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.
EYELEMATIC MANUFACTURING CO., INC.
Respondent.

OSHRC DOCKET
NO. 93-1664

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 June 29, 1995. The decision of the Judge will become a final order of the Commission on July 31, 1995 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 July 19, 1995 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
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Review Commission
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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.

Date: June 29, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-1664

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant v. EYELEMATIC MANUFACTURING COMPANY, INC. Respondent.	OSHRC DOCKET NO. 93-1664

Appearances:

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Office of the Solicitor
U.S. Department of Labor
For Complainant

Barrett A. Metzler, President
Northeast Safety Management, Inc.
West Hartford, CT
For Respondent

Before: Administrative Law Judge Richard DeBenedetto

DECISION AND ORDER

On June 7, 1993, Eyelematic Manufacturing Company, Inc. ("Eyelematic") was issued two citations as the result of an inspection of its facility located in Watertown, Connecticut. Eyelematic is engaged in the manufacture of small metal parts used for various commercial products such as cosmetics and battery cans (Tr. 158, 468-69). The first citation contains seven items alleging serious violations of various general industry standards with a total proposed penalty of $12,800; the second citation contains two other-than-serious violations with no penalties proposed. At the commencement of the hearing, Eyelematic withdrew its notice of contest to both of the violations alleged in the other-than-serious citation (Tr. 4-5, 23-24). Therefore, these items are affirmed with

no penalty assessed (Tr. 23-24).[1] With regard to the serious citation, Eyelematic agreed to withdraw its notice of contest to Items 3a and 3b in exchange for a 50% reduction in the $1200 penalty proposed (Tr. 223-26). This settlement was accepted at the hearing, reducing the total proposed penalty to $12,200 (Tr. 226).

APPROVED CONTAINERS VIOLATION

Under the first item of the serious citation, the Secretary alleges that Eyelematic failed to place flammable or combustible liquids into "approved" containers before use. Specifically, the Secretary contends that neither of the two containers observed by the compliance officer during his inspection – a one-gallon plastic container of paint thinner in the finishing area and a five-gallon metal can of flammable liquid in the print room – were approved for use with flammable or combustible liquids (Tr. 38, 40-41, 54, 70-71, 87-88; Exhibits C-1, C-2, C-3, C-18 & C-19).

As originally cited, the two flammable liquid containers were alleged to have been "used" or "stored" in violation of § 1910.106(d)(2)(i) which reads as follows:

> *Design, construction, and capacity of containers* – (i) Only approved containers and portable tanks shall be used. Metal containers and portable tanks meeting the requirements of and containing products authorized by chapter I, title 49 of the Code of Federal Regulations (regulations issued by the Hazardous Materials Regulations Board, Department of Transportation), shall be deemed to be acceptable.

At the hearing, the Secretary amended the subsection under which this condition was cited to allege violation of § 1910.106(e)(2)(iv)(d) instead of the 106(d)(2)(i) standard (Tr. 9-10, 15-16). The amended standard provides:

> (e) *Industrial plants.*
>
> * * *
>
> (2) *Incidental storage or use of flammable and combustible liquids.*
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> * * *

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[1] At the hearing, the Secretary corrected a typographical error in the standard cited under Item 1 of the other-than-serious citation (Tr. 19-20). The standard at 29 C.F.R. § 1910.22(d)(1) is substituted for § 1910.23(d)(1).

(iv) *Handling liquids at point of final use.*

* * *

(d) Flammable or combustible liquids shall be drawn from or transferred into vessels, containers, or portable tanks within a building only through a closed piping system, from safety cans, by means of a device drawing through the top, or from a container or portable tanks by gravity through an approved self-closing valve. Transferring by means of air pressure on the container or portable tanks shall be prohibited.

The Secretary has failed to relate the amended standard to the evidence presented. The thrust of the Secretary's case at the hearing was that the containers did not meet the criteria of Underwriter's Laboratory (UL) or Factory Mutual and therefore, were not approved (Tr. 38, 40, 65-67, 70-72).[2] In this respect, the Secretary's amendment, despite his assurances to the contrary, fundamentally changed the factual basis of the violation from the design and construction of containers to the process of transferring liquids (Tr. 14).

Given the confusion surrounding the allegation, it is not surprising that the item was not clearly and fully tried under the standard originally cited or the amended standard. Although § 1910.106(d)(2)(i) specifically applies to the *storage* of flammable or combustible liquids, the Secretary has not shown whether these containers were actually being "stored" in the areas in which they were observed. *See* § 1910.106(d)(1)(i) ("This paragraph shall apply only to the storage of flammable or combustible liquids in drums or other containers..."). According to the unrebutted testimony of Eyelematic's safety director, the containers had been removed from a storage area and placed *temporarily* in the referenced areas until the substances could be transferred to safety cans and taken to the work area where they would be used (Tr. 92, 478-80). In addition, Eyelematic raised the issue of whether the containers could be considered "acceptable" pursuant to the requirements of the Department of Transportation regulations mentioned in § 1910.106(d)(2)(i), but the matter was left unresolved (Tr. 42, 49, 55, 64, 67, 71-72, 82-85). The record does not provide adequate evidentiary support to sustain this item.

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[2] This corresponds with the definition of "approved" found at § 1910.106(a)(35) ("Approved, unless otherwise indicated, approved, or listed by a nationally recognized testing laboratory. Refer to § 1910.7 for definition of nationally recognized testing laboratory.").

MACHINE GUARDING VIOLATION

Under the second item of the serious citation, the Secretary alleges that Eyelematic failed to protect its employees from the hazards associated with ingoing nip points, rotating parts, and reciprocating parts in violation of § 1910.212(a)(1).[3] Under the first and third instances of violation, the Secretary claims that adequate guarding was not provided for eighty-five cam-operated eyelet presses and that no guarding at all was provided to protect employees from sixteen crank arms on eight of these machines (Tr. 131, 160-62, 180-85; Exhibits C-16 & C-17). Under the second instance, the Secretary claims that a trash compactor located in the receiving area lacked an interlocking device which would have prevented the compactor from operating when its doors were open (Tr. 162-68; Exhibit C-20).

Under § 1910.212(a)(1), the Secretary is required to prove that a hazard within the meaning of the standard exists in the cited employer's workplace. *ConAgra Flour Milling Co.*, 16 BNA OSHC 1137, 1147, 1993 CCH OSHD ¶ 30,045 (No. 88-1250, 1993), *rev'd on other grounds*, 25 F.3d 653 (8th Cir. 1994); *Jefferson Smurfit Corp.*, 15 BNA OSHC 1419, 1421, 1991 CCH OSHD ¶ 29,551 (No. 89-0553, 1991). Specifically, the Secretary must show that employees are exposed to a hazard as a result of the manner in which the cited machine functions and is operated. *ConAgra*, 16 BNA at 1147; *Jefferson Smurfit*, 15 BNA at 1421. The Secretary has failed to present any such evidence.

With regard to the cited eyelet machines, the compliance officer provided no information whatsoever as to how this type of machine functions or how Eyelematic's employees operate it (Tr. 130-62, 180-201, 205-12). In fact, he readily admitted that he did not know how an eyelet machine operates (Tr. 189, 289). Without detailed information about the actual operation of these machines, the compliance officer's vague references to points of operation, nip points, and rotating parts, as well as the numerous photographs he took of the cited machines, lack context and provide little support

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[3] This standard provides:

> One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are - barrier devices, two-hand tripping devices, electronic safety devices, etc.

for the Secretary's allegations (Tr. 139, 146, 152-54, 156, 192-93, 196, 199-200, 205, 207; Exhibits C-4 to C-11 & R-2). Moreover, credible testimony from Eyelematic's safety director indicates that in the course of their normal work duties, Eyelematic's employees do not come in proximity to any of these allegedly hazardous areas during the machine's operation (Tr. 490-93, 503, 515-16, 525, 528, 532-36). *See Jefferson Smurfit*, 15 BNA at 1422. The Secretary has failed to sustain his burden of proving a violation of § 1910.212(a)(1) under the first and third instances of this citation item.

The Secretary does not fare much better with regard to the trash compactor cited under the second instance of this violation. Again, the compliance officer never explained how the compactor functions or is operated by Eyelematic's employees (Tr. 162-76). Not even the photographic evidence, which pictures only a close-up of the compactor's closed doors, sheds any light on this critical issue (Exhibits C-14 & C-15). According to Eyelematic's safety director, the point of operation in the compactor is located behind the doors approximately eight feet down and the doors, pictured in Eyelematic's photograph of the machine, are positioned several feet above the floor (Tr. 499-500, 529, 540; Exhibit R-1). The safety director also testified that anyone operating the compactor must remain stationed at the controls located several feet away from the doors and there is no reason for any employee to go into the compactor while it is operating (Tr. 500-02, 529-32, 538-42). In fact, he indicated that an outside contractor, not Eyelematic, handles the trash compactor's repair and maintenance (Tr. 502). Because the record does not show that the compactor, as operated, posed a hazard to Eyelematic employees, a violation of § 1910.212(a)(1) under the second instance is not established. Consequently, the entire item is vacated.

MECHANICAL POWER PRESS VIOLATION

The fourth item of the serious citation alleges a grouped violation of four standards which govern the operation of mechanical power presses. All four items are based upon the compliance officer's observations of a single mechanical power press located in the echo room (Tr. 231; Exhibits C-21 to C-26). Under the first item, Eyelematic is cited for failing to ensure that the power press's two-hand tripping device operated with concurrent controls in violation of § 1910.217(b)(6)(i) (Tr.

231-34; Exhibits C-21 to C-23).[4] The second item alleges a failure to guard the point of operation at the back of the press in violation of § 1910.217(c)(1)(i) (Tr. 234-35, 272-73; Exhibits C-22 & C-24).[5] Finally, under the last two items, the Secretary contends that Eyelematic violated §§ 1910.217(e)(1)(i) and (e)(1)(ii), respectively, for failing to establish and follow an inspection program which would ensure that all of the press's parts are in safe operating condition and for failing to maintain weekly reports of inspections conducted to determine the condition of specific mechanisms on the press (Tr. 236-37; Exhibits C-25 & C-26).[6]

Eyelematic does not deny that it failed to comply with the requirements of the standards. It argues, however, that because the power press was not in production at the time of the inspection,

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[4] Section 1910.217(b)(6)(i) provides:

> A two-hand trip shall have the individual operator's hand controls protected against unintentional operation and have the individual operator's hand controls arranged by design and construction and/or separation to require the use of both hands to trip the press and use a control arrangement requiring concurrent operation of the individual operator's hand controls.

[5] Section 1910.217(c)(1)(i) provides:

> It shall be the responsibility of the employer to provide and insure the usage of "point of operation guards" or properly applied and adjusted point of operation devices on every operation performed on a mechanical power press.

[6] Sections 1910.217(e)(1)(i) and (ii) provide:

> (e)*Inspection, maintenance, and modification of the presses* - (1) *Inspection and maintenance records.* (i) It shall be the responsibility of the employer to establish and follow a program of periodic and regular inspections of his power presses to ensure that all their parts, auxiliary equipment, and safeguards are in a safe operating condition and adjustment. The employer shall maintain a certification record of inspection which includes the date of inspection, the signature of the person who performed the inspection and the serial number, or other identifier, of the power press that was inspected.
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> (ii) Each press shall be inspected and tested no less than weekly to determine the condition of the clutch/brake mechanism, antirepeat feature and single stroke mechanism. Necessary maintenance or repair or both shall be performed and completed before the press is operated. These requirements do not apply to those presses which comply with paragraphs(b)(13) and (14) of this section. The employer shall maintain a certification record of inspections, test and maintenance work which includes the date of the inspection, test, or maintenance; the signature of the person who performed the inspection, test, or maintenance; and the serial number or other identifier of the press that was inspected, tested or maintained.

it was not subject to these requirements (Tr. 544-45, 551-52, 555). Eyelematic's safety director testified that the press had recently been taken out of storage and was being used to experiment with dies before it was to be placed into production (Tr. 264, 544-45, 547-48, 555-59, 561-62). There is no basis for believing that the standards exempt power presses from their requirements when those presses are used for purposes other than regular production (Tr. 551, 561-62). A press that is operated for special purposes can pose the same type of hazards as a press operated in full production mode (Tr. 241, 244, 247-48, 257-60, 264-67, 558, 564). The general requirements of § 1910.217(c)(1)(i) expressly require an employer to provide and ensure the use of point of operations guards or devices "on *every* operation performed on a mechanical power press" (emphasis added). Similarly, § 1910.217(e)(1)(ii) provides that any necessary repairs or maintenance must be "performed and completed *before the press is operated*" (emphasis added).

Contrary to Eyelematic's claims, the applicability of § 1910.217(c)(1)(i) does not hinge upon whether an employee was considered an "operator" of the machine for production purposes (Tr. 245-46, 549). Once the press was removed from storage and before it was operated, Eyelematic should have equipped it with the proper safety devices and inspected all of its parts in order to verify that they were in safe operating condition (Tr. 244, 248, 264-66). Because these requirements were not met, an employee operating the press for any reason could have suffered serious physical injury (Tr. 256, 262-63). Therefore, the violation must be affirmed as serious. Based upon the penalty criteria set forth at § 17(j) of the Act, 29 U.S.C. § 666(j), a penalty of $2000 is assessed.

SPROCKET WHEELS AND CHAINS VIOLATION

Under the fifth item of the serious citation, the Secretary alleges that Eyelematic failed to guard exposed chain and sprocket drives on five of its eyelet machines in violation of § 1910.219(f)(3). This standard provides, in relevant part, that all sprocket wheels and chains must be enclosed unless they are more than seven feet above the floor or platform. Although the record contains no specific evidence indicating the height of the cited mechanisms, Eyelematic's safety director described some of them as being at chest or head level (Tr. 573-76; Exhibit C-30). In addition, the photographs suggest that none of the exposed parts were positioned more than seven

feet above the floor (Exhibits C-27 to C-30).[7]

Unlike the machine guarding standard set forth at § 1910.212(a)(1), the Secretary is not required to prove that the exposed sprockets and chains posed a particular operational hazard to employees in order to establish a violation of § 1910.219(f)(3). Here, proof of exposure hinges upon whether Eyelematic's employees had "access" to the unguarded parts, i.e whether it was "reasonably predictable" that during the course of their normal work duties, their personal activities while on the job, or their normal manner of entering or exiting the assigned work area, the employees would come within the "zone of danger" resulting from the alleged violation. *Armour Food Co.*, 14 BNA OSHC 1817, 1824, 1987-90 CCH OSHD ¶ 29,088 (No. 86-247, 1990); *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, 1975-76 CCH OSHD ¶ 20,448 (No. 504, 1976).

Based on the photographic evidence alone, it would appear that inadvertent contact with any one of the exposed parts is more than just a remote possibility (Exhibits C-27 to C-30). An employee simply passing the side of one of the eyelet machines during its operation could easily make contact with the exposed sprocket and chain located there, particularly if the employee is wearing loose clothing of any kind (Tr. 566-68, 576-77; Exhibit C-27). In addition, contrary to Eyelematic's contentions, an employee may not always take the time to completely lock out a machine when making routine, minor adjustments to components located in these areas, such as the numerous fluid hoses winding in and around the exposed wheels and chains (Tr. 568-72, 575; Exhibits C-27 to C-30). Contact with the exposed parts is also possible given the close proximity of various buckets and barrels placed around the machine, as well as a red control button located in the immediate vicinity of one of the sprockets and chain (Tr. 574-78; Exhibits C-27 to C-30). In sum, each of these areas is simply too open and accessible to conclude that contact with an exposed wheel or chain is unlikely. Employee exposure having been established, the violation must be affirmed. Because contact with these exposed parts could result in serious physical injury, the violation has been properly characterized as serious (Tr. 281-81, 283, 286-88). Under the penalty criteria set forth at § 17(j) of the Act, 29 U.S.C. § 666(j), a penalty of $1200 is assessed.

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[7]It should be noted that where, as here, a standard contains an exception, the burden of proving the exception lies with the party claiming its benefit. *See, e.g., Falcon Steel* Co., 16 BNA OSHC 1179, 1181, 1993 CCH OSHD ¶ 30,059 (Nos. 89-2883, 89-3444, 1993).

OXYGEN, ARGON, & ACETYLENE CYLINDERS VIOLATION

Under the sixth item of the serious citation, the Secretary alleges that Eyelematic improperly stored an oxygen cylinder with a cylinder of argon and a cylinder of acetylene in violation of § 1910.253(b)(4)(iii). This standard requires oxygen cylinders that are in storage to be separated from fuel-gas cylinders or combustible materials by a minimum distance of twenty feet or by a noncombustible barrier at least five feet high and having a fire-resistance rating of at least one-half hour. It is undisputed that three cylinders which contained the referenced substances were tied together with a clothesline around a metal beam in the echo room (Tr. 301-05, 308-09; Exhibits C-32, C-33, & C-34).[8] Although argon is considered an inert substance, the OSHA assistant area director testified that acetylene is a fuel that is considered flammable as both a liquid and a gas (Tr. 314-15, 590). His testimony on this point was not challenged.

At the hearing, the dispute centered on whether the metal beam around which these cylinders were tied can be considered a "barrier" under the terms of the standard. Where the very purpose of this standard is to maintain enough of a distance or separation between oxygen cylinders and those which contain fuel and other combustible materials so as to prevent the possibility or the spread of a fire, it cannot be credibly argued that the metal beam constituted a barrier which accomplished this goal (Tr. 310, 314-16, 325). The beam is simply not wide enough to provide an adequate barrier between the cylinders (Tr. 305-12, 316-22, 328; Exhibits C-33 & C-34). Furthermore, Eyelematic's representative and its safety director admitted that the manner in which the cylinders were stored was not ideal under the circumstances (Tr. 324, 585-86, 589). For instance, in this position, the cylinders could have sustained damage from mechanized equipment which might run into them (Tr. 318-19; Exhibits C-33 & C-34). Also, the rope used to bind the cylinders together, as well as the materials stored in the area surrounding them, were flammable, creating an environment in which fire could spread quickly (Tr. 327, 581-83, 586). Under these clearly hazardous conditions, a serious violation of § 1910.253(b)(4)(iii) has been established, and a penalty of $1200 is assessed. 29 U.S.C. § 666(j).

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[8] Although Eyelematic's safety director indicated that these cylinders were empty at the time of the inspection, the cylinders no doubt contained vapor or even residue of the substances stored therein (Tr. 75-76, 583-85).

ELECTRICAL VIOLATIONS

Under the seventh item of the serious citation, the Secretary alleges a grouped violation of four electrical standards. Under the first item, Eyelematic is cited for failing to provide sufficient access to electrical equipment in violation of § 1910.303(g)(1).[9] It is undisputed that numerous boxes were stacked on pallets which were positioned in front of two disconnect boxes located in the echo room (Tr. 338-39, 348, 592-94, 598-99; Exhibits C-35 & C-36). Although Eyelematic's safety director admitted that one of its employee had placed the pallets in a restricted area so marked by a yellow line painted on the floor, he insisted that access to the disconnects was still available along one side of the pallets (Tr. 348, 592 , 598-600, 602-05; Exhibit C-35). The photographic evidence, however, does not support his claim (Tr. 348, 351-53; Exhibit C-35). Even if an aisle did exist in this area, the pallets and stacked boxes still limited an employee's ability to immediately access the equipment for "ready and safe" operation or maintenance.

There is also insufficient evidence to establish Eyelematic's defense of unpreventable employee misconduct with regard to this violation (Tr. 332-333). While the safety director's testimony suggests that Eyelematic has a safety rule which addresses the cited condition and has enforced that rule, at least in this case, by reprimanding the employee who placed the pallets in the restricted area, there is nothing in the record to indicate that Eyelematic effectively communicated this rule, or any others, to its employees (Tr. 603-04). *See Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994) (quoting from *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1816, 1991-93 CCH OSHD ¶ 29,807 (No. 87-692, 1992) (to establish affirmative defense of unpreventable employee misconduct, employer must show that "it had established a work rule designed to prevent the violation, adequately communicated those work rules, and effectively enforced those work rules when they were violated"). This item, therefore, is affirmed.

Under the second item, the Secretary charges Eyelematic with failing to mount several "wall boxes" observed throughout the facility in violation of § 1910.303(g)(2)(ii). According to the

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[9] The Secretary amended this item to allege violation of § 1910.303(g)(1) instead of § 1910.303(f) (Tr. 16-17). The amended standard requires that sufficient access and working space be provided and maintained about all electric equipment so as to permit the ready and safe operation and maintenance of such equipment.

compliance officer, these boxes, which are enclosed by a metal casing and have either two or four outlets on its face, are designed to be mounted on a fixed surface and failure to do so subjects them to potential damage (Tr. 362-64, 366-68, 370, 373-76; Exhibits C-37 to C-51). The cited standard, however, contains no such mounting requirement and in fact, does not even refer to outlet boxes (Tr. 371-72, 381-82). Appearing under the heading, "Guarding of live parts", § 1910.303(g)(2)(ii) merely provides that in locations where electric equipment will be exposed to physical damage, enclosures or guards must be so arranged and of sufficient strength as to prevent such damage. Where the focus of this standard is the enclosure or guard used to prevent contact with the equipment's live parts and its ability to protect that equipment from damage, it is not clear how § 1910.303(g)(2)(ii) applies to Eyelematic's failure to mount an outlet box to a fixed surface (Tr. 362-63, 370-72, 381-82, 388, 607). Without evidence that the boxes were exposed to potential damage because of the way in which they were used and that their metal casings were of insufficient strength to protect internal parts from any such damage, the Secretary has not shown how this standard is relevant to the cited condition (Tr. 362-364, 367, 371-72, 374-76, 383-84, 606, 608-09, 616).

The OSHA assistant area director himself expressed skepticism regarding the application of the cited standard. Admitting that the standard "does not explicitly explain the complete circumstances", the official identified another electrical standard which presumably addresses the condition more appropriately (Tr. 380, 387, 389). He testified that this type of outlet box must be mounted in order to be listed for use by UL; therefore, he would have cited Eyelematic under § 1910.303(b)(1)(i), a general standard which essentially provides that the UL listing for a particular piece of electrical equipment is one of the factors to consider when determining the safety of that equipment (Tr. 386-87, 389-90). Given that this standard contains no reference to outlet boxes, mounting requirements, or the UL listing criteria, its applicability is baseless (Tr. 392). Accordingly, this item must be vacated.

Under the third item, the Secretary claims that Eyelematic's failure to provide a disconnect pole to open or close overhead bus ducts located in its "non-conforming area"[10] constitutes a

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[10]The term "non-conforming area" appears in two out of the fourteen subitems of the grouped electrical violations. Apparently, the term is a designation assigned by Eyelematic for its own purposes and to distinguish it from other plant departments, such as the echo and eyelet rooms.

violation of § 1910.304(d)(1)(i) (Tr. 395-97; Exhibits C-52 & C-53). This standard provides:

> Means shall be provided to disconnect all conductors in a building or other structure from the service-entrance conductors. The disconnecting means shall plainly indicate whether it is in the open or closed position and shall be installed at a readily accessible location nearest the point of entrance of the service-entrance conductors.

For the purposes of the standard, the "disconnect means" is broadly defined as a device, or group of devices, or other means by which the conductors of a circuit can be disconnected from their source of supply.[11] § 1910.399. Eyelematic contends that it provided such means by placing a disconnect pole in its production room, an area adjacent to the " non-conforming area" (Tr. 621-22, 627, 630-31). In fact, the pole is visible in the photograph submitted by the Secretary in support of the alleged violation (Tr. 399-400, 621-22, 630-31; Exhibit C-52). But according to the Secretary, § 1910.304(d)(1)(i) has been interpreted by OSHA as requiring a disconnect pole or other such means in every room or area of a given facility (Tr. 623, 626-27). The standard, however, requires only that disconnecting means be installed in a "readily accessible location nearest the point of entrance of the service-entrance conductors".[12] Because there is nothing in the record to indicate the location of the service-entrance conductors, there is insufficient evidence to determine whether Eyelematic actually violated this standard when it provided a disconnect pole in the production room, but not in the "non-conforming area." This item is therefore vacated.

The fourth item alleges the use of flexible cords for purposes that are prohibited by § 1910.305(g)(1)(iii).[13] The Secretary claims that Eyelematic attached a flexible cord in three places to building surfaces and used flexible cords as a substitute for fixed wiring in two areas (Tr. 411-20,

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[11] The compliance officer testified that using a disconnect pole or a stepladder are two basic ways in which overhead ducts may be disconnected (Tr. 396-97, 401-02, 626, 629).

[12] It should be noted that based solely upon the definition of "readily accessible", placing the disconnect pole in an adjacent area about thirty feet away from the overhead bus ducts would appear to satisfy the terms of the cited standard (Tr. 627, 629). *See* § 1910.399 ("Capable of being reached quickly for operation, renewal, or inspections, without requiring those to whom ready access is requisite to climb over or remove obstacles or to resort to portable ladders, chairs, etc.").

[13] This standard provides, in relevant part, that flexible cords and cables may not be used "as a substitute for the fixed wiring of a structure" or "where attached to building surfaces". § 1910.305(g)(1)(iii)(A) and (D).

431-36, 445-48, 458; Exhibits C-54, C-55, C-59, C-60 through C-C-63, & C-67).[14]

It is undisputed that in Eyelematic's secondary industrial area, a flexible cord was run between two points along the ceiling, then tie-wrapped to a conduit near floor level (Tr. 632, 637; Exhibits C-60 & C-61). Contrary to the Secretary's allegations, this cord was not actually "attached" to the ceiling, but was strung through small metal loops, known as "stand-offs", which were clamped to a ceiling beam (Tr. 632, 636). To attach something is to join or fasten it, terms which suggest that an attached item is not capable of free movement. *Websters' Third New International Dictionary of the English Language* at 140 (Unabridged 1971). *See Otis Elev. Co.*, 16 BNA OSHC 2116, 2118 (No. 92-2541, 1994). Here, there is no indication that simply running the cited cord through these two loops somehow prevented it from moving freely. Nor is it shown that the described condition is regarded within the electrical trade as falling within the standard's prohibition. A cord that is tie-wrapped to a conduit, on the other hand, will not move freely and therefore, is "attached". But as even the Secretary has acknowledged, it is not clear whether a conduit can be considered a "building surface" within the meaning of § 1910.305(g)(1)(iii)(D) (Tr. 637-38, 644-45). Where the term is not defined in the regulations, its meaning must assume its normal everyday usage and reading the words in their normal and customary manner, the term clearly refers to the exterior faces of a building structure, such as walls, ceilings, and floors (Tr. 638-39). *See Otis Elev.*, 16 BNA at 2116. Here, the cord was attached to the surface of a fixture, not the surface of the building. Accordingly, this item is vacated.

Finally, in Eyelematic's echo room, the compliance officer observed a two-outlet box with a switch that was directly wired with two flexible cords and, in the "non-conforming area," he observed a four-outlet box that was directly wired with one flexible cord (Tr. 413-20, 445-48, 457-58; Exhibits C-62, C-63, & C-67). The evidence establishes that these cords were used in lieu of fixed or permanent wiring; that they were wired to boxes that were mounted does not change the fact that the cords were used in a manner prohibited by § 1910.305(g)(1)(iii) (Tr. 450-53, 457-58). In terms of exposure, the compliance officer reported that several Eyelematic employees were working in these areas of the facility and as such, had access to the improperly wired boxes (Tr. 416, 446;

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[14] At the hearing, the Secretary withdrew instances C, D, E, and G from this item, leaving only instances A, B, and F at issue (Tr. 18-19, 642-44, 646).

Exhibits C-55 & C-59).

Eyelematic contends that because an outlet box can be considered a "fixture", wiring it with flexible cords is permitted by § 1910.305(g)(1)(i) (Tr. 640-41).[15] But according to the National Electric Code (NEC), this term, which is not defined in the OSHA regulations, more accurately describes various types of lighting fixtures, such as pendants, receptacles, and incandescent filament lamps. NEC, § 410-1 (1981). In addition, a "fixture" is commonly defined as something that is fixed or attached as a permanent appendage or a structural part, such as a permanently mounted lighting device; here, the parties agreed that the outlet boxes were "portable" in that they could be moved and mounted anywhere (Tr. 646-48). *Websters' Third New International Dictionary* at 861. Therefore, these two instances of violation must be affirmed.

In sum, the violation alleged under the seventh item of the serious citation is affirmed to the extent that Eyelematic failed to provide sufficient access to disconnect boxes and used flexible cords in lieu of fixed wiring. According to the compliance officer, the hazard of both conditions is potential electric shock in that the blocked disconnects could result in delaying the response time to an emergency requiring immediate deenergization of electrical equipment or cause an employee to trip and come into contact with a live part; the flexible cords used in lieu of fixed wiring would be subject to wear and tear that might fray the cord and expose live wiring (Tr. 340-44, 346-47, 415-16, 445-46, 448). The compliance officer, however, failed to provide any specific information regarding the magnitude of any such shock or the resulting effect. Therefore, the violation is affirmed as nonserious. In terms of a penalty, the Secretary has already suggested a $400 reduction in the proposed $2000 penalty for those instances which he withdrew at the hearing (Secretary's Post-Hearing Brief at 5). Given that two of the four violations grouped under this item were vacated and that the violation as a whole has been affirmed as nonserious, a penalty of $300 is appropriate. 29 U.S.C. § 666(j).

Based upon the foregoing findings and conclusions, it is

ORDERED that item 1 of citation number 1 (approved containers) is vacated. It is further ORDERED that item 2 of citation number 1 (machine guarding) is vacated. It is further

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[15] This standard provides that flexible cords and cables shall be used only for specified uses, one of which is the wiring of fixtures. § 1910.305(g)(1)(i)(B).

ORDERED that item 3 of citation number 1 (guarding abrasive wheels) is affirmed and a penalty of $600 is assessed as agreed by the parties. It is further

ORDERED that item 4 of citation number 1 (mechanical power press) is affirmed and a penalty of $2000 is assessed. It is further

ORDERED that items 5 (sprocket wheel and chains) and 6 (stored cylinders) of citation number 1 are affirmed and a penalty of $1200 is assessed for each item. It is further

ORDERED that item 7 of citation number 1 (electrical conditions), as amended, is affirmed in part and vacated in part, and a penalty of $300 is assessed. It is further

ORDERED that citation number 2 is affirmed, as amended.

RICHARD DeBENEDETTO
Judge, OSHRC

Dated: June 22, 1995
Boston, Massachusetts

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Phone: (202) 606-5400
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SECRETARY OF LABOR
Complainant,
v.
MOISHE'S MOVING SYSTEMS
Respondent.

OSHRC DOCKET
NO. 94-2532

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 June 22, 1995. The decision of the Judge will become a final order of the Commission on July 24, 1995 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 July 12, 1995 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
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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.

Date: June 22, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 94-2532

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 94-2532
MOISHE'S MOVING SYSTEMS, INC.,	:	
Respondent.	:	

Appearances:

Alan L. Kammerman, Esq.
U.S. Dept. of Labor
For Complainant

Fran Mulnick Parker, Esq.
Corporate Counsel
For Respondent

BEFORE: CHIEF JUDGE IRVING SOMMER

DECISION AND ORDER

The Secretary moved to dismiss the Respondent's notice of contest as not being timely filed under Section 10 of the Act. A hearing was held in New York, N.Y. on March 14, 1995 concerning the merits of the motion at which time testimony and evidence were profert by both parties.

The Respondent was issued a serious citation and a notification of proposed penalty on November 18, 1992 which was received on December 8, 1992. Under Section 10(a) of

the Act, 29 U.S.C. 659(a), an employer must notify the Secretary that it intends to contest the citation or proposed penalty within fifteen working days of its receipt. The Respondent had until December 30, 1992 to file its notice of contest, but did not do so, instead sending a letter to the regional office of the Occupational Safety and Health Administration dated January 4, 1993, which was received on January 11, 1993 stating therein, "Please let this letter serve as our Notice of Intent to Contest the captioned citation issued on November 18, 1992, as well as the underlying violation, and the abatement date and penalty imposed in connection therewith."

Mr. Erez Shternlicht, the building manager for the Respondent testified that he was on vacation when the citation was received and found it in his box on his return and immediately filed a notice of contest. The evidence shows that the Respondent was since at least January 1992 in the process of reconditioning the building in question and moving into the building. There was a temporary office on the third floor and some office space elsewhere. Mr. Shternlicht testified at the time involved herein there were 30 to 40 employees at the building including "some office people." He further testified he called the office every day and had not been told of the receipt of the citation by anyone.

While I am sympathetic to the plight of the Respondent, it is apparent there is present no excusable neglect or mistake under Rule 60(b). What we have here is simple neglect on part of management to provide assistance and suitable management procedures when the person in charge is absent. Here, while the building manager was vacationing, no system was in place to see that important mail was processed promptly; actually, Mr. Shternlich admitted he called daily, and still was not apprised of the certified mail waiting for perusal

and disposition. The Respondent's business procedures were both lacking and woeful. The Commission has held that employers whose improper business procedures has led to failure to file on a timely basis are not entitled to relief. See *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020; *Stroudsburg Dyeing & Finishing Co.*, 13 BNA OSHC 2058. The office procedures of the Respondent, a going business with over thirty people present at the building herein should provide for reliable, continuous mail scrutiny. The reasons advanced by the Respondent for its failure to file in a timely manner do not constitute "excusable neglect" or "any other reason for justifying relief" under Rule 60(b) of the Federal Rules of Civil Procedure. Simple negligence will not establish entitlement to relief. *E.K. Construction Co.*, 15 BNA OSHC 1165, 1166; *Rebco Steel Corp.*, 8 BNA OSHC 1235.

Accordingly, the motion of the Secretary to dismiss is GRANTED.

ORDER

The citation issued to the Respondent on November 18, 1992 and proposed penalty is AFFIRMED in all respects.

IRVING SOMMER
Chief Judge

DATED: JUN 21 1995
Washington, D.C.