COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC #5145-14

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

AMERICAN FUJI SEAL, INC., — RESPONDENT

* * * * * * * * * *

David N. Shattuck, Frankfort, for the Secretary. Kyle D. Johnson, Louisville, for American Fuji Seal.

DECISION AND ORDER OF THIS REVIEW COMMISSION

This case comes to us on American Fuji Seal's (AFS) petition for discretionary review. We granted review and asked for briefs. 803 KAR 50:010, section 47 (3) (ROP 47 (3)).

Our hearing officer affirmed three citations issued to American Fuji Seal. The first serious citation alleged AFS failed to remove a damaged or defective chain link bridle (a bridle chain sling is used to lift, or position, heavy objects) from service. A second serious citation alleged AFS exposed its maintenance employees to an unguarded belt and pulley. A third, non serious citation alleged AFS should have covered an electrical junction box raceway. The bridle sling citation carried a

penalty of $3,250,[1] the belt and pulley citation a penalty of $6,300.[2] The non serious electrical citation had no penalty.

KRS 336.015 (1) charges the Secretary of Labor with the enforcement of the Kentucky occupational safety and health act, KRS chapter 338. When a compliance officer conducts an inspection of an employer and discovers violations, the commissioner of the department of workplace standards issues citations. KRS 338.141 (1). If the cited employer notifies the commissioner of his intent to challenge a citation, the Kentucky Occupational Safety and Health Review Commission "shall afford an opportunity for a hearing." KRS 338.141 (3).

The Kentucky General Assembly created the Review Commission and authorized it to "hear and rule on appeals from citations." KRS 338.071 (4). The first step in this process is a hearing on the merits. A party aggrieved by a hearing officer's recommended order may file a petition for discretionary review (PDR) with the Review Commission; the Review Commission may grant the PDR, deny the PDR or elect to call the case for review on its own motion. Section 47 (3), 803 KAR 50:010. When the Commission takes a case on review, it may make its own findings of fact and conclusions of law. In *Brennan, Secretary of Labor v OSHRC and Interstate*

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[1] A high serious, lesser probability penalty of $5,000. The CO said he adjusted the penalty for the company's size (number of employees) and good faith. The company had not had a prior, similar violation for three years. TE 26 – 28.

[2] 2a and 2b are grouped. A $7,000 unadjusted penalty: high serious and greater probability. The company got no credit for good faith or history. Apparently the company got a credit for size but the CO did not elaborate and was not asked to. But AFS has not complained about the penalties. TE 37 – 38.

Glass,[3] 487 F2d 438, 441 (CA8 1973), CCH OSHD 16,799, page 21,538, BNA 1 OSHC 1372, 1374, the eighth circuit said when the commission hears a case it does so "de novo." See also *Accu-Namics, Inc v OSHRC*, 515 F2d 828, 834 (CA5 1975), CCH OSHD 19,802, page 23,611, BNA 3 OSHC 1299, 1302, where the Court said "the Commission is the fact-finder, and the judge is an arm of the Commission..."[4]

Our supreme court in *Secretary, Labor Cabinet v Boston Gear, Inc*, Ky, 25 SW3d 130, 133 (2000), CCH OSHD 32,182, page 48,639, said "The review commission is the ultimate decision-maker in occupational safety and health cases...the Commission is not bound by the decision of the hearing officer." In *Terminix International, Inc v Secretary of Labor*, Ky App, 92 SW3d 743, 750 (2002), the Kentucky Court of Appeals said "The Commission, as the ultimate fact-finder involving disputes such as this, may believe certain evidence and disbelieve other evidence and accord more weight to one piece of evidence than another."

Introduction

American Fuji Seal, according to Edmund Becherer, American Fuji's human resources director, is a packaging company selling labels that are placed on bottles:

> Our primary product is something called a shrink sleeve label. You see it commonly on, say, a Nestle Nesquik bottle...or a Clorox spray trigger bottle. It is a label. We extrude our own film. We print onto that film. And then we convert that printed film into individual rolls that we seam together and it becomes a cylindrically-shaped label...The label then gets applied to the container at the customer's location...Typically heat is applied to that label, and it shrinks to the container.

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[3] In *Kentucky Labor Cabinet v Graham*, Ky, 43 SW3d 247, 253 (2001), the supreme court said because Kentucky's occupational safety and health law is patterned after the federal, it should be interpreted consistently with the federal act.

[4] See federal commission rule 92 (a), 29 CFR 2200.

Transcript of the evidence, page 75 (TE 75)

According to Mr. Becherer, AFS prints millions if not billions of labels a year. AFS employs 500 workers at its Bardstown facility. TE 76.

Serious item 1

For item 1, the inspecting compliance officer found a chain link sling on the shop floor. See photographic exhibit 2; this photograph shows three lengths of chain lying parallel to one another. At the end of each length of chain is a hook. The opposite end of each length of chain is fastened to an oval metal ring. The oval metal piece is designed to be attached to a lifting device - a crane or fork lift truck. The hooks on the other ends of the lengths of chain are attached to the object being lifted or the chain is wrapped around the object to be lifted and the hook is secured onto itself. Photographic exhibit 3 is a close up of the hooks. Two hooks have an eye welded onto the hook. On the third hook, we see a piece of metal where, perhaps, an eye once existed. TE 18.

For AFS, the issue was whether it failed to remove a sling with missing safety hook latches from service as the citation alleges.

Compliance Officer Timothy Kappel said the hook "had missing latches." TE 18. Then the CO said the cited standard "requires that any slings that are found to be defective, damaged, they're to be removed from service." TE 20. The CO said the missing latches are proof of damage requiring the employer to remove the sling from service.

The cited standard says:

> 1910.184 (d) *Inspections* Each day before being used, the sling and all fastenings and attachments shall be inspected for damage or defects by a competent person designated by the employer. Additional inspections shall be performed during sling use, where service conditions warrant. Damaged or defective slings shall be immediately removed from service.
>
> (emphasis added)

This standard contains two elements. First it says the employer shall inspect the sling each day before it is to be used. This requires proof the sling was to be used that day and because of that the employer was required to inspect it for damage. As we shall demonstrate, there is no proof the sling was used or was to be used on the day of the inspection. This first element is important because that is what the standard requires; the citation alleges a sling should have been inspected and removed from service on the day of the employer's inspection.

The second element states damaged or defective slings shall be immediately removed from service. But the standard does not explicitly say if the last element, the last sentence of the standard, is part and parcel of the "day of usage" element. From a close reading of the standard we are convinced the two elements are interrelated because the first sentence states "attachments shall be inspected for damage," connecting the first element to the second.

Here then is the citation:

> 29 CFR 1910.184 (d): Each day before being used, the sling and all fastenings and attachments were not inspected for damage or defects by a competent person designated by the employer. Additional inspections were not performed during sling use, where service conditions warrant. Damaged or defective slings were not immediately removed from service.

a. On 02/19/14, a three (3) leg bridle sling was observed near the 106 Pelletizer with missing safety hook latches and was not removed from service.

This citation alleges the sling should have been removed from service on February 19. But the cited standard is very specific: the sling must be inspected each day before being used which, as we have observed, requires proof the sling was to be used on that day, necessitating an inspection.

AFS makes several arguments. AFS points out that section 1910.184 (a) states a sling is used for the "movement of material by hoisting" but there was no proof this sling was used for hoisting.

Concrete Construction Co, CCH OSHD 30,328, BNA 16 OSHC 1642 (1994), is a construction case and so different standards are applied: 1926[5] rather than 1910.[6] Nevertheless, the construction standard for sling inspections reads exactly as the general industry standard for inspecting slings. Concrete Construction was using a sling to keep an I beam from bouncing while being hoisted. The issue was whether the sling with worn links was in use. The ALJ wrote:

> Even if it was not under tension at the time of the inspection, the chain must be said to be 'in service' within the meaning of the cited standard if it is in place to back up another support mechanism or to stop unwanted movement.[7]
>
> at 16 OSHC 1649

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[5] Construction.

[6] General industry.

[7] Both the general industry and construction standards state a sling hoists material. Here is the definition for a sling in the 1910 standard: "*Sling* is an assembly which connects the load to the material handling equipment." This ties the use of a sling with preventing unwanted movement but not necessarily lifting.

For both sling standards, general industry and construction, slings are used for hoisting. 1910.184 (a) and 1926.251 (a) (b). Nevertheless, *Concrete Construction* makes two points: one, a sling can be used as a support mechanism to stop unwanted movement during a hoist and still be in service. And, two, the sling must be in use for the inspection requirement to apply.

AFS is, according to *Concrete Construction*, incorrect when it argues a sling is only subject to regulation when it is used to hoist an object: a sling will be seen as in use if it is hoisting something or preventing unwanted movement. *Concrete Construction*. But the issue remains whether the sling was in use on the day of the inspection or on some other day, use that would require its inspection by AFS on that day.

AFS in its brief argues the sling was not in service on the date of the inspection February 19. The Cabinet called Steve Carothers, an AFS maintenance man, as a rebuttal witness. Mr. Carothers was asked if the sling was used on February 19; he said he had no idea. TE 187. The CO did not see it in use or prove it was going to be used that day; this means the Cabinet could not prove the sling was in use on February 19. TE 44. And so we find AFS had no duty to inspect the sling that day. Compliance Officer Kappel testified the sling had been used in October of the previous year, some four months before the inspection. TE 58. But here again the CO had not seen the sling in use in October. AFS makes a compelling argument: CO Kappel had no idea if the latches were on the sling or not in October of the previous year. TE 46. He could not know, he wasn't present at AFS in October. TE 68. We

find there is no proof the sling had no latches when it was used in October of the previous year.

Next, AFS argues the CO was incorrect when he took the position a sling without latches was defective because it previously had latches; CO Kappel could cite to no standard to support him. TE 46. We have found no case law on point. The cited standard does not mention latches or define defective.

In *Ormet Corporation*, CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135 (1991), the federal review commission said:

> In order to prove that an employer violated a standard, the Secretary must show that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew,[8] or with the exercise of reasonable diligence, could have known of the violative conditions.

Certainly the standard applies; it is found in the sling subpart of 1910. Employees had access to the cited condition; the CO found the sling lying on the shop floor. The sling was in plain sight, proving employer knowledge. The problem of course is the lack of proof the sling was going to be used on the day of the inspection, February 19, or for that matter had latches the previous October. No one knows whether, back in October, the latches were missing or present on the sling. TE 46.

We have found there is no proof the sling was used or was to be used on a day that would trigger the need of an inspection.[9] What presents instead is a sling

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[8] The comma should come after the word "or," not before it. Nevertheless this is how it is punctuated by OSHRC on line as well as CCH and BNA.

simply lying on the floor on the day of the inspection. The Cabinet also failed to prove employees were exposed to a hazard on February 19 or the previous October. *Ormet, supra*, elements two and three.

We dismiss serious item 1. The Secretary has failed to prove a violation of the sling standard because there is no proof the sling was to be used on February 19 or the previous October. TE 46. We have no proof of the condition of the sling in October. *Ormet, supra.*

Serious item 2

This citation is grouped because while a belt[10] and two pulleys are used together to perform a task, they have separate standards, both requiring guarding. A continuous belt runs around two pulleys. The belt transfers power from an engine, or another power source, at one end to a device needing power on the other end.

item 2a

Here is the citation for item 2a:

> 29 CFR 1910.219 (d) (1): Pulley(s) with part(s) seven feet or less from the floor or work platform were not guarded in accordance with the requirements specified in 29 CFR 1910.219 (m) and (o):
>
> a. On 02/19/14, the pulleys on the transfer blower from die cutting to regrind chopper/hopper were not guarded to prevent maintenance employees who work on the

[9] The Cabinet introduced an email from the CO to Roger Carter, AFS's facilities manager. TE 24. In that email Mr. Carter, responding to a question from the CO, referred to a damaged sling. Exhibit 5. Mr. Carter was examined about the sling but not about the email. Mr. Carter said latches were not necessary for the work at AFS. TE 125. He said the hooks were intact, meaning they were not damaged. TE 126. Mr. Carter was asked if he knew when the sling was last used; he said "I do not ma'am." TE 174. We find Mr. Carter's statement he did not know when the sling was last used, we infer prior to the date of the inspection, credible because Mr. Carter had discussed the sling on direct examination and cross examination and in response to questions put to him by the hearing officer, giving him time to reflect on his recollections. This exchange between Mr. Carter and his examiners reinforces our finding the Cabinet could not prove specific dates when the sling was used by AFS.

[10] A continuous belt which runs on the pulleys.

adjacent work platform from contacting the rotating belt and pulley assembly.

The cited standard for item 2a states:

> 1910.219 (d) **Pulleys – (1)** Guarding. Pulleys, any parts of which are seven (7) feet or less from the floor or working platform, shall be guarded in accordance with the standards specified in paragraphs (m) and (o)[11] of this section. Pulleys serving as balance wheels (eg, punch presses) on which the point of contact between belt and pulley is more than six feet six inches (6ft 6in) from the floor or platform maybe guarded with a disk covering the spokes.

The belt and pulley were unguarded; they were found on a platform some 20 feet above the shop floor. TE 28, 47 and 184. Compliance Officer Kappel testified this unguarded belt and pulley arrangement was "within seven feet of a work platform."[12] TE 30. This belt and pulley were in plain sight of the CO while he was walking on the shop floor; the compliance officer took a photograph from the floor, where he first observed it. TE 31, TE 32 and photographic exhibit 6. The CO said the hazard is the two surfaces, the belt and the face of a pulley, coming together to form a nip point. TE 29 and 30.

While we are here discussing serious item 2a, our analysis touches on both citations: the pulley citation, 2a, and the belt citation, 2b.

Employees on the ground level of the plant have no access to the belt and pulley and so serious item 2 does not apply to them. Only maintenance workers climb the

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[11] 1910.219 (m) requires the guard to be of expanded metal, solid sheet metal, wire mesh or pipe.
[12] AFS relies on *Conagra Flour Milling Co*, BNA 16 OSHC 1137, 1150 (1993),a federal ALJ recommended order, in support of its argument the pulleys must be located over a floor or platform and not adjacent to the platform. AFS's reliance is misplaced. First of all, the word "over" does not appear in the cited standard. Second, in *Conagra* the ALJ cited with approval to another case where employees "walked past the machine 'directly adjacent' to the nip points." At 16 OSHC 1150. (emphasis added) The AFS platform was 20 feet from the floor below but the belt and pulleys were less than seven feet from the platform where maintenance men regularly worked. TE 30.

20 feet to the platform where the belt and pulleys are found. Maintenance employees go up to the platform to work on several machines including the belt and pulleys and a blower motor.[13] An early federal case said a mechanical transmission apparatus standard, a belt and pulley arrangement is a power transmission apparatus, does not apply to maintenance men working on the apparatus.

In *Grayson Lumber Company, Inc*, CCH OSHD 16,171, page 21,152, BNA 1 OSHC 1234, 1235 (1973), the federal commission, two members sitting, dismissed a citation for not guarding a "mechanical transmission apparatus," an alleged violation of 1910.219, because the only employees affected by the violation were maintenance workers performing maintenance duties on the machine.

Grayson raises the issues of employee access to a mechanical device and the purpose of the work. If the standard does not apply to maintenance men performing maintenance on a machine, then the department, to prove a violation, would have to demonstrate the exposed workers were not maintenance men or that the maintenance men had access[14] to the unguarded apparatus but were not necessarily performing work on the unguarded apparatus.

Compliance Officer Kappel said AFS maintenance workers accessed the platform regularly to perform maintenance: troubleshoot and unstop the blower powered by the belt and pulleys. TE 36. We find performing work on the transfer blower is not work on the belt and pulley even though the blower is powered by the belt and pulley. This proves maintenance workers were exposed to the hazard presented by

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[13] Transfer blower. TE 142 and 144 and the citation, exhibit1.
[14] Near enough to be hurt by the unguarded belt and pulley.

the unguarded belt and pulley when working on the blower, a task they regularly performed. TE 126 – 127.

When asked about maintenance employee access to the cited condition, the unguarded belt and pulley, the Cabinet's compliance officer gave this testimony in response to questioning by the hearing officer:

> A. It's the one with the yellow guardrails and the see-through catwalk. That's the maintenance platform. I'm taking a picture up underneath it.[15]
> Q. Where are you going to be standing if you're going to get your hands on this?
> A. Well, anywhere on this platform, the standard says that any of these within seven feet of a platform such as this, they have to be guarded.
> Q. And so they'd be standing within that yellow cage sort of thing?
> A. Yes, ma'am.
> Q. So if they're going to get their hands on this, they're standing inside that cage reaching out to get their hands on the pulley?
> A. Reaching out or slipping, trying to catch their fall, missing the guardrail and going right through.
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> TE 62 – 63

We find this testimony from the compliance officer proves AFS maintenance workers had access to the unguarded belt and pulley.

The belt and pulley standards apply to maintenance employees who were on the platform performing work on the blower. AFS had knowledge of the hazard because the unguarded belt and pulleys were in plain sight from the shop floor. No one disputes the belt and pulleys were unguarded,[16] proving a violation of the pulley standard. *Ormet, supra.*

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[15] Here the CO is discussing photographic exhibit 6.
[16] The belt and pulley cover was reinstalled after the inspection. TE 133.

item 2b

Here is the cited standard:

> 1910.219 (e) (2) *Overhead horizontal belts. (i)* Overhead horizontal belts, with lower parts seven (7) feet or less from the floor or platform, shall be guarded on sides and bottoms in accordance with paragraph (o) (3)[17] of this section.
>
> (emphasis added)

For item 2b the citation states:

> 29 CFR 1910.219 (e) (2) (i): Overhead horizontal belt(s) with lower parts seven – 7 feet or less from the floor(s) or platform(s) were not guarded on the sides and bottom in accordance with the requirements specified at CFR 1910.219 (o) (3):
>
> a. On 2/19/14, the belts on the transfer blower from die cutting to regrind chopper/hopper were not guarded to prevent maintenance employees who work on the adjacent work platform from contacting the rotating belt and pulley assembly.
>
> (emphasis added)

The ALJ in *Concrete Construction, supra*, dismissed a citation alleging a failure to guard rotating parts. Employees were using "a concrete smoothing machine with areas of its belt and pulley drive unguarded." In his recommended order ALJ Schoenfeld stated the pulley was "encased in a cage-like structure." At 16 OSHC 1649. The ALJ also observed when employees stopped and started the concrete smoother (think of a floor buffer smoothing concrete), they stood on the opposite side of the machine from the pulley – indicating a lack of employee exposure to the hazard.

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[17] 1910.219 (o) (3). Guards shall enclose the length of the belt. Where this is impracticable, the guard shall enclose the runs of the belt and the face of the pulley.

But in our AFS case, the maintenance employees worked on machinery found on the same platform as the unguarded belt and pulley. TE 36.

Oberdorfer Industries, Inc, CCH OSHD 32,697, page 51,644 - 51,645, BNA 20 OSHC 1321, 1330 (2003), is about an unguarded mechanical apparatus. Here the federal review commission upheld a citation alleging the employer failed to guard a revolving shaft on a universal horizontal boring machine. First the two member commission determined the standard imposes a mandatory requirement for guarding the shaft because it was seven feet or less from the floor. Next, the Secretary had to prove employee access to the unguarded shaft. To operate the boring machine an employee must stand some 11 inches in front of the shaft as it rotates. Because the rotating shaft had a smooth surface, the commission reduced the serious citation to non serious. In *Oberdorfer*, federal OSHA's compliance officer proved maintenance employee access to the cited condition, the unguarded, rotating shaft.

For AFS's belt and pulley violation, the device was some 20[18] feet in the air on a platform accessed only by maintenance workers. So there is no proof of general employee access to the unguarded belt and pulley. At the time of the inspection, no one was working on the platform. To sustain a violation of the cited hazard, the Cabinet would have to prove access to the belt and pulley while working on another adjacent machine. We find the Cabinet proved the maintenance employees worked

[18] While the platform was 20 feet above the shop floor, maintenance employers had access to the platform where they could perform work on the belt and pulley, or the blower or some other device. So the standard's requirement that the platform is seven feet or less from the belt and pulley is satisfied.

on the blower motor while they had access to the hazard presented by the unguarded belt and pulley. CO Kappel testified[19] he interviewed maintenance employees who reported they regularly accessed the platform where the unguarded belt and pulley were located. TE 36.

AFS argues maintenance employees could lock out the belt and pulley when performing maintenance on the platform where the belt and pulley were located. We find this is not so; Steve Carothers, a maintenance worker, testified he had to obtain the services of another employee whose job it was to stand by the blower switch on the shop floor so no one could accidently restore electric power to the blower. TE 182. In other words there was no way to lock out the power to the blower motor. Even though AFS was not cited for a lock out/tag out violation, the company attempted to defend the belt and pulley violation by alleging the motor could be disconnected. While there was an electrical switch controlling power to the blower motor on the shop floor, and another adjacent to the platform 20 feet above the shop floor, there was no way for a maintenance employee to lock out the power, put the padlock key in his pocket and place the electric current in his control.

Nevertheless, maintenance employees did use the disconnect switch at the platform to turn power off to the blower motor. TE 133 – 134. But this reliance on the platform disconnect switch proves employee access to the hazard presented by the unguarded belt and pulley. Roger Lee Carter, facilities manager for AFS, testified for the company. TE 110. When asked by our hearing officer how a

[19] AFS counsel objected but did not pursue a ruling.

maintenance employee could gain access to the unguarded belt and pulley, this is what he said:

> A. Well, you would walk – this catwalk continues. There's a step up to get to this area. You would be on the catwalk. To get to the belt and pulley assembly, you would walk on this level, on this same level, and you would go over to the belt and pulley system. Then you have accessibility to get to the disconnect.
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> TE 135

Mr. Carter illustrates a critical point. A maintenance man working on the blower motor would need to turn it off. To get to the disconnect located at platform level, he would be exposed to the hazard of the unguarded belt and pulley. TE 135 and *Grayson Lumber*, *supra*.

AFS argues the cited belt standard does not apply because it is directed to overhead belts which "shall be guarded on sides and bottom..." 1910.291 (e) (2) (i). While we agree with this reasoning, we must still affirm serious item 2a, with its penalty of $6,300 because a hazard is presented when a belt runs into an unguarded pulley. Pulley violations may be cited and affirmed even though a belt violation is not proven or even alleged. *Liberty Shrinkers Corporation*, CCH OSHD 22,773, BNA 6 OSHC 1779, 1780 (1978), a federal administrative law judge recommended order.

We affirm serious item 2a and the penalty of $6,300.[20] The cited standard applies, directed as it is to the hazards presented by belts when they come into contact with an unguarded pulley and create a pinch point. TE 29 – 30.

[20] We dismiss serious item 2b but not the $6,300 penalty.

Maintenance workers regularly access the platform where the unguarded belt and pulleys are found. TE 36. The unguarded belt and pulleys are in plain sight, proving constructive knowledge of the cited hazards. *Kokosing Construction Co, Inc*, CCH OSHD 31,207, BNA 17 OSHC 1869 (1996). The inspecting CO spotted the belt and pulleys while walking underneath them. See exhibit 6. The question about a violation of the standards comes in two parts: one, the belt and pulleys were unguarded, a violation. Two, did the Cabinet prove the maintenance men perform work on the platform where the unguarded belt and pulleys were located, work that did not involve the belt and pulleys but did place the workers in close proximity to the unguarded belt and pulleys? Maintenance employees worked on the blower while adjacent to the unguarded belt and pulley. TE 36 and TE 135. *Ormet, supra.*

Citation 2,
item 1

This citation was written for an apparent violation of the general industry electrical standard. The citation states:

> 29 CFR 1910.305 (b) (2) (i): All pull boxes, junction boxes, and fittings were not provided with covers identified for the purpose.
>
> a. On 2/19/14, an electrical junction box raceway was observed to be missing a cover, exposing the inner electrical wiring.
>
> (emphasis added)

Here is the cited standard:

> **1910.305 (b) (2)** Covers and canopies. **(i)** All pull boxes, junction boxes, and fittings shall be provided with covers identified for the purpose. If metal covers are used, they shall be grounded. In completed instillations, each outlet box shall have a cover, faceplate, or fixture canopy. Covers of outlet boxes having holes through

> which flexible cord pendants pass shall be provided with bushings designed for the purpose or shall have smooth, well-rounded surfaces on which the cords may bear.
>
> (emphasis added)

Photographic exhibits 8 and 9 show the uncovered raceway and wires; the cited standard requires the raceway to be covered, and grounded if it is metal. Our problem with this citation is the lack of proof of a violation of an electrical standard. *Ormet, supra*. During his inspection the compliance officer used a device to determine if the wiring was carrying electricity; it was. See photographic exhibit 9. But the tester did not read the voltage. TE 40.[21] This is important because a standard found in 1910.303 says guarding of live electrical parts, boxes are designed to contain live electrical parts, must be performed if the electrical equipment is operating at 50 volts or more.

In *Trinity Industries, Inc*,[22] a federal administrative law judge decision, CCH OSHD 29,043,[23] 1990 WL 483733, reversed on other grounds, BNA 15 OSHC 1579 (1992), the judge dismissed a citation alleging the employer had failed to cover an electrical box containing energized wire. In *Trinity* the CO did not discover what voltage the wires carried. Trinity had defended by citing 1910.303 (g) (2) (i) which states:

> (2) Guarding of live parts. (i) Except as required or permitted elsewhere in this subpart, live parts of electric equipment operating at 50 volts

[21] The CO says the wires were insulated and the wires were connected with plastic wire nuts so there were no exposed wires or connectors. TE 40.

[22] The administrative law judge's order may be found by going to oshrc.gov and selecting final commission decisions. Select the year 1992 and click on the entry: *Trinity Industries, Inc*, 88-1545 and 88-1547, dated 4/21/92. The ALJ order can be found at the conclusion of the commission decision.

[23] The CCH summary of the ALJ's decision omitted any discussion of the electrical citation.

> or more shall be guarded against accidental contact by approved cabinets or other forms of approved enclosures, or by any of the following means:

In his decision the ALJ said "It seems clear that Subpart S concerns itself with offering protection against 50 volts or more. The applicable 'general requirements' set forth and section 1910.303 must be established prior to establishing specific requirements of other provisions of Subpart S. Since the evidence fails to establish the voltage of the wires, the Secretary is missing an important element of her proof. The alleged violation is vacated."[24]

The cited electrical standard directs employers to use boxes, covers and other fittings to protect employees. Section (1910.305 (b) where the cited standard is found is generally directed toward the use of cabinets and boxes. But 1910.303 (g) (2) (i) states the guarding of electrical parts is required only for those live parts carrying at least 50 volts. *Trinity Industries.*

In the case before us the Cabinet's compliance officer determined the wires carried voltage. But he failed to determine the voltage and so we must dismiss this non serious electrical citation issued to AFS. *Trinity Industries.*

To prove the cited standard applies, the Cabinet would have to show the wires to be protected were operating at least 50 volts. We infer the 50 volt requirement found in 1910.303 (g) (2) (i) proves a hazard: wiring at 50 volts or more is presumed to be a hazard.

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[24] WL 483733, star page number 27. See also docket 88 – 1547, item 13 for the ALJ decision on OSHRC.

In *Cagle's Inc*, a federal ALJ recommended order, CCH OSHD 31,947, pages 47,442 – 47,443 (1999), Cagle's received a citation for failing to cover a 220 volt box for a pump. Cagle's was cited for a violation of 1910.303 (g) (2) (i), the standard which requires guarding of electrical equipment operating at 50 volts or more. In his recommended order the federal ALJ said the box was "plainly observable within the room," proving constructive knowledge of the hazard even though the box was not near a walkway.

Cagle's presents a situation where an electrical box should have been covered and the proof was the wiring within the box carried 220 volts; we do not have such proof before us.

We find reinforcement of the necessity for the Cabinet first to prove the wiring carried at least 50 volts in *Oberdorfer Industries, Inc*, CCH OSHD 31,626, pages 45-575 (1998), where the federal administrative law judge found, based on testimony by the inspecting compliance officers, the standard applied because "Respondent's operations were 120-volt, 220-volt and 460 (average) systems...Thus, the voltage of exposed wire exceeded 50 volts." In addition to proving the voltage exceeded 50 volts, the compliance officer in *Oberdorfer* determined the wires at the time of the inspection were live, using an AC sensor. At CCH pages 45,576 - 45577.

The standard applies to the cited condition because it is found in the electrical safety subpart of 1910 and is an alleged electrical violation. Subpart S. Photograph exhibit 9 shows a junction box with a missing cover. Because the Cabinet has failed to prove the box carried at least 50 volts, we dismiss the

nonserious electrical citation. Employee access to the cited condition is shown because the compliance officer testified the box was located in an area with employee foot traffic. TE 40. Compliance Officer Kappel testified the box presented a fire hazard because dust could build up in the uncovered box; this is after all a non serious citation with no penalty. TE 39. The Cabinet proved employer knowledge because the alleged violation was in an area where employees walking past it had access to the unguarded condition. *Ormet, Trinity, supra.*

The Cabinet did not prove, did not attempt to prove, the wires carried more than 50 volts. *Oberdorfer Industries* and *Trinity, supra.* We dismiss nonserious citation 2, item 1 because the Cabinet failed to prove the subject wires carried at least 50 volts; this is a failure to prove the standard applies. *Ormet, Trinity, supra.*

It is so ordered.

February 2, 2016.

Faye S. Liebermann
Chair

Paul Cecil Green
Commissioner

Joe F. Childers
Commissioner

Certificate of Service

I certify a copy of this decision was served on the following in the manner indicated on February 2, 2016:

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