UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Korte Construction Co., Respondent.	DOCKET NO. 09-1907

Appearances:

Jeremiah Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington
For Complainant

Aaron Owada, Esq., AMS Law, Lacey, Washington
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a Korte Construction Co. ("Respondent") worksite in Fort Lewis, Washington on October 6, 2009. As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent alleging one serious violation of the Act with a proposed penalty of $825.00. Respondent timely contested the citation and a trial was conducted on October 18, 2010 in Seattle, Washington.

Jurisdiction

Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act. The record establishes that at all times relevant to this action, Respondent was an employer engaged in a business affecting

interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). (Tr. 96-101). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Applicable Law

To establish a *prima facie* violation of the Act, the Secretary must prove by a preponderance of the evidence that: (1) the cited standard applies to the condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharmaceutical Products*, 9 BNA OSHC 2126, 1981 CCH OSHD ¶25,578 (No. 78-6247, 1981).

Stipulations

The parties offered, and the court accepted, the following stipulations:

1. The Occupational Safety and Health Administration (hereinafter "OSHA") had jurisdiction over the Respondent's workplace located at 9119 Mill Park Avenue in Fort Lewis, Washington at the time of the inspection issued in this case.

2. The court has jurisdiction to hear this matter.

3. Compliance Safety and Health Officer (hereinafter "CSHO") Kalah Goodman (hereinafter "Ms. Goodman") was a duly authorized representative of the Secretary at the time of the inspection at issue in this case.

4. CSHO Nicole Flessner (hereinafter "Ms. Flessner") was a duly authorized representative of the Secretary at the time of the inspection at issue in this case.

5. At times prior to, and including the inspection date, Respondent ran two heavy duty black cables through two separate window openings on the north side of the medical/dental clinic under construction at the worksite.

6. The black cables originated at a temporary power pole outside the medical/dental clinic and were wired into a spider box inside of the medical/dental clinic.

7. At times prior to and including the inspection date, Respondent ran a twelve-gauge extension cord through a window opening on the north side of the medical/dental clinic under construction at the worksite.

8. The extension cord was plugged into a receptacle on a temporary power pole outside the medical/dental clinic and was connected to a portable fan inside of the medical/dental clinic.

9. The black cables and extension cord are flexible cable or flexible cords as those terms are defined in 29 C.F.R. 1926.405(a)(2)(ii)(I).

10. Respondent or Respondent's agents were responsible for supplying and maintaining the black cables, extension cord, and the spider boxes to which the black cables were attached.

11. Respondent's employees were working at the work site in the proximity of the medical/dental clinic on or about October 5, 2009.

12. Employees for other employers were working at the worksite, inside and outside of the medical/dental clinic on or before October 5, 2009.

13. A flexible cord or cable passed through open windows with friction hinges that hold the windows open on the north side of the medical/dental building at the worksite and could be compressed between the moving window panel and the sill.

14. Respondent's jobsite met the requirements of the Occupational Safety and Health Administration ("OSHA's") guidance to compliance officers for focused inspections in the construction industry.

15. 29 C.F.R. 1926.405(a)(2)(ii)(I) does not define the term "protected from damage."

16. OSHA acknowledges a good faith effort by Korte in installing plastic PVC pipe was an acceptable fix for OSHA.

17. The copies of photographs labeled Complainant's Exhibits C-4.1 to C-4.3 are true

and correct copies of photographs produced by the Respondent of a section of electrical conductor after it had been compressed in a window of the same design as the windows at issue in this case.

18. The copies of photographs labeled Respondent's Exhibits R-1.1 to R-1.3 are true and correct copies of photographs produced by Respondent of a section of electrical conductor; the videos labeled Respondent's Exhibits R-2, R-3 and R-4 are true and accurate videos of the cable and windows as shown in Complainant's Exhibits C-4.1 to C-4.3; Respondent's Exhibit R-5 is a true and correct copy of the manufacturer's Carolprene jacketed Type SOOW specification sheet.

19. The proposed adjusted penalty, as calculated in Exhibit A to the Complaint, was calculated correctly with reference to OSHA's policies and procedures.

Additional Factual Findings

Three witnesses testified at the hearing: (1) CSHO Kalah Goodman, (2) CSHO Nicole Flessner, and (3) Respondent's Safety Director, Kevin Moorhead. (Tr. 19, 78, 95). Based on their testimony and discussion of evidentiary exhibits, the court makes the following additional factual findings:

On October 6, 2009, OSHA Compliance Officers Kalah Goodman and Nicole Flessner performed a programmed inspection of a construction project in Ft. Lewis, Washington. (Tr. 22). Respondent was the on-site general contractor for the $18 million project which consisted of the construction of a 30,000 square foot medical/dental building. (Tr. 24, 97, 101). Three of Respondent's own employees were working at the site, in addition to numerous subcontractor employees. (Tr. 24). During the inspection, CSHO's Goodman and Flessner observed three flexible electric cords running through two different windows. (Tr. 25-26, 29-30, 85-86; Ex. C-1.1). Each of the two windows had a black cord running through it, which was described as "extra-hard-usage cord designed for use to connect temporary power to spider boxes to run

power appliances on the job site." (Tr. 29-30, 62, 102, 110-113; Ex. C-1.1, R-4). In addition, one of the windows also had a smaller, yellow, twelve-gauge plug-in-type cord running through it. (Tr. 52-53, 114-115; Ex. C-1.1).

It was undisputed that both windows were equipped with "friction hinges," which prevented the windows from inadvertently opening or closing. They must be forced one direction or the other to move. (Tr. 68, 103). There were also circular rubber gaskets running along the bottom edge of the windows. (Tr. 58, 60, 102, 105-106; Ex. R-2). At the time of the inspection, both windows were in an open position, though one of the windows was only open the approximate thickness of the large black cord. (Ex. C-1.1).

CSHO Goodman testified that she observed minor "nicks" and a "depression" in the cord running through the nearly closed window, but did not know whether the marks were caused by the window or even occurred on this jobsite. (Tr. 30-31, 54-55, 60-61). She took no photographs of these marks during her inspection and was unable to point them out using the video footage taken during the inspection. (Tr. 54). CSHO Goodman acknowledged that the marks she observed did not cause any of the internal wiring (a/k/a conductors) to be exposed. (Tr. 65). She also agreed that OSHA does not consider minor nicks or abrasions which do not penetrate the outer cord sheathing to be safety concerns. (Tr. 55-56).

The citation in this case was based on CSHO Goodman's and CSHO Flessner's concern that the three cords at issue were improperly exposed to sharp window edges and the pinch-points of the windows themselves. (Tr. 58, 73, 86). OSHA characterized the violation as "serious" because employees contacting internal conductors of damaged electrical cords could be shocked, resulting in involuntary movement, falls, and lacerations. (Tr. 36, 86). CSHO Goodman testified, however, that this condition posed no risk of a fatal injury. (Tr. 61). She further testified that any employees who walked near the area where the cords traveled through the open windows were exposed to a hazardous condition, but she did not consider herself

exposed to a hazardous condition while standing 2-3 feet from the window examining the cords. (Tr. 37, 50). It was undisputed that, at the time of the inspection, there were no employees working near either of the windows at issue. (Tr. 50-51, 90-91, 94).

After the inspection, Respondent conducted various tests using a rubber balloon, a section of the black cord identified in the citation, and one of the same type of windows along the same wall, to determine whether any sharp edges were present and whether there was potential for damage from running the cords through the window. (Tr. 104, 124-126, 140; Ex. R-2, R-3). First, Respondent repeatedly closed the window on an inflated balloon. (Ex. R-2). The edges of the window, even while fully closed and latched, did not pop the balloon. (Tr. 107; Ex. R-2). Second, Respondent dragged the balloon back and forth along the edges of the window and the window sill. (Tr. 107; Ex. R-2). The balloon still did not pop. (Tr. 107; Ex. R-2). Third, Respondent repeatedly slammed the window closed while a section of the black cord was run through the window. (Tr. 107-108; Ex. R-3). The employee performing the test was instructed to intentionally attempt to damage the cord. (Tr. 119). The repeated slamming of the window onto the cord resulted in a very minor indentation to the outer sheathing of the cord. (Tr. 109; Ex. R-3). Later examination of a cross-section of the cord at that location revealed no discernible damage. (Tr. 109-111, 116; Ex. R-1, R-3, R-4). It is important to note that there was no evidence that such abuse ever actually occurred while the cords were in use on the jobsite. (Tr. 119, 121). The purported purpose of Respondent's persuasive demonstration was to determine whether the cords could be damaged by allegedly sharp window edges or by closure of the windows under extreme and intentionally abusive treatment.

Discussion

Citation 1 Item 1

The Secretary alleged in Citation 1 Item 1 that:

> *29 C.F.R. §1926.405(a)(2)(ii)(I): Flexible cords and cables were not protected from damage. Sharp corners and projections were not avoided. Flexible cords and cables may pass through doorways or other pinch points, if protection is provided to avoid damage: (a) Exterior North Side of Building, where unguarded flexible cables included: (1) Flexible cables originating at the temporary power pole were run through windows and wired into spider boxes located within the building. (2) A 12 gauge extension cord plugged into a receptacle at the temporary power pole was run through a window and plugged into a portable fan.*

The cited standard provides:

> *29 C.F.R. §1926.405(a)(2)(ii)(I): Flexible cords and cables shall be protected from damage. Sharp corners and projections shall be avoided. Flexible cords and cables may pass through doorways or other pinch points, if protection is provided to avoid damage.*

The plain language of the cited standard permits flexible cords to pass through doorways and other pinch point openings (e.g., windows) if they are protected from damage. The standard does not articulate any specific methods for providing that protection. (Tr. 57). Therefore, as CSHO Goodman acknowledged, it is a performance standard which affords a reasonable level of discretion on the part of the employer in deciding the best methods of protection for their particular worksite. (Tr. 57). See also *OSHRC v. Thomas Industrial Coatings, Inc*., 21 BNA OSHC 2283, 2008 CCH OSHD ¶32,937 (No. 97-1073, 2007). In this instance, the cords were

protected from damage in several ways. First, the two black cords themselves were heavy-duty, hard-wired, industrial-use cords designed to route electrical energy to spider boxes for the various tools used on construction sites. These were not common plug-in-type extension cords. These cords were encased with a substantial and durable outer layer of black rubber, and then additional layers of internal rubber sheathing around each conductor. (Ex. R-1, R-4). Second, the windows did not have sharp edges, as demonstrated by Respondent's post-inspection demonstration. The window design, including the round rubber gaskets along the window edges, protected the cords from damage. Third, all three cords were protected from damage by the friction hinges on these particular windows. The windows would not, absent external force, inadvertently close onto the cords. Lastly, the thinner, yellow, 12-gauge extension cord was additionally protected from damage by its proximity to the thicker, more durable, black cord running through the same window. (Tr. 132; Ex. C-1.1). The thickness of the nearby black cord, the friction hinges of the window, the rubber gaskets along the window edges, and the lack of any sharp edges along the window opening, all served to protect the yellow cord from damage.

While these protective measures may not have been the best recommended practices for protecting flexible electric cords, it is not this court's role to determine whether Respondent implemented the best method of protection available. Rather, the court's role is to decide whether Complainant has proven by a preponderance of the evidence that Respondent failed to implement at least the minimally acceptable levels of protection for the cords in compliance with the cited regulation. Complainant's evidence failed to convince the court that Respondent violated the terms of the cited regulation. Accordingly, Citation 1 Item 1 will be VACATED.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1 Item 1 is hereby VACATED.

Date: 2/28/2011
Denver, Colorado

/s/
PATRICK B. AUGUSTINE
Judge, OSHRC