IN THE UNITED STATES
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor, Complainant, v. ALABAMA SALVAGE AUCTION COMPANY, INC., d/b/a TOTAL RESOURCE AUCTIONS, Respondent.	OSHRC DOCKET No. 13-1529

DECISION AND ORDER

COUNSEL: M. PATRICIA SMITH, Solicitor of Labor, STANLEY E. KEEN, Regional Solicitor, THERESA BALL, Associate Regional Solicitor, Matt S. Shepherd, Esq., for Complainant

DAVID L. WILLIAMS, Safety and Health Consultant, Occupational Safety and Health Associates, Inc., for Respondent.[1]

JUDGE: GATTO, J.

I. INTRODUCTION

The above-styled action came before this Court on a complaint filed by Thomas E. Perez, Secretary of Labor, United States Department of Labor (the "Secretary"), pursuant to section 10(c) of the Occupational Safety and Health Act of 1970[2] and Commission Rule 34(a)[3] alleging that Alabama Salvage Auction Company, Inc., d/b/a Total Resource Auctions ("Alabama

[1] Williams is a non-attorney representative authorized to appear and represent Alabama Salvage pursuant to Commission Rule 22(a), 29 C.F.R. § 2200.22(a).

[2] 29 U.S.C. § 659(c).

[3] 29 C.F.R. § 2200.34(a).

Salvage"), violated section 5(a) of the Act[4] and 29 C.F.R. §§ 1910.303(b)(1), 1910.304(g)(5), 1910.334(a)(2)(i), and 1910.1200(e)(1). The Secretary proposed penalties totaling $7,700. Alabama Salvage admits that it violated each of the cited regulations but disputes that the violations were serious or that the penalties are appropriate. This Court has jurisdiction over the subject matter and the parties pursuant to Section 10(c) of the Act. A one day trial was held on February 4, 2014, in Birmingham, Alabama. For the reasons indicated *infra*, the Secretary's contested citation items and his proposed penalties are **AFFIRMED**.

II. FINDINGS OF FACT

Alabama Salvage is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, 29 U.S.C. 652(5). (Pretrial Order ¶ 2(a); *see also* Compl. ¶ 2; Answer ¶ 2.) The principal place of business and employment of Alabama Salvage is at 5750 Highway 78 East, in Birmingham, Alabama (the "worksite"). (*Id*.) As of the date of the alleged violations, Alabama Salvage was engaged in the salvaging and sale of vehicles. At that time, Alabama Salvage had approximately twenty employees, with fifteen employed at the worksite. (Trial Tr. 22, February 4, 2014; *see also* Compl. ¶ 3; Answer ¶¶ 3, 8.)

In response to an Alabama Salvage employee complaint[5] filed with the Department of Labor's Occupational Safety and Health Administration ("OSHA"), Donald Bar Kirby, a Compliance Safety and Health Officer[6] in the Birmingham Area OSHA Office conducted an inspection of Alabama Salvage's worksite on or about April 17, 2013. (Tr. 19, 20.) As a result of the inspection, OSHA issued a Citation and Notification of Penalty ("the citation") alleging

[4] 29 U.S.C. § 654(a).

[5] The main component of the employee complaint alleged violations involving forklifts. (Tr. 20.)

[6] OSHA Compliance Safety and Health Officers conduct inspections and document safety hazards within companies and at jobsites. (Tr. 11.)

that Alabama Salvage committed four serious violations of the Act in the car wash area of the worksite. The Secretary proposed a group penalty of $4,200.00 for items 1a, 1b, and 1c and proposed a penalty of $3,500.00 for item 2. (Compl. ¶¶ 5, 6; Answer ¶ 6; *see also* Cit. pp. 6-9.)

On or about September 12, 2013, the Secretary timely received Alabama Salvage's notice of contest filed pursuant to § 10(c) of the Act. (Compl. ¶ 7; Answer ¶ 7; *see also* Cit. p. 9.) Importantly, Alabama Salvage admitted to the violations and only disputes the classification; *i.e.*, whether the violations were serious, and whether the Secretary's proposed penalties are appropriate. (Tr. 8-9, 72; *see also* Answer ¶ 8.) Despite these admissions, Alabama Salvage argues as an affirmative defense a "complete lack of knowledge of the conditions alleged." (Answer ¶ 9.)

Citations

In item 1a of the citation, the Secretary alleged that Alabama Salvage violated 29 C.F.R. § 1910.303(b)(1), the "general" rule of the Design Safety Standards for Electrical Systems, because electrical equipment "was not free from recognized hazards that were likely to cause death or serious physical harm to employees" since "an extension cord being used to service a shop vacuum was damaged and had exposed wires." (Compl. ¶ 5; *see also* Cit. p. 6.)

The Secretary also alleged in item 1b that Alabama Salvage violated § 1910.304(g)(5), the "wiring design and protection" rule of the Design Safety Standards for Electrical Systems, because the path to ground from circuits, equipment, and enclosures "was not permanent, continuous, and effective" in that "an extension cord used to service the vacuum cleaner had the grounding wire broken." (Compl. ¶ 5; *see also* Cit. p. 7.)

In item 1c, the Secretary alleged that Alabama Salvage violated § 1910.334(a)(2)(i), the "equipment use" rule of the standards on Safety-Related Work Practices, because the extension

cord was "not visually inspected before use on any shift for external defects (such as loose parts, deformed and missing pins, or damage to outer jacket or insulation) and for evidence of possible internal damage (such as pinched or crushed outer jacket)" since the "damaged extension cord being used outside in a wet area was not inspected and removed before use." (Compl. ¶ 5; *see also* Cit. p. 8.)

As to item 2 of the citation, the Secretary alleged that Alabama Salvage violated § 1910.1200(e)(1), the "hazard communication" rule of the standards on Toxic Hazardous Substances, because it "did not develop, implement, and/or maintain at the workplace a written hazard communication program which describes how the criteria specified in § 1910.1200(f), (g), and (h) will be met" in that "a written hazard communication program was not developed, implemented and maintained for employees working with hazardous chemicals such as, but not limited to, Super Chief SC-675." (Compl. ¶ 5; *see also* Cit. p. 9.)

Inspection

As to the inspection, while on-site, Kirby noticed that the employees were washing cars with a pressure washer, without any personal protective equipment, and vacuuming the cars with a "shop vac" in the same wet area. (Tr. 25, 26, 30, 31; *see also* Compl't Exs. C-10, C-11.) The chemical being used by the employees to wash the cars was Super Chief SC-675 ("Super Chief"), a high alkaline truck wash.[7] (Tr. 31-33; *see also* Compl't Exs. C-12, C-13.) The Super Chief container had a corrosive DOT "Class 8" label, which designated the contents as a hazardous material. (*Id*.) Alabama Salvage stipulated that Super Chief was a hazardous material. (Tr. 74.)

[7] According to Etowah Chemical, the manufacturer, Super Chief contains sodium hydroxide, biodegradable detergents and chelating agents. *See* http://www.etowahchemicals.com/PIB/pdf/SC-675-PIB.pdf.

After talking with the employee who was washing the car, Kirby asked Chase Pealer, Alabama Salvage's lot operations manager, for a copy of Alabama Salvage's hazard communication program. However, Pealer told Kirby that Alabama Salvage did not have a written program. (Tr. 33, 72.) This Court agrees with Kirby's assessment that "if you don't have a hazardous communication program, you're not communicating to the employees what the hazards of the chemicals are and how to prevent [them] from being exposed to those hazards." (*Id*. at 73.)

Significantly, Kirby noticed that the extension cord that was plugged into the vacuum had cuts in several areas in the outside jacket. The female end of the cord, which is the receptacle end of the cord, was damaged and had white tape wrapped around it. Upon further inspection, Kirby noticed bare copper wire and observed that the ground wire was completely cut in two. (Tr. 27-30; Compl't Exs. C-1 thru C-9; *see also* Pretrial Order ¶¶ 3(a) - 3(h); Compl. ¶¶ 4-7.) The cord was, however, being used on a line with a functioning ground fault circuit interrupter ("GFCI").[8] (Tr. 48, 49.)

As Kirby testified to, and this Court finds persuasive, "[w]ater conducts electricity more, makes it more fluid. It just -- electricity tries to find the easiest route to ground, and water is a conductor of electricity. So it tries to find -- it utilizes the water to help to find the ground." This Court also agrees with Kirby's assessment that water in the area of the damaged cord made a

[8] A *ground fault* occurs when electrical current flows on a path where it's not supposed to be. Under normal conditions, current flows in a circuit, traveling from the source, through the device it operates, called the *load*, and then back to the source. (Resp't's Ex. R-1.) Current (amps) flows out to the load from the "hot" side (which is generally at 120 volts AC) and returns on the "neutral" side (which is at zero volts). Under normal conditions, these two currents (hot and neutral) are equa1. If they are not equal, because of *current* leakage (current returning on a different path than the neutral conductor), we get a ground fault. This can occur if current flows through your body and returns to the source through a path to ground. Electricity will take ANY available path to return to its source. We want it to return only on the neutral. *Id.* The [GFCI] works by using the above principles. It measures total current on the hot side and total current on the neutral side of the circuit. They are supposed to be equal. If these two currents differ from each other by more *than* 5 *milliamps* (plus or minus 1 mA), the GFCI acts as a fast-acting circuit breaker and shuts off the electricity within l/40 of 1 second. You can still feel this small amount of current, but it will quickly shut off. *Id*.

shock or an electrocution more likely. (Tr. 26.) "They're holding the cord, pulling the vacuum cleaner in different areas. You know, they've got five or six cars lined up on each side that they're washing, pulling cords through. I mean, it's just not a good situation. It's very serious." (*Id*. at 42.) "Water conducts electricity. So it's highly conductive. And electricity likes to find ground. So if it's on your hands or if it's on the ground, it's going to try to find it. And if you have a pinhole or a tear or a damage crack or something of that nature in the hot or the neutral, it will go to it more easily." (*Id*. at 45.)

This Court also finds persuasive Kirby's assessment that the GFCI will not trip if there is a line-to-line contact "unless it's going to ground." (*Id*. at 46, 47.) Since the GFCI is looking for the ground fault, "if it detects the ground, that's what trips it." (*Id*. at 47.) If the cord is not going to the ground, the person holding the cord will become "part of that circuit" and the GFCI will not trip. (*Id*.) "If the employee picks up the cord to plug in something or to move the shop vac from point A to 8 point B . . . and he doesn't make ground, he'd be in line-to-line contact." (*Id*. at 49.) This line-to-line hazard could result in burns, shock, damaged tissue, and even death. (Tr. 49.)

This Court finds that there is also a potential for secondary injuries associated with the shock, such as tripping and falling, at this particular worksite. In particular, there were damaged vehicles, metal, broken glass, and bumpers lying on the ground, all of which exposed employees to potential secondary hazards. (*Id*. at 51; *see also* Compl't Ex. C-10.) The car washers were exposed on a daily basis to these hazards. (*See* Tr. 52, 70.) Alabama Salvage's employees admitted to Kirby at the inspection that they had been using the damaged cord out in the open for about a year and were repairing it with white tape each time it was cut. (*Id*. at 53.) The damaged cord was also lying out in the open when Kirby walked through the worksite. (*Id*. at 70.)

III. CONCLUSIONS OF LAW

To establish a prima facie violation of the section 5(a) of Act, the Secretary must show by a preponderance of the evidence that (1) the cited standards apply, (2) there was a failure to comply with the cited standards, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994). Due diligence includes "the obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent their occurrence." *Frank Swidzinski Co.,* 9 BNA 1230, 1233 (No. 76-4627, 1981).

Applicability of Cited Standards

Addressing the applicability of the cited standards, the Electrical Standards (29 C.F.R. §§ 1910.301-1910.399), address "electrical safety requirements that are necessary for the practical safeguarding of employees in their workplaces **. . . .**" § 1910.301. More specifically, section 1910.334(a) "applies to the use of cord and plug-connected equipment, including flexible cord sets (extension cords)." Therefore, clearly the cited regulation § 1910.303(b)(1), related to the examination of electrical equipment, § 1910.304(g)(5), related to wiring design and protection, and § 1910.334(a)(2)(i), related to the use of electrical equipment, including extension cords, apply to Alabama Salvage in order to safeguard its employees in their workplace.

As to the hazardous communication rule, § 1910.1200, it provides that the purpose "is to ensure that the hazards of all chemicals produced or imported are classified, and that information concerning the classified hazards is transmitted to employers and employees" and that "[t]he transmittal of information is to be accomplished by means of comprehensive hazard communication programs . . . ." Alabama Salvage admits that its employees used Super Chief

SC-675, a hazardous chemical. Therefore, the hazardous communication rule applies in order to transmit information concerning this hazard to Alabama Salvage's employees.

Sections 1910.303, 1910.304, and 1910.334 Violations

The Secretary alleges in item 1a of the citation that Alabama Salvage committed a serious violation of 29 C.F.R. § 1910.303(b)(1), which provides in relevant part that "[e]lectrical equipment shall be free from recognized hazards that are likely to cause death or serious physical harm to employees." The Secretary alleges in item 1b that Alabama Salvage committed a serious violation of § 1910.304(g)(5), which provides that "[t]he path to ground from circuits, equipment, and enclosures shall be permanent, continuous, and effective." The Secretary alleges in item 1c that Alabama Salvage committed a serious violation of § 1910.334(a)(2)(i), which provides in relevant part that "[p]ortable cord- and plug-connected equipment and flexible cord sets (extension cords) shall be visually inspected before use on any shift for external defects (such as loose parts, deformed and missing pins, or damage to outer jacket or insulation) and for evidence of possible internal damage (such as pinched or crushed outer jacket)."

As indicated in section II *supra*, Alabama Salvage admits that it violated each of the cited regulations but argues that the violations were not serious since the extension cord was plugged into a GFCI. Therefore, Alabama Salvage argues that its employees were not exposed to a serious hazard. This Court finds no merit in this argument. Section 17(k) of the Act provides that:

> a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm *could* result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

(Emphasis added.) 29 U.S.C. § 666(k). Thus, the Secretary need not show that there was a substantial probability that an accident *would* actually occur; he need only show that if an accident occurred, serious physical harm *could* result. *See Sec'y of Labor v. Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA 1044, 1047 (No.. 08-0631, 2010); *Dec-Tam Corp.*, 15 BNA 2072, 2077 (No. 88-523, 1993).

Here, the standards clearly prohibit the use of a worn or frayed cord and the use of a cord with a broken grounding wire, and require the inspection and removal of a damaged cord. The cord that was indisputably in use here was damaged and was being used with a broken grounding wire. It is also clear that the damaged cord was not properly inspected and removed since it had been in use while damaged for an extended period of time.

Further, the existence of a GFCI has no bearing on whether the terms of these standard were violated. "Although GFCI's will trip before an employee is electrocuted, they do not prevent electric shock. An employee experiencing a shock may suffer a serious, even fatal, secondary injury as a result of the recoil from the shock. 41 Fed. Reg. 55,701 (1976)." *A.I. Baumgartner Construction, Inc.*, 16 BNA 1995, 1999 (No. 92-1022, 1994). Thus, even though a GFCI is designed to protect against serious injury, employees were nonetheless subject to a potentially serious, even fatal, secondary injury resulting from the shock in the instant case is the dispositive factor in finding of a serious violation. *Id*. The fact that the cut cord was resting in a wet area is an aggravating circumstance. *Id*. Therefore, this Court concludes that Alabama Salvage committed a serious violation of §§ 1910.303(b)(1), 1910.304(g)(5), and 1910.334(a)(2)(i) and affirms items 1a, 1b, and 1c of the Secretary's citation.

Section 1910.1200 Violation

The Secretary alleges in item 2 of the citation that Alabama Salvage committed a serious violation of 29 C.F.R. § 1910.1200(e)(1), which provides in relevant part that "[e]mployers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, safety data sheets, and employee information and training will be met . . . ." This section therefore requires employers to provide information to their employees about the hazardous materials to which they are exposed, by means of a hazard communication program. As indicated in section II *supra*, Alabama Salvage admits that Super Chief SC-675 was being used at the worksite by its employees and that it did not have a written hazard communication program.

A "hazardous material" means "a substance or material that the Secretary of Transportation has determined is capable of posing an unreasonable risk to health, safety, and property when transported in commerce, and has designated as hazardous under section 5103 of Federal hazardous materials transportation law (49 U.S.C. 5103)." 49 C.F.R. § 171.8. "The term includes … materials designated as hazardous in the Hazardous Materials Table (*see* 49 CFR 172.101) . . . ." *Id*. Since a sodium hydroxide solution, such as Super Chief SC-675, is listed in DOT's hazardous materials table as a class 8 corrosive material, it is a hazardous material.[9] *See* §172.101(d). Thus, a written hazard communication program was required. This Court therefore concludes that Alabama Salvage committed a serious violation of 29 C.F.R. § 1910.1200(e)(1), when it failed to develop, implement, and maintain at the worksite a written hazard communication program and affirms item 2 of the Secretary's citation.

[9] The U.S. Department of Transportation's ("DOT") Class 8 regulations provide in relevant part that a class 8 corrosive material means "a liquid or solid that causes full thickness destruction of human skin at the site of contact within a specified period of time." 49 C.F.R. § 173.136(a).

Employees Access to Violative Condition

This Court finds that the Secretary has clearly shown that employees had access to the violative conditions since there is no dispute that employees had access to and were using the damaged cord and were using Super Chief SC-675, both on a daily basis for an extended period of time.

Employer Knowledge

Where a cited condition is "readily apparent to anyone who looked," employers have been found to have constructive knowledge. *Hamilton Fixture*, 16 BNA 1073, 1091 (No. 88-1720, 1993), *aff'd* on other grounds, 28 F.3d 1213 (6th Cir. July 1, 1994). An employer is chargeable with knowledge of conditions that are plainly visible to its supervisory personnel. *Baumgartner Construction*, 16 BNA 1995, 1998.

As indicated *supra*, Alabama Salvage pled the affirmative defense of complete lack of knowledge of the conditions alleged. However, this Court concludes that even assuming, *arguendo*, that actual knowledge was lacking in a particular instance, as discussed in section II *supra*, the damaged cord was in plain view of the compliance officer during the inspection and was readily apparent to anyone who looked. The damaged cord was also openly used by employees and plainly visible to its supervisory personnel for an extended period of time. Alabama Salvage admitted that it did not have a written hazard communication program even though its employees were using Super Chief SC-675, a hazardous chemical. Thus, this Court finds no merit in Alabama Salvage's claim of a complete lack of knowledge of the violative conditions. Alabama Salvage had constructive knowledge and with the exercise of reasonable diligence could have or would have known of the existence of the violative conditions.

Penalties

The Secretary proposed a $4,200 group penalty for items 1a, 1b, and 1c of the citation and proposed a $3,500 penalty for item 2 of the citation. Section 17(b) of the Act provides a maximum penalty of up to $7,000 for each serious violation. 29 U.S.C. § 666(b). Once a citation is contested, the Commission has the sole authority to assess penalties. *Hern Iron Works*, 16 BNA 1619, 1621 (No. 88-1962, 1994). Thus, although the Act places limits for penalty amounts, it places no restrictions on the Commission's authority to raise or lower penalties within those limits. Compare sections 17(a)-(g) and 17(j); 29 U.S.C. §§ 666(a)-(g) and 666(j).

In determining what penalty is appropriate for a violation, section 17(j) of the Act, requires the Commission to consider the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. 29 U.S.C. § 666(j). These factors are not necessarily accorded equal weight. Generally speaking, however, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992).

Here, the small size of the company mitigates in favor of Alabama Salvage with approximately twenty employees at the time of the OSHA inspection. However, Alabama Salvage is not entitled to consideration regarding previous violations since the Secretary presented no evidence of prior OSHA inspections. Alabama Salvage is also not entitled to a consideration for good faith since it failed to have a written hazard communication program and failed to properly train its employees regarding the hazard. Finally, although the gravity of the violation was lessened by the GFCI protection on the cord, as indicated *supra*, the fact that the cut cord was resting in a wet area is an aggravating circumstance. Accordingly, having weighed the four statutory 17(j) factors, this Court concludes that a group penalty of $4,200

for the serious violations of 29 C.F.R. §§ 1910.303(b)(1), 1910.304(g)(5), and 1910.334(a)(2)(i), and a penalty of $3,500 for the serious violation of § 1910.1200(e)(1) are appropriate. Therefore, the Secretary's proposed penalties are **AFFIRMED**. Accordingly,

IV. ORDER

IT IS HEREBY ORDERED THAT the Secretary's contested Citation 1, Items 1a, 1b, 1c, and 2 are **AFFIRMED**.

IT IS FURTHER ORDERED THAT a group penalty of $4,200.00 is assessed for Items 1a, 1b, 1c for the serious violations of 29 C.F.R. §§ 1910.303(b)(1), 1910.304(g)(5), and 1910.334(a)(2)(i).

IT IS FURTHER ORDERED THAT a penalty of $3,500.00 is assessed for Item 2 for the serious violation of 29 C.F.R. § 1910.1200(e)(1) violation.

SO ORDERED THIS 3rd day of **March, 2014.**

/s/
JOHN B. GATTO, Judge
U.S. Occupational Safety and
Health Review Commission