



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.	:	OSHRC DOCKET NO. 97-424
	:	
TIREMAN’S TIRE SHOP, INC.,	:	
	:	
Respondent.	:	

APPEARANCES:

Luis A. Micheli, Esquire
 New York, New York
 For the Complainant.

Glenn Lefurgy
 Mahopac, New York
 For the Respondent, *pro se*.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is 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”) inspected Respondent’s facility, an auto tire and repair shop, on December 16, 1996, after receiving an employee complaint about the shop; as a result of the inspection, Respondent was issued a two-item serious citation alleging violations of 29 C.F.R. §§ 1910.22(c) and 1910.305(b)(1).¹ Respondent contested the citation, this matter was designated an E-Z Trial case pursuant to Commission Rule 203(a), and a hearing was held on July 17, 1997.

¹While none of the conditions listed in the complaint were found to be violations, the alleged violations noted above were in plain view and were consequently cited. (Tr. 18-20; 32).

Citation 1 - Item 1

This item alleges a violation of 29 C.F.R. 1910.22(c), which provides as follows:

Covers and/or guardrails shall be provided to protect personnel from the hazards of open pits, tanks, vats, ditches, etc.

Robert Zurlo, the OSHA compliance officer (“CO”) who conducted the inspection, testified there was an auto repair pit in the shop which he measured to be 40 feet long, 43 inches wide and 5.5 feet deep, and that employees were walking by the pit and entering it to work on a vehicle. The CO noted the pit was unguarded, as shown in C-1, a photo he took, and that employees could have inadvertently stepped or fallen into it and been seriously injured; he spoke to Glenn Lefurgy, the shop’s owner and president, who was with him and agreed the pit could possibly cause an injury.² The CO also noted there was a work bench with equipment on it on one side of the pit, a wheel rack on the opposite side, and alignment equipment and stairs in the middle of the pit; however, none of these protected against the hazard, particularly since the bench and rack were several feet from the pit. The CO said the hazard could have been abated by use of a movable metal grate and/or movable netting, as shown in C-4, a photo he took of a pit at another car shop. (Tr. 3-13; 21-29; 33-35).

Glenn Lefurgy testified he had previously had fencing around the pit, as recommended by his insurer, but that he had replaced the fencing, again on the recommendation of his insurer, with the equipment the CO had seen. Lefurgy said that OSHA had inspected his shop in 1990 and had not cited the pit then, and that R-1, a photo he took after the citations were issued, showed the equipment around the pit and the plywood he had put over it as an abatement measure; his opinion was that the equipment that was in place when the CO was there was adequate. (Tr. 22-24; 39-47).

In light of the record, the Secretary has demonstrated the alleged violation. First, the CO’s testimony and photos establish that the equipment in and around the pit did not prevent employee exposure to the cited hazard and, moreover, that there was a feasible means of abating the hazard. Second, Lefurgy’s testimony did not rebut that of the CO, and R-1, Lefurgy’s own photo of the pit, actually supports the Secretary’s position; R-1 clearly shows the pit with no guarding on three sides

²The shop was sold after the inspection, and Lefurgy no longer has any financial interest in it. (Tr. 36-37). However, dismissal of a case on the basis that it is moot is error where “the Secretary continues to seek the assessment of penalties, and the employer continues to defend against them.” *See Kenny Niles*, 17 BNA OSHC 1940, 1945 (No. 94-1406, 1987).

and that the equipment adjacent to the pit would have afforded no protection to employees walking or working near those sides. Finally, even assuming *arguendo* that the pit was inspected in 1990, it is well settled that OSHA's failure to cite a condition pursuant to a previous inspection provides no basis for vacating a later citation for the same condition. This item is affirmed as a serious violation, and the Secretary's proposed penalty of \$600.00, which is based on the employer's size, history and good faith, and the low gravity of the violation, is assessed. (Tr. 13-14).

Citation 1 - Item 2

This item alleges a violation of 29 C.F.R. 1910.305(b)(1), which states as follows:

Conductors entering boxes, cabinets, or fittings shall also be protected from abrasion, and openings through which conductors enter shall be effectively closed. Unused openings in cabinets, boxes, and fitting shall be effectively closed.

CO Zurlo testified he observed two circuit breaker panels on the back wall of the shop that had missing breakers; he determined the panels were energized with his tick tracer and then asked Lefurgy about them, who told him that his office manager used the panels each morning and evening to turn the power in the shop on and off. The CO said the missing breakers left open spaces in the panels, as shown in C-2-3, photos he took of the panels, and that anyone reaching into them to turn the power on or off could have inadvertently contacted the exposed live wires in the open spaces and received an electrical shock or burn. The CO also said that the condition could have been corrected by placing blanks or dummy breakers in the open spaces, and that Lefurgy told him that he had an electrician coming into the shop who would be taking care of the problem. (Tr. 8; 14-17; 29-30).

In view of the foregoing, the alleged violation has been shown. Again, the CO's testimony and photos establish the cited hazard, and Lefurgy's statement, that the electrician had taken out the bad breakers the week before and would be returning that week to replace them, does not rebut the Secretary's evidence. (Tr. 45-46). This item is accordingly affirmed as a serious violation, and the proposed penalty of \$450.00, which is based on the same factors noted above as well as the low gravity of the condition and the limited exposure to it, is assessed. (Tr. 17).

Conclusions of Law

1. Respondent Tireman's Tire Shop, Inc., 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 serious violation of 29 C.F.R. 1910.22(c) and 29 C.F.R. 1910.305(b)(1).

Order

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

1. Items 1 and 2 of citation 1 are AFFIRMED as serious violations, and penalties of \$600.00 and \$450.00, respectively, are assessed.

Irving Sommer
Chief Judge

Date: