United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
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SECRETARY OF LABOR
Complainant,
v.
KIEWIT ATKINSON KENNY
Respondent.

OSHRC DOCKET
NO. 95-0830

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 26, 1996. The decision of the Judge will become a final order of the Commission on May 28, 1996 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 16, 1996 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
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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./SKA

Date: April 26, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 95-0830

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,	:	
Complainant	:	OSHRC
	:	DOCKET NO. 95-0830
v.	:	
KIEWIT ATKINSON KENNY,	:	
Respondent.	:	

Appearances:

Paul J. Katz, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Richard D. Wayne, Esq.
Hinckley, Allen & Snyder
Boston, Massachusetts
For Respondent

Before: Administrative Law Judge Barbara Hassenfeld-Rutberg

DECISION AND ORDER

This proceeding arises under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et. seq.*, ("the Act"), to review citations issued by the Secretary of Labor ("Secretary") pursuant to § 9(a) of the Act and a proposed assessment of penalty thereon issued pursuant to § 10(c) of the Act.

On March 30, 1995, Kiewit Atkinson Kenny ("Kiewit") was issued two citations stemming from the inspection of a tunnel construction project on Deer Island in Winthrop, Massachusetts. The first citation alleges sixteen serious violations, all but three of which have been resolved by the

parties or withdrawn by the Secretary (Tr. 4-9; Exhibit J-1).[1] The three remaining violations involve electrical hazards and a total penalty of $6,400 is proposed. The second citation alleges four other-than-serious violations, three of which have been withdrawn by the Secretary (Tr. 302 ; Exhibit J-1). No penalty is proposed for the remaining item. Kiewit filed a timely notice of contest and a hearing was held in Boston, Massachusetts on November 6 and 7, 1995.

Kiewit serves as general contractor for the ongoing tunnel project and at the time of the inspection, had at least 150 employees present at the work site (Tr. 13, 299). These employees included tunnel boring machine operators and safety supervisors who performed regular safety surveys of the worksite (Tr. 13-14, 25-26, 32, 54, 74-75, 132-35, 292). Given that much of their work extends throughout the tunnel, many of Kiewit's own personnel may have been exposed to some, if not all, of the hazardous conditions alleged herein (Tr. 32-33, 54). But even if Kiewit's own employees were not exposed, Kiewit may be held responsible for the exposure of other employees present at the site. As the project's general contractor, Kiewit is charged with overseeing the entire worksite and ensuring that safe working conditions are being practiced by the various subcontractors hired for the project (Tr. 13-14, 70, 135, 291-92, 295-98). As such, Kiewit is in a position, by virtue of its supervisory role, to obtain the abatement of hazardous conditions created or controlled by another employer (Tr. 25-26, 32, 54, 75). *See, e.g., Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188, 1975-76 CCH OSHD ¶20,691 (No. 12775, 1976) ("The general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors"); *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1199, 1975-76 CCH OSHD ¶ 20,690 (No. 3694, 1976) (general contractor on multi-employer worksite has sufficient control over entire project to take necessary steps to assure compliance).

At the hearing, Frank Gagnon, Kiewit's electrical supervisor, described himself as the company's liaison with the project's electrical subcontractor, Mass-Reid Electric ("Mass-Reid") (Tr. 192). He acknowledged that it is part of his job to notify Mass-Reid whenever a hazardous electrical condition is discovered and to ensure that the condition is abated (Tr. 192, 246-47). He also indicated that while Mass-Reid is responsible for performing all scheduled maintenance on the

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[1] The settlement agreement is approved and incorporated herein (Exhibit J-1).

project's electrical equipment, it is Kiewit who ensures that the maintenance program is being completed (Tr. 201-02, 212-13, 292). Kiewit even provides Mass-Reid with the tags and locks used to lockout electrical equipment (Tr. 209-12). Thus, the fact that Kiewit employees are contractually prohibited from performing any type of electrical work themselves does not lessen Kiewit's obligation as general contractor to address those hazards which may affect the safety of the jobsite as a whole (Tr. 32, 73-75, 120-21, 192-93, 201-02, 211- 12, 221, 291-92). *Id.* Accordingly, I find that Kiewit may properly be held responsible for those violations which it reasonably could have been expected to prevent or abate by reason of its supervisory capacity.

Serious Citation 1, Item 5

Under this item, the Secretary alleges violation of 29 C.F.R. § 1926.403(d)(1) which requires, in relevant part, all electrical equipment to be firmly secured to the surface on which it is mounted. According to the Secretary, three pieces of electrical equipment located in different areas of the tunnel were not properly secured in the manner required. Two instances of violation involve tunnel lighting contactors, 12" x 12" metal boxes which essentially serve as light switches (Tr. 17-18, 21, 24). The first contactor was hung from a railing with two nylon tie wraps strung through its "ears" at the top of the box and thus it could swing (Tr. 17-18, 28, 138; Exhibit C-2). It had three cables running into it - one plug-connected and two directly wired (Tr. 18-19, 21, 116-17). The second contactor was resting unattached on top of a large transformer and also had one plug-connected cable and two hard wired cables running into it (Tr. 23-24, 28, 116-17; Exhibit C-3). The third instance of violation involves a large, 30 KV transformer with feet which was sitting on top of a grating floor of a raised metal platform about seven feet off the ground (Tr. 30, 130, 132-33, 138, 232-33). The transformer itself was approximately four feet high, three feet wide, and weighed at least 200 pounds (Tr. 30-31, 34, 232). William Coffin, the compliance officer, for the Occupational Safety and Health Administration ("OSHA") testified that the transformer was not secured and was unstable because it was resting on top of a one-inch diameter cord (Tr. 30, 129-31, 233-35).

Kiewit does not dispute that the transformer and two contactors were not secured in the manner required by the cited standard. However, Kiewit claims that these pieces of equipment are temporary and therefore, do not need to be secured. Kiewit argues that these items are not intended

to remain inside the tunnel permanently, but will be removed once the construction project is completed; thus they contend the items should be are considered as only temporary installations (Tr. 115, 225, 234).[2] But Kiewit has failed to prove that temporary equipment is specifically excluded from the requirements of § 1926.403(d)(1). There is nothing in Article 305, the temporary wiring section of the National Electric Code (NEC) cited by Kiewit, to suggest that such equipment need not be secured in the manner required under NEC § 110-13 and duplicated in the cited standard (Tr. 115, 131). Thus, temporary or not, this equipment should have been secured in accordance with § 1926.403(d)(1).

Similarly, there is nothing in the record to support Kiewit's claim that the cited pieces of equipment are meant to be portable and therefore, do not need to be secured (Tr. 226-27). The compliance officer testified that unlike a mobile distribution unit, such as a "spider", this equipment is *not* intended to be portable (Tr. 116, 128-29, 137-38, 226). This is consistent with the fact that the transformer and one of the contactors have not been moved from their positions for the past two years (Tr. 28-30, 239). Furthermore, it would be a true stretch of the imagination to characterize a 200-pound transformer as a portable piece of equipment designed to be easily moved from one location to another (Tr. 31). Even if this equipment were portable, Kiewit has failed to identify any standard or NEC section which exempts portable equipment from the requirements of the cited standard.

According to the compliance officer, all three of these pieces of equipment should have been firmly secured in order to protect against the damage that accidental movement can cause (Tr. 27, 34-35, 126-27). The evidence indicates that the first contactor was free to swing back and forth from its two connection points and the second contactor could have fallen from its position atop a transformer (Tr. 17, 19, 24-25, 128 ; Exhibits C-2 & C-3). Similarly, the cited unstable transformer sitting on a raised platform was capable of tipping over if struck by a locomotive car or used as stepping stool by an employee (Tr. 30-32, 138-39). The compliance officer also testified that an employee performing work on a piece of electrical equipment that is not secure could come into

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[2] It is worth noting that at the time of the hearing, only one of the contactors has been removed from the tunnel since its installation in 1994; the transformer, also placed in the tunnel in 1994, is not expected to be removed until the summer of 1996 (Tr. 239).

contact with a live circuit if the equipment should move or slide around (Tr. 19-22, 24-25, 27). Although it is expected that the electricians on site would only work on equipment that has been properly deenergized, the compliance officer noted that for certain procedures, such as testing the circuits, the equipment must remain energized (Tr. 19, 126-27, 227-30). Given these circumstances, I find that the cited equipment posed an electrical hazard. Since these conditions were not hidden and could, with reasonable diligence, have been noticed by a Kiewit safety supervisor during a routine safety inspection, Kiewit should have known that these hazards existed.

At the hearing, Gagnon, Kiewit's electrical supervisor, provided extensive testimony regarding the tunnel's electrical system and the safeguards in place at the time of the inspection. These measures include a pilot or ground check system which monitors for breaks in the tunnel's primary feed of 13,800 volts, and several vacuum breakers positioned throughout the tunnel to distribute the 13,800 volts and monitor for overcurrent (Tr. 94-96, 195-200, 203-05, 249-50, 271-73). According to Gagnon, if the flow of current surges or is broken, these systems respond by immediately cutting the feed of 13,800 volts (Tr. 196-98, 204-06, 249-50, 267, 279). Gagnon also identified an independent tripping device which monitors the current for the 660/480/120 voltage systems connected to the tunnel boring machine (Tr. 200-01). Finally, he indicated that an assured grounding system, as well as a ground fault circuit interrupter (GFCI) program on all 120 volt circuits, are used at the tunnel site (Tr. 198-99, 201-02, 268-69, 271-72, 276-77, 282). While these systems provide employees working in the tunnel with some level of protection from electrical hazards, they address those hazards primarily associated with the main feed of 13,800 volts, not systems operated at lower voltage levels (Tr. 249-50, 267, 311-12). Moreover, these precautions are meant to serve in addition to, not in place of, the requirements of the cited standard (Tr. 145). There was no evidence of a waiver asked for by Kiewit. Accordingly, the violation is affirmed.

Section 17(k) of the Act, 29 U.S.C. § 666(k), provides that a violation is "serious" if there is "a substantial probability that death of serious physical harm could result" from the violation. In order to establish that a violation should be characterized as serious, the Secretary need not establish that an accident is likely to occur, but must show that in the event of an accident, it is probable that death or serious physical harm could occur. *Flintco Inc.*, 16 BNA OSHC 1404, 1405, 1993 CCH OSHD ¶ 30,227 (No. 92-1396, 1993). There is no question that an electrical hazard poses the threat

of serious physical harm or even death. Here, this hazard was exacerbated by the fact that the tunnel environment is damp and wet (Tr. 21-22, 34, 207). As the compliance officer indicated, if an unsecured piece of equipment short-circuits due to accidental damage or moves while being worked on such that contact with a live circuit is made, an employee may suffer serious burns or even electrocution (Tr. 19-21, 23, 25, 34-35). Accordingly, this violation was properly characterized as serious.

Pursuant to § 17(j) of the Act, the Commission is authorized to assess each violation an appropriate penalty, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. *Merchant's Masonry, Inc.*, 17 BNA OSHC 1005, 1006-07, 1995 CCH OSHD ¶ 30,635 (No. 92-424, 1994). The most significant of these factors is the gravity of the violation, which includes the number of exposed employees, the duration of exposure, the precautions taken to prevent injury, and the degree of probability that an injury would occur. *Id.*

The Secretary has proposed a penalty of $1,600 for this violation. For some reason, the Secretary has chosen not to introduce any evidence whatsoever regarding the calculation of the penalties proposed for the items in dispute. Thus, an independent analysis of the relevant penalty criteria is required. First, I find that the gravity of the violation is low. Exposure to these conditions was essentially limited to those employees who had direct access to the cited equipment, specifically the electricians, and in some instances, Kiewit's safety supervisors. The duration of exposure and the probability of injury is also low given that most of the work to be performed would only be done once the equipment was deenergized. In addition, I find that equipping the electrical system with several levels of safety features and dedicating one employee to coordinate Kiewit's efforts with Mass-Reid demonstrates good faith on Kiewit's part. After carefully weighing these facts in light of the record as a whole, I find a penalty of $1000.00 to be reasonable and appropriate under the circumstances.

Serious Citation 1, Item 12

Under this item, the Secretary alleges violation of § 1926.408(a)(4)(v) which requires, in relevant part, that the nonenergized metal parts of electrical equipment operating at over 600 volts

be bonded and grounded to all metal pipes and rails at the portal and at intervals not exceeding 1000 feet throughout the tunnel.[3] Contrary to testimony from Gagnon, this standard is applicable to the tunnel project pursuant to § 1926.408(a)(4)(i) which states:

> The provisions of this paragraph apply to installation and use of high-voltage power distribution equipment which is associated with tunnels and which is portable and/or mobile, such as substations, trailers, cars, mobile shovels, draglines, hoists, drills, dredges, compressors, pumps, conveyors, and underground excavators.

(Tr. 50-51, 215-16).

The compliance officer testified that the tunnel contained electrical equipment, such as transformers, disconnect switches, and pump controllers, containing nonenergized metal parts. These non-energizied metal parts were not bonded to the metal pipes which supply water and air to the head of the tunnel or the metal rails which carry the locomotive through the tunnel (Tr. 41-43, 45, 52, 109-11, 308; Exhibit R-3). Bonding these components would require physically connecting them with a wire that would allow the potential between these parts to be the same, *i.e* the bond would eliminate the chance of electricity being carried throughout the tunnel (Tr. 43, 45, 47-48, 51, 53-54, 308-09).

Gagnon maintains that the tunnel's electrical system is bonded and grounded by its pilot or ground check system. Under this system, he explained, every load center is first bonded to the main feed cable at 1,500-foot intervals and then grounded to the platform on which it sits; because the platforms rest on steel rods which are driven into the earth, they are "grounded" by a path to earth (Tr. 217, 219-21, 241-42, 272, 277-78). Gagnon admitted that bonding these components in this way does not conform with the cited standard (Tr. 242). He also acknowledged that at the start of the tunnel project, Kiewit had begun to bond in the manner required by § 1926.408(a)(4)(v), but subsequently discontinued this practice and apparently removed the initial bonding (Tr. 51-52, 109, 253-54; Exhibit R-3).

By Kiewit's own admission, it has not complied with § 1926.408(a)(4)(v), nor did it apply

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[3] According to § 1926.408(a), this requirement applies to all circuits and equipment operated at over 600 volts. As noted *supra*, the current running throughout the tunnel was 13,800 volts (Tr. 53).

for a waiver. Moreover, while its alternative bonding system presumably provides some level of protection with regard to the specific components involved, *e.g.* the load centers and the platforms, the system does not address the key aspects of the cited standard - the nonenergized metal parts of electrical equipment and the metal pipes and rails running the length of the tunnel (Tr. 309). As the compliance officer indicated, if a 480 volt wire came in contact with one of these pipes, electrical current could be carried throughout the tunnel (Tr. 47-48, 310). Should an employee come into contact with that current, he may suffer serious burns or even electrocution (Tr. 48, 53). Accordingly, I find that a serious violation of § 1926.408(a)(4)(v) has been established.

The Secretary has proposed a penalty of $2,000 for this violation. Although exposure to this condition extended to any employee working throughout the tunnel who might come into contact with the metal pipes or metal rails, I find that the gravity of the violation remains low given that the likelihood of an injury occurring is remote. Also, for the same reasons indicated *supra* with regard to the previous violation, Kiewit should receive credit for good faith. Thus, based upon an independent analysis of the penalty criteria set forth at § 17(j) of the Act, I find that a penalty of $1,600 is reasonable and appropriate under the circumstances.

Serious Citation 1, Item 13

Under this item, the Secretary alleges violation of § 1926.417(d)(3) which requires, in relevant part, that a lock and tag be placed on each disconnecting means used to deenergize circuits and equipment on which work is to be performed. According to the compliance officer, a 480 volt water pump in need of repair had been disconnected from a breaker panel which was turned off and tagged, but not locked out (Tr. 55-56, 65-66, 75, 146-47; Exhibit C-7).[4] After removing the pump,

[4] There was some question at the hearing regarding whether the breaker panel had a cover and if so, whether the cover was open or closed at the time of the inspection. After some initial uncertainty, the compliance officer recalled that the panel had a cover which was partially open when he approached the area during the walkaround inspection (Tr. 119-20, 157-58, 306-07). The presence of a door is consistent with the fact that given the conditions of the tunnel, the panel showed relatively few signs of extensive moisture or dirt (Tr. 207-08, 289-90). However, rust marks do appear to the right of the breaker switch and the handmade, cardboard sign seems too large to have allowed a cover to shut completely over the face of the panel (Exhibit C-7). As such, I am inclined to believe the compliance officer's testimony that the cover was (continued...)

the cable which connected the pump to the breaker panel was coiled and hung on the wall, its end encased in plastic and tape in order to keep moisture out (Tr. 56-59, 68-69, 98-99, 145-46; Exhibit C-6). The cable was not within sight of the breaker panel (Tr. 59, 69). The compliance officer testified that since the breaker was still connected to an energized source and was not locked out, it could be accidentally switched on, thus energizing the cable (Tr. 58-59, 62, 66-67, 77, 147-48, 153-54).

As pictured in Exhibit C-7, the breaker panel had two "tags" attached to it. One was a handwritten, cardboard sign which read "Danger Leave Off" (Tr. 75-76; Exhibit C-7). The second - a laminated, preprinted tag used for lockout purposes - was attached directly to the breaker switch with a nylon tie wrap (Tr. 76; Exhibit C-7). Kiewit contends that the nylon tie wrap served as a "lock" to the extent that it secured the breaker switch in the same manner as a padlock. According to Gagnon, the ends of a nylon tie wrap lock together and the tie wrap could not have been removed from the panel without cutting it off (Tr. 210-11). The compliance officer confirmed that breaker's switch could not be thrown without removing the tie wrap by cutting it off (Tr. 76-77, 149-50).

The compliance officer asserts that the cited standard must be interpreted as requiring the lock used to lockout a disconnecting to be an actual padlock that opens with a key, however, there is nothing in the standard to suggest that this is the case (Tr. 150).[5] Section 1926.417(d)(3)

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[4](...continued)
partially open when he observed the panel.

[5] The lockout/tagout standard for construction contains no definitions, but the corresponding general industry standard defines both "lockout" and "lockout device". Under § 1910.147(b), lockout is defined as:

> The placement of a lockout device on an energy isolating device, in accordance with an established procedure, ensuring that the energy isolating device and the equipment being controlled cannot be operated until the lockout device is removed.

Lockout device is defined as:

> A device that utilizes a positive means *such as* a lock, either key or combination type, to hold an energy isolating device in a safe position and prevent the energizing of a machine or equipment. Included are blank flanges and bolted slip blinds. (Emphasis added).

(continued...)

specifically states that "[t]he lock shall be attached so as to prevent persons from operating the disconnecting means unless they resort to undue force or the use of tools." Since the nylon tie wrap locks into place and would have prevented individuals from operating the breaker panel "unless they -resort[ed] to undue force or the use of tools", I agree that the tie wrap served as a lock for lockout purposes. The nylon tie wrap coupled with the two tags warning against energization provided the protection required by the cited standard. As such, the alleged violation must be vacated.

Other than Serious Citation 2, Item 3

Under this item, the Secretary alleges violation of § 1926.251(a)(1) which requires, in relevant part, that defective rigging equipment be removed from service. According to Jean Manoli, an OSHA Assistant Area Director for Health, who participated in the subject inspection, a hook connected to a mooring and supporting a pulley which tows cars carrying materials through the tunnel did not have a safety latch, a positive locking device which would have covered the area from the base of the hook to its tip (Tr. 163-66; Exhibits C-8 & R-4). Without such a latch, Manoli testified that the hook could have slipped from its mooring, potentially injuring employees in the area (Tr. 164).

Manoli maintains that the hook is defective because it is manufactured with a safety latch yet the one cited did not have one (Tr. 167-71). There is nothing in the record, however, to support the claim that the cited hook is of the type manufactured with a safety latch. Manoli acknowledged that there are some hooks which are not manufactured with such latches (Tr. 170-71). Moreover, one of Kiewit's safety supervisors testified that this hook in particular was manufactured *without* a safety latch and in order to obtain one, the latch would have to be ordered from the manufacturer separately as an option to the hook itself (Tr. 292-93). There is no evidence to indicate that the hook was present and required when manufactured and then was missing at the time of the inspection, thus the alleged violation must be vacated.

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[5](...continued)
Neither definition precludes the use of an alternative means of locking out an energy source to comply with these standards.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed findings of fact or conclusions of law inconsistent with this decision are denied.

ORDER

Serious citation 1, item 5, alleging violation of 29 C.F.R. § 1926.403(d)(1) is AFFIRMED and a penalty of $1000.00 is assessed.

Serious citation 1, item 12, alleging violation of 29 C.F.R. § 1926.408(a)(4)(v) is AFFIRMED and a penalty of $1,600 is assessed.

Serious citation 1, item 13, alleging violation of 29 C.F.R. § 1926.417(d)(3) is VACATED.

Other than serious citation 2, item 3, alleging violation of 29 C.F.R. § 1926.251(a)(1) is VACATED.

BARBARA L. HASSENFELD-RUTBERG
Judge, OSHRC

Date: April 18, 1996
Boston, Massachusetts