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

OSHRC DOCKET
NO. 92-2541

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 September 27, 1994. The decision of the Judge will become a final order of the Commission on October 27, 1994 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 October 17, 1994 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
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Review Commission
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Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

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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. /SKA

Date: September 27, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-2541

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,	:	
Complainant	:	OSHRC DOCKET NO. 92-2541
v.	:	
OTIS ELEVATOR COMPANY,	:	
Respondent.	:	

Appearances:

Susan Salzberg, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

W. Scott Railton, Esq.
Reed, Smith, Shaw & McClay
McLean, Virginia
For Respondent

DECISION AND ORDER

On July 22, 1992, Otis Elevator Company ("Otis") was issued two citations alleging serious and nonserious violations of various electrical standards with a total proposed penalty of $4,875.[1] The citations stem from a six-day inspection of a construction site located at the Yale University Hospital in New Haven, Connecticut. A twelve-story building was being added on to the hospital and Otis, one of 22 subcontractors at the site, was hired to install the building's elevators (Tr. 17-18, 257, 358, 384, 388).

Compliance officer David Pataky, accompanied by compliance officer Julie Beeberman, arrived at the site on April 21, 1992, and held an opening conference with representatives from the general contractor for the project, Turner Construction ("Turner"), as well as several of the subcontractors onsite (Tr. 17-19, 163, 340). Because Otis's foreman

[1] At the hearing, the Secretary withdrew the first item of the serious citation, reducing the total penalty to $3,000 (Tr. 5).

for the project was not present that day, the chief elevator mechanic acted as Otis's representative (Tr. 19, 162, 340). During the course of the meeting, the compliance officer suggested, as he had on previous inspections of multi-employer worksites, that only representatives from Turner and one other employer accompany him during the inspection; this would ensure that the walkaround group was of a manageable size and would minimize the potential for disruption (Tr. 20, 163, 286, 341-42). He then asked if any of the subcontractor representatives present objected to such an arrangement and except for the electrical contractor's representative, no one expressed a desire to accompany him during the walkaround (Tr. 164-65, 286-87). Based on these events, Otis contends that it was not afforded the opportunity to accompany the compliance officers on their inspection as required by § 8(e) of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. § 657(e).[2] Otis also claims that under these circumstances, the inspection was "unreasonable" and therefore, contrary to § 8(a) of the Act, 29 U.S.C. § 657(a).[3]

By giving the employer representatives the chance to voice any concerns they might have had about the proposed walkaround group, the compliance officer clearly provided Otis, as well as the other subcontractors present at the opening conference, with an opportunity to accompany him on the inspection. *See Concrete Constr. Co.*, 15 BNA OSHC 1614, 1618, 1992 CCH OSHD ¶ 29,681 (No. 89-2019, 1992) (under the Act, the Secretary

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[2] Section 8(e) provides in relevant part:

> Subject to regulations issued by the Secretary, a representative of the employer...shall be given the opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection.

[3] Section 8(a) provides:

> In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized -
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

is obligated to afford an employer the opportunity for accompaniment). That Otis's chief mechanic believed, mistakenly or otherwise, the compliance officer would immediately notify each subcontractor if a potential violation was discovered during the inspection does not change the fact that Otis, having been given the opportunity to do so, could have requested at any time during the six-day inspection that it be included in the walkaround group (Tr. 22, 343-43).[4] In fact, Otis's foreman apparently attended a *second* opening conference held on the second or third day of the inspection specifically for those employers who were unable to attend the first meeting and again, after being informed of the walkaround arrangements, no objections were made by Otis (Tr. 362-64). Under these circumstances, the compliance officer substantially complied with the requirements of § 8(e). *See Chicago Bridge & Iron Co. v. OSHRC*, 535 F.2d 371, 377 (7th Cir. 1976).

Even if Otis had been denied the opportunity to accompany the compliance officers during their inspection, it has not been established that as a result, Otis was prejudiced in its ability to prepare or present a defense to the violations alleged. *See Marshall v. Western Waterproofing Co.*, 560 F.2d 947, 951 (8th Cir. 1977) (prejudice must be shown before failure on the part of the Secretary's representatives to comply with § 8(e) will result in a vacated citation). The record itself does not appear to support Otis's claim that it has been deprived of the opportunity to develop its case fully on these issues; to the contrary, Otis had ample information available to it in presenting its defense to the alleged violations. Furthermore, in claiming prejudice, Otis focuses primarily on the compliance officer's failure to contact Otis throughout the inspection as the cited conditions were observed. But if Otis was truly troubled by its inability to observe these conditions firsthand, it could have insisted on being included in the walkaround group, particularly once the electrical steward, who was present during the walkaround, brought a potential violation to the attention of Otis's foreman on the second day of the inspection (Tr. 365, 381, 383). Therefore, Otis has failed to sustain

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[4] The compliance officer claimed that he told employer representatives they would be notified during the inspection only if a condition presented an "imminent danger" to employees (Tr. 163-64). He also indicated that he believed communication with each subcontractor at the site was possible through a radio carried by the Turner representative, but Otis's chief mechanic testified that Otis's radios were *not* linked with Turner's (Tr. 163-64, 169-70, 343).

its allegation of a violation of § 8(e) of the Act. As such, its companion claim under § 8(a) also must fail.

The violations alleged in the subject citations revolve around three different electrical cords or cables encountered by the compliance officers during the inspection. The first, an orange extension cord, was located in the basement of the building and was energized, but not being used, at the time it was observed (Tr. 23-24, 46-47, 180; Exhibits C-1, C-2, & C-3). The second, a set of yellow cables, was located on the fifth floor and powered the temporary or "false" cars used by Otis while constructing the rails inside each hoistway or elevator shaft (Tr. 84, 100-01, 103-04, 291-92, 344, 378-79; Exhibits C-7 through C-9, C-19 through C-23). The third, an orange flexible cord, was located in the subbasement and powered the lights inside one of the elevator cars (Tr. 125-27, 131, 219, 289, 374, 392; Exhibits C-16, C-17, & C-18).

It is undisputed that the yellow cables and the orange flexible cord belonged to Otis (Tr. 84, 103, 130-31, 289, 366, 374, 390). However, Otis's foreman claimed that since the orange extension cord observed in the basement was set up in a manner that Otis did not utilize, it could not have belonged to Otis at the time (Tr. 372-73). He was unable to deny, though, that the cord was clearly marked with a blue tag indicating that it had been tested in accordance with Otis's assured equipment grounding program (Tr. 33-35, 43-44, 373, 384). Although the foreman speculated that the cord had been taken by another trade onsite and used accordingly, there is nothing in the record to substantiate his claim (Tr. 373). It is concluded that the cord was Otis's property for which it was responsible.

ALLEGED VIOLATIONS OF §§ 1926.405(g)(1)(iii) and 416(e)(2)

The first part of the grouped violations alleges three instances of violation under § 1926.405(g)(1)(iii), an electrical standard which specifies the prohibited uses of flexible cords and cables. The Secretary contends that Otis violated two of these prohibitions at the Yale site by attaching cords and cables to building surfaces and by running a cord through a hole in a wall.

The orange extension cord the compliance officer observed in the basement was wrapped around and draped over several pipes and hangers located near the ceiling before

coming to rest upon a waist-high wooden rail (Tr. 23, 32, 38-39, 42, 45-46, 191-93; Exhibits C-1, C-2, & C-3). Similarly, the yellow cables observed on the fifth floor were draped over pipes also located near the ceiling (Tr. 84-85, 100; Exhibits C-8 & C-9).[5] The Secretary maintains that both of these conditions violate the prohibition against attaching flexible cords to a building surface.[6]

Because the term is not defined in the regulations, there was considerable debate between the parties over whether pipes or hangers can be considered "building surfaces" within the meaning of the standard (Tr. 50, 85-86, 193, 228-31, 236, 321, 335). Virtually all fixtures or building materials one might find at a new building construction site have "exterior surfaces" at some point during the various stages of construction. However, the meaning of "building surfaces" under § 1926.405(g)(1)(iii)(D) is no different than it is in normal everyday usage, and reading the words in their normal and customary meaning, the term clearly refers to the exterior faces of the building structure, such as walls, ceilings and floors.

Moreover, the cords in question were not actually "attached" to the pipes and hangers. To attach something is to join or fasten it, terms which suggest that an attached item is not capable of free movement. *See Websters' Third New International Dictionary of the English Language* at 140 (Unabridged, 1971). As both of the Secretary's witnesses suggested, a cable which is simply draped over or loosely looped around a pipe will slide along the exterior of the pipe fairly easily if tugged on (Tr. 48, 69, 194, 292, 320). In fact, because the cables were capable of movement, the Secretary contends that they were subject

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[5] These cords were also hung from a wall with some type of wire and are the subject of an additional charge which will be discussed *infra* (Tr. 86-87, 94-97, 100, 226-28; Exhibit C-9).

[6] Section 1926.405(g)(1)(iii) provides that flexible cords and cables shall not be used in a prohibited manner "unless necessary for a use permitted in paragraph (g)(1)(i) of this section". Under that paragraph, flexible cords and cables may be used for certain purposes including elevator cables. Because the yellow cables were used to power temporary elevator cars, Otis contends that they were "elevator cables" within the meaning of this subsection and therefore, the restrictions of § 1926.405(g)(1)(iii) do not apply (Otis's Post-Hearing Brief at 17). The use to which a cable is put does not determine its classification as an "electrical cable". According to *The National Electrical Code Handbook* (NEC), elevator cable is a trade name which must conform to certain described specifications. NEC, 2d ed., § 400-4, Table 400-4 (1981). There is nothing in the record to show that the flexible cables in question conformed to the NEC specifications in order to qualify as elevator cables.

to potential abrasion (Tr. 38, 42, 48, 69, 194, 225, 292, 319-20). However, most of the items around which the cables were wrapped or draped were round and fairly smooth, and therefore, not likely to sever a cable's outer insulation (Tr. 232, 320-21; Exhibits C-1 & C-2). According to the compliance officer, there was no damage evident on the orange extension cord and the abrasions he observed on one of the yellow cables were apparently not on segments in this particular area (Tr. 48, 51, 139, 144, 278-79; Exhibits C-20, C-22, & C-23). Under these circumstances, the likelihood that an abrasion would occur, let alone that an exposed live conductor would energize a pipe or beam, creating the possibility of electric shock, was remote at best (Tr. 61-62, 68-69, 320-21).

Equally problematic is the Secretary's proof of exposure to the cited conditions. Although the compliance officer did not actually observe any Otis employees using the cords, the Secretary claims that exposure is established because the cords were "available for use". Proof of exposure hinges upon whether Otis's employees had "access" to this equipment, i.e. whether it was "reasonably predictable" that during the course of their normal work duties, the employees would come within the "zone of danger" resulting from the alleged violation. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1284, 1993 CCH OSHD ¶ 30,148 (No. 91-862, 1993).

Here, the compliance officer conceded that no one from Otis was present in the basement or on the fifth floor at the time he observed the cited conditions (Tr. 185-86, 196, 251-52, 263, 288, 369, 380). That an Otis employee was observed in the basement several days after the orange extension cord was abated using a hand tool powered by a *different* extension cord reveals little about the potential for exposure to the cited cord at the time the alleged violation existed (Tr. 70-83, 180-83, 197, 254; Exhibit C-6). Although the basement was apparently an area in which Otis's employees periodically worked at this time, Otis's foreman testified that it was not likely the employees would have needed to use any electrical cords given the type of work being done; indeed, the compliance officer confirmed that at the time he observed the cited condition, there were no tools or equipment in the area that could have been plugged into the "available" cord (Tr. 180, 373, 385).

Furthermore, according to Otis, all of the cars powered by the cited yellow cables had been taken "out of service" by the time the inspection took place; this procedure involved

moving each car to the top of its respective shaft, locking it into place with a "safety", and disconnecting the cords from the power outlet (Tr. 343-45, 353-56, 360-61, 380, 398-99, 400-03). Although the compliance officer maintains that he noticed cars positioned at the fifth floor level which he assumed would have to be moved at some point to the top of their shafts, the record clearly supports Otis's claim that all of the cars had been taken out of service and secured at the top of the building at this time (Tr. 104, 196-97, 290-91). The log kept by one of Otis's mechanics documenting his weekly safety checks of each car confirms that all of the cars had been taken out of service by April 13, 1992, more than a week before the inspection began (Tr. 343, 362, 400-02; Exhibit R-4).

Because the yellow cables had not yet been removed at the time of the inspection, the Secretary argues that they were "available for use" by Otis's employees (Tr. 326-31, 348-53, 403). Otis, however, has demonstrated that all of the work to be performed with the false cars had been completed by that time (Tr. 362, 369, 399, 403). Once taken out of service, the cars were never moved again and remained in place to serve as a work platform for employees working in that area (Tr. 348-49, 360, 362). After the permanent cars were constructed, each was raised up its respective shaft with a winch and the roof of the car, used as a floor for Otis employees to stand on while removing the cited cables and dismantling the false car, still locked in place above (Tr. 348-53, 361). The Secretary, therefore, has not shown that it was "reasonably predictable" that Otis's employees would have accessed either the orange extension cord or the yellow cables in their allegedly violative conditions during the course of their normal work duties at the time. *Dover Elevator, supra*, 16 BNA OSHC at 1284. Thus, taken as a whole, the evidence of record does not support the first and second alleged instances of violation cited under § 1926.405(g)(1)(iii).

The third instance of violation alleged under this standard involves the orange flexible cord that the compliance officer observed in the subbasement. Otis does not dispute that the cord was run through a hole in a concrete wall and that an Otis employee had used the cord to power the lights for an elevator car in which he was working (Tr. 125-27, 131, 216, 219, 289, 374, 386, 390-93; Exhibit C-16, C-17, & C-18). Because the cord was wedged through the hole alongside a metal conduit and the hole itself appears to have had an

uneven edge along one side, the potential for abrasion clearly existed, subjecting the Otis employee who set up the cable to an electrical shock hazard (Tr. 131-32, 289-90, 331, 374, 390-95).

Otis claims that there was no other way for the cord to be located given the fact that lights were needed inside the elevator car in order for the necessary work to be performed and the electrician onsite was unable to provide the proper voltage from any other source. But clearly some form of protection could have been placed around the hole, cushioning the cord from possible abrasion (Tr. 273). As such, a violation of § 1926.405(g)(1)(iii) has been established with regard to this cited instance. Because the compliance officer, however, never indicated the magnitude or effect of the electrical shock which might result from this condition and the duration of the potential hazard was only as long as it took the employee to set up the cable, the hazard cannot be presumed to be of a serious nature. Thus, the violation is affirmed as nonserious.

The second part of the grouped violation alleges that Otis hung the cited yellow cables with wire in violation of § 1926.416(e)(2) (Tr. 86-87, 94-97, 138-39; Exhibits C-9, C-19, C-20, & C-22). In contrast with the previously cited standard which broadly applies to flexible cords and cables, the prohibitions contained in this standard specifically apply to extension cords only ("Extension cords shall not be fastened with staples, hung from nails, or suspended by wire"). While the compliance officer alternately referred to the yellow cables throughout the hearing as extension cords/cables, flexible cords/cables, and "branch circuit extensions", it is not clear whether these cords can actually be considered "extension cords" for the purposes of the cited standard (Tr. 84-86, 100, 125, 138-41, 143-44, 249-51). As commonly defined, an "extension" cord is a section of cord or cable that "forms an additional length". *See Websters' Third New International Dictionary of the English Language* at 804-05 (Unabridged, 1971). Here, each yellow cable ran from an Otis outlet to the bottom of a false car in apparently one continuous piece; there is nothing in the record to suggest that the cables served to connect additional ones running between these two points. In fact, the compliance officer commented more than once at the hearing about the long lengths of cord used for this purpose (Tr. 103, 125).

Even if these cords were considered "extension cords" within the meaning of the standard, the same deficiencies discussed *supra* regarding employee exposure exist here. Since the false cars had been taken "out of service", Otis did not intend to energize these cords again. Where the Secretary has failed to establish that these conditions violated the standard or that Otis's employees were likely to use the cables in the course of their normal work duties at the time, a violation has not been shown. *Dover Elevator*, *supra*, at 1284.

Accordingly, the grouped violation is affirmed as a nonserious violation only with regard to the third instance under § 1926.405(g)(1)(iii) and a penalty of $200 is assessed.

ALLEGED VIOLATION OF § 1926.416(e)(1)

The third item of the serious citation alleges that Otis failed to take out of service a visibly damaged yellow cable in violation of § 1926.416(e)(1), which prohibits the use of worn or frayed electric cords or cables. Because the cord's outer insulation was cut, exposing the inner grounding conductor, the potential for electrical shock clearly existed (Tr. 143-46; Exhibits C-20, C-22, & C-23). But as discussed *supra*, when this condition was observed, the false cars powered by the cited cables were already locked in place at the top of their shafts and the cables had been disconnected, not to be used by Otis again. Thus, although the cable was, as the Secretary contends, "available for use" in this condition, it was not "reasonably predictable" that Otis's employees would have used it in the course of their normal work duties at the time. *Id.*

Furthermore, Otis's chief mechanic testified that when the false cars were being operated, he inspected all of the yellow cables on a daily basis (Tr. 343-45). Although these inspections ceased once the cars were taken out of service, he indicated that if these cables were to be reenergized for any reason, they would have been checked first for damage and immediately replaced if necessary (Tr. 343-44, 346, 370). Without proof of exposure, the alleged violation must fail.

ALLEGED VIOLATION OF § 1926.405(b)(2)

The first item of the nonserious citation alleges that an Otis employee plugged the orange flexible cord observed in the subbasement into a gang box which did not have a face

plate in violation of § 1926.405(b)(2), which requires that all pull boxes, junction boxes, fittings, and outlet boxes be provided with covers. The compliance officer testified that without a face plate, contact with the live parts of this receptacle was possible, subjecting the Otis employee who plugged the cord into the outlet to an electrical shock hazard (Tr. 146-47, 152-57; Exhibit C-16).

The employee testified that he noticed the outlet did not have a face plate over it, but did not feel it was hazardous for him to use (Tr. 404-05, 407-09). However, he essentially acknowledged that the live parts of this outlet were indeed accessible (Tr. 409). Although the condition was the primary responsibility of the electrician onsite, an Otis employee was exposed to a condition which he recognized had the potential to be hazardous (Tr. 206-14, 393, 405-07). As such, the uncovered receptacle should not have been used until a face plate was put on by either the electrician or the Otis employee himself (Tr. 209-14, 213, 406-07). Under these circumstances, a violation of § 1926.405(b)(2) has been established and the item is affirmed. The Secretary does not recommend that a penalty be assessed.

ALLEGED VIOLATION OF § 1926.416(b)(2)

The second item of the nonserious citation alleges that Otis violated § 1926.416(b)(2) when it failed to keep the area around its power outlet on the fifth floor clear of the yellow cables, creating a "tripping hazard" (Tr. 88, 157-58; Exhibit C-7). Under this standard, working spaces, walkways, and similar locations must be kept clear of cords "so as not to create a hazard to employees".

While such language may appear to lend itself to broad interpretation, the cited standard must be read in the context in which it appears. Section 1926.416(b)(2) is contained in Subpart K, the electrical subpart of the construction standards, and specifically falls under a subsection which sets forth the general requirements for working with energized equipment and live circuits. Where the fundamental purpose of these standards is to protect employees from contact with live electrical circuits and avoid electrical shock, the hazard which the cited standard seeks to prevent must be of an electrical nature (Tr. 88). An employer's failure to keep work areas which are frequently travelled by employees free of

obstacles is more appropriately addressed by a housekeeping standard, such as § 1926.55 and § 1910.22. Since § 1926.416(b)(2), by virtue of its inclusion in Subpart K, cannot apply to a condition which allegedly poses a tripping hazard, and because the electrical hazard issue as it relates to the cited standard was not pleaded or tried by the parties, this item cannot be sustained.

Based upon the foregoing findings and conclusions, it is

ORDERED that item 2a of citation number 1 alleging violation of § 1926.405(g)(1)(iii) is affirmed as a nonserious violation and only as it relates to the instance of running a cord through a hole in the wall; a penalty of $200 is assessed for the affirmed violation. The remaining two alleged instances of violating the same standard are vacated. It is further

ORDERED that item 2b of citation number 1 alleging serious violation of § 1926.416(e)(2) is vacated. It is further

ORDERED that item 3 of citation number 1 alleging serious violation of § 1926.416(e)(1) is vacated. It is further

ORDERED that item 1 of nonserious citation number 2 alleging violation of § 1926.405(b)(2) is affirmed. It is further

ORDERED that item 2 of nonserious citation number 2 alleging violation of § 1926.416(b)(2) is vacated.

RICHARD DeBENEDETTO
Judge, OSHRC

Dated: _____
Boston, Massachusetts