United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90
100 Alabama Street, S. W.
Atlanta, Georgia 30303-3109

Phone: (404) 562-1640 Fax: (404) 562-1650

SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket No. 97-562
SHONEY'S, INC., d/b/a CAPTAIN D'S, Respondent.	:	**(EZ)**

Appearances:

Carla Gunnin, Esquire
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

Jay St. Clair, Esquire
Bradley, Arant, Rose & White
Birmingham, Alabama
For Respondent

DECISION AND ORDER

Shoney's Inc.(Shoney's) operates a "Captain D's" seafood restaurant in Florence, Alabama. On January 15, 1997, the Occupational Safety and Health Administration (OSHA) inspected the restaurant after an employee's death. As a result of the inspection, Shoney's received a serious citation because an electrical receptacle in the kitchen was unsuitable for wet or damp locations as required by §1910.305(j)(2)(ii). OSHA alleges that the receptacle used for two fish fryers is in a damp location because of Shoney's daily cleaning of the kitchen. A penalty of $1,625 is proposed. Shoney's timely contested the citation.

The case is assigned to EZ trial proceedings in accordance with 29 C.F.R.§ 2200.200, *et seq*. Shoney's acknowledges that it is an employer engaged in a business affecting commerce within the meaning of §3(5) of the Occupational Safety and Health Act.

On July 3, 1997, a hearing was held in Huntsville, Alabama. Shoney's argues that the receptacle is not in a wet or damp location. The court agrees, and the citation is vacated.

Background

Shoney's "Captain D's" restaurant in Florence, Alabama, was built in 1994 in accordance with applicable building and electric codes (Tr. 62, 94). The restaurant consists of a dining area for customers, a counter area where food orders are received, and the kitchen area where the food is prepared and passed through an opening to the counter area (Tr. 47).

The kitchen area measures approximately 30 feet by 50 feet and consists of a food preparation area and storage areas (Tr. 56-57). The kitchen floor and walls are tiled (Tr. 76, 96). There are drain holes in the middle of the floor (Tr. 64). In the food preparation area along one wall, there are two portable fish fryers, a rolling cart to prepare food, and a fish cooler (refrigerator) (Exh. C-4; Tr. 54-55).

The fish fryers are approximately 3 feet high, 2 feet long, and 1 foot wide. They are on wheels, allowing a 6-inch opening underneath the fryers (Exh. C-4; Tr. 77, 82, 65). The fryers are plugged into a 120-volt double-duplex receptacle installed in a two-gang outlet box with a stainless steel cover (Exh. C-1; Tr. 103). The receptacle is 16 to 18 inches above the tiled floor and located behind the two fryers (Tr. 20). Other electrical receptacles in the kitchen area are located 3 feet above the floor. The fish fryers remain plugged into the receptacle during the cleaning process (Tr. 54).

The kitchen floor is cleaned every evening at approximately 9:45 p.m. The assistant manager and two employees are involved in the cleaning, and it takes thirty to forty-five minutes (Tr. 52, 79-80). To clean the floor, employees fill two 30-gallon plastic trash cans on rollers with water from an ordinary garden hose. One trash can is filled with soapy water for cleaning the floor, and the other trash can is filled with clean water for rinsing (Exh. C-2; Tr. 64, 81). By dipping a tea pitcher into the trash cans, water is thrown onto the areas to be cleaned, including under the fish fryers. A bristle brush and squeegee are used to clean the floor (Tr. 64, 72, 96). When the trash can is approximately

half emptied, the trash can is tipped over allowing the remaining water to pour onto the floor[1] (Tr. 64, 69). After the floor is scrubbed with soapy water, clean water is applied in the same manner. On October 29, 1996, an employee, John Tutwiler, died while cleaning the kitchen (Tr. 27). He was using the garden hose to clean inside the fish cooler. The cooler is located approximately 30 inches from the fryers[2] (Tr. 68, 73, 78, 85). Shoney's reported the death to OSHA as a possible heart attack (Tr. 27). After receiving a confidential telephone call claiming Tutwiler was electrocuted, OSHA initiated its inspection on January 15, 1997 (Tr. 27). OSHA found no evidence of electrocution or that he died as a result of the electrical receptacle behind the fish fryers (Tr. 14, 29). According to the coroner's report, Tutwiler died from asthma (Tr. 10). However, OSHA concluded that the receptacle used for the fish fryers was located in a damp location because of the amount of water used during cleaning. Compliance Officer Judith Etterer was under the impression that "copious quantities of water are used" (Tr. 20).

Discussion

In order to establish a violation of a safety standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies to the alleged condition; (2) the terms of the standard were not complied with; (3) employees were exposed to or have access to the violative condition; and (4) the employer knew or could have known of the violative condition with the exercise of reasonable diligence. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1221-22, 1991-93 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991). The Secretary has the burden of proof.

The Secretary concedes that the location of the receptacle is normally not damp. She contends that the cleaning process makes it a damp location (Tr. 113-114). The Secretary claims that abatement requires the use of a ground fault interrupter or a change in the cleaning process.

Shoney's does not dispute employees' exposure and knowledge of the condition if the location is "damp" as contemplated by §1910.305(j)(2)(ii). Shoney's also does not dispute that the

[1]The ability to tip over the trash depends on the strength of the worker (Tr. 69).

[2]The distance is based on counting the number of 6-inch floor tiles in Exhibit C-4 (Tr. 76-77).

receptacle is not suitable for "damp" locations. Shoney's argues, however, that the standard is vague and contends that the receptacle is not in a damp location.

Section 1910.305(j)(2)(ii) Is Not Vague

Section 1910.305(j)(2)(ii) requires that "a receptacle installed in wet or damp locations shall be suitable for the location." A safety standard, such as is in this case, is generally construed liberally. It is not impermissibly vague simply because it is broad in nature. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2205, 1991-93 CCH OSHD ¶ 29,964 (No. 87-2059, 1993). Instead, "a broad regulation must be interpreted in the light of the conduct to which it is being applied and external objective criteria, including the knowledge and perceptions of a reasonable person, may be used to give meaning to such a regulation in a particular situation." *Id.* at 2205-06. *Also see American Bridge Company*, 17 BNA OSHC 1169, 1172 (No. 92-959, 1995).

The wording of §1910.305(j)(2)(ii) is not vague or ambiguous. As noted by Thomas Thompson, Shoney's electrical expert, the standard is identical to a provision in the National Electric Code which has remained unchanged since 1971 (Tr. 98-99). The language is plain and admits to no more than one meaning. It requires a suitable receptacle for a wet or damp location. The terms "wet or damp" are defined at §1910.399. If not defined, words are given their ordinary meaning. As used in the standard, "suitable" refers to the type of receptacle needed for wet or damp locations. If the location is wet or damp, Shoney's expert was easily able to identify the necessary compliance with the standard (Tr. 101).

Therefore, §1910.305(j)(2)(ii) is not vague, and the electrical receptacle in Shoney's kitchen is covered by the standard if the receptacle is in a damp location.

The Receptacle Is Not in a Damp Location

The citation alleges that the electrical receptacle behind the fish fryers was not suitable for damp locations.[3] The Secretary alleges that the location is damp because moisture during the

[3]The Secretary does not contend the location was "wet."

cleaning process may come in contact with the live receptacle. A "damp" location is defined at §1910.399 as:

> [P]artially protected locations under canopies, marquees, roofed open porches, and like locations, and interior locations subject to moderate degrees of moisture, such as some basements, some barns, and some cold-storage warehouses.

The receptacle is 16 to 18 inches above the floor. According to Compliance Officer Etterer, if the receptacle was 3 feet above the floor, there is no violation (Tr. 51). The other electrical receptacles in the kitchen are 3 feet above the floor. Also, the Secretary concedes that but for the cleaning process, the electrical receptacle for the fish fryers is in a "dry" location (Tr. 7). A "dry" location is defined at §1910.399 as:

> [A] location not normally subject to dampness or wetness. A location classified as dry may be temporarily subject to dampness or wetness, as in the case of a building under construction.

The Secretary failed to meet her burden of proof. She failed to show that the location of the receptacle is exposed to a "moderate degree of moisture" during the kitchen's cleaning. The cleaning takes forty-five minutes daily. The water is immediately removed from the floor. The floor is only temporarily subject to dampness each day. There is no showing, however, that moisture ever contacts the receptacle. The compliance officer did not observe moisture on the receptacle or see the actual cleaning process. There is also no evidence that employees interviewed stated that moisture was seen on the wall near the receptacle. The receptacle is not in the open and is protected from any direct contact with water by the two fish fryers. The receptacle is behind the fryers. The receptacle is also recessed approximately one-quarter inch, preventing contact from water running down the wall (Tr. 95, 103). Further, part of the cooking hood protrudes 4 inches out over the receptacle (Tr. 105).

Also, with water being thrown underneath the fish fryers during the cleaning process, there is no showing that water could splash onto the receptacle. The receptacle is located 16 to 18 inches above the floor. There is also no showing as to the amount of water used in the area of the fryer. The opening beneath the fish fryer is only 6 inches, and the fryer is against the wall. The location of the receptacle prevented any moisture from coming in contact with the receptacle.

The Secretary's other concern about the use of the garden hose to wash the inside of the fish cooler is also speculative and contrary to Shoney's instructions. The fish cooler is approximately 30 inches from the fryers. There is no explanation as to how water sprayed inside the cooler could reach the receptacle for the fish fryers. Also, the citation is not for spraying inside the cooler which was plugged in or for the receptacle used by the cooler. Further, using the hose to clean inside the cooler was contrary to the manager's instructions. Tutwiler was the only employee shown to use the hose to clean inside the cooler.

The compliance officer's testimony is given little weight since she did not observe the cleaning process. Her testimony is speculative as to the quantity and flow of water in the location of the fish fryers. The amount of water used in the area of the fish fryers is unknown. The two trash cans were used to clean the entire kitchen area of 1,500 square feet (Tr. 96). The compliance officer was given only a verbal demonstration of the process by the assistant manager (Tr. 47, 57). Her opinions are refuted by John Thompson, a master electrician with thirty-seven years' experience. Thompson identified the location of the receptacle as a dry location (Tr. 93-94). Unlike a cement floor found in a basement or the area inside a cold storage warehouse, Thompson explained that a tile floor expels the water and does not absorb it (Tr. 96). The floor drains and squeegee keep the floor dry during cleaning.

In *Victor Microwave, Inc.*, 1996 OSAHRC Lexis 57 (Docket No. 94-3024, 1996), a violation of §1910.305(j)(2)(ii) was found at a receptacle behind a large split sink used for bright dip operations. The judge found that the sink was filled with solution and with running water subjecting the receptacle to "moderate degrees of moisture." Unlike the split sink, the receptacle in this case is not located in an area subject to moisture. The receptacle is not in a damp location.

Accordingly, a violation of §1910.305(j)(2)(ii) is not established.

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 ORDERED:

Serious Citation No. 1, item 1, in violation of § 1910.305(j)(2)(ii), is vacated.

KEN S. WELSCH
Judge

Date: August 18, 1997