UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036–3419

FAX:
COM (202) 606–5050
FTS (202) 606–5050

SECRETARY OF LABOR
Complainant,
v.
NATIONAL ENGINEERING & CONTRACTING
Respondent.

OSHRC DOCKET
NO. 92-1745

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 May 7, 1993. The decision of the Judge will become a final order of the Commission on June 7, 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 May 27, 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
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: May 7, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-1745

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

William S. Kloepfer
Assoc. Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
1240 East Ninth Street
Cleveland, OH 44199

Kent W. Seifried, Esq.
Poston, Seifried & Scholemer
One Riverfront Place
Suite 810
Newport, KY 41071

Nancy J. Spies
Administrative Law Judge
Occupational Safety and Health
Review Commission
1365 Peachtree St., N. E.
Suite 240
Atlanta, GA 30309 3119

00103035481:05

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 (404) 347-4197

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

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 92-1745
NATIONAL ENGINEERING & CONTRACTING COMPANY,	:	
Respondent.	:	

Appearances:

Janice L. Thompson, Esq.
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Kent W. Seifried, Esq.
Poston, Seifried & Schloemer
Newport, Kentucky
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

National Engineering and Contracting Company (National), contests alleged serious violations of § 1926.404(f)(6), for failure to have a Toshiba fax/recorder/telephone unit properly grounded; of § 1926.405(g)(2)(iv), for failure to provide strain relief for an extension cord plug; of § 1926.20(b)(3), for failure to tag out or remove a defective extension cord; and of § 1926.701(b), for failure to protect employees from falling onto unguarded

protruding reinforcing steel.[1] National denies that the conditions cited constitute violations of the Occupational Safety and Health Administration (OSHA) standards. Jurisdiction and coverage are admitted (Answer, ¶¶ 2, 5).

National is a construction contractor. During the April 30 to May 15, 1992 OSHA inspection, National was the general contractor for a construction project which replaced an interstate bridge in Cleves, Ohio. OSHA conducted the inspection pursuant to a general inspection warrant.

Preliminary Rulings

Two preliminary issues were raised:

1. Respondent was not permitted to inquire of matters going beyond the "four corners" of the warrant. The warrant was obtained by compliance officer John Collier, who was subpoenaed by National. Collier did not conduct the inspection. The Secretary moved to quash the subpoena, citing *Franks v. Delaware*, 438 U.S. 154 (1978), for the proposition that challenges to the validity of a search warrant were limited to review of the material submitted to the magistrate. As an exception to the rule, if it is shown that evidence presented to the magistrate was intentionally or recklessly tainted by fraud or misrepresentation, inquiry beyond the "four corners" of the warrant is permissible.

National had to specify where the application was false. In its Response to Motion to Quash Subpoena of John Collier and in argument at hearing, National set out the alleged falsehoods. The motion to quash was granted after consideration of the parties' positions. The evidence was insufficient to meet the *Franks* standard.[2]

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[1] When the complaint was filed, the Secretary withdrew Item Nos. 1 - 3, concerning working over water.

[2] In accordance with *Franks*, National's "Response To Motion To Quash Subpoena of John Collier" specified those portions of the application which allegedly demonstrated reckless disregard for the truth. National made four arguments:

(l) It argued the warrant application did not comply with § 1903.4. That regulation permits application for an anticipatory warrant if, "in the judgment of the Area Director and the Regional Solicitor," such is desirable or necessary. National is mistaken in its belief that the application failed to state that this judgment had been made (App. ¶ 12).

(continued...)

2. National's attempted defense of vindictive prosecution.[3]

National attempted to raise the defense of vindictive prosecution for the first time in its brief. Amendment was not appropriate. For reasons more fully stated in the order of March 2, 1993, this defense was stricken. The parties' settlement correspondence, which was referenced in the brief, was also stricken.

The appearance of vindictiveness results where, as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or a punitive animus towards a defendant because it exercised a specific legal right. *U. S. v. Gallegos-Curiel*, 681 F. 2d 1164 (9th Cir. 1982). National purports the vindictiveness occurred because it exercised its constitutional right to a pre-inspection warrant. It relies on the testimony of former National employee John Brock. National views the testimony as exposing a "smoking gun." It argues that the testimony and other perhaps

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[2](...continued)

(2) It argued Collier lacked personal knowledge of the details of the random selection process conducted by the University of Tennessee under contract with OSHA. To support this argument, National presented Collier's deposition testimony from another case. The standard set forth in *Franks* does not require personal knowledge of every fact in the warrant affidavit since probable cause may be founded upon hearsay or information believed to be true. Collier could reasonably accept that the University of Tennessee randomly selected inspection sites, a fact which National has not challenged. There was no fraud or misrepresentation in advising the magistrate that the selection process was random.

(3) It argued the application stated that Area Office records indicate "there have been no previous inspections at this particular worksite"(App. ¶ 3). This was a true statement. National's alleged confusion regarding a discrepancy with compliance officer Denton's notes on his Form 1-B appears disingenuous and would not be a sufficient showing for purposes of the *Franks* standard.

(4) At hearing National also argued that the application misstated facts which allowed OSHA to get an anticipatory warrant. It asserts that it does not always require a warrant and that to imply a blanket policy in the application was a misstatement. The application states that National has a "policy of forbidding government inspection of their worksites without a valid inspection warrant" (App. ¶ 4). National's written policy (Exh. J-1), together with knowledge that National has at least in some, if not all, instances required a warrant prior to entry, is a sufficient basis for OSHA's characterization of National's policy. Regulation 1903.4 does not require a blanket refusal of entry before authorizing an anticipatory warrant. National's subpoena to John Collier was properly quashed. National failed to make the necessary showing under *Franks* to justify a review beyond the "four corners" of the warrant.

[3] Vindictive prosecution claims arise when the government increases the severity of charges against a defendant who has exercised a constitutional right, while selective prosecution occurs when the government, while not prosecuting others for similar conduct, brings charges against a person on the basis of race, religion or the exercise of a constitutional right. *U. S. v. Butterworth*, 693 F.2d 99 (9th Cir. 1982).)

more circumstantial events fit into a pattern of conduct which reveals OSHA's hidden motivation.

Brock's testimony concerns a conversation which allegedly took place during Denton's interview with Brock. Brock allegedly saw Denton videotaping a relatively new saw which had a nicked cord. According to Brock, he approached Denton after the videotaping was completed and told him, [Expletive deleted] "that saw is only 3 days old. Give us a break." According to Brock, Denton responded, "I am going to nail this [expletive deleted] company for everything I can" (Tr. 220).

Such a statement, if true, would indicate a disgraceful attitude, one totally inappropriate for a government agent. Exercise of a constitutionally protected right must never be a basis to "punish" an employer. Was the statement actually made?[4]

In weighing credibility, surrounding circumstances were considered. It is believed that if Denton stated an intention to "nail" the company by citing all possible violations, he would have cited the nicked cord which allegedly prompted his comment. The item was not cited. Denton is a trained investigator, who has conducted over 1300 OSHA inspections (Tr. 64). National alleged no other comments or incidents of unprofessional conduct by Denton. To the contrary, Denton described conversations as "pleasant" (Tr. 133).

Since the purported animus would arise from National's insistence on a warrant, Denton's actions in serving the warrant are regarded as enlightening. Denton sought to avoid using the anticipatory warrant (Tr. 130). Denton accommodated National's requests for delays over a three hour period both before and after he served the anticipatory warrant (Tr. 66-76). Denton had no objection to continuing to wait a reasonable time. He was directed by his supervisor to begin the inspection (Tr. 70). Denton's demeanor as a witness was completely compatible with the accommodating course he pursued prior to beginning the inspection. These are not the actions of a vindictively motivated investigator.

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[4] Denton did not specifically contradict Brock's testimony. The Secretary's counsel stated her intention to rebut the testimony. Since National rested without presenting evidence, the Secretary could offer no rebuttal. In these circumstances Denton's failure to specifically deny the allegation is not taken as his agreement that he made it.

Brock's demeanor was also observed. Brock claimed to be deeply shocked by the alleged statement. He initially told no one from National that it had been made, not even his friend from National who helped him get his job. He recalled mentioning the statement only to his wife. Brock first brought up the alleged comment when he spoke to National's attorney after receiving a subpoena from the Secretary to testify in the case. Brock did not advise the Secretary's counsel of the alleged impropriety, although a complaint to Denton's agency would have been appropriate (Tr. 225, 232-233).

It is certainly less likely that the compliance officer's alleged profanity would deeply shock Brock, since he testified he used profanity in speaking to Denton in the first place. Brock's memory of other details from Denton's interview are quite foggy, leaving the question why this comment was something "you don't forget" (Tr. 227). National correctly points out that Brock was a short-term, now former, employee. This does not necessarily negate a motive to fabricate such a statement. As Brock noted in explaining how he heard of the National job from a friend, "In our trade, you solicit your own work. Wherever you hear of a job you go there" (Tr. 213). Brock is currently unemployed. Brock may have hoped that helping National in a court case would, without any improper motive on National's part, translate into future good will.

The demeanor of both witnesses having been observed, and the circumstances surrounding Denton's alleged comment having been considered, no credibility is given to the comment. National's other examples of a vindictive motive deserve only brief comment.

OSHA's statement that National's policy required a pre-inspection warrant has not been shown to be incorrect. Even if National did not *always* require a warrant, OSHA was not shown intentionally to misstate the case. In light of the language of § 1903.4, an anticipatory warrant may be sought even when there is no absolute certainty that it will be needed. OSHA'S failure to include all possible qualifiers in the warrant application, which under § 1903.4 need only include a statement of a past practice of refusing warrantless inspections, does not establish a vindictive motive.

OSHA lacked a motive for the mishandling and destruction of potential evidence in this case. Denton and OSHA's control over the videotapes and photographs Denton took at the worksite can only be characterized as shoddy, *i.e.*, taped over and miscopied

videotapes and lost photographic film. There is no credible motive for the Secretary's intentional destruction of the evidence. It does not show vindictiveness toward National.

Nor does the Secretary show animus by his early withdrawal of three of the cited items. Withdrawal resulted in National not having to defend against the cited items. It is not unusual that cited items are withdrawn either in settlement or as a result of litigation. Impugning a vindictive motive because initially cited items are withdrawn does not reflect the reality of OSHA practice.

Although Denton did not know whether all violations listed on OSHA's computer printout were final orders. Denton used the printout to calculate National's "past history credit" for his penalty recommendations. Denton assumed that a column on the printout showing "current penalties" constituted final order violations. Any final order violation resulted in the same percentage credit afforded National, lessening the need to determine if all violations listed on the printout were final (Tr. 180-182). National's penalty was not calculated differently than any other employer's (See Exh R-6, Tr. 178).

National has not shown that vindictiveness likely occurred to prompt the Secretary's actions in this case. Even if the defense had been allowed, the outcome would not have been affected. The defense of vindictive prosecution was not meritorious.

National's Defenses

Was the warrant valid?

National argues that the warrant was unconstitutional since it was improperly obtained. It seeks to have the complaint dismissed or to suppress evidence gained during the inspection. Contrary to the Secretary's first argument, the issue is not moot because the inspection has taken place. National may litigate the lawfulness of the warrant.

National's reliance on alleged misstatements in the warrant application is misplaced (See discussion in Fn. 2). The anticipatory warrant was obtained in accordance with § 1903.4. The Secretary established probable cause through application of his administrative plan for programmed inspections. This plan has withstood previous judicial scrutiny. (*See*

Donovan v. Trinity Industries, Inc., 824 F.2d 634 (8th Cir. 1987); *Tri-State Steel Construction, Inc., and National Engineering & Contracting Co.*, 15 BNA OSHC 1903, 1992 CCH OSHD ¶ 29,852 (Nos. 89-2611 and 89-2705, 1992).) It is unnecessary to rule on the Secretary's alternate arguments for justifying entry onto the worksite. The warrant was validly obtained and issued.

Was Transmittal of the Notice of Contest Timely?

National seeks the sanction of dismissal. It asserts that even though the Secretary's complied with Commission Rule 2200.33, the transmittal was not as soon as intended by the "immediately advise" language of § 10(c) of the statute [29 U.S.C. § 659(c)]. Prejudice is not asserted. Rule 2200.33 prescribes that the Secretary shall notify the Commission within 15 working days after receipt of a notice of contest (NOC). The Secretary received the NOC on June 3, 1992; the Commission received it on June 22, 1992, a time lapse of 13 working days. The Secretary has complied with Rule 2200.33. The Commission is specifically authorized by § 12(g) of the Act [29 U.S.C. § 662(g)] to enact regulations to promote the orderly transaction of its proceedings. Since the Rule is a reasonable interpretation of statute's requirement that the Secretary "immediately advise" the Commission of receipt of a NOC, compliance with the Rule is compliance with the statute. National's challenge to the Rule and its application in this case are rejected.

Was there good cause to excuse the late filing of the Complaint?

National seeks the sanction of dismissal because the Secretary filed his complaint two days late (NOC was received by the Commission on June 22nd, and the complaint was mailed on July 24th). OSHA's clerical employee notified the Solicitor that OSHA would transmit the NOC to the Commission on June 24, 1992. OSHA actually sent the NOC to the Commission between June 17 and June 19, 1992 and, as noted, it was received on June 22nd. National does not allege prejudice. The two day delay was caused, not by contumacious conduct, but by inadvertent clerical error in mailing the NOC before the date

stated. The Commission will not dismiss on the basis that a party failed to follow its Rules. Other sanctions may be appropriate. Dismissal of the entire case serves mainly to punish employees. National's motion to dismiss for late filing of the complaint is denied.

Alleged Serious Citation

Procedural Status

At the close of the Secretary's case, National moved for a directed verdict. The Motion was considered as one made under Rule 41(b), Fed.R.Civ.P., and was preliminarily denied. National declined to present evidence and rested.

The decision reached in this case reflects the state of the record. National presented no evidence although its safety director and one of its attorneys accompanied Denton throughout the inspection. The Secretary's *prima facie* case was not overwhelming. The appraisal of the evidence was similar to that made by the reviewing court in *Astra Pharmaceutical v. OSHRC*, 681 F.2d 69, 74 (1st Cir. 1982), where it noted:

> The "evidence a reasonable mind might accept as adequate to support a conclusion" is surely less in a case . . . where it stands entirely unrebutted in the record by a party having full possession of all the facts, than in a case where there is contrary evidence to detract from its weight. *See, e.g., Noranda Aluminum, Inc., v. OSHRC*, 593 F.2d 811, 814 & n. 5 (8th Cir.1979)(decision to leave Secretary's case unrebutted "a legitimate but always dangerous defense tactic in litigation") . . . Thus, thin as the underlying evidence was, we find it sufficient in these circumstances.

Item 4: 29 C.F.R. § 1926.404(f)(6)

The Secretary alleges National used an improperly grounded Toshiba facsimile (fax)/telephone machine in violation of § 1926.404(f)(6). The standard requires that:

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

National's employees used a Toshiba fax/telephone unit located in its job trailer (Tr. 84). This equipment was manufactured with a three-pronged plug. The third prong was the

grounding pin. A three-pronged receptacle outlet was available in National's trailer for the unit. The circuit was energized at 110 volts (Tr. 85). For an unknown reason, someone utilized a two-pronged "cheater" (adapter) plug for the unit, the type that allows a three-pronged plug to be plugged into two-holed receptacle outlet (Tr. 198). National's superintendent Delsignore and a Mr. Brummley, both management employees, used the telephone in Denton's presence (Tr. 85). National immediately removed the adapter and plugged the unit directly into the receptacle.

To establish a *prima facie* case that an employer has violated a standard promulgated pursuant to § 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies to the facts, (2) the requirements of the standard were not met, (3) employees had access to the hazardous condition, and (4) the employer knew or could have known of the hazardous condition with the exercise of reasonable diligence. *Walker Towing Corp.*, 14 BNA OSHC 2072, 1991 CCH OSHD ¶ 29,239 (No. 87-1359, 1991).

National primarily disputes the existence of a hazard. The existence of a standard presumes that a hazard is present when the terms of the standard are not met. *See Wright & Lopez*, 10 BNA OSHC 1108, 1981 CCH OSHD ¶ 25,728 (No. 76-0256, 1981). Arguing that a hazard does not exist despite a violation is an "impermissible challenge to the wisdom of the standard." *Heath & Stich, Inc.*, 8 BNA OSHC 1640, 1643, 1980 CCH OSHD ¶ 24,880 (No. 14188, 1980). If it can be shown that the hazard is so remote or speculative that it presents no direct or immediate hazard to employees, a violation is not established.

The machine's exterior surface was plastic. An employee could not receive a shock from the machine's surface in the event of an electrical short. Compliance officer Denton, based on his experience with similar types of machines, asserted that a shock might be possible when paper was being changed or unjammed. The proof established by this testimony was not sufficiently contradicted. Noting that if the unit were de-energized, it could not shock, National posits that employees could have unplugged the unit if they opened it. It asserts the Secretary failed to prove that employees would leave the unit energized when unjamming or changing paper or "fixing" the machine. National, not the

Secretary, had the burden of establishing that employee training or some special mechanical means would prevent the unit from being energized when performing these tasks.

A ground was required on this electrical equipment. It was manufactured with the ground. The standard requires a ground on equipment not only for the most expected "normal use" but also for anticipated activities such as changing paper or unjamming equipment. The adapter plug interrupted the continuous path of the electrical ground. The anticipated hazard occurs if there is a malfunction in the machine. An employee coming into contact with conducting parts may then become a ground and receive an electrical shock. The standard applies to the facts and was not met. Employees used or had access to the machine for both telephoning and faxing.

While the Secretary has the burden to prove employer knowledge of a cited condition, this requirement can be satisfied upon a showing that the employer could have ascertained the condition through the exercise of reasonable diligence. *Prestressed Systems, Inc.*, 9 BNA OSHC 1864, 1865, 1981 CCH OSHD ¶ 25,358 (No. 16147, 1981). Visual inspection of the plugged unit would readily disclose the condition.

Use of the adapter may well have been sheer inadvertence. National may have had facts in its possession which would establish that the anticipated hazard was not applicable in the circumstances of its use of the unit. It did not present these facts. Although the Secretary may have chosen to utilize its resources in a far more effective way, he chose to pursue this violation. The record as it stands establishes a violation of the standard.

To establish that a violation is "serious" under § 17(k) of the Act, 29 U.S.C. § 666(k), there must be a substantial probability that death or serious physical harm could result from the violative conditions. The machine was located inside the trailer and was not exposed to the elements. It was not exposed to water, which might increase the severity of an electrical accident. If shocked, an employee would not fall from heights. Not every electrical hazard involves a realistic likelihood of electrocution. There has been no showing why a shock from the unit could likely result in serious injury. The issue is not the likelihood of an accident occurring but the likelihood of it causing a serious injury. In these circumstances the likelihood of a serious injury from the ungrounded fax/telephone unit is

remote and speculative. Although a violation is established, it is properly classified as "other than serious" and no penalty is assessed.

Item 5a: 29 C.F.R. § 1926.405(g)(2)(iv)

Did National's use of a 50 foot extension cord with its outer cord cover pulled loose from the female end plug violate § 1926.405(g)(2)(iv)? The standard provides:

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

National used generators to provide temporary power on the bridge project. Employees used extension cords to power tools from the generators. Employees took the generators and cords, along with other construction equipment used on the bridge site, in and out of the trailer before and after work (Tr. 205). At the time of the inspection, work had already begun. Other cords had been chosen and were in use on the site. A 50 foot extension cord, with the outer insulation pulled away at the plug end, was coiled in the center of the bridge (Tr. 89). Denton at first estimated the cord was 50 feet from the nearest workstation, but later stated it was about 100 feet from where work was being performed (Tr. 92, 156). The cord was not being used.

The cord's outer insulation was pulled away from the from the female plug end (Exh. C-7; Tr. 89-90). Internal wires were exposed from 1 to ½ inch before the cord was connected to the plug. Each of the internal wires was insulated with its own casing. There were no exposed live wires (Tr. 100). The internal wires were directly connected into the plug. Denton testified that he observed that there was no strain relief for the terminal screws in the female plug (Tr. 89).

National argues that the terms of the standard do not reflect the conditions cited by the Secretary. It argues that although the plug was pulled away from the outer insulation of the cord, this did not show a lack of strain relief. It asserts that the plug itself served as a flexible connecting device and strain relief. National also argues that since the connectors

were tight, the wires were not pulling loose from the terminal screws. It notes that there would probably be sufficient slack in the cord to prevent it from being pulled.

The fact that the outer insulation was pulled away from the cord's internal wires does not alone establish a lack of strain relief. With the primary insulation pulled away, however, it is obvious that there is no strain relief mechanism attached outside of the plug. National's speculation that there may have been strain relief in the plug, is just that: speculation. It declined to provide factual evidence on the point (Tr. 161-165).

The standard does not require that an ultimate hazard be immediately apparent before there is a violation. Compliance with the standard lessens the possibility of exposure to the hazard. It is not significant that the connectors were still tight and that the wires had not yet pulled loose. Without strain relief, it becomes more likely that the wires could be pulled loose. Whether the cord is of sufficient length to give slack on the line is not meaningful. Strain relief is required. National cannot rely on its employees' plugging tools into a de-energized extension cord. As Brock noted, whether the tool or the cord is plugged in first is a "chicken or egg" type decision (Tr. 219). That the cord presented a potential danger was recognized by Brock, who stated he cut off such plugs, and by superintendent Delsignore who agreed to remove it from the jobsite (Tr. 172, 218). Use of the extension cord plug as it was observed during the inspection would violate the requirements of the standard.

The Secretary relies on the admission of employee Brock to prove the third element of his *prima facie* case, *i.e.*, that there is employee exposure. Brock allegedly told Denton that he used the cord the day before the inspection in the described condition. Brock did not recall such a conversation. Since he usually cut off a plug in that condition, he did not believe he had used or seen the extension cord as it was shown in Exhibit C-7 (Tr. 218). Brock is not considered a reliable witness. Although he had knowledge of general jobsite practices, his memory was quite vague concerning specific conditions during the period surrounding the inspection. Given the questionable credibility of Brock's testimony, any admission, which moreover he generally denies, is entitled to little weight. The Secretary cannot rely on Brock's testimony to establish exposure.

In addition to proof of actual use, exposure may be shown by proof if employees had access to the violative conditions. *See Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804 (3rd Cir. 1985). By necessity, evidence of access must often be circumstantial. The evidence centers on Brock since there is insufficient information for which, if any, other employees could be considered exposed to a zone of danger created by the violation.

Brock described the general process for getting equipment onto the jobsite each day. Since equipment was stored in locked trailers overnight, in the mornings employees brought out the generators, tools, extension cords and like equipment. "The carpenters and laborers, normally we just grab the stuff and carry it out to the bridge" (Tr. 234). Employees took whatever tools they felt they might be using throughout the course of the day. Having helped carry equipment, Brock normally stretched out the number of extension cords he intended to use that day (Tr. 206).

The extension cord in issue was coiled in the middle of the bridge about 100 feet from Brock's workstation. The evidence presented supports a reasonable inference that the cord was brought out of the locked trailer that morning to be available for employees' use. While a cord with a pulled plug may not have been anyone's first choice, the cord was available to be used if needed. Employees might logically be expected to use the cord. Additional cords were available only in the trailer while Brock was on the bridge, and extension cords were required to power all tools on the jobsite. National presented no information which militates against that conclusion.

National alleges that the cord was effectively "removed from its place of operation" and was isolated from any use. Since National presented no facts to support this contention, it is speculation. National could rebut the Secretary's evidence by showing that there was only a remote chance of exposure and thus no real risk. There was no showing by National of safety training, supervision, work assignments and practices, or reasons why employees would not use a defective cord which had been brought to the bridge for use. The availability of the cords established that employees were exposed to the violation.

National's foreman was on the jobsite daily. The cords were taken in and out each day (Tr. 204). Through the exercise of reasonable diligence National could have known of

the defective condition of the extension cord plug. The violation, which was grouped with § 1926.20(b)(3), is affirmed.

Item 5b: 29 C.F.R. § 1926.20(b)(3)

The Secretary alleges that National's failure to tag or physically remove the extension cord with pulled plug violated § 1926.20(b)(3). The standard provides in pertinent part:

> (b) *Accident prevention responsibilities* . . . (3) The use of any machinery, tool, material, or equipment which is not in compliance with any applicable requirement of this part is prohibited. Such machine, tool, material, or equipment shall either be identified as unsafe by tagging . . . or shall be physically removed from its place of operation.

The extension cord with pulled internal wires at the female plug did not have strain relief and was defective. The cord was available for employees' use, although it was not in use at the time of the inspection. The normal practice was for employees to bring the equipment they intended to use from the trailer onto the bridge each morning. The inference must be that this cord was brought out for use. Although it was not chosen initially, there was nothing to prevent an employee from retrieving the cord if needed. National argues that the cord was in fact cast "off to the side" and isolated from use. This statement is not supported by factual evidence. The defective cord was not tagged, removed or otherwise taken from service. National's failure to do so violated the standard.

Classification

Many of the considerations National urged as showing there was no hazard, reduce the likelihood that an accident would result in serious injury or death. Although on an elevated bridge, Brock's work station was not near the edge and even if startled by a shock when connecting a tool he would not fall from heights. The grouped violations of § § 1926.405(g)(2)(iv) and 1926.20(b)(3) are affirmed as non-serious and no penalty is assessed.

Item 6: 29 C.F.R. § 1926.701(b)

The Secretary alleges that National's employee was exposed to falling onto rebar, in violation of § 1926.701(b). The standard requires:

> (b) *Reinforcing steel.* All protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement.

Was Brock exposed to the hazard of impalement on protruding reinforcing steel (rebar)? Does the standard presume a hazard of impalement whenever an employee could fall into reinforcing steel, or must the Secretary prove both that an employee could fall and that the fall could result in impalement?

At the northeast corner of the bridge off to one side, reinforcing steel protruded from what would become a concrete parapet wall on the bridge. Brock worked at the same level where the rebar protruded. The rebar consisted of twelve pieces of vertical steel, each 30 inches high and ½ inch in diameter (Tr. 102). The rebar was arranged in two rows, two in front and ten behind (Exh. C-13). Beside the rebar was a short stack of lumber. Denton observed Brock at his work station 8 to 10 feet from the rebar. As he watched, Brock went over to the wood, picked up a piece of lumber, and returned to his work station (Tr. 101-103, 146). When he was at the wood pile, he was as close as 1 foot to the rebar (Tr. 107). Brock is 5 foot 7 inches tall (Tr. 215). National capped or protected rebar when it foresaw a hazard (Tr. 106). This rebar was not capped or otherwise guarded. The Secretary alleges Brock was exposed to the hazard of impalement while he approached and bent over to get the wood. Denton defined "impalement" to include a person walking into or falling on rebar which would penetrate some part of the body (Tr. 101).

National argues that the standard does not apply in these circumstances. It asserts that a fall into the rebar from the same plane would result only in cuts or scratches--not in "impalement," which by Denton's definition requires "penetration." It notes that the Secretary presented no evidence of the force of a fall onto rebar from the same level or proof that impalement could occur from a fall with that force. It notes that the typical hazard with rebar occurs when an employee is working above the rebar from heights.

The Secretary asserts that the standard intends to cover "impalement" even if the employee is not "above" the protruding steel. The Secretary cites a part of the explanation from the final rule in support of this position:

> OSHA realizes that employees could be, in fact, often are, in a position where only part of their body is above the protruding steel, such as walking alongside of protruding rebar. . ." 53 Fed. Reg. 22612, at 22618, June 16, 1988.

Arguing that the standard establishes the hazard, the Secretary contends it is National's burden to prove impalement could not occur.

In assessing the parties' arguments, the language of the standard is controlling. The standard addresses "all protruding reinforcing steel, onto *and into which* employees could fall"(emphasis added). The "into which" language addresses situations where, as here, an employee can fall from the same level as the protruding rods. The wording of the standard supports that once the Secretary establishes an employee "could" realistically fall into the rebar, a hazard of impalement is presumed. The Secretary thus need not present facts establishing, for example, the force anticipated from the weight of a person's fall or the force needed for rebar to penetrate the body. Since Brock was as close as 1 foot to some of the rebar, was bending and retrieving materials, he could realistically fall into the rebar. National did not rebut that showing, and it failed to establish that impalement could not occur if Brock fell. National violated the standard.

The anticipated injury from a relatively short fall into ½ inch diameter rods is penetration of a body part, which is considered serious.

In arriving at the appropriate penalty, National's size, past history and good faith were considered. The gravity of the offense is the principal factor to be considered. *Nacirema Operating Co.*, BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972). The gravity of the violation is not high. The photographs and testimony establish that the worksite was orderly and clean. No tripping or slipping hazards were noted. The rebar was painted a bright color and was easily visible. The fall of a 5 foot 7 inch man into 30 inch rebar, while causing "serious" injury, would not likely result in death. The spacing of the rebar in two columns further reduced the likelihood of an accident. The violation is affirmed as serious. A penalty of $400 is considered appropriate.

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), Fed.R.Civ.P.

ORDER

Based on the foregoing decision, it is ORDERED;

(1) That the violation of 29 C.F.R. § 1926.404(f)(6) is affirmed as non-serious and no penalty is assessed.

(2) That the grouped violations of 29 C.F.R. § 1926.405(g)(2)(iv) and 29 C.F.R. § 1926.20(b)(3) are affirmed as non-serious and no penalty is assessed.

(3) That the violation of 29 C.F.R. § 1926.701(b) is affirmed as serious and a penalty of $400 is hereby assessed.

/s/ Nancy J. Spies
NANCY J. SPIES
Judge

Date: April 27, 1993