; and, in fact, did result in Hurd's near-fatal electrocution. Therefore, we find that the violation was properly classified as serious.

Section 17(j) of the Act, 29 U.S.C. 666(j), provides that the Commission shall assess an appropriate penalty for each violation, giving due consideration to the gravity of the violation, and to an employer's size, previous history, and good faith. Here, Kokosing has raised no objections to the $1,875 penalty proposed by the Secretary and assessed by the judge. Accordingly, we find it appropriate to assess the proposed penalty amount.

ORDER

We affirm a serious violation of 29 C.F.R. § 1926.405(a)(2)(ii)(I) and assess a penalty of $1,875.

SO ORDERED.

/s/_____
W. Scott Railton
Chairman

/s/_____
Thomasina V. Rogers
Commissioner

/s/_____
Horace A. Thompson
Commissioner

Dated: August 9, 2006

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant v. Kokosing Construction Company, Respondent.	OSHRC Docket No. **04-1665**

Appearances:

Mary L. Bradley, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Keith L. Pryatel, Esquire
Kastner Westman & Wilkins LLC
Akron, Ohio
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Kokosing Construction Company (Kokosing) is engaged in construction contracting with a principal place of business in Frederickstown, Ohio. On September 8, 2004, the Occupational Safety and Health Administration (OSHA) conducted an inspection and investigation subsequent to an accident that occurred at the Respondent's jobsite in Cincinnati, Ohio on September 7, 2004. As a result of this inspection and investigation, a citation was issued to Kokosing on September 16, 2004. Respondent filed a timely notice contesting the citation and notification of proposed penalty. A hearing was held, pursuant to EZ trial procedures, in Columbus, Ohio, on January 21, 2005. Prior to the hearing, the Secretary amended her Citation and Complaint to allege a violation of 29 CFR § 1926.403(i)(2)(ii) and in the alternative a violation of 29 CFR § 1926.405(a)(2)(ii)(I). Prior to the hearing, the Secretary vacated Citation 1, Item 1, subpart B. At the hearing the Secretary vacated the alleged violation of 29 CFR § 1926.403(i)(2)(ii). For the reasons that follow the alleged

violation of 29 CFR § 1926.405(a)(2)(ii)(I) is affirmed as a serious violation and a penalty of $1,875.00 is assessed.

Background

On September 7, 2004, two employees of the Respondent received an electrical shock while moving a wire rope choker from under energized 480-volt electrical cords and water discharge hoses. A wire prong or burr on the choker punctured the outer insulation of one electrical cord, energizing the choker and electrically shocking both employees, knocking them to the ground. One employee required CPR and was taken to the hospital. Both employees recovered from their injuries. Kokosing reported the incident to OSHA, which conducted an inspection and accident investigation. A citation was issued as a result of that investigation.

Discussion

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of those conditions.

Southwestern Bell Telephone Co., 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

In the citation, as amended, the Secretary alleges a serious violation of 29 CFR § 1926.405(a)(2)(ii)(I) as follows:

> **Citation 1, Item 1 Type of Violation: Serious**
>
> 29 CFR § 1926.405(a)(2)(ii)(I): Flexible cords and cables shall be protected from damage:
>
> Kokosing Construction Company, Inc., Cincinnati, Ohio: On or about September 7, 2004, a foreman and laborer were moving hoses and a wire rope choker off of a 480-volt flex cord which supplied power to submersible pumps in an excavation. A wire strand protruding from a damaged section of the choker cut the insulation on the cord resulting in the foreman and laborer receiving an electric shock. The foreman, who assisted in moving choker, was in an excellent position to have firsthand knowledge of the violative condition as the employer has a safety program

requiring regular and frequent inspections of the job site. Consequently, the employer should have known that wire strands were protruding from damaged sections of the choker and that pulling a damaged choker across an energized power cord could not only expose the cord to physical damage but could also result in electric shock to employees. In addition, the employer did not provide employees with clear and specific procedures for ensuring that flexible cords are protected when dragging wire rope choker over the cords.
NOTE: The remainder of the amended allegation was vacated by the Secretary.

The standard at 29 CFR § 1926.405(a)(2)(ii)(I) provides:

> (I) Flexible cords and cables shall be protected from damage. Sharp corners and projections shall be avoided. Flexible cords and cables may pass through doorways or other pinch points, if protection is provided to avoid damage.

At the hearing, the Respondent through counsel, stated on the record that Kokosing did not dispute the applicability of 29 CFR § 1926.405. In its post-hearing brief the Respondent argued that the cited standard applies to flexible cords and cables, and that it does not apply to the heavy-duty SOOW extension cord at issue in this case. I find that the Respondent's statement at the hearing, agreeing to applicability of the standard, is binding on the Respondent. By accepting applicability, it relieved the Secretary of the burden of proving that element of her prima-facie case. It would be prejudicial to the Secretary to allow the Respondent to subsequently argue that the standard does not apply. The standard is applicable.

The Respondent failed to comply with the terms of 29 CFR § 1926.405(a)(2)(ii)(I) when it failed to protect the 480-volt SOOW electrical cords from damage.

At its Cincinnati, Ohio jobsite, Kokosing was engaged in installing underground sewer lines. The job included excavating deep trench lines. The Respondent used trench boxes with four deep well dewatering pumps to extract water from the trench. On September 7, 2004, the Respondent's employees Rice, Hurd and Woodruff removed two sections of discharge pipes into which the dewatering hoses emptied. The discharge piping was reconnected. Rice, the Respondent's working foreman in charge of the crew, went about 10 feet down into the excavation to untangle the pumps' dewatering hoses and electrical cords. At this time, the cords were not energized. Rice fed the cords up to Hurd and Woodruff on the upper bank of the excavation. After the hoses and cords were

untangled, the dewatering pumps were energized. Hurd and Woodruff placed the hoses and cords on a braided wire choker used to pull trench boxes.

Rice instructed Hurd to help him fish out the braided wire choker from under the two 3-inch diameter dewatering hoses and the two 2-inch heavy-duty electrical cords that had been placed on top of the choker. Rice lifted up one end of the choker with one hand and used his other hand to lift a discharge hose to remove some weight from the choker. Hurd held the other end of the choker with two hands and was pulling it. Rice was pushing his end. At no time did either employee attempt to protect the electrical cords from damage. While one end of one hose was lifted off the pile of material, the electrical cords were always in contact with the choker below as the choker was being pulled from under the cords. The weight of the cords and at least one hose remained on the choker. No barrier or shield was placed between the metal choker and the electrical cords during the attempted extraction. The hoses and cords were not lifted from the top to unpile them from the choker. The Respondent's employees took no measures to protect the electrical cords from being damaged as they dragged the metal braided choker along the surface of the cords piled on top of it. A protruding prong on the choker punctured one of the electrical cords laying on top of the choker.

Both the working foreman, Rice, and the employee, Hurd, were exposed to the violative conditions when they held the choker while trying to pull it from under the pile of discharge hoses and energized electrical cords. Both not only had access to the conditions by being within the zone of danger, but received a serious electrical shock from the damage done to the electrical cord by the choker while they were holding opposite ends of that choker.

Remaining to be determined is whether the Respondent had the requisite knowledge of those conditions. Kokosing had knowledge of these violative conditions through Rice, its working foreman. Rice's knowledge is imputed to the Respondent. Rice supervised and directed the work of the crew. He could recommend disciplinary action when dissatisfied with a crew member's performance. He directed Hurd and Woodruff to move the discharge hoses and electrical cords from the trench. He instructed Hurd to help move the wire braided choker from beneath the pile of hoses and energized electrical cords. His job title is foreman, and he acted as a foreman or supervisory employee in the actual performance of his duties on this jobsite – what Rice knew, the Respondent knew.

Rice knew the metal choker was on the ground with two heavy hoses and two energized heavy-duty electrical cords piled on top of it. Having observed this condition, he proceeded to instruct Hurd to help him remove the braided metal cable from under the hoses and cords. He did not stop to evaluate the situation, de-energize the cords or even unstack the hoses and cords from atop the choker. Rather, Rice and Hurd, under Rice's direction and control, attempted to pull the metal choker from under the heavy load. The foreman raised one end of one hose to remove some weight, thus recognizing there was excess weight on the cable. He left the weight of the heavy-duty electrical cords in full and direct contact with the choker. He then directed Hurd to pull the metal cable while he pushed the other end to extricate it from this pile.

Both ends of the choker were in plain view and had obvious damaged eyes that could cut or abrade the heavy-duty electrical cords. Rice knew this choker was rubbing against the unprotected cords. The intended action was for Hurd to pull the cable towards him. This would necessarily result in the damaged eye on Rice's end being pulled through the bottom of the pile in full contact with the unprotected flexible cords. Knowing these conditions, Rice proceeded to push the choker while Hurd pulled the opposite end against the cords without first protecting the electrical cords from damage.

The Respondent argues that neither Rice nor Kokosing knew that a burr protruded from the choker. Rice may not have known of the burr that ultimately cut through the electrical cord causing severe electrical shock to the two employees. He did know, however, that the metal choker was under the full weight of the cords and partial weight of the hoses. He also directed Hurd to pull the choker, knowing that it was rubbing against the unprotected electrical cord. He knew or could have known that this action could damage the cords.

While he had no instruction on how to protect electrical cords from being cut, Rice knew Kokosing's policy against laying electrical cords over metal objects. He knew that electricity and metal should be separated. He testified, however, that it was common practice to pull chokers out as he did here. He was attempting to correct a bad situation. He knew that the hoses and cords should not have been placed on top of the cable. He also knew that he was pulling the choker from under the cords and took no action to protect those electrical cords from damage.

The Respondent violated 29 CFR § 1926.405(a)(2)(ii)(I). The violation was serious. Death by electrocution or serious injury from electrical shock could result from failure to protect electrical

cords from damage. Here, responders felt no pulse when Hurd was first checked: CPR was administered, and he was revived and taken to the hospital.

At the pre-hearing conference the Respondent raised the affirmative defense that the alleged violative condition was the result of unpreventable employee misconduct. The Respondent failed to address this defense in its post-hearing brief. That defense has, therefore, been abandoned by the Respondent. There is no need to address that defense here.

Penalty Assessment

Section 17(j) of the Act requires that when assessing penalties, the Commission must give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. 19 U.S.C. § 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.*, 16 BNA OSHC 1769, 1776 (No. 88-237, 1994).

Kokosing is an employer with over 1,000 employees. It has no history of violations which were affirmed in the last three years.

Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation "depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *J. A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

This was a three-employee crew. The foreman and another employee were exposed to the hazards of electrocution or electrical shock. If these employees received an electrical shock, the likely result would be death or serious physical injury. Based on these factors, a penalty of $1,875.00 is assessed for the violation of 29 CFR § 1926.405(a)(2)(ii)(I).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

1. Citation No. 1, Item 1, alleging a serious violation of 29 CFR § 1926.405(a)(2)(ii)(I) is affirmed and a penalty of $1,875.00 is assessed.

2. Citation No. 1, Item 1, alleging in the alternative a serious violation of 29 CFR § 1926.403(i)(2)(ii) and subpart B of Item 1 were withdrawn by the Secretary. Those portions of Item 1 are vacated.

/s/ Stephen J. Simko, Jr.

STEPHEN J. SIMKO, JR.
Judge

Date: March 2, 2005