



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
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SECRETARY OF LABOR
Complainant,
v.
SECURITY ELEVATOR, INC.
Respondent.

OSHRC DOCKET
NO. 92-2320

**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 August 5, 1993. The decision of the Judge will become a final order of the Commission on September 7, 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 25, 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

A handwritten signature in cursive script, appearing to read "Ray H. Darling, Jr.", written over the typed name.

Ray H. Darling, Jr.
Executive Secretary

Date: August 5, 1993

DOCKET NO. 92-2320

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
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Marshall H. Harris, Esq.
Regional Solicitor
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14480 Gateway Building
3535 Market Street
Philadelphia, PA 19104

James F. Sassaman, Director of
Safety
GBCA
P.O. Box 15959
36 South 18th Street
Philadelphia, PA 19103

Irving Sommer
Chief Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
1120 20th St. N.W., Suite 990
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SECRETARY OF LABOR,

Complainant,

v.

SECURITY ELEVATOR, INC., and
 its successors,

Respondent.

Docket No. 92-2320

Appearances:

Maureen A. Russo, Esq.
 U.S. Dept. of Labor
 Philadelphia, Pa.
 For Complainant

James F. Sassaman
 36 South 18th Street
 Philadelphia, Pa.
 For Respondent

Before: Administrative Law Judge Irving Sommer

DECISION AND ORDER

This is a proceeding under Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. section 651 et seq., (the Act), to review a citation issued by the Secretary of Labor pursuant to section 9(a) of the Act, and the proposed assessment of penalties therein issued, pursuant to section 10(a) of the Act.

Following an inspection of the Respondent's business site at 1032 Black Rock Road, Collegeville, Pennsylvania, the Secretary of Labor issued a citation charging a serious violation of the standard at 29 C.F.R. 1926.350(d)(2) and 29 C.F.R. 1926.350(j). The alleged violation of 29 C.F.R. 1926.350(j) was settled by the parties prior to trial. A hearing was held on the remaining item in Philadelphia, Pennsylvania. No jurisdictional issues are

is dispute, the parties having pleaded sufficient facts to establish that the Respondent is subject to the Act and the Commission has jurisdiction of the parties and of the subject matter.

DISCUSSION

Alleged Violation of 1926.350(d)(2)-Serious Citation 1, item (a)

The standard at 1926.350(d)(2) provides:

(d) Use of fuel gas. The employer shall thoroughly instruct employees in the safe use of fuel gas, as follows:

(2) The cylinder valve shall always be opened slowly to prevent damage to the regulator. For quick closing, valves on fuel cylinders shall not be opened more than 1 1/4 turns. When a special wrench is required, it shall be left in position on the stem of the valve while the cylinder is in use so that the fuel gas flow can be shut off quickly in case of an emergency. (underlining added). In the case of manifolded or coupled cylinders, at least one such wrench shall always be available for immediate use. Nothing shall be placed on top of a fuel gas cylinder, when in use, which may damage the safety device or interfere with the quick closing of the valve.

The site visited by the compliance officer was one in which nine buildings were being constructed for Sterling Drug Co. He testified that on April 28, 1992 he observed a fuel gas cylinder not in use, without a special wrench attached. He described the special wrench as one which is of a T-type configuration, and is used to open and closed the cylinder, thusly controlling the gas flow. Compliance officer Doherty states the Respondent's foreman Duffy told him that he had operated the cylinder earlier in the day, and had used a crescent wrench for the job. Doherty testified the fuel-gas cylinder has a square stem, necessitating a special wrench to speedily turn off the gas during an emergency, but he did acknowledge that a crescent wrench can be adjusted to do the job, although he felt not up to the merits of the special one because of some shortcomings. However, the Respondent's foreman stated that he used either a specially constructed T-wrench or a crescent wrench for said operation which were effective, and that such wrenches were immediately next to the

cylinder. The compliance officers notes indicate that he was told by Duffy that "when in use the wrench is on", meaning when the cylinder is being used.

On this record I cannot state that the Secretary has proven a violation of the standard herein by a preponderance of the credible evidence. The compliance officer did not see the cylinder in use. The inference to be gained from his testimony is that a crescent wrench when adjusted can carry out the same functions as a so called special wrench-in any event the respondent demonstrated that it recognized the needs in such work and that either a special wrench or an adjusted crescent wrench was used. The testimony of Mr. Duffy, the Respondent's foreman as to the use of the wrenches when the fuel gas cylinders were in operation was positive, uncontradicted and not inherently improbable, and I accept it. The totality of the evidence does not establish a violation of the standard at 1926.350(d)(2) and it is vacated.

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

Based upon the Findings of Fact, Conclusions of Law, and the entire record, it is hereby ORDERED:

Citation no. 1, item (a) alleging a violation of 29 C.F.R. 1926.350(b)(2) is VACATED AND SET ASIDE.



IRVING SOMMER
Judge

DATED: AUG - 4 1993
Washington, D.C.