UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
ART SPECIALTY COMPANY
Respondent.

OSHRC DOCKET
NO. 92-1227

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 May 7, 1993. The decision of the Judge will become a final order of the Commission on June 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 May 27, 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
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Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

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Counsel for Regional Trial Litigation
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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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr./skw

Date: May 7, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-1227

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,
Complainant,

v.

ART SPECIALTY COMPANY,
Respondent.

OSHRC DOCKET NO. 92-1227

APPEARANCES:

Helen J. Schuitmaker, Esq., Office of the Solicitor,
U.S. Department of Labor, Chicago, Illinois

Robert A. Motel, Esq., 4433 West Touhy Avenue, Chicago, Illinois

Before: Administrative Law Judge James A. Cronin, Jr.

DECISION AND ORDER

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

Respondent, Art Specialty Company (ASC), maintains a workplace at 3720 North Milwaukee Avenue, Chicago, Illinois, where it is engaged in manufacturing lamps. ASC admits it employs workers in a business affecting commerce and is an employer subject to the Act.

Following an inspection of ASC's workplace by the Occupational Safety and Health Administration (OSHA) on February 12, 1992, ASC was cited for eleven "serious," and two "other than serious" violations of the general industry standards at §§1910, *et seq.*, as well as for one "other than serious" violation of the recordkeeping regulations.

By filing a timely notice of contest, ASC brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On January 26, 1993 a hearing was held in Chicago, Illinois. Only the Respondent submitted a posthearing brief on the contested issues, and the matter is now ready for decision.

ASC does not defend against the majority of the items cited in the citation, but questions the appropriateness of the penalties proposed in all cases.

The determination of what constitutes an appropriate penalty is within the discretion of the Review Commission. *Long Manufacturing Co. v. OSHRC*, 554 F.2d 902 (8th Cir. 1977). In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principal factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶15,032 (No. 4, 1972). Some of the elements to be considered in determining the gravity are: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Secretary v. National Realty and Construction Co.*, 1 BNA OSHC 1049, 1971-73 CCH OSHD ¶15,188 (No. 85, 1971).

ASC is a small employer of 29 employees with no history of prior violations (Tr. 6, 26). In calculating proposed penalties OSHA took ASC's size and no prior history of violations into account and reduced the calculated penalties by 50 percent.

ASC contends that Complainant failed to take into account its good faith in immediately abating all citation items (Tr. 159), and that Complainant overstated the gravity of the cited violations by exaggerating employee exposure and the probability of injury. OSHA's Compliance Officer (CO), Walter Gulik, testified that ASC was given no credit for ASC's immediate abatement of the alleged violations because of the absence of a written safety program and the significant number of violations found at the worksite (Tr. 26, 56, 124). CO Gulik testified that a 25% reduction in a penalty may be applied for employers demonstrating good faith (Tr. 25).

A penalty reduction for good faith of the full 25%, however, would be inappropriate due to ASC's ignorance of OSHA standards and the significant number of serious

violations found at its worksite. The judge, however, finds that based on ASC's demonstrated desire to comply with OSHA regulations which is evidenced by its immediate abatement of the cited violations, a partial good faith reduction of 10% is appropriate.

The appropriateness of the gravity designation for each of the cited violations will be determined separately.

Serious Item 1 - Alleged Violation of 29 C.F.R. §1910.24(h)

Section 1910.24(h) requires that standard railings be provided "on the open sides of all exposed stairways and stair platforms."

It is undisputed that there was a wooden stairway in ASC's dock area which was only partially guarded; a railing extended halfway down the stairs on one side (Tr. 16, 119; Exh. C-1, C-2, C-3). The stairway was approximately 12 feet high (Tr. 16), and led to two lofts on which cardboard boxes and packing material were stored (Tr. 16). During the course of the inspection, Compliance Officer (CO) Gulik was told that the stairs were used infrequently, perhaps once a month, to retrieve packing materials (Tr. 17). CO Gulik testified that a fall from the stairway could result in fractures (Tr. 21, 116).

Oscar Ramirez, ASC's manager, first testified that the packing materials stored in the loft were obsolete and that the cited stairway had not been used, even to clean the area, for the last 20 years (Tr. 154,166-169). He then stated, however, that the stair had been used 12 or 13 years ago to check a heater switch box in the loft (Tr. 170). After the inspection, this alleged violation was originally abated by adding a railing, but Mr. Ramirez stated that shortly afterwards the entire stairway was removed because ASC had no use for it (Tr. 173-174, 186-188).

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). In this matter the only issue is that of employee access to the hazardous condition. The Commission

has held that in order to show a prima facie case of employee access, the Secretary must demonstrate the probability that employees were or would be in the "zone of danger" in the course of their normal duties or activities. *Wyman Gordon Co.,* 15 BNA OSHC 1433, 1449, 1992 CCH OSHD ¶29,550, p. 39,940 (No. 84-785, 1991). In this case, the Secretary has failed to make out her prima facie case. On the subject of employee exposure, the testimony of Mr. Ramirez, who was familiar with operations at ASC, must be credited over that of CO Gulik. CO Gulik had little independent memory of the inspection, and was unclear as to the source of his information that the stairs were used monthly, at one point crediting it to Mr. Ramirez (Tr. 28-29). Mr. Ramirez, however, stated that he was with CO Gulik only a small portion of the inspection (Tr. 155), and contradicted much of CO Gulik's testimony at the hearing.

In addition, Mr. Ramirez' testimony that the stairway was unused was corroborated by ASC's removal of the stairway, indicating that access to the loft was indeed unnecessary.

Because the Secretary failed to make out her prima facie case, "serious" citation 1, item 1 will be vacated.

Serious Item 2 - Alleged Violations of 29 C.F.R. §1910.212(a)(3)(ii)

The cited standard requires that where a machine's point of operation exposes an employee to injury, a guard shall be installed so as to "prevent the operator from having any part of his body in the danger zone during the operating cycle."

CO Gulik testified that he found two metal cutting shears that were not protected with finger guards (Tr. 27; Exh. C-4, C-5, C-6). A guard was available for the shears, but the operator had removed it to adjust the machine, and had not replaced it (Tr. 33-34). An operator accidentally placing his fingers under the point of operation could suffer amputation (Tr. 39).

It is undisputed that the shears were in use at the time of the inspection (Tr. 29, 32). CO Gulik testified that Mr. Ramirez told him the shears were used three to four

times a week (Tr. 35). At the hearing, however, Oscar Ramirez testified that Francisco Martinez operated the shears only on a weekly basis (Tr. 157, 163, 189).

CO Gulik could not describe the operation of the machine, or remember how close the operator's hands came to the unguarded blade in performing his task (Tr. 33). He stated that an operator would have had to have his hands within six inches of the blade in order for him to consider it a hazard (Tr. 130). Mr. Ramirez testified that the closest Martinez' hands came to the shear blade was 18 inches, the length of the material he was working on (Tr. 194).

CO Gulik also testified that there was no ring guard on the point of operation of a Chicago riveting machine (Tr. 38), which was in use at the time of his inspection (Tr. 43). CO Gulik stated that the riveting machine is operated by means of a foot pedal, which is activated by the operator as he holds the rivet between a "hammer and anvil" (Tr. 37). CO Gulik stated that the operator's fingers normally are within inches of the point of operation (Tr. 37-38), and that an operator placing his finger within the point of operation could suffer fractures or impalement with a rivet (Tr. 39). CO Gulik testified that Marvin Barrioz and Carlos Estrada used the riveting machines daily (Tr. 43).

Mr. Ramirez testified that only Barrioz operated the riveting machine (Tr. 164, 189).

In order for the Secretary to prove a violation of §1910.212(a)(3)(ii), she must establish that (1) the points of operation of the machine were unguarded and (2) the operation of the machine exposed employees to injury. *Rockwell International Corporation*, 9 BNA OSHC 1092, 1980 CCH OSHD ¶24,979 (No. 12470, 1980). In that case the Commission held that:

> The mere fact that it was not impossible for an employee to insert his hands under the ram of a machine does not itself prove that the point of operation exposes him to injury. Whether the point of operation exposes an employee to injury must be determined based on the manner in which the machine functions and how it is operated by the employees. *Id.* at 1097-98.

See also, Jefferson Smurfit Corp., 15 BNA OSHC 1419, 1991 CCH OSHD ¶29,551 (No. 89-0553, 1991).

In the case of the metal cutting shears, the Secretary failed to introduce any evidence indicating that its operator is exposed to a hazard as a result of the way the shears are used. CO Gulik could not remember how close the operator's fingers came to the unguarded blade when using the machine. Mr. Ramirez, who was familiar with the operation of the shears, testified that the operator never was closer than 18 inches to the blade. In the absence of any evidence to the contrary, Mr. Ramirez' testimony is credited, and this judge finds that Complainant failed to prove that ASC's employees were exposed to a hazard within the meaning of the standard.

In the case of the riveting machine, however, CO Gulik's testimony that the operator's fingers come within inches of the point of operation is unrebutted and is sufficient to establish the cited violation. CO Gulik's testimony as to the frequency of exposure and the severity of the hazard is also uncontradicted.

The Secretary proposes a penalty of $1,000.00 reduced from an original assessment of $2,000.00. Because only one of the items cited was proven, and because ASC immediately abated both items, a penalty of $400.00 is considered appropriate.

Serious Item 3 - Alleged Violation of
29 C.F.R. §1910.212(b)

The cited standard requires that machines designed for a fixed location be securely anchored. At the hearing, CO Gulik testified, without contradiction, that four drill presses were not anchored to prevent "walking" or movement while in operation (Tr. 44-45; Exh. C-8). CO Gulik stated that an unmounted drill press could fall, resulting in cuts or lacerations to the operator's hands and arms (Tr. 46). CO Gulik testified that the unmounted drill presses were in use during his inspection (Tr. 46).

Mr. Ramirez stated that Louis Palencia operates the drill presses three or four days a week (Tr. 165-166, 189). In its brief, ASC argues that other drill presses, which were secured to the floor (Tr. 47), were used to the exclusion of the unsecured presses. At the hearing, however, ASC introduced no evidence contradicting CO Gulik's testimony that the unsecured drill press was in use at the time of the inspection. More

over, metal shavings around the base of the unsecured press indicate that it was in use (Tr. 46, Exh. C-8).

The Secretary proposes a penalty of $750.00, reduced from the original assessment of $1,500.00. However, because ASC immediately abated the violation (Tr. 49), this judge finds that a penalty of $600.00 is appropriate.

Serious Item 4 - Alleged Violation of 29 C.F.R. §1910.215(a)(4)

The cited standard requires that work rests be affixed a maximum of 1/8" from the wheel of offhand grinding machines to support the material being worked. CO Gulik testified, without contradiction, that ASC's bench grinder was missing its work rest at the emery wheel (Tr. 49; Exh. C-9). CO Gulik stated that without the work rest, the material being worked could slip into the wheel well, causing the emery wheel to shatter (Tr. 49-51). The shattered wheel could cause facial lacerations and possibly the loss of an eye (Tr. 49). CO Gulik stated that the bench grinder was used weekly (Tr. 53).

Mr. Ramirez stated that Louis Palencia operated the bench grinder "very seldom," but could not elaborate (Tr. 190). In its brief, ASC asserts that eye protection was worn by employees using the grinder; however, no evidence to that effect was adduced at the hearing.

The citation proposed a penalty of $950.00. However, CO Gulik testified at the hearing that OSHA intended a penalty of $750.00, reduced from $1,500.00 (Tr. 54, 65). This judge finds that the gravity of the violation was moderately high, but the severity of the hazard, possible loss of an eye, is balanced by the infrequent use of the grinder and the absence of any previous injuries (Tr. 203). The penalty will be reduced an additional 10% based on ASC's good faith in immediately abating the hazard (Tr. 53). A penalty of $600.00 will be assessed.

Serious Items 5a, 5b - Alleged Violations of 29 C.F.R. §1910.219(d)(1) and (e)(1)(i)

Sections 1910.219(d)(1) and (e)(1)(i), respectively, require that pulleys less than seven feet from the floor be equipped with a standard guard, and that horizontal belt drives less than seven feet from floor level be guarded, both as described elsewhere in that section.

During the course of his inspection CO Gulik found that the belt and pulley drive for ASC's metal parts tumbler had been removed to adjust the pulley and not replaced (Tr. 57, 59; Exh. C-10). CO Gulik testified that the area around the drive pulley was accessible to employees who stored materials there (Tr. 58), and that the equipment was used on a daily basis by Francis Martinez (Tr. 59). Mr. Ramirez, however, stated that only Louis Palencia operated the metal parts tumbler and only on a weekly basis (Tr. 190).

CO Gulik also testified that the belt and pulley drive for an air compressor had only a partial guard which would not prevent a hand or fingers from being caught at the ingoing nip points (Tr. 60; Exh. C-11). CO Gulik testified that employees lubricating, adjusting or servicing the compressor would be exposed to the hazard (Tr. 61). Mr. Ramirez admitted that Francisco Martinez started up the compressor every day, but stated that no other employees had reason to be in the area (Tr. 190).

CO Gulik testified that the unguarded belts and pulleys could result in fractures and lacerations to the fingers (Tr. 65). A penalty of $1,000.00 was proposed.

For the reasons discussed above on the subject of employee exposure, the testimony of Oscar Ramirez is credited over that of CO Gulik. This judge finds that the gravity of the violations, which was based on CO Gulik's estimate of employee exposure, was overstated. In addition, ASC's demonstrated good faith in immediately abating the violation warrants a reduction in the penalty.(Tr. 60, 159). A penalty of $600.00 is considered appropriate and will be assessed.

Serious Item 6 - Alleged Violation of
29 C.F.R. §1910.242(b)

The cited standard requires that where compressed air is used for cleaning it shall not exceed 30 p.s.i. of pressure.

CO Gulik testified that ASC used compressed air hoses in its machine shop for cleaning machinery. CO Gulik measured the air pressure on the hoses at 90 p.s.i. (Tr. 66-68). Excessive pressure in the hoses could cause eye damage if directed at an employee's face, or force an air bubble, or embolism, into the blood stream of an employee with a cut in an area exposed to the stream of air (Tr. 68-69).

CO Gulik testified that Louis Palencia used the air hoses on a daily basis (Tr. 69). Again, his testimony was contradicted by Mr. Ramirez, who stated that Mr. Palencia operated the air hose approximately once a month (Tr. 191).

Again, the testimony of Mr. Ramirez regarding employee exposure is credited over that of CO Gulik because of his greater familiarity with Respondent's operations.. The gravity of the cited violation is deemed to be low based on the infrequent exposure of one employee to the hazard and the low probability of an accident actually occurring. The proposed penalty of $750.00 is reduced to $300.00 to reflect the overstated gravity and a 10% reduction for ASC's good faith in immediately abating the violation (Tr. 70).

Serious Item 7 - Alleged Violation of
29 C.F.R. §1910.147(c)(4)(i)

The cited standard requires that employers develop written energy control procedures where employees are engaged in "the servicing and maintenance of machines and equipment in which the *unexpected* energization or start up of the machines or equipment, or release of stored energy could cause injury to employees . . . ."

It is undisputed that ASC had no written lock-out/tag-out program for controlling unexpected start ups (Tr. 70-71). ASC argues that an outside agency performs all their equipment repair and servicing (Tr. 71). CO Gulik testified, however, that ASC employees remove dies from punch presses (Tr. 72). CO Gulik stated that the inadvertent start up of equipment could result in serious injury or death (Tr. 73).

ASC argues that the cited standard is not applicable because its own employees perform no repairs or service on equipment. The lock-out/tag-out standards, however, are intended to protect not only maintenance employees, but "affected employees," that is, employees "whose job[s] require [them] to operate or use a machine or equipment on which servicing or maintenance is being performed under lockout or tagout, or whose job[s] requires [them] to work in an area in which such servicing or maintenance is being performed." *See*, §1910.147(b) *Definitions*. Employers are expected to develop an energy control program for the benefit of such affected employees, who must be instructed in the purpose and use of the plan (*See*, §1910.147[c][7]), and for exchange with outside maintenance contractors, who are required to coordinate their activities with the on-site employer. *See §1910.147(f)(2).*

The Secretary has made out a prima facie case, and the cited violation will be affirmed. Based on ASC's good faith, however, the proposed penalty of $750.00 will be reduced to $600.00.

Serious Items 8a, 8b - Alleged Violations of
29 C.F.R. §1910.253(b)(2)(iv) and (b)(4)(iii)

Section 1910.253(b)(2)(iv) requires that valve protection caps be in place on stored gas cylinders. Subsection (b)(4)(iii) requires that oxygen cylinders be separated from fuel gas cylinders by 20 feet or by a non combustible barrier.

CO Gulik testified without contradiction that oxygen and acetylene cylinders were chained together in the machine shop, where employees were present daily (Tr. 75-76, 78). The valve protection cap was missing from one of the acetylene cylinders (Tr. 77).

An unprotected gas valve may be damaged, causing the gas to escape explosively, and propelling the cylinder like a missile (Tr. 78). Escaping acetylene may also ignite, a possibility which is increased by the presence of the nearby oxygen (Tr. 79).

Three employees work in the machine shop area (Tr. 163).

A penalty of $750.00 was proposed. Because the violation was immediately abated (Tr. 81), the original penalty will be reduced by an additional 10%; $600.00 will be assessed.

Serious Items 9, 10 - Alleged Violations of
29 C.F.R. §1910.1200(e)(1) and (h)

The cited standards respectively require that the employer develop and implement a written hazard communication program, and that it train its employees as to chemical hazards in the workplace. Specifically, the employer must inform employees of the location and availability of its written hazard communication plan.

Hazardous materials including xylene, lead based paints, and 40-CE machine cleaner and RC-42 compressor oil were present in ASC's machine shop and painting areas (Tr. 149-151). It is undisputed that ASC had not developed a written program (Tr. 82), and had not made the availability of information about hazardous chemicals known to ASC employees (Tr. 94-95).

Absent a hazard communication program, employees may remain ignorant of the harmful effects of hazardous chemicals, and may not take proper precautions or use protective equipment to avoid harmful contact (Tr. 86, 90, 92).

Approximately six employees worked in the machine shop and painting areas (Tr. 133, 163-164).

Penalties of $750.00 for each violation of §1910.1200 *et seq.* were proposed. Based on ASC's good faith in immediately abating the violations (Tr. 89, 95), a penalty of $600 for each violation is considered appropriate and will be assessed.

Other than Serious Item 1 - Alleged Violation of
29 C.F.R. §1904.2(a)

The cited violation requires employers to maintain a log of recordable occupational injuries and illnesses. ASC admits that no OSHA log was maintained in 1991 or 1992 until the time of the inspection (Tr. 200).

A "regulatory penalty" of $1,000.00 is proposed, reduced from an original recommended penalty of $2,000.00. Because the violation was immediately abated, the penalty will be reduced by 10%. A penalty of $800.00 will be assessed.

Other than Serious Item 2 - Alleged Violation of
29 C.F.R. §1910.157(g)(3)

The cited standard requires employers to provide training in the use of portable fire extinguishers to employees designated to use them as part of an emergency plan.

CO Gulik testified that no training was provided regarding the use of wall mounted fire extinguishers (Tr. 98). However, there was no evidence that ASC had an emergency plan involving the use of the fire extinguishers, and Mr. Gulik stated it was just as likely employees would just leave the plant without attempting to fight incipient stage fires (Tr. 99).

No evidence in the record indicates that ASC designated any of its employees to use fire fighting equipment. The cited standard, therefore, appears to be inapplicable in this case. Section 1910.157(g)(1), however, requires employers to provide training for all employees whenever portable fire extinguishers are provided for use. CO Gulik's testimony that no training in the use of fire extinguishers was unrebutted; the citation, therefore, is amended to conform to the evidence, and a violation of §1910.157(g)(1) will be affirmed. No penalty is assessed.

Other than Serious Item 3 - Alleged Violation of
29 C.F.R. §1910.303(f)

The cited standard requires that circuits and their disconnecting means or overcurrent devices be legibly marked to indicate their purposes. CO Gulik testified, without contradiction, that circuit breaker boxes on the machine room's south wall were not identified with the circuits they controlled (Tr. 102-103).

No penalty was proposed, and the citation will be affirmed without penalty.

Findings of Fact

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

ORDER

Based on the findings of fact, conclusions of law, and upon the entire record, it is ordered:

1. Item 1 and Item 2(a), Citation No. 1 are VACATED.
2. Item Nos. 2(b) through 10, Citation No. 1, are AFFIRMED.
3. The following penalties are assessed:

Citation No. 1

Item 2	-	$ 400.00
Item 3	-	600.00
Item 4	-	600.00
Item 5	-	600.00
Item 6	-	300.00
Item 7	-	600.00
Item 8	-	600.00
Item 9	-	600.00
Item 10	-	600.00

Citation No. 2

Item 1	-	$ 800.00

Total Penalties: $5,700.00

James A. Cronin, Jr.
Judge, OSHRC

Dated: April 23, 1993