



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,

v.

MOSACO AKA MODERN SALES & CONST. INC
Respondent.

OSHRC DOCKET
NO. 92-1615

**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 10, 1993. The decision of the Judge will become a final order of the Commission on July 12, 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 June 30, 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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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Ray H. Darling, Jr.
Executive Secretary

Date: June 10, 1993

DOCKET NO. 92-1615

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,

Complainant,

v.

MODERN SALES AND CONSTRUCTION
COMPANY, INC., d/b/a MOSACO,

Respondent.

OSHRC Docket No. 92-1615

APPEARANCES:

Gary R. Williams, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Judy A. Gano, Esquire
Gano Law Offices
Wilmington, Ohio
For Respondent

Before: Administrative Law Judge Edwin G. Salyers

DECISION AND ORDER

Respondent, Modern Sales and Construction Company, Inc. (MOSACO), is a construction contractor with headquarters in Wilmington, Ohio. At the time in question, it was engaged as the general contractor at a worksite located on the premises of the Randal Company in Wilmington in connection with the reconstruction and expansion of that industrial facility. Respondent concedes in its answer to the Secretary's complaint that it is subject to the jurisdiction of the Occupational Safety and Health Review Commission.

On April 8, 1992, pursuant to a random selection from the *Dodge Reports*, Compliance Officer Steven B. Medlock conducted an inspection of respondent's worksite under the provisions of the Occupational Safety and Health Act (29 U.S.C. § 651 *et seq.*). Medlock was accompanied by Gary Hibbs, respondent's worksite supervisor, throughout his inspection. As a result of this inspection, respondent was issued a serious citation consisting of the following charges:

1

29 CFR 1926.403(i)(2)(i): Live parts of electric equipment operating at 50 volts or more were not guarded against accidental contact by cabinets or other forms of enclosures, or by any of the following means: (A) by location in a room, vault, or similar enclosure that is accessible only to qualified person; (B) by partitions or screens so arranged that only qualified persons will have access to the space within reach of the live parts; (C) by location on a balcony, gallery, or platform so elevated and arranged as to exclude unqualified persons; (D) by elevation of 8 feet or more above the floor or other working surface and so installed as to exclude unqualified persons:

(a) On the exterior area of the building there was an orange extension used which had the primary and secondary insulation cut or torn exposing the energized conductors.

(b) In the interior area of the building there was a flat yellow extension cord used which had the insulation cut or torn away exposing the energized conductors.

2

29 CFR 1926.404(f)(6): The path to ground from circuits, equipment, or enclosures was not permanent and continuous:

(a) On the exterior area of the structure there was an ungrounded ground fault circuit interrupter [sic] powering extension cords and Black & Decker drills.

3

29 CFR 1926.405(g)(2)(iv): Flexible cords were not connected to devices and fittings so that strain relief is provided to prevent pull from being directly transmitted to joints or terminal screws:

(a) On the exterior area of the building there was an orange extension cord used which had the primary insulation pulled away from the strain relief at the female and exposing the secondary insulated conductors.

4

29 CFR 1926.416(e)(1): Worn or frayed electric cords or cables were used:

(a) Located between the exterior areas of the building addition and new building construction there was an orange extension cord used which had the primary insulation damaged over an approximate 10" area exposing the secondary insulated conductors.

The foregoing citations were issued by the Secretary on May 5, 1992, and were timely contested by MOSACO. In its answer to the Secretary's complaint, MOSACO filed a general denial of the factual allegations contained in the complaint but did not specifically plead any affirmative defenses.

Serious Citation No. 1, Item 1

During the course of his inspection, Medlock observed a series of extension cords, plugged end to end, running from an energized receptacle located inside a building to a work area outside where employees of respondent were using the cords to provide power to their tools. The first cord in the series which was plugged into the receptacle appeared to be in good working condition and was fully insulated from end to end. The second and third cords, however, bore gashes or cuts through the primary and secondary insulation which exposed the copper wire conductor (Exhs. C-2, C-3; Tr. 22, 23, 65, 77). The existence of this condition was conceded by respondent at the hearing (Tr. 5), and it is readily apparent that such a condition creates a potential for electrical shock to employees working in proximity to the cords. The serious nature of this condition was increased with respect to one cord (referred to in the record as the "orange cord"), which bore two cuts and was located near a puddle of water (Tr. 32, 40, 50, 77).

In its posthearing brief, respondent concedes a violation of the standard found at 29 C.F.R. § 1926.403(i)(2)(i) but argues that the Review Commission should consider certain circumstances in arriving at a penalty determination for this item (Respondent's Brief, pgs. 8-9). The thrust of this argument is that respondent is a small business which has not established a "formal training program on detecting cuts in cords" but does have a policy to guard against this condition based upon its oral instructions to supervisors that they must regularly inspect extension cords to detect and remove defective cords. Respondent did not plead or prove, however, a defense based upon "unpreventable employee misconduct." No showing was made that respondent had a clearly defined work rule to guard against the cited condition or that this rule was effectively communicated and enforced. *See Pride Oil Well Services*, 15 BNA OSHC 1809, 1992 CCH OSHD ¶ 29,807 (No. 87-692, 1992). In this particular instance, respondent maintains Hibbs did not have an opportunity to inspect the cords prior to the discovery of the cuts and, therefore, lacked knowledge of the violative condition. This approach is insufficient to establish a defense based upon lack of knowledge since the condition was in plain view and could have been detected with the exercise of reasonable diligence. *Prestressed Systems, Inc.*, 9 BNA OSHC 1864, 1981 CCH OSHD ¶ 25,358 (No. 16147, 1981).

In short, the Secretary has met his burden of proof with respect to this item, and respondent has not established a viable defense. Accordingly, the charge will be affirmed.

Serious Citation No. 1, Item 2

This item charges respondent with a violation of 29 C.F.R. § 1926.404(f)(6)¹ for its use of a ground-fault circuit interrupter (GFCI) which allegedly did not provide a permanent and continuous ground. Medlock observed this GFCI in use between two of the cords

¹ Section 1926.404(f)(6) provides:

(6) *Grounding path.* The path to ground from circuits, equipment, and enclosures shall be permanent and continuous.

described previously which were supplying power from an inside receptacle to power tools utilized by respondent's employees working outside the building. Medlock separated the GFCI from one of the cords and noted the grounding pin was loose, so loose, in fact, that it could be moved in and out of its seat with minimum effort (Tr. 23). Using a testing device (either an Etcon and/or a Green Leaf circuit tester), he determined the GFCI did not ground as it was supposed to do (Tr. 30). He then detached the GFCI and took it inside the building where he plugged it into a permanent receptacle for another test which also reflected it did not ground. He could, however, by manipulating the grounding prong (*i.e.*, "pulled it back out and pulled the prong out a little bit, and kind of held it sideways and jimmed it on in there a little bit"), cause the GFCI to properly ground (Tr. 31). He also tested the cords to which the GFCI had been attached and determined they were properly grounded which lead him to conclude the GFCI, and not the cords, was the cause of the problem. *Id.*

Respondent does not dispute that the ground pin in the GFCI was loose. This condition was noted by Hibbs at the time the condition was discovered by Medlock. Hibbs testified, however, that he tested the GFCI by using the testing device built into the GFCI prior to and at the time Medlock conducted his test, and the results of both tests indicated a proper ground (Tr. 84). Hibbs also testified that Medlock activated the built-in tester on the GFCI just prior to testing the device with the Etcon tester, and the built-in tester reflected the GFCI was properly grounded (Tr. 88). Paul Hannah, respondent's project manager, tested the GFCI after it had been removed from service using both the built-in tester and a tester "similar" to the one used by Medlock. He testified both of these tests reflected the GFCI was properly grounded at the time he performed the tests (Tr. 118).

Two points emerge from the evidence presented on this issue. It is obvious that the loose grounding prong on the GFCI created the potential for malfunction if the prong was not firmly seated. On the other hand, if the GFCI were tightly plugged into its receptacle, the prong would make contact with the ground and would function normally. This later condition appears to have been the situation when Hibbs tested the GFCI prior to the tests conducted by Medlock. The loose prong was not in plain view. The loose prong could only be detected by actually removing the GFCI from its receptacle and examining it carefully

as Medlock did in this case. The court fully credits the testimony of Hibbs on this point and finds as a fact that he used the built-in tester on the GFCI to test the device before it was examined by Medlock. As a result of this test, Hibbs reasonably believed the GFCI was in proper working order. Based upon this finding, the court concludes that MOSACO lacked the requisite knowledge of the violative condition and had exercised reasonable diligence under the foregoing circumstances. This item will be vacated.

Serious Citation No. 1, Item 3

This item charges respondent with a violation of 29 C.F.R. § 1926.405(g)(2)(iv)² for its alleged failure to provide appropriate strain relief on an extension cord in use at the worksite. Once again, the focus of the charge relates to the series of cords observed by Medlock and previously described. One of these cords (the orange cord) was attached to another cord by means of a female plug. Medlock observed that the primary insulation had been pulled back or separated from the female plug, thereby exposing the secondary insulated conductors which were directly attached to terminal screws inside the plug (Exh. C-4; Tr. 23, 24, 34-36)). Medlock testified this condition violated the standard since any pull on the cord would be directly transmitted to the terminal screws causing the conductors to separate and creating the potential for electrical shock or electrocution (Tr. 35, 36). Medlock explained that the primary insulation surrounding the conductors running into the plug protects the conductors from stress placed upon the cord and serves as a strain relief device since the primary insulation is locked into the plug. *Id.* See *Hamilton Fixture*, slip op. dated April 20, 1993 (No. 88-1720), in which the Review Commission affirmed a violation of the cited standard under similar circumstances.

Hibbs admitted during his testimony that he had replaced the female plug on the cord in question sometime prior to the Secretary's inspection. In doing so he was unable to force

² Section 1926.405(g)(2)(iv) provides:

(iv) *Strain relief.* Flexible cords shall be connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminal screws.

the primary insulation through the opening into the plug (Tr. 94). This circumstance left an opening between the conductors and the plug and failed to provide support to the conductors which were connected directly to the terminal screws (Tr. 100-102). In the event the cord was pulled or yanked, a strain would result and be transmitted directly to the terminal screws in contravention of the cited standard. This item will be affirmed.

Serious Citation No. 1, Item 4

While inspecting the cords previously described, Medlock observed and photographed (Exh. C-5) a 10-inch section of one cord which he considered to be “worn or frayed” in contravention of § 1926.416(e)(1).³ He noted that the primary insulation was “damaged or torn,” thereby exposing the secondary insulation which covered the conductors (Tr. 24). Hibbs acknowledged the existence of this condition in his testimony (Tr. 96), and respondent appears to concede the point in its posthearing brief (Respondent’s Brief, pg. 7). This item will be affirmed.

It is noted in passing, however, that the serious nature of the cited condition is somewhat diminished under the circumstances of this case. It is undisputed that the frayed condition of the primary insulation on the cord in question did not extend into the secondary insulation. Medlock conceded there were no bare wires on this cord and that the conductors were still protected by the secondary insulation (Tr. 36). He further acknowledged that this condition presented no immediate danger unless or until the secondary insulation was breached exposing the conductors (Tr. 37). This aspect bears upon the gravity factor and will be considered in assessing an appropriate penalty.

³ Section 1926.416(e)(1) provides:

(e) *Cords and cables.* (1) Worn or frayed electric cords or cables shall not be used.

Characterization of Violations

Section 17(k) of the Act defines a serious violation as a condition which may result in death or serious injury to employees. The Review Commission has held that it is not necessary to prove a substantial probability that an accident will occur. It is sufficient to prove that an accident is possible and that death or serious injury could result. *Dravo Corp.*, 7 BNA OSHC 2095, 1980 CCH OSHD ¶ 24,158 (No. 16317, 1980). Each of the three remaining items of the Secretary's citations presents a substantial probability that employees exposed to the cited hazards may experience electrical shock or electrocution with resultant serious harm or death. Accordingly, these items are properly classified as serious violations.

Respondent does not question the serious classification assigned to item 1 of the Secretary's citation but asserts that items 3 (no strain relief) and 4 (frayed cord) should be classified as *de minimis* with no penalties assessed. Section 9(a) of the Act provides the Secretary with discretion to "prescribe procedures for the issuance of a notice in lieu of a citation with respect to *de minimis* violations which have no direct or immediate relationship to safety and health (emphasis supplied). Such a classification is appropriate when the nature of a violation is trifling, e.g., a minor breach of a toilet partitioning standard. *J. W. Black Lumber Co.*, 3 BNA OSHC 1678, 1975-76 CCH OSHD ¶ 20,114 (No. 4734, 1975), or failure to provide a receptacle for disposable cups. *R. H. Bishop Co.*, 1 BNA OSHC 1767, 1973-74 CCH OSHD ¶ 17,930 (No. 637, 1974). A classification of *de minimis* has no application, however, to a situation where, as here, the potential consequences of an accident would expose employees to electrical shock or electrocution.

Penalties

The Secretary proposes in this case a \$3,000 penalty for each of the cited items. The compliance officer computed these penalties in accordance with standard agency procedures. He allowed a 40 percent reduction in view of the small size of the employer's business.

The Review Commission is the final arbiter of the appropriateness of penalties in all contested cases. *Secretary v. OSAHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act, the Commission is required to find and give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the appropriate penalty. 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).

In assessing the gravity factor, this court sees a distinction between the three remaining cited items. It is apparent that item 1, dealing with an exposed copper conductor, presents a high gravity for potential harm to employees. Accordingly, the \$3,000 proposed for this violation is considered appropriate. Item 3 of the citation presents a gravity of somewhat lesser degree and a penalty of \$2,000 will be assessed for this violation. Item 4 of the citation presents a lesser degree of gravity than that proposed for item 3 and a penalty of \$1,000 will be assessed for this charge.

ORDER

Based on the foregoing, it is hereby ORDERED:

- (1) Serious Citation No. 1, item 1, is affirmed and a penalty of \$3,000 is assessed.
- (2) Serious Citation No. 1, item 2, is vacated.
- (3) Serious Citation No. 1, item 3, is affirmed and a penalty of \$2,000 is assessed.
- (4) Serious Citation No. 1, item 4, is affirmed and a penalty of \$1,000 is assessed.

/s/ Edwin G. Salyers
EDWIN G. SALYERS
Judge

Date: June 1, 1993