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SECRETARY OF LABOR
Complainant,
v.
P. J. LODOLA & SONS, INC.,
Respondent.

OSHRC DOCKET
NO. 93-0539

# 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 April 21, 1994. The decision of the Judge will become a final order of the Commission on May 23, 1994 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 11, 1994 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
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Petitioning parties shall also mail a copy to:

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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./RK

Date: April 21, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-0539

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| SECRETARY OF LABOR,<br>Complainant,<br><br>v.<br><br>P. J. LODOLA & SONS, INC.,<br>Respondent. | OSHRC Docket No.: 93-539 |

Appearances:

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Office of the Solicitor
U. S. Department of Labor
Boston, Massachusetts
For Complainant

Barrett A. Metzler, President
Northeast Safety Management, Inc.
West Hartford, Connecticut
For Respondent

Before: Administrative Law Judge Nancy J. Spies

***DECISION AND ORDER***

On January 20, 1993, the Secretary issued two citations to P. J. Lodola and Sons, Inc., (Lodola), alleging violations of the Occupational Safety and Health Act of 1970 (Act). The citations resulted from a multi-employer construction inspection conducted from September 16 to October 27, 1992, by Occupational Safety and Health Administration (OSHA) investigator Anthony Fuschillo. The Secretary alleges that Lodola was in serious violation of § 1926.405(b)(2), for failure to cover an electrical outlet box; and of § 1926.1052(a)(3), § 1926.1052(c)(1) and § 1926.1052(c)(4), for failure to have stairs risers at required heights and with handrails and midrails. In addition, the Secretary charges nonserious violations involving failure to tag out a defective drill, to have an approved fire extinguisher, and to have conductors more than 15 feet from areas subject to truck traffic. Lodola primarily

argues that the facts do not constitute violations or that compliance would result in a greater hazard.

Lodola was the electrical subcontractor for construction of a "palletized" warehouse for the Lego Corporation in Enfield, Connecticut, at the time of the OSHA inspection (Tr. 14-15, 23).

## SERIOUS CITATION NO. 1

### Item 1: Alleged violation of 29 C.F.R. § 1926.405(b)(2)

The Secretary asserts that Lodola's failure to cover an electrical outlet was a serious violation of § 1926.405(b)(2). Lodola admits that the outlet had no faceplate, but argues that a deliberate act would be necessary before an injury could occur. The standard provides:

> (b)(2): Covers and canopies . . . In energized installations each outlet box shall have a cover, faceplate, or fixture canopy.

Fuschillo observed a three-gang receptacle located in Lodola's office trailer that did not have a faceplate covering the outlet. The receptacle was energized and powered a radio, refrigerator and air conditioner (Tr. 31-32). Employees regularly went into the office trailer and passed by the uncovered outlet. Lodola's foreman, Wayne Centore, sat within a hand's reach of the outlet. Centore broke the coverplate about 1 week before the inspection (Exh. C-3; Tr. 44, 215).

Lodola disputes the existence of the hazard. Certainly the uncovered outlet box did not present a readily accessible hazard. In order for someone to be shocked from the uncovered outlet box, that person must have contacted either the metal mounting straps or the connection materials at the side of the outlet receptacle (Exh. C-5; Tr. 23, 168, 170). Simultaneously, in order to become grounded, he or she would have to touch some other conducting material such as the outlet box itself or the space heater mounted on the wall (Tr. 33-34). Lodola argues that the necessary combination of these occurrences was so implausible that the hazard did not exist.

Even if the probability of an electrical shock was low, outlets must be covered to protect the user from contact with the live electrical parts contained in it (Tr. 166). Wayne Centore, Lodola's electrical foreman, impliedly recognized the hazard when he admitted that the condition should have been corrected; that it would have been corrected if it had occurred on the jobsite proper; and that replacing the cover simply "fell between the cracks" (Tr. 217). Further, 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. 760256, 1981). The employer is not free to unilaterally disregard the existence of a federal standard merely because the employer disagrees with its efficacy. Finally, Lodola's argument that the experienced electricians who used its trailer would know enough to avoid the hazard is rejected. Accidents, such as Centore's in breaking the coverplate in the first instance, regularly occur even to knowledgeable individuals (Tr. 108, 215). The standard has been violated.

The degree of the hazard is relevant to determining the proper characterization and appropriate penalty of a violation. *See A.P. O'Horo Co.*, 14 BNA OSHC 2004, 191 CCH OSHD ¶ 29,223 (No. 85-369, 1991). To establish that a violation is "serious" under Section 17(k) of the Act, there must be a "substantial probability" that death or serious physical harm could result from the violative conditions. This language refers not to the likelihood of an accident occurring, but rather to the severity of an injury if an accident were to occur. *Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 1069 (3rd Cir. 1979). Although the Secretary alleges the violation is serious, the classification is not warranted. The outlet was inside the trailer, not subject to the elements. Since employees were exposed to the hazard only while in the trailer, there was no possibility that a shock could startle and result in a fall from heights. The outlet was not used to provide power for a variety of tools, as would have been the case had the outlet been located at the building under construction. In fact, the appliances that were plugged into the outlet had never been unplugged from it (Tr. 217). These facts not only affect the probability of an accident occurring, they also lessen the severity of the potential injury. Since the probability of serious injury caused by the uncovered outlet was remote and speculative, the violation is properly classified as "other

than serious." *See Hamilton Fixture*, 16 BNA OSHC 1073, 93 CCH OSHD ¶ 30,034 (No. 88-1720, 1993).

No penalty is assessed for the "other than serious" violation.

**Item 2a: Alleged violation of 29 C.F.R. § 1926.1052(a)(3)**

The Secretary asserts in Item 2a that the riser height of the storage trailer was not uniform as required by § 1926.1052(a)(3) which provides:

> Riser height and tread depth shall be uniform within each flight of stairs, including any foundation structure used as one or more treads of the stairs. Variations in riser height or tread depth shall not be over ¼-inch (0.6 cm) in any stairway system.

The storage trailer had 7 risers, counting from the ground to the trailer. The total height from ground to the trailer floor was 4 feet (Tr. 49). Fuschillo measured the individual riser heights in ascending order as: 9¼ inches; 6 inches; 5⅝ inches; 5 13/16 inches; 5¾ inches; 5¾ inches; and 11½ inches from the last step onto the trailer floor (Tr. 48). The standard prohibits a variation in riser heights of more than ¼ inch. Here, the variation was almost 6 inches between the last step into the trailer and the third step. Even if the last step is not considered to be a riser, an almost 4 inch difference existed between the first step from the ground and third steps. The second and third "middle steps" also varied in height by more than ¼ inch. The steps were in plain sight and, at a minimum, Lodola had constructive knowledge of the variation of the risers. The Secretary has established the violation.

**Item 2b: Alleged violation of 29 C.F.R. § 1926.1052(c)(1);**
**Item 2c: Alleged violation of 29 C.F.R. § 1926.1052(c)(4)**

The Secretary maintains that the stairways for the storage and office trailers were defective since they lacked either the necessary stairrails or midrails in violation of §§ 1926.1052(c)(1) and (c)(4). Lodola argues that it was not practical to have railings on both open sides of the storage trailer. It disputes whether railings were required at the office trailer. The standards require:

§ 1926.1052(c)(1): Stairways having four or more risers or rising more than 30 inches, whichever is less, shall be equipped with: (1) at least one handrail; and (2) one stairrail system along each unprotected side or edge.

"Stairrail system" is defined by § 1926.1050(b) as "a vertical barrier erected along the unprotected sides and edges of a stairway to prevent employees from falling. . .."

§ 1926.1052(c)(4): Midrails, screens, mesh, intermediate vertical members, or equivalent intermediate structural members, shall be provided between the top rail of the stairrail system and the stairway steps.

As stated, the stairway into the storage trailer had seven risers and rose 4 feet (Tr. 49). The stairway of Lodola's office trailer had four risers, counting the top step into the trailer and had a total rise of 35 inches (Tr. 85-86). The requirements of the standards apply. The stairway of the storage trailer had one railing on its right side. This railing had no midrail. There was no railing on the open left side of the storage trailer. The office trailer had railings, but these had no mid-rails or other acceptable alternative protection. Employees regularly used both stairways. Lodola had knowledge of the conditions because the obviously variable stairs were in plain sight at its own trailers (Tr. 124). The Secretary has established the violation.

**Greater Hazard Defense**

The burden now shifts to Lodola to establish its asserted defense that use of side railings would have created a greater hazard. This defense is predicated upon the fact that the doors of the storage trailer door swung from the side. Lodola argues that if both open sides of the stairway had railings, the stairway would have to be moved each time the trailer doors were opened or closed. The stairs weighed more than 200 pounds. Lodola anticipates that a potential fall from the stairway was a lesser hazard than that involved in physically moving stairs by hand (Tr. 196-197). It also asserts that assigning an employee to the task would create a financial burden for it.

Any employer who believes that compliance will create a greater hazard than that addressed by the standard must establish that: (1) the hazards of compliance are greater than the hazards of noncompliance; (2) alternative means of protection are unavailable; and

(3) a variance was unavailable or inappropriate. *E.g., Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1225, 1991 CCH OSHD ¶ 29,442, p. 39681 (No. 88-821, 1991); *Lauhoff Grain Co.*, 13 BNA OSHC 1084, 1088, 1986-87 CCH OSHD ¶ 27,814, pp. 36,397-98 (No. 81-984, 1987). Lodola has not met any of the elements of the defense.

Lodola, in effect, argues that placing railings to protect falls from the storage trailer would subsequently create a *new* hazard, the physical strain of moving the stairs. The greater hazard defense is limited to instances where the specific hazard would be heightened by compliance. *Russ Kaller, Inc.*, 4 BNA OSHC 1758, 1976-77 CCH OSHD ¶ 21,152 (No. 11171, 1978). It is not met by the employer's unsubstantiated opinion about the creation of a new hazard. Lodola did not address why it could not utilize removable railings, a landing platform or, if necessary, some mechanical means to move the stairway. Further, it presented no evidence that it had attempted any type of alternative protection for employees or had applied for a variance from the standard. Lodola failed to establish a defense to the violation.

**Classification and penalty of 2a, 2b, and 2c**

The hazard addressed by having railings on open sides is tripping or falling from the stairway. Likewise, midrails serve the purpose of providing a means to arrest a fall. Although the fall distance from either stairway was 4 feet or less, such an accident could be expected to result in a sprain or even a broken bone. The hazard at the storage trailer was enhanced because employees sometimes carried equipment in and out of the trailer. The prohibition against excessive variations in riser height is not merely a technical requirement. Discrepancies in riser height disrupt the body's rhythm. They can cause one to become off-balanced, misstep, trip or fall, especially when hurrying or carrying objects. Further, the expected momentum of such a fall from an upright position cannot be ignored. *See Austin Bldg. Co. v. OSHRC,* 647 F.2d 1063, 1967 (10th Cir. 1981) (employer cannot rely on the "possibility of a fortunate fall"). The substantially probable result of these violations is a sprain or broken bone, which is serious bodily harm. Grouped items 2a, 2b, and 2c are affirmed as serious violations.

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). It must 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. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14, 1993 CCH OSHD ¶ 29,964, p. 41,032 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight. The gravity of the violation is the primary element in the penalty assessment. *Trinity Indus.*, 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶ 29,582, p. 40,033 (No. 88-691, 1992).

Lodola had eighteen employees on site and employed 50 in its company (Tr. 39, 209). The majority of the on-site employees were exposed to the hazard of falls from either or both stairs (Tr. 41, 44). Considerations of good faith include the fact that Lodola had an ongoing safety program. It did not have a history of previous serious violations of the Act (Tr. 39). The likelihood of injury as well as the fact that Lodola had some but not all of the required handrails were considered as mitigating factors. A total penalty of $600 is assessed for the three items.

## "OTHER" CITATION NO. 2

### Item 1: Alleged violation of 29 C.F.R. § 1926.20(b)(3)

The alleged violation of § 1926.20(b)(3) is based on Lodola's alleged failure to tag a defective drill which was available for use by Lodola's employees. Lodola argues that it could not have known of the alleged violation. The standard provides:

> 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 locking the controls to render them inoperable or shall be physically removed from its place of operation.

Part 1926 requires that the tool be grounded. As part of Lodola's assured equipment grounding conductor (aegc) program, Lodola's employees inspected equipment weekly, more often that the aegc related standard required (Tr. 198). Compliance officer Fuschillo inspected the Milwaukee drill to determine if it was properly grounded. The tool was not

in use and was in the tool box. By moving the grounding pin back and forth, Fuschillo found that the grounding pin was loose and thus that the drill had only an intermittent ground (Tr. 58-59). Fuschillo recommended the citation because he feared the drill could be used while ungrounded. He acknowledged that the tool could also be properly grounded depending upon the position of the grounding pin (Tr. 60). A loose grounding pin presents the potential for shock or electrocution. The condition should have been immediately corrected when it became known to Lodola. Should Lodola have known of the condition?

In compliance with Lodola's aegc program the tool had been checked, found to be functioning properly, and color coded the week prior to the OSHA inspection (Tr. 198). The Secretary has the burden to prove employer knowledge of a cited condition. This requirement can be satisfied by a showing that the employer failed to discover the defect in materials or equipment through the exercise of "reasonable diligence." *See Prestressed Systems, Inc.*, 9 BNA OSHC 1864, 1865, 1981 CCH OSHD ¶ 25,358 (No. 16147, 1981). Lodola inspected the drill. The fact that the grounding pin was or became loose was not obvious from casual observation. There was no proof that the drill had even been used during the intervening week between Lodola's tool check and the OSHA inspection (Tr. 137-138). Lodola exercised the "reasonable diligence" required of an employer in searching for safety-related defects and had a reasonable basis to believe that the tool was properly grounded. Lodola lacked the knowledge requisite to establish the violation. The alleged violation is vacated.

**Item 2: Alleged violation of 29 C.F.R. § 1926.152(d)(4)**

The Secretary charges that Lodola violated § 1926.152(d)(4) by failing to have a fire extinguisher of the capacity required by the standard. Lodola claims that it had available extinguishers with sufficient output. The standard requires:

> At least one portable fire extinguisher having a rating of not less than 20-B units shall be provided on all tank trucks or other vehicles used for transporting and/or dispensing flammable or combustible liquids.

At the time Fuschillo saw Lodola's diesel refueling tank, which was on the back of a Ford pick-up truck, it was located at the corner of the building under construction

(Exh. C-10, C-11; Tr. 63). This truck regularly went onto the jobsite, and the tank was used to refuel Lodola's portable generators (Tr. 145). The truck bed also carried two five-gallon fuel containers. Lodola kept two fire extinguishers behind the seat in the pickup truck. Each extinguisher was rated at 5-B:C [1] (Tr. 62-63, 142). Fuschillo opined that two extinguishers would not meet OSHA's requirement that the stated output be from one extinguisher (Tr. 65). Here, however, even combining the capacity of both of Lodola's extinguishers, they were not the equivalent of one 20 square foot capacity extinguisher. These were the only extinguishers "provided" for the fuel tank. Lodola suggests that some other pick-up trucks may also have had extinguishers on them. Such speculation does not negate the Secretary's specific evidence of a violation. The violation is asserted to be nonserious in part because diesel fuel rather than gasoline was being pumped (Tr. 65). An "other" than serious violation is affirmed without penalty.

**Item 3: Alleged violation of 29 C.F.R. § 1926.152(g)(9)**

The Secretary asserted a violation of § 1926.152(g)(9) because Lodola failed to have "no smoking" signs posted on or near the fuel dispensing pick-up truck (Tr. 67). The standard specifies that:

> (g) *Service and refueling areas.* Conspicuous and legible signs prohibiting smoking shall be posted.

It is undisputed that there were no signs posted to prohibit smoking at the place where fuel was dispensed from Lodola's Ford pick-up truck. The standard requires that a sign be conspicuously posted. It is without significance that the two employees who usually refueled the equipment did not smoke. On this multi-employer worksite other employees necessarily had access to the areas where the truck was parked or where refueling was taking place. All employees should have been notified that smoking in the refueling area was forbidden. A nonserious violation is affirmed. No penalty is assessed.

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[1] Fire extinguishers are rated by number and letter. The number designates the number of square feet of fire it can extinguish. The letter "A" designates an extinguisher that can put out wood, paper, grass and like materials. "B" designates a rating for petroleum fires; "C" for electrical fires; and "D" for flammable metals such as aluminum and magnesium (Tr. 63, 64).

**Item 4: Alleged violation of 29 C.F.R. § 1926.153(l)**

The Secretary charges a violation of § 1926.153(l) which provides:

> § 1926.153 **Liquefied petroleum gas** (l) Storage locations shall be provided with at least one approved portable fire extinguisher having a rating of not less than 20-B:C.

Lodola stored liquid propane gas in a fenced area some distance behind its office trailer. The area in which the gas was stored had long dry grass. Lodola had a fire extinguisher placed near the storage location, but it was rated at only 10- B:C and not at the minimally required 20- B:C rating (Exhs. C-2, C-12; Tr. 68, 72). There were no other extinguishers within 75 feet of the storage area (Tr. 146). Although Centore testified that a fire extinguisher rated 75-B:C could be found at another location on the jobsite, he did not argue that this would affect a violation occurring at the propane storage area (Tr. 200). The Secretary has established a nonserious violation. No penalty is assessed.

**Item 5: Alleged violation of 29 C.F.R. § 1926.404(c)(1)(ii)(C)**

A violation of § 1926.404(c)(1)(ii)(C) is charged because an electrical conductor which crossed over a road or accessway, arguably "subject to truck traffic," was less than 15 feet above the ground. Whether placement of the conductor at this height was a violation depends upon what type of traffic the roadway was "subject to." Lodola contends the roadway was used only for residential traffic and was thus governed by § 1926.404(c)(1)(ii)(B). The standards provide:

> § 1926.404(c)(1) *Outside conductors and lamps--(ii)* Clearance from ground.**
>
> (B): 12 feet - over areas subject to vehicular traffic other than truck traffic.
>
> ** (C): 15 feet - over areas other than those specified in paragraph (c)(1)(ii)(D) of this section that are subject to truck traffic.
>
> ** (D): 18 feet - over public streets, alleys, roads & driveways.

**Subject to truck traffic**

The accessway presented a direct route from a public road into the office trailer area at the jobsite (Exh. C-2). It appeared to be a frequently travelled road (Exh. C-15). Fuschillo characterized the road as a service entrance, although it was not the primary service entrance (Tr. 80). Fuschillo's speculation that truck traffic would have brought and taken away trailers for the various subcontractors is not sufficient to meet the Secretary's burden. However, Fuschillo observed a UPS truck on the roadway, although it stopped about 12 inches short of passing under the conductor. Later in the investigation, but after the conductor had been raised, he observed a second UPS truck drive under the wires (Tr. 81). This latter evidence is not a basis for a violation, but it supports that the earlier observation of a truck was not a mere aberration. Centore stated that the UPS truck Fuschillo observed was also the first he had seen. However, in further describing how the accessway was made, Centore explained:

> And, then delivery people -- UPS, Federal Express, all of them -- will not get out of a truck if it means their sneakers are going to get dirty. So, they drive wherever they want (Tr. 201).

It was not unexpected that a direct accessway from street to the jobsite trailers would be used by delivery trucks. The standard requires only that the roadway be "subject to truck traffic." This is a lesser measure than the "designed for" or "primarily used by" definition suggested by Lodola. Observation by the compliance officer and circumstances such as the road's location between a public road and a large construction site establish that the accessway was "subject to truck traffic."

**Noncompliance with the standard**

The conductor brought electricity from the main pole at the street to a pole near Lodola's office trailer. It serviced the trailer and the security lights (Tr. 76). Fuschillo verified that the conductor was energized. With the assistance of Centore, Fuschillo measured the wire as it crossed the roadway and found it to be 12 feet, 4 inches above the ground (Tr. 82-83). Employees of Lodola or other employers had access to the hazard of potentially hitting and breaking an energized conductor or contacting a fallen conductor or

energized vehicle. Since Lodola was the electrical contractor, since the conductor serviced its trailer, and since Centore raised it during the inspection, Lodola may be considered both the creating and controlling employer. *See Flint Engineering & Const. Co.*, 15 BNA OSHC 2052, 1991-93 CCH OSHD ¶ 29,923 (No. 90-2873, 1992); *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1199, 1975-76 CCH OSHD ¶ 20,690, p. 24,784 (No. 3694, 1976) (consolidated cases). The violation was in plain sight and Lodola had constructive knowledge of the violation. The violation is affirmed as nonserious. No penalty is assessed.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

## ORDER

Based on the foregoing decision, it is ORDERED:

(1) Serious citation No. 1, item 1, alleging a violation of § 1926.405(b)(2) is affirmed as an "other-than-serious violation" without penalty;

(2) Serious citation No. 1, items 2a, 2b and 2c alleging violations of §§ 1926.1052(a)(3), 1926.1052(c)(1) and 1926.1052(c)(4) is affirmed and a total penalty in the amount of $600.00 is assessed;

(3) "Other-than-serious" citation No. 2, item 1, alleging a violation of § 1926.20(b)(3) is vacated; and

(4) "Other-than-serious" citation No. 2, items 2, 3, 4 and 5 alleging violations of §§ 1926.152(d)(4), 1926.152(g)(9), 1926.153(l), 1926.404(c)(1)(ii)(C) are affirmed without penalty.

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

Date: April 11, 1994