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1990 WL 118164 (O.S.H.R.C.)

OCCUPATIONAL SAFETY HEALTH REVIEW COMMISSION

*1 SECRETARY OF LABOR, COMPLAINANT

v.

MAUTZ & OREN, INC., RESPONDENT

OSHC DOCKET NO. 89-1366

June 4, 1990

DIRECTION FOR REVIEW

Mautz & Oren, Inc. (hereinafter "Respondent") filed a Petition for Discretionary Review in the above-cited action with the Occupational Safety and Health Review Commission (hereinafter "Commission") on May 21, 1990. Respondent alleges it has been aggrieved by the Decision and Order of Administrative Law Judge Edwin G. Salyers dated April 25, 1990 and filed with the Commission on May 3, 1990. Based on a preliminary examination of the official record, transcript, as well as the Decision and Order of Judge Salyers and pursuant to [29 U.S.C. § 661\(j\)](#) and the Occupational Safety and Health Review Commission's Rule 92(a), [29 C.F.R. § 2200.92\(a\)](#), the aforementioned Decision and Order is directed for review. The issues to be considered by the Commission are as follows:

1. Did the Administrative Law Judge err in affirming the alleged repeated violation of [29 C.F.R. § 1926.404\(b\)\(1\)\(i\)](#)?

2. Did the Administrative Law Judge err in concluding that the cited standard applied to the cited conditions? In particular, did the Judge properly conclude that the use of an extension cord plugged into the permanent wiring of the building created conditions that required the Respondent to either provide "ground fault circuit interruptors"(sic,be,d070796) (GFCIs) or establish and implement an "assured equipment grounding conductor program" (AEGC program)?

3. Should the alleged violation be vacated on the ground that the Secretary failed to prove that the extension cords in question were plugged into "120-volt, single-phase, 15- and 20-ampere receptacle outlets"?

4. Should the alleged violation be vacated, or the violation classified as de minimis, on the ground that the Respondent substantially complied with the requirement that it establish and implement an AEGC program?

5. Assuming that the Respondent violated the cited standard, was the Administrative Law Judge correct in classifying this violation as repeated? In particular, did the Judge properly conclude that the present violation and the prior violation of the cited standard were "substantially similar"?

6. Did the OSHA Area Director comply with the provisions of the Field Operations Manual governing the handling of referrals from other government agencies when he decided to conduct an inspection of the Respondent's workplace rather than informing the Respondent by

letter that a “nonformal complaint” had been received? If not, should the citation be vacated on the ground that the Secretary failed to comply with her own stated enforcement procedures?

The Commission's briefing order to follow may designate additional issues.

EDWIN G. FOULKE, JR.
CHAIRMAN
June 4, 1990

May 17, 1990

Executive Secretary

Occupational Safety and Health Review Commission

1825 K Street, N.W., Room 401

Washington, D.C. 20006-1246

Re: Secretary of Labor v. Mautz & Oren

Dear Sir or Madam:

Enclosed for filing are the original and three copies of Respondent's Petition for Review in the above-captioned case.

Very truly yours,
Andrew J. Martone

RESPONDENT'S PETITION FOR DISCRETIONARY REVIEW

*2 Comes now respondent, Mautz & Oren, Inc. (“Mautz & Oren”), and pursuant to Section 2200.9 of the Rules of Procedure of the Occupational Safety and Health Review Commission, petitions for discretionary review of the Administrative Law Judge's decision in the above-captioned case.

In support of its petition, Mautz & Oren states as follows:

1. It was admitted at the hearing that OSHA failed to follow the procedures set forth in the Field Operations Manual when it performed the inspection and issued the citation in this case. The Secretary unequivocally violated the procedures set forth in Chapter IX.B.3.c, A.8.a & b of the Field Operations Manual, which required OSHA to notify Mautz and Oren by letter that it had received a non-employee referral and give Mautz & Oren an opportunity to correct the alleged violation of its own volition before being subject to inspection. The ALJ refused to vacate the citation on this basis, finding that violating the procedures established in Field Operations Manual was “entirely within [the Area Director's] discretion.” The ALJ cited [FMC Corp., 5 BNAOSHC 1707 \(OSHRC 1977\)](#) in support of his conclusion that the guidelines contained in the Field Operations Manual do not accord procedural rights to individuals.

In FMC Corp., the Review Commission was faced with deciding to what extent the notes to the Field Operations Manual would control the characterization of violations as “willful” or “repeated.” Id. at 1709. This technical question did not affect the procedural rights of the respondent in that case. In the instant case, Mautz & Oren was clearly prejudiced by the Area Director's failure to follow the procedures outlined in the Field Operations Manual; if those procedures had been followed, the citation would not have issued. Transcript at 182. Rather than providing guidelines for internal calculations and determinations as was the case in FMC Corp., the provisions of the Field Operations Manual involved in this case establish the procedures by which OSHA deals with the public. Pursuant to Chapter XI, Sections A.8.a and B.3.c, before an inspection is ordered on the basis of a referral, OSHA is required to notify the employer in writing that a referral has been received in order to afford the employer an opportunity to correct any alleged violations without being subject to inspection and citation. In this case Mautz & Oren was not notified of the referral which prompted the inspection and was not afforded the opportunity to correct the alleged violation of its own volition.

In Morton v. Ruiz, 415 U.S. 199, 235 (1974), the Supreme Court held that government agencies are bound to follow their own rules when dealing with the public, stating:

Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are even more rigorous than otherwise would be required.*³ See also, NLRB v. Unifemme, 570 F.2d 230 (8th Cir.1978) (NLRB should have followed the procedures established in its Field Operations Manual, enforcement of board order denied). In our case, the Secretary's failure to follow its own procedures clearly affected the rights of Mautz & Oren to correct the alleged violation. Consequently, OSHA's failure to follow its own procedures warrants overruling the ALJ's decision and vacating the citation.

2. The ALJ's third conclusion of law, that “[t]he evidence in this case confirms that respondent did not follow the provisions of 29 C.F.R. § 1926.404(b)(1)(ii)” is not supported by the record. The cited standard, 29 C.F.R. § 1926.404(b)(1)(ii) provides:

Ground Fault Circuit Interrupters. All 120 volt, single phase, 15 and 20 ampere receptacle outlets on construction sites, which are not part of the permanent wiring of the building or structure and which are in use by employees, shall have approved Ground Fault Circuit Interrupters for personal protection....Clearly, Section 1926.404(b)(1)(ii) only applies to 120 volt electrical systems with 15 and 20 ampere receptacle outlets. At the hearing, the Secretary did not produce any evidence whatsoever to prove that the electrical system on the job site was a 120-volt system of the specified amperages. The Secretary's failure to prove the specifications of the electrical system in question is a failure to establish a necessary element of the alleged violation which mandates vacating the Citation. Herman Crallman & Sons, Inc., 9 BNAOSHC 1991 (OSHRC 1981). The ALJ's conclusion that Mautz & Oren violated Section 1926.404(b)(1)(ii) is not supported by the record.

3. The Administrative Law Judge also found in his third Conclusion of Law that, as an alternate grounds for affirming the Citation, Mautz & Oren did not comply with the provisions of 29 C.F.R. § 1926.404(b)(1)(iii), which mandates the establishment and implementation of an Assured Equipment Grounding Conductor (AEGC) program. Although at hearing Mautz & Oren proved that it substantially complied with AEGC program requirements,^{FN[FN1]} the ALJ concluded that Mautz & Oren's failure to keep records of the tests performed on extension cords amounted to a violation of the cited standard.

While Mautz & Oren's failure to maintain written records of tests performed on electrical cord sets on the job site may have been a technical violation of [29 C.F.R. 1926.404\(b\)\(1\)\(iii\)](#), it hardly warranted the issuance of the citation and the penalty assessed. Mautz & Oren complied with the substantive requirements of the AEGC standard and its alleged failure to comply with the record-keeping requirements of the standard constitutes at most a de minimis violation. Mautz & Oren's compliance with the substantive aspects of [Section 1926.404\(b\)\(1\)\(iii\)](#) protected its employees as the standard was intended to do; the keeping of the written records would not have substantially reduced the alleged risk of electric shock. Consequently, Mautz & Oren's failure to keep written records of its cord testing was at most a de minimis violation of [§ 1926.404\(b\)\(1\)\(iii\)](#). See [Secretary of Labor v. Daniel Construction, 13 BNAOSHC 1128 \(OSHRC 1986\)](#).

*4 4. The characterization of Mautz & Oren's alleged violation of the AEGC standard as a "repeat" violation is therefore incorrect. The ALJ based this characterization on a prior, untested citation which included a violation of [29 C.F.R. § 1926.404\(b\)\(1\)\(i\)](#). This violation specifically involved the absence of a circuit interrupter on a piece of equipment controlled by respondent and in no way involved alleged violations of the AEGC standard [§ 1926.404\(b\)\(1\)\(iii\)](#). Transcript at 98, 142. Mautz & Oren's failure to keep records of its cord testing was at most a de minimis violation of [Section 1926.404\(b\)\(1\)\(iii\)](#), not a repeat violation of [Section 1926.404\(b\)\(1\)\(i\)](#). The citation's characterization of the alleged violation in this case as a repeat violation was therefore incorrect.

5. The penalty assessed against Mautz & Oren was also incorrectly calculated. Mautz & Oren's failure to keep written records of its cord testing was not a repeat violation and the penalty was in part based on the Secretary's characterization of the alleged violation as a repeat violation. In addition, when the severity of potential injury was taken into account for the purpose of calculating the proposed penalty, alleged noncompliance with the standard was considered to have potentially fatal consequences. Transcript at 102, 104. The Secretary offered no evidence at hearing that Mautz & Oren's failure to keep written records of its cord testing could lead to a fatality, especially in view of the fact that Mautz & Oren complied with the substantive provisions of the AEGC standard.^{FN[FN2]} The penalty was incorrectly calculated.

6. Finally, the ALJ's decision failed to address Mautz & Oren's contention that it was not responsible for the electrical system on the job site because it relied on an independent contractor for the purposes of complying with applicable OSHA standards. The uncontradicted evidence at hearing showed that Mautz & Oren relied on John Luthe, an electrician employee of the independent contractor in charge of all electrical work on the job site, to make all electrical decisions on the job site, including compliance with applicable OSHA standards. Tr. at 157-158, 165-166. It was also clearly demonstrated at the hearing that Mautz & Oren did not control or supervise Luthe in the performance of the electrical work on the job site. Tr. at 171, 172. Because the independent contractor specifically advised Mautz & Oren that neither ground fault circuit interrupters nor an AEGC program was required for the electrical system on the job site, Mautz & Oren's reasonable reliance upon that advice should not subject it to liability for the alleged violation. See [Secretary of Labor v. Cuthers Corp. d/b/a Woodland Construction, 13 BNAOSHC 1906 \(OSHRC 1989\)](#).

Conclusion

For all the above reasons, respondent requests that the Review Commission review the de-

cision of the Administrative Law Judge in this case.

Respectfully submitted,

***5 HUSCH, EPPENBERGER, DONOHUE, CORNFELD & JENKINS**

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FN1 Wilbur Tewle, Mautz & Oren's job superintendent, testified at the hearing that he regularly visually inspected the extension cords, tested them with a continuity checker and removed defective and suspect cords from service. Tr. at 150, 165-66. Given that the purpose of the AEGC program requirement is to assure that extension cords are periodically inspected for defects (Tr. at 188), Mautz & Oren substantially complied with the AEGC requirements.

FN2 At the hearing, the Secretary admitted that no risk of fatality actually existed with respect to the alleged violations. Tr. at 99-100.

DISCLOSURE OF CORPORATE STATUS

Comes now respondent, Mautz & Oren, Inc., and pursuant to [29 C.F.R. § 2200.91\(h\)](#) states that it has no parent, subsidiary or affiliated corporations.

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