

SECRETARY OF LABOR,  
Complainant,

v.

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OSHRC Docket No. 96-1478

HOSPITALITY MANAGEMENT, INC.,  
d/b/a EXECUTIVE INN,  
Respondent.

APPEARANCES

Dorian West, Esq.  
Office of the Solicitor  
d/b/a  
U. S. Department of Labor  
Atlanta, Georgia  
For Complainant

Ms. Sharon Charania  
Hospitality Management, Inc.,  
Executive Inn  
Atlanta, Georgia  
For Respondent

Before: Administrative Law Judge Paul L. Brady

**DECISION AND ORDER**

This proceeding is brought pursuant to Section 10 of the Occupational Safety and Health Act of 1970 (Act). Hospitality Management, Inc., doing business as Executive Inn (Hospitality), contests a citation and proposed penalty issued by the Occupational Safety and Health Administration (OSHA). The citation, as amended, alleges a serious violation of the standard at 29 C.F.R. § 1910.333(a)(1). The standard, which pertains to safety-related work practices on or near electrical equipment which may be energized, states in pertinent part as follows:

*Deenergized parts.* Live parts to which an employee may be exposed shall be deenergized before the employee works on or near them, unless the employer can demonstrate that deenergizing introduces additional or increased hazards or is infeasible due to equipment design or operational limitations.

The amended citation alleges that:

Live parts to which an employee could be exposed were not deenergized before the employee worked on or near them:  
Electrical Room - Main Electrical Panel  
- Employee instructed to cut a piece of metal to fit a missing filler blank in a 40 amp breaker opening of a main electrical panel operating at 50 volts or more.  
When the employee inserted the piece of metal in the opening he contacted the live

bar either directly or indirectly and was electrocuted (on or about July 20, 1996).

There is no dispute that an employee was attempting to place a piece of metal in a breaker opening when he contacted the live bar and received electrical burns. The employee, Mr. Abdusaboor, was instructed to cut a piece of metal to fit a missing filler blank in the opening of the electrical panel. The accident occurred in the electrical room of Hospitality's hotel.

Ms. Patricia Morris, Safety Specialist for OSHA, testified she conducted the inspection of Hospitality's premises following a referral from the Fulton County Fire Department (Tr. 17). The hotel had been closed because of fire code violations, and the missing blank in the panel was one of the violations (Tr. 41).

As part of her investigation, Ms. Morris learned that Mr. Abdusaboor had not performed any electrical work for Hospitality, but was hired to hang sheetrock and paint (Tr. 25). Exhibit C-1 shows where a 40-amp (240 volts) breaker would have gone and where the filler blank was to be placed. Ms. Morris explained that live parts were within one to two inches within the opening (Tr. 27, 28).

Ms. Sharon Charania, representing Hospitality, testified that original replacement blanks were of an outdated style and could not be purchased ready-made. The filler blanks, therefore, had to be cut out of sheet metal and placed in the panel (Tr. 60). She explained that:

The actual gap was not -- was not live. There was, however, a live bar receded in the panel that was live, and that controlled lighting in the -- controlled lighting, as well as electrical outlets for the room itself, the corridor outside the room, three adjoining meeting rooms, the lounge area, the guest laundry and other common areas, which included the emergency fire alarm system, which is also located in the lobby.

(Tr. 61).

Ms. Charania stated that Mr. Abdusaboor was hired as a maintenance man and the job in question did not require an electrician (Tr. 67-68). She indicated that in replacing the filler "there's no electrical wires or other bars that have to be contacted or touched." Hospitality asserts the system was not deenergized because the fire code prohibits cutting off the fire alarm system as several persons, including children, were living in the building. In addition, replacement of the filler could not be performed in the dark. An alternate source of lighting, such as a flashlight would not be adequate (Tr. 62). Hospitality indicated that the employee did not perform the task according to his instructions (Tr. 62).

To establish the affirmative defense of unpreventable employee misconduct, the employer must prove: “(1) that it has established work rules designed to prevent the violation; (2) that it adequately communicated these rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered.”

*Nooter Construction Co.*, 16 BNA OSHC 1572, 1578 (No. 91-237, 1996). In this case, such defense does not apply since no training was provided Mr. Abdusaboor and Hospitality had no safety rules or safety program in effect (Tr. 13).

The record discloses that approximately 15 to 25 persons resided in the building (Tr. 41) and that the filler could be replaced in 25 to 30 minutes (Tr. 52). Ms. Morris testified that under these circumstances those persons in the hotel could simply be notified that the fire alarm system would not be operable during that time. Also, the work could be performed with artificial lighting (Tr. 41, 54). Ms. Morris pointed out that even if deenergizing the system was infeasible, the use of personal protective equipment, such as insulated covers or protective gloves should have been utilized (Tr. 54, 55). The evidence clearly shows that the Secretary established the violation as alleged.

The Secretary alleges that the violation is serious. A violation is serious under § 17(k) of the Act if “an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident.” *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1324 (No. 86-351, 1991). Hospitality’s failure to deenergize parts resulted in third degree electrical burns to both hands of its employee and his possible death. The violation is serious.

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty the Commission is required to find and give “due consideration” to (1) the size of the employer’s business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered. Ms. Morris testified that the original proposed penalty was \$5,000, but because of Hospitality’s size, the amount was reduced to \$2,000. No credit was given for good faith because of a lack of cooperation and because of the gravity of the violation.

#### 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 hereby ORDERED that:

Item 1 of the citation alleging a violation of § 1910.333(a)(1) is affirmed and a penalty in the amount of \$2,000 is hereby assessed.

PAUL L. BRADY  
Judge

Date: February 20, 1997