UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
RAMZEL-TEXAS SERVICES, INC.
Respondent.

OSHRC DOCKET
NO. 92-0535

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 1, 1993. The decision of the Judge will become a final order of the Commission on July 1, 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 June 21, 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: June 1, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-0535

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. RAMZEL-TEXAS SERVICES, INC., Respondent.	OSHRC DOCKET NO. 92-0535

APPEARANCES:

Olivia Tanyel Harrison, Esquire
Dallas, Texas
For the Complainant.

Newman Carter Ramzel
Austin, Texas
For the Respondent, *pro se*.

Before: Administrative Law Judge Stanley M. Schwartz

DECISION AND ORDER

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act").

The Occupational Safety and Health Administration ("OSHA") inspected a worksite at Lubbock High School in Lubbock, Texas, where Respondent was engaged in asbestos removal, from July 9 through 22, 1991; as a result, Respondent was issued a serious citation with three items.[1] Respondent contested the citation, and a hearing was held on December 3, 1992; at the hearing, Respondent contested not only the citation items but also the propriety of the inspection itself.

[1]The alleged violations were observed on July 18, 1991.

The Inspection

Based on the record and the arguments of the parties, the issue in this case is whether OSHA obtained valid third party consent to conduct the inspection. The record establishes that Rose Mediano, the school principal, was on the premises at the time of the inspection due to summer school being in session, and that she gave OSHA permission to conduct the inspection. The Secretary contends that Mediano had the authority to consent because of her control over the school. Respondent, on the other hand, contends that Mediano had no authority to consent to an inspection of its work areas because of its control over those areas.

The validity of third party consent depends upon whether the "permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171 (1974). Common authority may not be implied solely from a third party's property ownership, but instead hinges on "mutual use of the property by persons generally having access or control for most purposes." *Id.* at 171 n.7.

Thomas Nystel, the OSHA compliance officer who inspected the site, testified that he met with Mediano in the principal's office at the school on July 17, and that he understood her to be the principal. He further testified that Mediano gave him permission to conduct the inspection, and that he had no doubt of her control over the premises because school was in session. The Secretary presented an affidavit signed by Mediano in which she states that she is the principal of the school, that she had control of the premises during the asbestos removal, and that she gave OSHA permission to conduct the inspection. *See* Complainant's motion for partial summary judgment. Although an affidavit is not the best evidence, in this particular case it does corroborate the testimony of the compliance officer. More importantly, Respondent does not contest these facts, but instead relies on provisions in the asbestos standard. In particular, Respondent cites to 1926.58(b), which defines "competent person" in part as the person "controlling entry to and exit from the enclosure," and to 1926.58(e)(3), which states that "[a]ccess to regulated areas shall be

limited to authorized persons or to persons authorized by the Act or regulations issued pursuant thereto."

On the basis of the foregoing, it can only be concluded that OSHA obtained valid third party consent in this case. The asbestos standard provisions set out above, without more, do not constitute proof of Mediano's lack of authority over Respondent's work areas. Moreover, Nystel's testimony, which is bolstered by Mediano's affidavit and not rebutted by Respondent, establishes that Mediano possessed the authority and control over the school premises that *Matlock* requires to give valid consent. Respondent's challenge of the inspection is therefore denied.

Item 1 - 29 C.F.R. § 1926.404(b)(1)(iii)

The subject standard is a subpart of 1926.404(b)(1)(i), which requires employers to use either ground fault circuit interrupters ("GFCI's") or an assured equipment grounding conductor program ("AEGCP") to protect employees on construction sites. The subject standard provides as follows:

> The employer shall establish and implement an [AEGCP] on construction sites covering all cord sets, receptacles which are not a part of the building or structure, and equipment connected by cord and plug which are available for use or used by employees.

Thomas Nystel testified the company had set up a panel of GFCI outlets into which a number of extension cords used to power equipment were plugged; however, two cords were plugged directly into the building's power supply, and the company did not have an AEGCP in place. One of the cords was plugged into a receptacle in the main hallway from which it ran outside, along the building, and into a wooden enclosure, as shown in C-2-4, where it powered a negative pressure fan. The other cord was connected to a receptacle in the science lab, which was used as a dressing room for employees and as an entrance into the containment area; this cord was plugged into another cord, as depicted in C-5, which powered a negative pressure monitor. Nystel said that both conditions were serious hazards because employees were working in and passing by the areas where the cords were located and an electrical defect could have resulted in a worker being shocked or electrocuted.

Respondent's contention in regard to this citation item is that C-2-5 do not show the cords servicing any of its equipment. Regardless, Nystel's testimony about both cords and the equipment it powered was credible and unrebutted by Respondent; accordingly, a serious violation of the standard is established. Turning to the assessment of an appropriate penalty, I note most of Respondent's cords were connected to the GFCI panel, that there were only two in violation of the standard, and that these same two cords were cited again in item 2, *infra*. Nystel himself considered items 1 and 2 interrelated and of low gravity because the light foot traffic in the areas of the cited cords made potential damage to them less likely. Upon considering these factors, as well as Respondent's size, history and good faith, it is concluded a penalty of $100.00 is appropriate for this item.

Item 2 - 29 C.F.R. § 1926.405(a)(2)(ii)(I)

The subject standard provides as follows:

> 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.

Thomas Nystel testified he saw three instances of electrical cords in areas where they were subject to damage in violation of the standard. The first instance was the cord powering a negative pressure fan located outside a vacuum truck parked on the east side of the school; C-6-7 depict the fan and the cord, and both employee traffic and equipment such as the ladder in C-7 could have damaged the cord. The second instance was the cord powering the negative pressure fan, as cited in the previous item and depicted in C-2-4; the cord was subject to damage from employee and student traffic, as was the other gray-colored cord in C-3. The third instance was the cord in C-5, as cited in the previous item, which was also unprotected and subject to damage. Nystel said these conditions could have resulted in shock or electrocution and could have been abated by suspending the cords out of the way or by covering them.

The foregoing, which was not rebutted by Respondent, establishes a serious violation of the standard. Based on the factors set out in the previous discussion, a penalty of $100.00 is assessed for this item.

Item 3 - 29 C.F.R. § 1926.405(j)(1)(iv)

The subject standard provides, in pertinent part, as follows:

> Lampholders installed in wet or damp locations shall be of the weatherproof type.

Thomas Nystel testified that the company's employees were removing asbestos in a crawlspace located in the basement of the building, and that a string of lights along the ceiling of the crawlspace provided illumination; the employees were using water hoses to dampen the asbestos-containing materials in the crawlspace, which made the area wet and created a serious hazard because the lampholders housing the lights were not weatherproof as required and could have caused employees to be shocked or electrocuted. Nystel said the wet condition of the crawlspace made the likelihood of an accident much greater.

Respondent's contention in regard to this citation item is that Nystel did not establish it had installed the lights in the crawlspace. However, Commission precedent is well settled that an employer is liable for conditions to which its workers are exposed, even if the employer did not create the conditions. Respondent presented no evidence to rebut Nystel's testimony, which clearly demonstrates a serious violation of the standard. Nystel's testimony also demonstrates that this violation had a higher gravity due to the wet condition of the crawlspace. In light of this factor and those set out above, a penalty of $300.00 is assessed for this item.

Conclusions of Law

1. Respondent, Ramzel-Texas Services, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. §§ 1926.404(b)(1)(iii), 1926.405(a)(2)(ii)(I) and 1926.405(j)(1)(iv).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Items 1, 2 and 3 of citation number 1 are AFFIRMED as serious violations. A penalty of $100.00 each is assessed for items 1 and 2, and a penalty of $300.00 is assessed for item 3.

Stanley M. Schwartz
Administrative Law Judge

Date: MAY 24 1993