UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
LAW BROTHERS CONTRACTING CORP.
Respondent.

OSHRC DOCKET
NO. 91-2293

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 December 9, 1992. The decision of the Judge will become a final order of the Commission on January 8, 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 December 29, 1992 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
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: December 9, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-2293

NOTICE IS GIVEN TO THE FOLLOWING:

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Richard W. Gordon
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Occupational Safety and Health
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UNITED STATES OF AMERICA
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SECRETARY OF LABOR,	:	
Complainant	:	OSHRC Docket No. 91-2293
v.	:	
LAW BROTHERS CONTRACTING, CORP.	:	
Respondent.	:	

Appearances:

William G. Staton, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Brian M. Cole, Esq.
Bryant, O'Dell and Basso
Syracuse, New York
For Respondent

Before: Administrative Law Judge Richard W. Gordon

DECISION AND ORDER

This proceeding arises under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq,* ("Act") to review citations issued by the Secretary for serious and other than serious violations pursuant to § 9(a) of the Act and proposed assessments of penalties thereon issued pursuant to § 10(a) of the Act.

BACKGROUND

Respondent is a general contractor that was performing renovation work at certain buildings located in Syracuse, New York. As a result of an inspection by a Compliance Officer ("CO") of the Occupational Safety and Health Administration ("OSHA") at Respondent's construction work site in April 1991, OSHA issued one serious and one repeat citation alleging a total of five violations of the Occupational Safety and Health Act ("Act"), with a total proposed penalty of $3,095.

Respondent filed a timely notice of contest[1] thereby instituting this proceeding before the Occupational Safety and Health Review Commission ("Commission"). The trial in this matter was held on June 26, 1992 in Syracuse, New York. The parties have submitted their briefs and this matter is now ready for decision.

DISCUSSION

At issue here are contested Serious Citation No. 1, items nos. 1 through 3a[2], with proposed penalties of $2,975., and Repeat Citation Number 2, item no. 1, with a proposed penalty of $120. What follows is a discussion of the contested Items and subparts:

A. Serious Citation No.1, item no. 1 (§ 1926.304(d))

This item alleges that Respondent's employees were using a portable, power-driven circular saw with a lower blade guard that did not automatically and instantly return to the covering position. This item assesses a penalty of $875.00.

During the course of the inspection, CO Thomas Rezsnyak observed an 8½ inch *Hitachi* portable circular saw that was equipped with a lower blade guard. (Tr. 16, 18). CO Rezsnyak observed that the left side of the lower blade guard remained retracted after a cut had been made. (Tr. 16; Ex. C-1). The CO determined that the condition had existed for eight months. (Tr. 17). The condition was subsequently corrected when the guard mechanism was removed and built-up sawdust was cleaned from its track. (Tr. 20; Ex. C-2). CO Rezsnyak further testified that he classified the violation as serious because operators of the saw can contact the exposed lower blade and possibly incur amputation of the limbs in the absence of a properly functioning guard. (Tr. 23).

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[1] Respondent's Notice of Contest failed to reference items 1 and 2 of Serious Citation No. 1 so that those items became final orders of the Review Commission by operation of § 10(a) of the Act. On June 16, 1992, Respondent filed a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure seeking relief of the final order pertaining to items 1 and 2 of Serious Citation No. 1 on the ground of mistake and inadvertence and on the further ground that no prejudice would result on the part of the Secretary. I granted Respondent's motion on June 24, 1992, over the objection of the Secretary. Prior to the commencement of the hearing on June 26, 1992, the Secretary, in light of the above order, orally moved to amend her complaint to include items 1 and 2 of Serious Citation No. 1. I granted the Secretary's motion over the objection of Respondent.

[2] In her Complaint, the Secretary amended the citation pursuant to Commission Rule 35(f) to vacate Serious Citation No. 1, item no. 3b. The proposed penalty of $1,225. for Serious Citation No. 1, item no. 3a is not affected by this amendment.

Respondent asserts that the Secretary has failed to show that the standard was applicable to the equipment in use and failed to show that the alleged violation resulted in exposure of a hazard to employees. Respondent contends that the *Hitachi* saw is not portable even though it is moved to different workshops within a project. Respondent explained that once a workshop is designated, the saw is taken into that room, attached to a table and remains in a stationary location. (Tr. 88,89).

The standard in question applies to "all portable, power-driven circular saws." While the term "portable" is not defined in Subpart I, the term is unambiguous and must be given its common meaning of "capable of being carried". Mr. Post testified that the *Hitachi* saw was capable of being moved and was, in fact, moved from workshop to workshop. (Tr. 88). Accordingly, I find that the *Hitachi* saw is portable and that therefore § 1926.304(d) applies.

Respondent's second argument, that the Secretary failed to show that the sticking guard constituted a hazard is without merit.[3] Mr. Howard Post, Respondent's superintendent, testified that the *Hitachi* saw was equipped with a sticking guard. He said that the left guard would stick when it was pulled to its fullest extension so the operator could line up his work before the saw was activated. (Tr. 85). Mr. Post explained that the saw was activated by a trigger which, when pressed, resulted in the left guard retracting and staying down during the cut. (Tr. 87). When the trigger is released, a blade brake stops the blade immediately. (Tr. 90,91).

While Respondent presents a convincing argument for vacation of this item, the facts do not support such an action. The uncontradicted testimony of the CO was that the blade guard remained in a raised position after a cut had been made because of an accumulation of sawdust, not because of the design of the saw. After the guard mechanism was cleaned, the guard functioned properly. (Ex. C-2). Accordingly, Serious Citation No.1, item no. 1, must be affirmed.

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[3] The Secretary in her brief asserts that Respondent's superintendent, Mr. Howard Post, agreed that it would be hazardous to operate the saw while the guard was stuck in the raised position because the blade continued to rotate after the trigger was released and could sever the cord. However, a review of the transcript (Tr. 90) reveals that Mr. Post was describing a portable *Skill* saw, not the *Hitachi* saw at issue in this citation. Mr. Post testified that the blade on the *Hitachi* saw stops when the trigger is released because the saw is equipped with a blade brake. (Tr. 90, 91).

B. Serious Citation No.1, item no. 2 (§ 1926.304(f))

This item alleges that Respondent failed to provide a magnetic switch or similar device to prevent automatic restarting of a table saw in the event of a power failure. This item assesses a penalty of $875.

The testimony of the CO was to the effect that he observed a table saw that was not equipped with a magnetic switch or other device to prevent automatic starting in the event of a power failure. (Tr. 25, 26). CO Rezsnyak confirmed the absence of the safety device by conducting a test with Respondent's foreman in which the power to the table saw was disconnected and then restarted. (Tr. 25, 26).

Respondent asserts that the cited standard does not require the installation of such a device on its equipment. Respondent further asserts that the standard references American National Standards Institute ("ANSI") standards. Since the ANSI standards were never offered or received into evidence, Respondent contends that there is no evidence that the magnetic switch described by CO Rezsnyak was either required by that code or applicable to the equipment in use. I disagree. The citation references Section 5.1.3.3, American National Standards Institute, 01.1-1961, Safety Code for Woodworking Machines.[4] The applicable standard is as follows:

> 5.1.3.3 Electrically driven equipment shall be controlled with magnetic switches or other devices that will prevent automatic restarting of the machine after a power failure, if automatic restarting of the machine would create a hazard.

While I believe that it would have been prudent to introduce the applicable ANSI standard into evidence, the Secretary was not legally required to do so. No deprivation of due process rights has occurred as the citation clearly put Respondent on notice of the requirements of the standard. While Respondent argues that the magnetic switch was an obscure item unknown to the industry in which Respondent operated, Respondent ultimately obtained the magnetic switch from the manufacturer of the saw. (Tr. 92).

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[4] Although the Secretary concedes that the numerical designation for the applicable ANSI standard references a 1961 edition, similar requirements appear in each edition of the standard from 1961 to 1975.

Respondent also asserts that the unrebutted testimony showed that the blade was fully guarded and thus no injury would result, even if someone fell on the table when the saw was running. (Tr. 93). I agree with Respondent on this point. However, the hazard here is that the saw could kickback the wood being cut which could strike the operator. (Tr. 27). Respondent states that the saw was equipped with an anti-kickback device which permitted the material to pass in one direction and prevented it from being kicked back toward the operator. (Tr. 93). However, CO Rezsnyak testified, without contradiction, that the anti-kickback device was located at the rear of the guard, approximately 12 inches from the cutting point, and would provide no protection for the operator if the wood being cut was not in contact with the anti-kickback device at the time of a power failure. (Tr. 28,29). Accordingly, Serious Citation No. 1, item no. 2 is affirmed.

C. Serious Citation No.1, item no. 3a (§ 1926.1052(a)(4))

This item alleges that Respondent failed to provide a platform where a door opened directly on a stairway. This item assesses a penalty of $1,225.

Respondent maintained two storage trailers at the work site. (Ex. C-4, C-5). CO Rezsnyak testified that the width of each of the two trailers was 80 inches (Tr. 61, 62) and that they were equipped with bifold doors, each door of which was approximately 40 inches wide. (Tr. 35). Mr. Post testified that the storage trailers remained locked and that only he and his foremen retained keys. (Tr. 95). He said no work was performed within the storage trailers and there were no lights in the trailer. (Tr. 95).

Access to the doors of the storage trailers was provided by a staircase, the top step of which was flush with the floor of the trailer. CO Rezsnyak testified that the width of the

top step of the stairs was slightly less than 80 inches. (Tr. 63). The doors of one trailer swung outward over a stairway the top step of which was approximately 9½ inches deep. (Tr. 36; Ex. C-4). The doors of the other trailer swung outward over a stairway the top step of which was approximately 11 inches deep. (Tr. 36-37; Ex. C-5). Employees could have been thrown from the stairways in the event that the doors had been opened while they were present, thus incurring fractures of the legs and ankles. (Tr. 39). The condition had existed at the work site for approximately 8 months. (Tr. 40). CO Rezsnyak further testified that after bringing this condition to the foreman's attention, a platform was provided at the top of each stairway which extended at least 20 inches beyond the swing of the doors. (Tr. 41; Ex. C-6).

During the hearing, there was much discussion over the definition of the term "width". Respondent contends that "width" is that area of the top step which is horizontally adjacent to the doorway, while the Secretary contends that "width" is the perpendicular distance from the doorway to the top of the stairs. Respondent is correct in defining "width" and "depth", as those terms apply to treads or steps. However, as the Secretary correctly asserts, these arguments presuppose that a step is a platform. While Respondent maintains that the top step is a platform, CO Rezsnyak testified that no platform was provided. (Tr. 33). Subpart X does not define the term "platform". However, the term "platform" is referenced in the definition of "riser height" found at 29 C.F.R. § 1926.1050(b). This section makes a distinction between "tread" and "platform/landing", suggesting that a platform is a landing.[5] Accordingly, I find that a step is not a platform

[5] A landing is a level part of a staircase at the end of a flight of stairs or connecting one flight with another.

and that therefore Respondent has not provided a platform in accordance with the cited standard. Having reached such a conclusion, there is no need to define "width" as that term applies to a platform. However, the Secretary appears to present a convincing argument, by asserting that Respondent's construction of the standard would defeat the remedial purposes of the Act by permitting the exposure of employees to the hazard of being propelled from stairways as described by Mr. Rezsnyak and thus render this provision meaningless and senseless. Accordingly, Serious Citation No. 1, item no. 3a must be affirmed.

D. Repeat Citation No. 2, item no. 1 (§ 1926.404(f)(6))

This item alleges that Respondent used tools with missing ground pins. This item assesses a penalty of $120.

CO Rezsnyak testified that he observed two pieces of electrical equipment that had no ground pins in their plugs. He observed a portable circular saw in a gang box on the third floor of the building, and a portable light stand in a gang box on the fourth floor. The record reflects that this equipment was immediately taken out of service by Respondent's foreman by severing electrical cords. CO Rezsnyak testified that the tools were not tagged as unsafe, marked, or somehow made inoperable so that an employee wouldn't grab the tool, use it and get hurt. (Tr. 45). CO Rezsnyak further testified that he believed Respondent's use of ground fault protection throughout the whole job site would limit any injury to a minor electrical shock. (Tr. 48). The CO also testified that he tested all equipment in use by Respondent's employees and found such equipment to be in compliance with OSHA standards. (Tr. 55). The credible evidence supports a finding that

each tool in question, while not in use, was available for use and was accessible to employees at the work site.

Based on the foregoing, I conclude that an *other than serious* violation existed. I also find that the violation constitutes a *repeat* violation.[6] Although Respondent contends that the bases of the instant case (not having a permanent path to ground) and the prior citation (not grounding a piece of equipment) are not similar, the evidence of record does not support that contention. The operative violative condition in both the instant case and the prior citation was that ground pins were missing from plug ends.[7] As the hazardous conditions are "substantially similar", the Secretary has proven a repeat violation. Repeat Citation No. 2, item no. 1 is affirmed.

Section 17(j) of the Act requires the Commission to give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the assessment of an appropriate penalty. Upon consideration of these factors, I have determined that a total penalty of $3,095. is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

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[6] The Secretary contends that the violation is repeat because Respondent was previously issued a citation in March 1990, for the identical infraction, and that the prior citation had become a final order of the Review Commission at the time that the instant citation was issued. (Ex. - C-9).

[7] In Repeat Citation No. 2, item 1, subpart a, a ground pin was loose, but not missing.

ORDER

1. Serious Citation No. 1, item no. 1 is **AFFIRMED** and a penalty of $875. is **ASSESSED.**

2. Serious Citation No. 1, item no. 2 is **AFFIRMED** and a penalty of $875. is **ASSESSED.**

3. Serious Citation No. 1, item no. 3(a) is **AFFIRMED** and a penalty of $1,225. is **ASSESSED.**

4. Repeat Citation No. 2, item no. 1 is **AFFIRMED** and a penalty of $120. is **ASSESSED.**

RICHARD W. GORDON
Judge, OSHRC

Dated: November 27, 1992
Boston, Massachusetts