

**BEFORE THE SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA**

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 2002-4139
OSHA INSPECTION NO. 305405698
CSHO ID NO. W5054

v.

BRITTHAVEN, INC.

ORDER

RESPONDENT.

APPEARANCES:

Complainant:

Ralf F. Haskell
Special Deputy Attorney General
North Carolina Department of Justice

Respondent:

Eric Lindburg
D S Swain Gas Company Inc.[sic-Britthaven, Inc.]

BEFORE:

Hearing Examiner: Carroll D. Tuttle

THIS CAUSE came on for hearing and was heard before the undersigned Carroll D. Tuttle, Administrative Law Judge for the Safety and Health Review Board of North Carolina, on May 22, 2003, at the Old YWCA Building, Room 124-1st Floor, 217 West Jones Street, in Raleigh, North Carolina.

The Complainant was present and represented by Mr. Ralf F. Haskell, Special Deputy Attorney General, North Carolina Department of Justice. The Respondent was present and represented by Attorney Eric Lindburg.

Based upon the evidence presented at the hearing and with due consideration of the arguments and contentions of all parties, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly.

FINDINGS OF FACT

1. This case was initiated by a Notice of Contest which followed a citation issued to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act) (N.C.G.S. § 95-126 *et seq.*).
2. Complainant, the North Carolina Department of Labor, by and through its Commissioner, is an agency of the State of North Carolina charged with inspection for, compliance with, and enforcement of the provisions of the Act (N.C.G.S. § 95-133).
3. Respondent, a North Carolina Corporation with its principal office located in Nags Head, North Carolina, is subject to the provisions of the Act (N.C.G.S. § 95-128) and is an employer within the meaning of N.C.G.S. § 95-127(9).
4. The undersigned has jurisdiction over the case (N.C.G.S. § 95-135).
5. On April 10, 2002, S B White, a Compliance Safety Officer (CSO) with the North Carolina Department of Labor, began an Occupational Safety and Health (OSH) inspection of Respondent's facility located at 430 West Health Center Drive, Nags Head, North Carolina. The inspection was a computer generated general scheduled inspection.
6. Respondent's facility is a 47,500 square feet brick building located on a fourteen acre tract of land. The area inspected was the maintenance area which is separated from the main portion of the building.
7. On April 25, 2002, as a result of the inspection, Complainant issued to Respondent one citation. Citation Number One, Item 1, alleges a serious violation of 29 CFR §1910.304(f)(4) with a proposed penalty of \$1,250.00. Citation Number One, Item 2 alleges a serious violation of 29 CFR 1910.305(a)(2)(iii)(G). Citation Number One, Item 3, alleges a serious violation of 29 CFR 1910.305(b)(1).
8. Respondent timely filed its Notice of Contest. This Board has jurisdiction over the subject matter and the parties to the action.
9. At this location, Respondent operates a 144 bed long term care facility.
10. Upon arriving at Respondent's facility, CSO White conducted an opening conference with Mr. Norman Davis, Jr., the Administrator of the facility. At the opening conference, CSO White presented his credentials, explained to him his purpose for his being there, explained the scope of the inspection to be conducted and obtained consent to conduct the inspection. CSO White conducted a walk around inspection of the facility including the maintenance area. During the course of the inspection, CSO White took notes, interviewed one employee and took photographs; all of which were included in the official report, which was used during the hearing.
11. After the inspection, CSO White conducted a closing conference on April 10, 2002, with Richard Gibson, during which the proposed violations were reviewed.
12. During the course of the inspection, CSO White observed a 50 feet long extension cord in the generator room which was plugged into a 110 volt outlet in the maintenance room. The extension cord had the ground pin missing from the male end of the cord. This condition is shown in Complainant's Exhibit No.1. This condition presented the possibility of an accident in that an employee using a tool plugged into the extension cord to provide electrical power could become a path to ground resulting in electrical shock. The electrical cord was available for use by employees who used the tools located in the maintenance area. Some tools were double insulated and some were not. Tools that were not double insulated using the extension cord with the missing ground plug could allow the housing of the tool to become energized and create a path to ground through the employee. The electrical cord was there to see although it was plugged into a wall socket.
13. This condition is classified "serious" because of the hazard of electrical shock. The penalty was calculated pursuant to the N.C. Field Operations Manual. The condition was assigned a "high" severity rating and a "lesser" probability rating resulting in a gravity based penalty of \$2,500.00. After applying adjustments for good faith of 40% and history of 10%, the proposed adjusted penalty is \$1,250.00.
14. CSO White determined and the Court finds that Respondent had a good safety program.
15. CSO White also observed that the 50 feet extension cord running through an opening in the wall through metal slates as is shown in Complainant's Exhibit #1, bottom photograph. The metal slates do not move; however, CSO White testified that the cord could become abraded through the metal slates. Respondent offered evidence that the outlet plug the cord was plugged into was a ground fault circuit interrupter outlet and would cut off if a ground occurred. However, the evidence from Respondent was based upon observations two days after the inspection and Officer White testified that the outlet he observed was not GFCI at the time of the inspection. Officer White did not have photographic evidence showing the outlet he testified about. Respondent further offered evidence that the room contained only the one outlet and that outlet was a GFCI outlet. The evidence from Respondent and from Complainant on this issue was very close and from credible witnesses. The Court cannot determine this issue because of conflicting testimony from credible witnesses and therefore, the Court finds that Complainant has not carried its burden of proof on this particular issue. The Court must take the position that the outlet was a GFCI type outlet and that any abrasion of the cord would cause the circuit to cut off. Although still a technical violation of the regulation, the lack of potential injury would cause the violation to be non-serious.
16. CSO White also observed a 1 inch by 3 inch opening electrical breaker box located in the hallway outside the main dining room. The opening was not covered by a "blank" leaving the area open for possible contact with the "raceway" or bar bringing electricity to the breaker box. The box did have a door on the box but was accessed by maintenance personnel. One or more employees were exposed to this hazard.
17. In calculating the penalty for Item 3 of Citation Number One, a severity assessment of "high" and probability assessment of "lesser" were given, resulting in a gravity-based penalty of \$2,500. Adjustment factors of forty percent (40%) for good faith and ten percent (10%) for history resulting in a proposed adjusted penalty of \$1,250. The proposed adjusted penalty of \$1,250 was calculated in accordance with the Department of Labor's field operations manual and is appropriate.
18. Based upon the foregoing Findings of Fact, the undersigned Hearing Examiner concludes as a matter of law the following:

CONCLUSIONS OF LAW

1. The foregoing findings of fact are incorporated by reference hereunder as Conclusions of Law to the extent necessary to give effect to the provisions of this Order;
2. The Review Board has jurisdiction of this case and the parties are properly before the Board;
3. Respondent is subject to the provisions of the Act (N.C.G.S. 95-128) and is an employer within the meaning of N.C.G.S. 95-127(9);
4. Respondent is in violation of 29 CFR §1910.304(f)(4) in that a 50 foot VAC electrical extension cord was missing the grounding pin from the attachment plug. However, the Court does not find that the outlet the cord was plugged into was not a CFCI outlet.
5. The violation is non-serious in that an accident would result in a non-serious injury.
6. Respondent is in violation of 29 CFR §1904.305(a)(2)(iii)(G) in that Respondent allowed the use of a 50 foot extension cord through an opening through metal slates in the wall. This violation is classified as non-serious in that an accident would likely result in a non-serious injury because the Court cannot determine from the evidence that the outlet is not a GFCI outlet.
7. Respondent is in violation of 29 CFR §1910.305(b)(1) in that Respondent allowed a 1 inch by 3 inch opening in a circuit breaker box without being covered by a "blank" or cover over the opening.
8. The violation is serious in that the missing cover in the breaker box could result in electrical shock to one or more maintenance employees who have access to the breaker box.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that

1. Citation One, Item 1, alleging a serious violation of 29 CFR 1910.304(f)(4) , is hereby affirmed as a non-serious violation without penalty.
2. Citation One, Item 2, alleging a serious violation of 29 CFR 1910.305(a)(2)(iii)(G), is affirmed as a non-serious violation without penalty.
3. Citation One, Item 3, alleging a serious violation of 29 CFR 1910.305(b)(1), is hereby affirmed;
4. The proposed penalty of \$1,250.00 is affirmed and shall be paid within ten (10) days of the filing of this Order.

This the 25th day of August, 2003.

Carroll D. Tuttle
Administrative Law Judge Presiding