UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
HANSEL PHELPS CONSTRUCTION CO.
Respondent.

OSHRC DOCKET
NO. 92-2347

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 July 12, 1993. The decision of the Judge will become a final order of the Commission on August 11, 1993 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 August 2, 1993 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: July 12, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-2347

NOTICE IS GIVEN TO THE FOLLOWING:

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

Tedrick Housh, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Bldg., Room 2106
911 Walnut Street
Kansas City, MO 64106

Robert R. Miller, Esquire
Stettner, Miller & Cohn, P. C.
1380 Lawrence Street, Suite 1000
Denver, CO 80204

James A. Cronin
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 250
1244 North Speer Boulevard
Denver, CO 80204 3582

00109547398:08

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 N. SPEER BOULEVARD
ROOM 250
DENVER, COLORADO 80204-3582

PHONE
COM (303) 844-2281
FTS (303) 844-2281

FAX
COM (303) 844-3759
FTS (303) 844-3759

SECRETARY OF LABOR, Complainant, v. HENSEL PHELPS CONSTRUCTION CO., Respondent.	OSHRC DOCKET NO. 92-2347

APPEARANCES:

For the Complainant:

Evert H. Van Wijk, Esq., Office of the Solicitor,
U. S. Department of Labor, Kansas City, Missouri

For the Respondent:

Robert R. Miller, Esq., Denver, Colorado

DECISION AND ORDER

Cronin Judge:

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

Respondent, Hensel Phelps Construction Co. (Hensel), at all times relevant to this matter, maintained a workplace at a federal prison facility under construction at 5880 South Highway 67, Florence, Colorado where it was engaged in construction activities. Hensel

admits it employed approximately 40 workers at the Florence worksite and is engaged in a business affecting commerce. Hensel, therefore, is an employer within the meaning of, and subject to the Act.

On April 13, 1992, a Compliance Officer (CO) with the Occupational Safety and Health Administration (OSHA) conducted an inspection of Respondent's Florence worksite (Tr. 10). As a result, Hensel was issued a "serious" citation containing seven items alleging violations of the Act.

By filing a timely notice of contest Hensel brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On March 1, 1993, a hearing was held in Denver, Colorado. At the hearing, item 5, 6 and the second instance of item 7 were withdrawn (Tr. 3). Complainant's request to amend item 4 was denied (Tr. 5). Though not withdrawn, Complainant abandoned that item, presenting no evidence of a violation. Citation 1, item 4, therefore, is vacated.

Remaining at issue are items 1 through 3, alleging violations of §§1926.152(b)(1); .350(j); .405(a)(2)(ii)(I); and item 7(a)(1) alleging a violation of §1926.1053(b)(16). The parties have submitted briefs on the contested issues, and the matter is ready for decision.

Alleged Violations

Serious citation 1, item 1 alleges:

1
29 CFR 1926.152(b)(1): In indoor storage of flammable or combustible liquids, more than 25 gallons of flammable or combustible liquids were stored in a room outside of an approved storage cabinet:

a) As the controlling contractor H.P.C.C. did not assure that its subcontractor CDI provided proper storage for flammable and combustible liquids at Bldg. 6, (sic) Federal Prison Complex, Florence, CO.

Serious citation 1, item 2 alleges:

2
29 CFR 1926.350(j) Section 3.2.4.3 American National Standards Institute Z49.1-1967 as adopted by 29 CFR 2926.350(j) (sic): Oxygen cylinders in storage were not separated from fuel-gas cylinders, reserve stocks of carbides, or highly combustible materials (especially oil or grease) by a minimum distance of 20 feet or by a noncombustible barrier at least five feet high having a fire-resistance rating of at least 1/2 hour:

a) At Bldg. G. Federal Prison Complex, Florence, Co: H.P.C.C. had an acetylene and an oxygen bottle stored beside each other at a column.

Serious citation 1, item 3 alleges:

3
29 CFR 1926.405(a)(2)(ii)(I): Protection was not provided to avoid damage to flexible cords and cables used for temporary wiring which passed through doorways or other pinch points:

a) Federal Prison Complex: Flexible cords were run through a metal door exposing the cord the (sic) physical damage.

Serious citation 1, item 7 alleges:

7
29 CFR 1926.1053(b)(16): Portable ladders with structural defects, such as, but not limited to, broken or missing rungs, cleats, or steps, broken or split rails, corroded components, or other faulty or defective components, were not either immediately marked in a manner that readily identified them as defective, or tagged with "Do Not Use" or similar language, and were not withdrawn from service until repaired:

a) At the H.P.C.C. jobsite Federal Prison Complex, Florence, CO: Two ladders belonging to H.P.C.C. had defects and were not removed from service and located at the following locations:

1) Bldg. G, 6 foot wooden step ladder.

Issues

1. Whether the storage of painting materials in Building G on April 13, 1992 constituted a violation of §1926.152(b)(1)?

   a. If so, whether Hensel, as the controlling contractor, had actual or constructive knowledge of the violation?

2. Whether the Secretary has shown, by a preponderance of the evidence, that Respondent violated §1926.350(j)?

3. Whether the Secretary has shown, by a preponderance of the evidence, that Respondent violated §1926.405(a) (2)(ii)(I) on April 13, 1993?

   a. Whether the citation and/or complaint provided Hensel with notice that the alleged violations covered not only Hensel's electrical cords, but those of its subcontractor Riviera Electric?

4. Whether the Secretary has shown, by a preponderance of the evidence, that Respondent violated §1926.1053(b)(16)?

Alleged Violation of §1926.152(b)(1)

Facts

It is undisputed that the painting subcontractor at the Florence worksite, CDI, stored galvite white primer, enamel paints, solvents, and toluene in the warehouse area of building G (Tr. 13-15, 21, 95). Hensel admits that toluene, mineral spirits and paint thinner are flammable materials (Tr. 116). The OSHA CO, Michael Kelly, testified that labels on the primer stated that the contents were combustible, and that enamel containers carried flammable substance warnings (Tr. 15-16). Material Safety Data Sheets (MSDS) from Sherwin Williams identify all their galvite white primer as combustible (Tr. 15, 21; Exh. C-3). MSDS for Sherwin Williams' enamels indicate flammability (Tr. 22; Exh. C-4).

Photographs taken by Kelly show more than 25 gallons of materials stored in the warehouse (Tr. 116-17; Exh. C-1, C-2). Kelly testified that he counted "under 300 gallon[s] total" of full stacked five gallon primer containers alone (Tr. 16). Kelly testified that ignition sources in the area included electrical outlets, an electrical drill, electric motors on scissors lifts in the area, and workers walking through the area with lighted cigarettes (Tr. 24, 29).

Kelly testified that employees of an electrical subcontractor, Riviera Electric, were in the vicinity working on electric lighting from two lifts, 20 and 50 feet, respectively, from the storage area (Tr. 27). In addition, employees of other subcontractors passed through the area to get through the building (Tr. 27, 120-21). Kelly stated that should the flammable and combustible materials be ignited, employees in the area might suffer burns and/or concussive injuries which could result in death (Tr. 28).

Hensel was the general contractor at the Florence prison facility (Tr. 10). Hensel superintendents conducted daily safety inspections of the worksite areas for which they were responsible, and had the authority to immediately stop work and correct any hazards to which its own or a subcontractor's employees were exposed (Tr. 25, 68, 92-93, 112, 114). Rick Lindow was the area supervisor responsible for the warehouse in Building G; however, he had left the site about two weeks earlier, following the substantial completion of that area (Tr. 113-14). Roy Barnhart, Hensel's general superintendent, stated that he conducted safety

inspections "every other day, three times a week" (Tr. 111). Either he or the general carpenter foreman inspected the warehouse area two to three times a week (Tr. 114-15).

Barnhart first testified that he knew CDI was storing its material in Building G, but that he had not seen it (Tr. 97, 118). Barnhart later stated that he had personally inspected the warehouse area on Thursday or Friday of the week preceding the Monday inspection (Tr. 115), but that he was not "consciously" aware that more than 25 gallons of material were being stored there (Tr. 120). He testified that the quantity of material changed, as five gallon pails were delivered at different times during the week, but that he knew, at some point, that more than 25 gallons of material were on hand (Tr. 120). Prior to the OSHA inspection, Barnhart was unaware of OSHA regulations requiring that more than 25 gallons of flammable or combustible material be stored in cabinets (Tr. 119). Barnhart testified that Rick Lindow had collected and compiled MSDS forms by subcontractor and, thus, was aware of the types of material being stored by CDI (Tr. 119).

Discussion

Section 1926.152(b)(1) provides that "no more than 25 gallons of flammable or combustible liquids shall be stored in a room outside of an approved storage cabinet."

The evidence establishes that the cited standard was violated. Hensel's representative, Barnhart, admitted that on April 13 more than 25 gallons of painting materials, many of which he knew to be flammable, were stored in Building G. Although Barnhart was uncertain of the flammability of the galvite white primer, stored there in the largest quantities, Rick Lindow, Hensel's area superintendent had compiled CDI's MSDS forms. The manufacturer's MSDS lists the primer's flash point, 105° F., and the vapor pressure of its components, none above 7.1 pounds per square inch. Paragraph (g) of the definitions section at §1926.155 states: "*Flammable liquids* means any liquid having a flash point below 140° F. and having a vapor pressure not exceeding 40 pounds per square inch (absolute) at

100° F."[1] Hensel should have been aware, therefore, that galvite white primer is "flammable" for the purposes of §1926.152.

It is uncontroverted that the flammable materials were not stored in an approved cabinet. Employees working in and passing through Building G were exposed to the hazard.

The Secretary does not contend either that Hensel created the cited hazard, or that its own employees were exposed. The Commission has held, however, that a general contractor may be held responsible for violations of other employers "where it could be reasonably expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite." *Blount International, Ltd.*, 15 BNA OSHD 1897, 1899, 1992 CCH OSHD ¶29,854, p.40,750 (No. 89-1394, 1992).

Barnhart admitted that Hensel had the authority to direct the correction of safety and health hazards it discovered. Hensel had actual knowledge, through its supervisors Barnhart and Lindow, that flammable painting materials were being delivered to and stored in Building G by CDI. Moreover, Barnhart testified that he knew more than 25 gallons of materials had been stored there at times. Exercising reasonable diligence, Hensel should, at that point, have directed CDI to provide an approved storage cabinet for such materials, and thereafter, monitored the quantities of materials stored in the open. Barnhart, however, was unaware of the storage requirements of §1926.152. His ignorance of the standard's requirements cannot excuse Hensel's failure to use due diligence, because an employer is presumed to know of the standards that affect its business; ignorance of the standards does not excuse noncompliance. *Capform, Inc.*, 13 BNA OSHC 2219, 1989 CCH OSHD ¶28,503 (No. 84-556, 1989).

The Secretary has established both the existence of a violation and Hensel's constructive knowledge of that violation. Citation 1, item 1 will be affirmed.

---

[1] The manufacturer's MSDS classifies galvite white primer as "combustible;" however, the definitions of "combustible" and "flammable" contained within the Hazard Communication Standard at §1910.1200 *et seq.* are not identical to those contained in the construction standards. Flammable liquid, for instance, is defined at §1910.1200(c) as "any liquid having a flashpoint below 100° F (37.8° C), ...

Penalty

The Secretary has proposed a penalty of $3,250.00. Hensel is a large employer. The Secretary took into account Hensel's lack of prior violations and its good faith in immediately abating the violation (Tr. 19, 30), and as a result had already factored in a 35% reduction in the penalty. The gravity of the violation was high because of the numerous ignition sources in the area, the traffic in the area, and the severity of probable injuries, including death, to an employee caught in a fire.

The Secretary's proposed penalty is considered appropriate and will be assessed.

Alleged Violation of §1926.350(j)

Facts

CO Kelly testified that on the day of his inspection he observed an acetylene and an oxygen bottle tied to a column two or three steps from Riviera Electric's gang box (Tr. 31-32; Exh. C-6). The cylinders were marked with the letters HPCC (Tr. 32, 70). Kelly interviewed two Hensel carpenters outside Building G, who said they had used an acetylene and oxygen torch to cut some rebar two to three days prior to the inspection (Tr. 32, 39-40), but had not used the cited tanks (Tr. 71-73). Roy Barnhart testified that Hensel had no oxygen or acetylene on site (Tr. 98), but that a number of subcontractors used the same gas supplier, and that gas cylinders were recycled (Tr. 99-101). Barnhart had not seen the gas cylinders in Building G prior to April 13 (Tr. 101).

Discussion

Section 1926.350(j) states:

> For additional details not covered in this subpart, applicable technical portions of American National Standards Institute, Z49.1-1967, Safety in Welding and Cutting shall apply.

ANSI §Z49.1-1967 states:

> "Oxygen cylinders in storage shall be separated from fuel-gas cylinders or combustible materials (especially oil or grease) a minimum distance of 20 feet or by a noncombustible barrier at least 5 feet high having a fire resistance rating of at least 1/2 hour.

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991). The Commission has held that the §1926.350(j)'s applicability is limited to the transport and storage of cylinders. *MCC of Florida, Inc.*, 9 BNA OSHC 1895, 1981 CCH OSHD ¶24,420 (No. 15757, 1981). In *MCC*, the Commission held that capped cylinders lashed to a rack and "waiting to be placed in service" were available for use and not subject to the regulation.

Here, the Secretary failed to show, by a preponderance of the evidence, that the cited cylinders were in storage. CO Kelly failed to adequately determine which employer controlled the cited tanks, and interviewed only Hensel employees about their welding activities. The cited tanks, therefore, may have been available for the use of employees other than Hensel.

Citation 1, item 2 will be vacated.

Alleged Violation of §1926.405(a)(2)(ii)(I)

Facts

CO Kelly observed three electric cords running through a doorway in Building D (Tr. 41, 103; Exh. C-8). Two of the cords, belonging to Riviera Electric, ran from a power panel box inside the building and supplied power to a temporary panel box outside (Tr. 41). A small wooden block was taped to those cords where the cords ran through the doorway (Tr. 43; Exh. C-9). The third cord belonged to Hensel, and ran from the outside panel back into the building (Tr. 41-42). Hensel's cord was unprotected; at the time of the inspection it ran through a gap between the door and the ground (Tr. 107; Exh. C-9). Kelly stated that the heavy metal door had no hardware to hold it open and could have cut through the electric cords if slammed or blown shut, and that the wooden block was of insufficient size to stop the door (Tr. 42-43).

Kelly believed that he tested the outside panel with a ground fault circuit interrupter (GFCI), and found it was energized (Tr. 43, 46). Barnhart, however, testified that the GFCI

test showed no power (Tr. 105). Barnhart stated that the panel had been killed from inside the building that day when the building was put on permanent power (Tr. 105). Barnhart did not know whether the power had been off all day (Tr. 108). A Riviera electrician, however, told Kelly that they would be at that location a few more days (Tr. 48). Kelly testified that he did not trace Hensel's cord (Tr. 41, 77, 80), but stated that he had just come from building B where a hammer and drill were being run from a second cord off the panel (Tr. 45; Exh. C-8).

Barnhart stated that Hensel's cord could not have been plugged into the panel prior to April 13 because Hensel rolls up its cords and stores them at its workstation at the end of each day (Tr. 107). Barnhart first stated that he had no idea how long the panel and the two feeder cords running to it had been in place, then admitted that the cords were a "permanent attachment" (Tr. 125). Barnhart further conceded that he had, in fact, previously inspected the area and had seen the cords and the wooden block taped to them (Tr. 125).

Discussion

Section 1926.405(a)(2)(ii)(I) provides:

> 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 Secretary has shown a violation of the cited standard. It is clear from CO Kelly's photographs that no protection was provided to prevent Hensel's cord from being pinched between the door and its jamb. The standard contains no provision for allowing employers to pass cords between the door and floor. Moreover, here the cord was in no way secured to the floor and if pulled taut, could easily have been caught between the door and jamb or the door and Riviera's wooden block.

This Judge finds it more likely than not that the cord was energized at some point on the day of the inspection. Even were Barnhart's testimony regarding the GFCI testing accepted, CO Kelly saw tools being operated from another extension cord running from the panel immediately prior to that testing. Finally it is unlikely that Hensel employees would have plugged an extension cord into the panel box that morning if it had been deenergized.

The record is devoid, however, of employer knowledge of the violative condition. Kelly did not talk to any Hensel employees in the area, and did not know who was using the cord. There is no evidence of how long the cord had been in the doorway, outside of Barnhart's statement that it could not have been there overnight. The undersigned cannot say, therefore, that Respondent should, in the exercise of due diligence, have known of the violation. *See, Williams Enterprises, Inc.*, 10 BNA OSHC 1260, 1981 CCH OSHD ¶20,875 (No. 16184, 1981).

In addition, the second instance of the cited violation, concerning Riviera's feeder cords also must be vacated. Neither the citation nor the complaint provide notice that Hensel would be required to defend the adequacy of Riviera's protective measures. The words "as the controlling contractor," present in other citation items pertaining to Hensel's supervisory role, are missing from this item. The complaint's recitation regarding the applicability of the standard states only that *Respondent* was using temporary wiring at its workplace.

Citation 1, item 3 will, therefore, be dismissed.

Alleged Violation of §1926.1053(b)(16)

Facts

In Building G, Kelly found a six foot ladder stenciled with Hensel's name leaning against a column (Tr. 53, 81; Exh. C-6). The ladder was unstable, was missing a step and had been bound together with duct tape where one leg was shattered (Tr. 54-55). The ladder was not tagged or identified as defective (Tr. 53, 127). Mr. Barnhart stated that he had ordered the ladder be taken out of service, and that his general labor foreman told him it had been thrown in a dumpster adjacent to Building G (Tr. 54, 109-110). CO Kelly did not ask Hensel employees in the area whether they used the ladder (Tr. 82).

Discussion

Section §1926.1053(b)(16) provides:

> Portable ladders with structural defects, such as, but not limited to, broken or missing rungs, cleats, or steps, broken or split rails, corroded components, or other faulty or defective components, shall either be immediately marked in a manner that readily identifies them as defective, or be tagged with "Do Not Use" or similar language, and shall be withdrawn from service until repaired.

The evidence establishes that a defective ladder was available for use in Building G. There was no showing, however, that Hensel's supervisory personnel were aware that the ladder was on the site. Rather, Barnhart testified that the ladder had been thrown out, and must have been retrieved from the dumpster. Work in the warehouse had been substantially completed and its inspection schedule reduced to two or three times a week. Nothing in the record indicates how long the ladder had been in the warehouse.

In the absence of any evidence that Hensel's supervisory personnel were, or should have been aware that the ladder was on site, the cited violation must be vacated.

Conclusions of Law

1. The Secretary has shown, by a preponderance of the evidence that §1926.152(b)(1) was violated on April 13, 1992.

2. Hensel could reasonably have been expected, through its supervisory powers to detect and abate the violation of §1926.152(b)(1).

3. The Secretary has failed to show, by a preponderance of the evidence, the applicability of §1926.350(j) to the conditions cited on April 13, 1992.

4. The Secretary failed to show, by a preponderance of the evidence, that Respondent violated §1926.405(a)(2) (ii)(I).

5. The Secretary's citation and complaint failed to provide Respondent with adequate notice that its supervisory role in discovering and abating its subcontractor's alleged violations of §1926.405(a)(2)(ii)(I) were at issue.

5. The Secretary has failed to show, by a preponderance of the evidence, that Respondent had actual or constructive knowledge of the conditions constituting a violation of §1926.1053(b)(16).

Findings of Fact

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed Findings of Fact that are inconsistent with this decision are denied.

Order

1. Serious Citation 1, item 1, alleging violation of §1926.152(b)(1) is AFFIRMED, and a penalty of $3,250.00 is ASSESSED.
2. Serious Citation 1, item 2, alleging violation of §1926.350(j) is VACATED.
3. Serious Citation 1, item 3, alleging violation of §1926.405(a)(2)(ii)(I) is VACATED.
4. Serious Citation 1, item 7, alleging violation of §1926.1053(b)(16) is VACATED.

James A. Cronin, Jr.
Judge, OSHRC

Dated: July 2, 1993