

United States of America  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION  
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SECRETARY OF LABOR,

Complainant,

v.

COMMERCIAL NEWSPAPER SERVICE, and  
its successors,

Respondent.

OSHRC DOCKET NO. 00-1150

**APPEARANCES:**

For the Complainant:

Jeannie Gorman, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington

For the Respondent:

Charles W. Fawcett, Esq., Skinner Fawcett, Boise, Idaho

Before: Administrative Law Judge: Stanley M. Schwartz

**DECISION AND ORDER**

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Commercial Newspaper Service, and its successors (Commercial), at all times relevant to this action, maintained a place of business at 136 E. Idaho Street, Meridian, Idaho, where it published athletic posters. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On May 18, 2000, following its receipt of a complaint, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Commercial's Meridian work site. As a result of that inspection, Commercial was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Commercial brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On November 7, 2000, an E-Z trial hearing was held in Boise, Idaho. At the hearing the parties submitted a joint stipulation, in which Commercial withdrew its notice of contest to the violations themselves. The parties agree that the sole issue in dispute is the appropriateness of the proposed penalties. No briefs are required in E-Z proceedings, and this matter is ready for disposition.

### **Alleged Violation of §1910.36(b)(6)**

Serious citation 1, item 1 alleges:

29 CFR 1910.36(b)(6): Building(s) or structure(s) equipped for artificial illumination were not provided with adequate and reliable illumination for all exit facilities:

(A) Storage Room: On 18 May 2000, and at times prior thereto, there was no illumination device provided for the means of egress.

(B) Pre-Press Room: On 18 May 2000, and at times prior thereto, there was no illumination device provided for the means of egress.

#### **Facts**

OSHA Compliance Officer (CO) Bill Bankhead testified that there was no emergency lighting in two separate areas of Commercial's basement, the storage room and the pre-press room (Tr. 17). Bankhead stated that an employee attempting to exit the basement could become disoriented in the dark and suffer cuts and/or bruises (Tr. 18). Bankhead stated that there was "limited" employee exposure to the hazard and that the likelihood of an accident occurring was low (Tr. 18). Bankhead believed the gravity of the violation was low.

Bankhead stated that he was told Commercial was a small employer, with approximately 60 employees at the Meridian site and 200 employees total (Tr. 75). However, Layton Denney, Commercial's production manager (Tr. 38-39), testified that there were only nine employees on the Meridian site, four of whom had access to the storage and pre-press areas (Tr. 43). Mike Justice, Meridian's owner, testified that on May 18, 2000 Commercial had a total of 68 employees on the payroll at all its work sites; Justice introduced documentary evidence corroborating his testimony (Tr. 59; Exh. R-1). Bankhead admitted that the figures presented at the hearing were more accurate than the information he was given during the inspection (Tr. 80).

Layton Denney testified that Commercial had begun to address the safety and health issues cited by OSHA before the OSHA inspection was instigated (Tr. 47). Denney stated that, as early as January 2000, Commercial began consulting with Boise State University's Safety and Health Consultation Program to identify safety concerns (Tr. 47-48; Exh. R-2, R-3). An inspection of Commercial's work site was made on April 3, 2000, and the consultant's report was issued on April 10, 2000 (Tr. 48; Exh. R-2). Prior to the OSHA inspection, Commercial began drafting a lock-out/tag-out program, and issued a purchase order to an electrician to bring the electrical equipment into compliance with OSHA standards (Tr. 48-50). Denney testified that by the time Commercial had its informal conference with OSHA, all but one of the violations had been abated (Tr. 53). By the hearing date, all the violations were abated (Tr. 54, 60). CO Bankhead testified that none of Commercial's prior attempts to abate the

safety and health violations in its workplace were taken into account in his assessment of the proposed penalties (Tr. 31-32).

It is undisputed that Commercial had no previous OSHA violations (Tr. 18, 59).

### Discussion

In determining an appropriate penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972).

As a threshold matter, this judge notes that, according to §17k of the Act, a violation is considered serious only if the violative condition or practice gives rise to a substantial probability of death or serious physical harm. CO Bankhead testified that the probable injuries that would result from Commercial's failure to provide emergency illumination devices at the means of egress would be cuts and bruises. Cuts and bruises are not "serious physical harm" as contemplated by the Act. Citation 1, item 1 is, therefore, reclassified as "other than serious." CO Bankhead, therefore, overstated the gravity of the cited violation. In addition, he failed to take into account Commercial's good faith efforts to abate safety and health violations in their work place prior to the OSHA inspection. Finally, the CO was misinformed as to the number of workers Commercial employed.

Taking into account the statutory factors, especially the mis-classification of this item, this judge finds that no penalty should be assessed for this item.

### **Alleged Violations of §1910.106(d) and 176(c)**

The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for injury resulting from an accident.

Serious citation 1, item 2a alleges:

29 CFR 1910.106(d)(7)(iii): Open flames and smoking were permitted in flammable or combustible liquid storage areas:

(A) Outdoor Secure Storage: On 18 May 2000, and at times prior thereto, employees were permitted to smoke cigarettes from a porch above a secure chemical storage area which contains a 55 gallon drum of Blanket Wash 405. The label on this flammable liquid directs it be kept away from flames, sparks, and heat.

Serious citation 1, Item 2b alleges:

29 CFR 1910.176(c): Storage areas were not kept free from accumulation of materials that constituted hazards from tripping, fire, explosion or pest harborage:

(A) Storage Room: On 18 May 2000, and at times prior thereto, numerous boxes of paper and other combustible material, such as but not limited to stacks of fiberboard, stored in this basement area increased the fire load and potential for a severe fire which would engulf the

entire building. Combustible material is stored approximately 12 inches away from incandescent light bulbs.

Facts

CO Bankhead testified that the probability of an accident occurring was low, but in the event of a fire, exposed employees would probably suffer smoke inhalation and/or burns, possibly resulting in death (Tr. 23). As in the preceding item, employee exposure to the hazard was limited (Tr. 23).

Discussion

A penalty of \$1,750.00 was proposed for this item. This item was properly classified as a serious, but low gravity violation. However, as noted above, the CO failed to properly compute the penalty, as he misapprehended Commercial's size and failed to give any credit for Commercial's good faith.

Taking into account the appropriate factors, this judge finds that a penalty of \$180.00 is appropriate and will be assessed.

**Alleged Violations of §1910.147(c)(1)**

Serious citation 3 alleges:

29 CFR 1910.147(c)(1): The employer did not establish a program consisting of an energy control procedure and employee training to ensure that before any employee performed any servicing or maintenance on a machine or equipment where the unexpected energizing, start up or release of stored energy could occur and cause injury, the machine or equipment would be isolated, and rendered inoperative in accordance with 29 CFR 1910.147(c)(4):

(A) Establishment: On 18 May 2000, and at times prior thereto, the employer had not established a lock-out/tag-out program.

Facts

Bankhead testified that Commercial's failure to implement a lock-out/tag-out program exposed its employees to possible bruises, cuts and/or amputations from residual energy in the presses (Tr. 24-25). Bankhead stated that the probability of an accident occurring was low because four of the five presses were of the cord and plug type (Tr. 24).

## Discussion

A penalty of \$1,750.00 was also proposed for this item. This item was properly classified as a serious, but low gravity violation. However, as noted above, the CO failed to take into account Commercial's actual size, or its good faith.

Taking into account the appropriate factors, this judge finds that a penalty of \$180.00 is appropriate and will be assessed.

### **Alleged Violations of §1910.303(g) and 305 et seq.**

Serious citation 1, item 4a alleges:

29 CFR 1916.303(g)(2)(ii): Enclosures or guards for electric equipment in locations where it would be exposed to physical damage were not arranged and of a strength to prevent such damage to the equipment:

(A) Storage Room: On 18 May 2000, and at times prior thereto, a bank of three incandescent light bulbs were not guarded to prevent damage, thus exposing employees to an electrical hazard

Serious citation 1, item 4b alleges:

29 CFR 1910.305(a)(2)(i): Temporary electrical power and lighting installations rated 600 volts, nominal, or less were used for purposes other than those permitted in subparagraphs (a), (b) and (c) of this paragraph:

(A) Pre-Press Room: On 18 May 2000, and at times prior thereto, the employer used a flexible extension cord as temporary wiring for the Plate Exposure Machine's (model VF-F5D serial # 76103) timer and vacuum pump.

Serious citation 1, item 4c alleges:

29 CFR 1910.305(b)(2): Pull boxes, junction boxes, and fittings were not provided with covers approved for the purpose:

(A) Storage Room: On 18 May 2000, and at times prior thereto, five junction boxes housing live electrical conductors were not provided with covers, thus exposing employees to an electrical hazard.

## Facts

CO Bankhead testified that the electrical hazards cited in items 4a through 4c exposed employees to shocking injuries and/or burns (Tr. 27). Because the violations were in the basement, there was, again, limited employee exposure to the hazard (Tr. 28).

Discussion

A penalty of \$1,400.00 was also proposed for this item. This item was properly classified as a serious, but low gravity violation. As discussed more fully above, the CO failed to take into account Commercial's actual size, or its good faith.

Taking into account the appropriate factors, this judge finds that a penalty of \$100.00 is appropriate and will be assessed.

**Alleged Violations of §1904.2**

Other than serious citation 2, item 1 alleges:

29 CFR 1904.2(a): A log of all recordable occupational injuries and illnesses, (OSHA Form No. 200 or equivalent), was not maintained at the establishment:

(A) Establishment: On 18 May 2000, and at times prior thereto, the 1999 Log and Summary of Occupational Injuries and Illnesses (OSHA 200) was not available for inspection. The company has not maintained any OSHA 200 logs.

No penalty was proposed for this item.

**ORDER**

1. Citation 1, item 1, alleging violation of §1910.36(b)(6) is AFFIRMED as an "other than serious" violation, without penalty.
2. Serious citation 1, items 2a and 2b, alleging violations of §§1910.106(d)(7)(iii) and 1910.176(c), respectively are AFFIRMED and a combined penalty of \$180.00 is ASSESSED.
3. Serious citation 1, item 3, alleging violation of §1910.147(c)(1) is AFFIRMED and a penalty of \$180.00 is ASSESSED.
4. Serious citation 1, items 4a, 4b and 4c, alleging violations of §§1910.303(g)(2)(ii), 1910.305(a)(2)(i) and 1910.305(b)(2), respectively are AFFIRMED and a combined penalty of \$100.00 is ASSESSED.
5. Other than serious citation 2, item 1, alleging violation of 1904.2(a) is AFFIRMED without penalty.

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/s/  
Stanley M. Schwartz  
Judge, OSHRC

Dated: December 18, 2000