BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

SOMERSET STUDIOS, INC.,

RESPONDENT.

DOCKET NO. OSHANC 93-2585
OSHA INSPECTION NO. 18498196
CSHO ID NO. P1402

ORDER

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 9:00 A.M. on the 15th day of December, 1995 in Room 700 on the seventh floor of the Wake County Courthouse, 316 Fayetteville Street Mall, Raleigh, North Carolina by Kenneth K. Kiser, Member and L. McKay Whatley, sitting as designated member of the North Carolina Safety and Health Review Board.

APPEARANCES

H. Allan Pell, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Stephen K. C. West, President of Respondent for Respondent.

ISSUES PRESENTED

1. Do the evidence, the findings of fact and the conclusions of law support the portion of the Order of the Hearing Examiner finding that the Respondent committed a serious violation of 29 CFR 1910.304(f)(4) by not having a permanent and continuous ground for electrical equipment and appliances?

2. Do the evidence, the findings of fact and the conclusions of law support the portion of the Order of the Hearing Examiner finding that Respondent committed a serious violation of 29 CFR 1910.305(g)(1)(iii)(b) by using flexible cords for prohibited purposes?

3. Do the evidence, the findings of fact and the conclusions of law support the portion of the Order of the Hearing Examiner finding that the Respondent committed a nonserious violations of 29 CFR 1910.106(e)(9)(i), 29 CFR 1910.212(a)(1), 29 CFR 1910.305(g)(2)(ii), 29 CFR 1910.37(f)(6), 29 CFR 1910.37(q)(1), 29 CFR 1910.305(g)(2)(iii) and 29 CFR 1910.1200(h)?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. 29 CFR 1910.304(f)(4) which provides: Grounding path. The path to ground from circuits, equipment, and enclosures shall be permanent and continuous.

2. 29 CFR 1910.305(g)(1)(iii)(B) which provides: Unless specifically permitted in paragraphs (g)(1)(i) of this section , flexible cords and cables may not be used: (B) Where run through holes in walls, ceilings, or floors:

3. 29 CFR 1910.106(e)(9)(i) which provides: Housekeeping--(i) General. Maintenance and operating practices shall be in accordance with established procedures which will tend to control

leakage and prevent the accidental escape of flammable or combustible liquids. Spills shall be cleaned up promptly.

4. 29 CFR 1910.212(a)(1) which provides: **Machine guarding**--(1) Types of guarding. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are--barrier guards, two-hand tripping devices, electronic safety devices, etc.

5. 29 CFR 1910.305(g)(2)(ii) which provides: Flexible cords shall be used only in continuous lengths without splice or tap. Hard service flexible cords No. 12 or larger may be repaired if spliced so that the splice retains the insulation, outer sheath properties, and usage characteristics of the cord being spliced.

6. 29 CFR 1910.37(f)(6) which provides: The minimum width of any way of exit access shall in no case be less than 28 inches. Where a single way of exit access leads to an exit, its capacity in terms of width shall be at least equal to the required capacity of the exit to which it leads. Where more than one way of exit access leads to an exit, each shall have a width adequate for the number of persons it must accommodate.

7. 29 CFR 1910.37(q)(1) **Exit marking**. (1) Exits shall be marked by a readily visible sign. Access to exits shall be marked by readily visible signs in all cases where the exit or way to reach it is not immediately visible to the occupants.

8. 29 CFR 1910.305(g)(2)(iii) which provides: Flexible cords shall be connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminal screws. (This violation was admitted by Respondent in open court and was treated as a withdrawal of the notice of contest for that item and also affirmed as a nonserious violation without penalty. In Respondent's brief he does not appeal this violation but he did appeal it in his appeal)

9. 29 CFR 1910.1200(h) which provides: **Employee information and training**. Employers shall provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area.

10. N.C.G.S. § 95-127(18) which provides: A "serious violation" shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use at such place of employment, unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation. (emphasis added).

Having reviewed and considered the record, the briefs and the arguments of the parties the Safety and Health Review Board of North Carolina hereby reverses the order of the Hearing Examiner affirming that the Respondent committed serious violations of 29 CFR 1910.304(f)(4) and 29 CFR 1910.305(g)(1)(iii)(B) as alleged in Citation No. 1, Items 1(a) and 1(b) respectively and finds that Respondent committed nonserious violations of the above cited two standards. The Board affirms the Order of the Hearing Examiner in all other respects. In support of its decision the Board makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. This case was initiated by a notice of contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.

2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).

3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(9).

4. The employer (Respondent) Somerset Studios, Inc. is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128) and the Board has jurisdiction over this case.

5. An inspection was made of Respondent's work site located in Morganton, North Carolina on September 18, 1992 by the Occupational Safety & Health Division of the North Carolina Department of Labor. The inspection was initiated as a general scheduled safety inspection.

6. As a result of that inspection a serious citation with two grouped alleged electrical violations with a proposed penalty of $1,200.00 and a nonserious citation with eleven alleged violations with no proposed penalties were issued on February 1, 1993.

7. The Respondent's Notice of Contest was filed with the Review Board on February 15, 1993.

8. On March 12, 1993, the Respondent filed its Statement of Position form with the Review Board.

9. On May 20, 1993 a hearing was held before the honorable Carroll D. Tuttle. During the hearing the Respondent withdrew his Notice of Contest as to Citation Two, Item 9 which alleged a violation of 29 CFR 1910.305(g)(2)(iii) for the failure to have strain relief on a plug.

10. By order dated January 11, 1994, and filed with the Board on January 19, 1994, Judge Tuttle held the following:

a. Citation One, Item 1a charging a serious violation of 29 CFR 1910.304(f)(4) for failure to provide permanent and continuous path to ground from circuits, equipment and enclosures in the plant shop area, was affirmed as a serious violation as grouped with Citation One, Item 1b for a total grouped penalty for 1a and 1b of $960.00.

b. Citation One, Item 1b charging a serious violation of 29 CFR 1910.305(g)(1)(iii)(b) for using flexible cords and cables for prohibited purposes in the plant shipping areas, plant paint booth area and plant office area, was affirmed as a serious violation as grouped with Citation One, Item 1a above.

c. Citation Two, Item 1 charging a nonserious violation of 29 CFR 1910.106(e)(9)(i) for failing to control leakage and prevent accidental escape of flammable or combustible liquids by blocking rear exit in such a manner as to allow damage or spills easily, was affirmed as a nonserious violation without penalty.

d. Citation Two, Item 2 charging a nonserious violation of 29 CFR 1910.212(a)(1) for failing to provide point of operation guard for shrink wrap gun to protect operators and other employees in the plant packaging area, was affirmed as a nonserious violation without penalty.

e. Citation Two, Item 3 was not contested.

f. Citation Two, Item 4 charging a nonserious violation of 29 CFR 1910.305(g)(2)(ii) for using flexible cords which were not continuous without splice or tap in the plant shop area, was affirmed as a nonserious violation without penalty.

g. Citation Two, Item 5 charging a nonserious violation of 29 CFR 1910.37(f)(6) for failing to provide exitway from the plant shop area which was at least 28 inches in width, was affirmed as a

nonserious violation without penalty.

h. Citation Two, Item 6 charging a nonserious violation of 29 CFR 1910.37(q)(1) for failing to mark exits or access to exits with a readily visible sign in the plant shop area, was affirmed as a nonserious violation without penalty.

i. Citation Two, Item 7 charging a nonserious violation of 29 CFR 1910.134(b)(2) for failing to provide an employee protection program for employees who wear 3M half mask respirators was dismissed.

j. Citation Two, Item 8 charging a nonserious violation of 29 CFR 1910.157(c)(1) for failing to provide readily accessible fire extinguishers was dismissed.

k. Citation Two, Item 9 charging a nonserious violation of 29 CFR 1910.305(g)(2)(iii) for failing to have strain relief on a plug was admitted by Respondent and affirmed as a nonserious violation without penalty.

l. Citation Two, Item 10 charging a nonserious violation of 29 CFR 1910.1200(e)(1)(i) for failing to provide a list of chemicals used in the workplace, was dismissed.

m. Citation Two, Item 11 charging a nonserious violation of 29 CFR 1910.1200(h) for failing to provide information and training on hazardous chemicals in the work area, was affirmed as a nonserious violation without penalty.

n. Respondent was granted an additional credit of 8 % for good faith which reduced the proposed penalty from $1,200.00 to $960.00.

11. On February 16, 1994, Respondent filed a joint appeal and request for production of documents with the Review Board appealing the hearing examiner's decision on all of the serious and nonserious violations he was found to have committed.

12. On February 15, 1994 Respondent filed a motion for dismissal on the grounds that there had been ex parte communication based on a letter of September 17, 1993 from federal OSHA to Congressman Cass Ballenger which Cass Ballenger's office forwarded to the Respondent and on other grounds.

13. An Order granting review was filed on March 29, 1994.

14. An order granting discovery of photographs not introduced into evidence and denying the motion for dismissal was also filed on March 29, 1994.

15. The Complainant filed a Response to Order Granting Discovery on April 21, 1994 indicating that it had provided the Respondent with copies of photographs not previously introduced as exhibits.

16. Respondent filed a Second Request for Dismissal with the Board on May 11, 1994.

17. On June 8, 1994 an order denying the second motion for dismissal was filed with the Board and signed by the Honorable Robin E. Hudson for the Chairman, J. B. Kelly.

18. On August 12, 1994 the Board issued a Notice of Default ordering Mr. West to file a copy of the transcript with the Board within 5 days of his receipt of the Order or face dismissal of his Petition for Review.

19. On August 22, 1994 Mr. West filed a Motion for a Default Judgment against the Complainant.

20. On August 30, 1994 the Board issued a Notice and Briefing Schedule indicating that the Board had received the transcript and ordering the Respondent to file his brief within 30 days of receipt of the Notice.

21. On September 7, 1994 the Complainant filed a Response to Request for Default Judgment.

22. On September 9, 1994 the Respondent filed a Rebuttal to Complainant's Response.

23. On September 13, 1994 Respondent filed a second Request for Default Judgment against Complainant based on the alleged failure of the Complainant to provide copies of photographs as was ordered by the Chairman in his discovery order and on the alleged violation of Board Rule .0512.

24. On September 21, 1994 the Complainant filed a Response to Request for Default Judgment.

25. On September 26, 1994 Respondent filed a third Request for Default Judgment against the Complainant and a Request for Extension of Time to file his brief.

26. On September 27, 1994 Respondent filed a Rebuttal to Complainant's Response to Respondent's Request for Default.

27. On October 3, 1994 Board Chair, Honorable Robin E. Hudson issued an Order granting the Respondent a 30 day extension of Time to file its brief.

28. On October 6, 1994 Complainant mailed out a second set of duplicate photographs to Mr. West.

29. On October 28, 1994 Respondent filed a fourth Request for Default Judgment against Complainant.

30. On November 7, 1994 Respondent made a second Request for an Extension of Time to file his brief.

31. On June 15, 1995 the Honorable Robin E. Hudson, Chair of the Review Board issued an order denying all four of Respondent's Request for Default and granting the Respondent's second Request for Extension of Time to file its brief by giving an additional 30 days from the date of the order and informing the Respondent that he was free to come to the Board's office to compare his photographs with the Board's numbered photographic exhibits.

32. On June 23, 1995 Respondent filed a Request for Dismissal for failure of the Board to timely file a response to Respondent's Motion.

33. On July 12, 1995 Respondent filed a third request for an extension of time to file his brief.

34. On July 13, 1995 Respondent filed with the Board a request for withdrawal of Board Member (Chair) Robin Hudson, to which he attached a schedule listing the expenses he would encounter to come to Raleigh to view the Boards's photographic exhibits.

35. On August 9, 1995, Chair Hudson sent copies of the last three court documents from Respondent to the Attorney General's office because Respondent had not certified that he had served the documents on the Attorney General.

36. On August 21, 1995 the Complainant made a Response to Request for Dismissal, Request for Extension of Time and Withdrawal of Board Member Robin Hudson.

37. By letter dated August 24, 1995 Chair Hudson sent a letter to Respondent with photocopies of the front and back of the photographic exhibits in the Board's file attached to the letter.

38. On August 31, 1995 Respondent filed with the Board a fifth Request for Default Judgment against the Complainant.

39. On September 15, 1995 Complainant filed a Response to Request for Default Judgment. On that same date the Complainant filed a joint Motion to Dismiss and Request for Default against Respondent for failure of Respondent to file its brief on time and failure to serve Complainant with any of the many motions that it had filed with the Board.

40. Also on September 15, 1995 the Board received a letter from Respondent thanking the Board for the copies of the photographs and requesting a copy of photographic Exhibit #14.

41. On September 25, 1995 Respondent filed with the Board a request for copies of documents referred to in the transcript which was in essence a Request for Discovery of Documents and was treated as such.

42. On September 28, 1995 Respondent filed a Response to Complainant's Motion to Dismiss and Request for Default.

43. On October 2, 1995 Respondent filed a Rebuttal to Complainant's Response to Respondent's Request for Default Judgment.

44. Also on October 2, 1995 Complainant filed a Response to Request for Documents.

45. On October 3, 1995 the Honorable Robin Hudson, Chair of the Review Board, issued an Order denying Respondent's last three Motions for Default and Dismissal and granting Respondent a third extension of time, 30 days from the date of the Order, in which to file his brief.

46. On October 4, 1995 Chair Hudson sent a letter to Respondent with a photocopy of exhibit #14 attached and an explanation that the original exhibit was a photocopy of two photographs in Complainant's photo log.

47. On October 12, 1995 Respondent filed a Rebuttal to Complainant's Response to Respondent's Request for Documents.

48. Also on October 12, 1995 Respondent filed an Objection to Order dated October 3, 1995 and Request for Expedited Response to Respondent's Third Request for an Extension.

49. On November 6, 1995 Respondent filed his brief with the Board, without sending a copy to the Complainant.

50. On November 7, 1995 the Board sent out a Notice of Review to the parties setting the appeal to be heard on December 15, 1995.

51. By Order dated November 7, 1995 the Honorable Robin Hudson denied Respondent's Request for Documents and denied Complainant's Motion to Dismiss and Request for Default and gave Complainant 30 days from service of Respondent's brief to file its brief.

52. On November 13, 1995 the Board delivered a copy of Respondent's Brief to Complainant.

53. On November 17, 1995 Complainant filed a Motion for Extension of time to file its brief until December 13, 1995 on the basis that it was not served with a copy of the brief by Respondent but was delivered a copy of the brief by the Board on November 13, 1995.

54. On November 21, 1995 Respondent filed an Objection to Complainant' Motion for Extension of Time.

55. On December 7, 1995, the Chair issued an order stating that the Respondent had until December 13, 1995 to file its brief by virtue of Board Rules and two previous orders and there was no need to grant an extension.

56. The issues on appeal were heard by the full Board on December 15, 1995.

57. At the close of the Hearing the Board gave Respondent until January 15, 1996 to file a supplemental brief in response to the Complainant's brief.

58. The Respondent filed a Rebuttal to Complainant's brief with the Review Board on January 2, 1996.

59. The Board adopts the Hearing Examiner's findings of facts numbered 8 through 40.

60. With respect to the violation of 29 CFR 1910.304(f)(4) in Citation One, Item 1a, the hazardous conditions of the improperly grounded equipment created the possibility of an accident, the substantially probable result of which would be burns and electrical shocks, ranging from just minor shock to actual electrocution.

61. With respect to the violation of 29 CFR 1910.305(g)(1)(iii)(b) in Citation One, Item 1b the hazardous conditions of the flexible cords used for prohibited purposes created the possibility of an accident, the substantially probable result of which would be electrical shocks and severe burns.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Board concludes as a matter of law as follows:

1. The foregoing findings of fact are incorporated as conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. The Board has jurisdiction of this cause and the parties are properly before this Board.

3. The Commissioner has failed to prove by the greater weight of the evidence that the Respondent committed a serious violation of 29 CFR 1910.304(f)(4).

4. The Commissioner has failed to prove by the greater weight of the evidence that the Respondent committed a serious violation of 29 CFR 1910.305(g)(1)(iii)(b).

5. The Commissioner has proven by the greater weight of the evidence that the Respondent committed a nonserious violation of 29 CFR 1910.304(f)(4).

6. The Commissioner has proven by the greater weight of the evidence that the Respondent committed a nonserious violation of 29 CFR 1910.305(g)(1)(iii)(b).

7. The Board adopts the hearing examiner's conclusions of law numbered 4 through 13.

DISCUSSION

The scope of review for errors of fact is the whole record test. Brooks v. Snow Hill Metalcraft Corporation, 2 NCOSHD 377 (RB 1983). N.C. Gen. Stat § 95-135(i) states that upon appeal to the Review Board "the Board shall schedule the matter for hearing, on the record, (emphasis added) except that the Board may allow the introduction of newly discovered evidence, or in its discretion the taking of further evidence upon any question or issue." The Board is "entitled, if not obligated, to review the entire record to discern whether the hearing officer's findings and conclusions are adequately supported." Brooks v. Schloss Outdoor Advertising, Co., 2 NCOSHD 552, at 560, 561 (RB 1985). "De novo review is applied for errors of law. Commissioner v. Tuttle Enterprises dba Jim Fleming Tank Company, 5 NCOSHD 115, at 117 (RB 1993), citing, Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981).

The Board follows the policy that ordinarily "facts found by a hearing examiner will be held conclusive when such facts are supported by substantial evidence. . . Substantial evidence means 'such relevant evidence as a reasonable man might accept as adequate to support a conclusion' ", Brooks v. Snow Hill Metalcraft Corp., 2 NCOSHD 377, at 380 (RB 1983), quoting Dunlop v. Rockwell International, 540 F.2d 1283 (6th Cir. 1976).

"In all proceedings commenced by the filing of a notice of contest, the burden of proof shall rest with the Commissioner to prove each element of the contested citation by the greater weight of the evidence." Rule .0514(a) of the Rules of Procedure of the Safety & Health Review Board of North Carolina, revised February 3, 1992, amended effective April 1, 1993. OSHA enforcement proceedings are civil in nature, rather than penal, and the applicable burden of proof is the ordinary burden of proof for civil actions, the preponderance of the evidence. Brooks v. Daniel Construction Company, 2 NCOSHD 299 (RB 1981); Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981).

In order to prove that the Respondent committed a serious violation of a specific standard the Commissioner of Labor must prove by a preponderance of the evidence the following elements:

1. A hazard existed;

2. employees were exposed;

3. the hazard created the possibility of an accident;

4. the substantially probable result of an accident could be death or serious physical injury and

5. the employer knew or should have known (applying the reasonable man test developed by the Court of Appeals in Daniel, supra) of the condition or conduct that created the hazard.

If there were actual knowledge by the employer of the hazardous condition or knowledge of the hazardous condition by the employer's supervisors that is imputable to the employer, then due process would not require that the reasonable man test be employed to prove employer knowledge for element numbered five above. See, Brooks v. Daniel Construction Company, 2 OSHANC 299, at 305 (RB 1981), affirmed, 2 OSHANC 309, Docket No.81 CVS 5703 (Superior Ct. 1983), affirmed, 2 OSHANC 311, 73 N.C. App. 426 (Ct. of Appeals 1984); Secretary v. Grand Union Company, 1975-1976 OSHD 23,926 at 23,927 note 3.

The testimony of the compliance officer and the record shows that for each of the two violations enumerated in Citation One, a hazard existed, employees were exposed, the hazard created the possibility of an accident and the Respondent knew or should have known of the conditions that created the hazard. The Commissioner has proven four of the elements that are necessary to prove a serious violation but has failed to prove the fifth element, that the substantially probable result of an accident could be death or serious physical injury. The evidence from the testimony of the compliance officer is that the most likely injury to result from an accident that could occur from a violation of 29 CFR 1910.304(f)(4) would be "at a minimum, electric shock and minor burns; at a maximum would be an electrocution." (T p 15, LL 10-12). The testimony as to the violation of 29 CFR 1910.305(g)(1)(iii)(b) is that the most likely injury "would have been an electric shock or a severe burn". (T p 22, LL 1-4). The Commissioner may prove that the substantially probable result of an accident could be serious physical injury or death by opinion evidence. The compliance officer's opinion just gives a range of injuries that could occur from the very minor to the most serious. This opinion does not meet the burden of proving by a preponderance of the evidence that the substantially probable result of a serious accident could be serious physical injury or death and the Commissioner has failed to prove that the violations enumerated in Citation One, Items 1a and 1b are serious. However the Commissioner has proven that these violations are nonserious. See, Brooks v. McWhirter, 2 NCOSHD 115, 303 NC 573 (Supreme Court, 1981). (The North Carolina Supreme Court reversed the Board's conclusion that a trenching violation was serious but found that the Commissioner had shown a nonserious violation). The Commissioner has proven by a preponderance of the evidence that the Respondent is in violation of 29 CFR 1910.304(f)(4) and 29 CFR 1910.305(g)(1)(iii)(b) and that the resulting injuries could be electric shock and minor burns which can be classified as minor injuries.

The Respondent appealed the portion of the hearing examiner's order finding that it committed seven nonserious violations of the NCOSH Act. We will treat each of the violations seriatim:

Citation Two, Item 1--29 CFR 1910.106(e)(9)(i).

The Commissioner alleges that Respondent did not comply with section 1910.106(e)(9)(i) by failing to control leakage and to prevent accidental escape of flammable or combustible liquids in that the storage of flammable liquids and compressed gas partially blocked the rear exit from the main shop area where they could be damaged or spilled easily. Compliance officer Parrish testified that he observed outside the rear exit to the building a 25 pound L.P.G. cylinder and 4+ gallons of flammable and combustible liquids that he felt were blocking the exit. He testified that the tops and bottoms of the cans were rusted and presented several hazards of leakage through the rusted parts of the containers and being kicked over in the event that someone exited the building through that exit in a hurry. He also testified that the violation could result in a fire and the resulting injuries could be

severe burn, smoke inhalation and hospitalization which are at least minor injuries. The plant manager was aware of the condition and this knowledge is imputed to the Respondent. Complainant's exhibit 9 and 10 illustrate the conditions referred to by compliance officer Parrish. The president of Respondent testified that this particular door was not an exit and that no one could possibly trip on the cans because they were out of the way. The Hearing Officer found the Respondent to be in nonserious violation of this standard and the preponderance of the evidence and substantial evidence supports that finding.

Citation Two, Item 2--29 CFR 1910.212(a)(1).

The Commissioner alleges that Respondent did not comply with section 1910.212(a)(1) in that it failed to provide point of operation guards for shrink wrap guns which would protect operators and other employees in the plant packaging area. The compliance officer testified and Complainant's exhibit 5 shows that there was no guard on the shrink wrap gun. The plant manager was aware that the guard had broken off and it had been broken off once before and replaced. This knowledge of the condition is imputed to the Respondent. Officer Parrish testified that the broken guard could cause minor burns from the gun directly and indirectly from any fire that the gun could start. Respondent's argument is that the cited regulation does not apply to a shrink wrap gun and that the guard was optional and he did not have to replace it. To support his argument Respondent states that shrink wrap guns are not one of the machines listed in section 1910.212(a)(3)(iv) which lists the some of the types of machines that usually require point of operation guarding. The list of machines is preceded by the language "The following are some of the machines which usually require point of operation guarding". (emphasis added). This language indicates that the list is not intended to be all inclusive and is plainly intended to be illustrative only. The judge found and the preponderance of the evidence and substantial evidence from the record supports the finding that the missing guard on the shrink wrap gun was in nonserious violation of section 1910.212(a)(1).

Citation Two, Item 4--29 CFR 1910.305(g)(2)(ii).

The Complainant alleges that the Respondent did not comply with 29 CFR 1910.305(g)(2)(ii) by using flexible cords which were not continuous without splice or tap in the plant shop area in that the flexible cord for glue gun and lighting was spliced. Compliance officer Parrish testified and Complainant's exhibit 14 shows that a flexible cord had been spliced together using wire nuts. The photocopy of the photograph shows two cords plugged into the spliced flexible cord. The compliance officer testified that the employer knew of the condition and that the injury that could result from the violative condition could be minor burns, smoke inhalation and electric shock which can be classified as minor injuries. Respondent's president testified that the glue gun had a continuous unspliced cord and that the exhibit did not illustrate the flexible cord for the glue gun and lighting. The preponderance of the evidence from the record clearly shows that a flexible cord was spliced and that two cords were plugged into a receptacle at the end of the spliced cord. The compliance officer in the citation stated that the "flexible cord for the glue gun and lighting was spliced". A reasonable interpretation is that the lighting and the cord for the glue gun were plugged into this spliced flexible extension cord pictured in Complainant's exhibit 14 and that the spliced flexible extension cord was used to power the glue gun and the lighting in violation of the standard. The judge so found and the preponderance of the evidence and substantial evidence supports the finding that the Respondent was in nonserious violation of 29 CFR 1910.305(g)(2)(ii).

Citation Two, Item 5--29 CFR 1910.37(f)(6).

The Complainant alleges that the Respondent committed a nonserious violation of 29 CFR 1910.37(f)(6) by failing to maintain the rear exitway from the plant shop area so that it had a clear exit space which was at least 28 inches in width. The compliance office testified that he opened the door to its widest point and measured the opening and the width was 18 inches. The door opened inward and was blocked by finished stock so that it could not open any farther. The plant manager knew of the condition and said they had to use the aisles for storage space and this knowledge is imputed to the Respondent. The compliance officer testified that the type of accident in an emergency would be minor burns and smoke inhalation at a minimum which can be classified as a minor injury. Complainant's exhibit # 11 illustrates this condition. Respondent's argument is that this is not an exit and that it leads to a fenced in area and would not be used as an exit in the event of an emergency. This is a spurious argument, in the event of an emergency employees may not have the leisure to remember that this door is not

supposed to be an exit. Common sense and the testimony of the compliance officer shows that the exit would allow employees to leave the building if it were on fire and seek refuge in the fenced in area. The judge so found these conditions to be a nonserious violation of 29 CFR 1910.37(f)(6) and the preponderance of the evidence and substantial evidence supports that finding.

Citation Two, Item 6--29 CFR 1910.37(q)(1).

The Complainant alleges that the Respondent committed a nonserious violation of 29 CFR 1910.37(q)(1) by failing to mark exits or access to exits with a readily visible sign in the plant shop area. The compliance officer testified that there were no signs above the door depicting the door as an exit or not an exit and there were no signs at the end of the corridor directing a person to the door. The type of injuries that could result from the condition is at least minor burns and smoke inhalation and the plant manager was aware of the condition. Again Respondent's argument is that this was not an exit which is clearly a spurious argument. The judge so found these conditions to be a nonserious violation of 29 CFR 1910.37(q)(1) and the preponderance of the evidence and substantial evidence supports that finding.

Citation Two, Item 9--29 CFR 1910.305(g)(2)(iii).

The Complainant alleged and the Respondent at the hearing admitted that it committed a nonserious violation of 29 CFR 1910.305(g)(2)(iii) by failing to have strain relief on a plug. Respondent appealed this item but failed to include it as one of the items that he was appealing in his brief. The Review Board generally limits its review to those items that are set out in the brief on appeal. In light of the admission by Respondent at the hearing and the omission of the item from the brief on appeal, the Board upholds the judge's finding of a nonserious violation of 29 CFR 1910.305(g)(2)(iii) and finds that the preponderance of the evidence and substantial evidence supports that finding.

Citation Two, Item 11--29 CFR 1910.1200(h).

The Complainant alleges that Respondent committed a nonserious violation of 29 CFR 1910.1200(h) by failing to provide information and training on hazardous chemicals in the work area. The compliance officer testified that he interviewed an employee about whether he had received any hazard communication training, had seen any material safety data sheets or had any training in chemical handling and that the employee answered No to each of the questions. The Respondent's President admitted that he had the employees trained by a supervisor during the 90 day probationary period while the standard requires them to be trained at the time of their initial assignment and whenever a new hazard is introduced into their work area. Providing the employees with the training within the 90 day probationary period is not providing them with their training at the time of their initial assignment. The hearing examiner heard the testimony of both the compliance officer and the Respondent's president and he gave greater credibility to the testimony of the compliance officer. The compliance officer also testified that inadequate training could result in inhalation, skin absorption or eye injury from exposure to the hazardous chemicals which is at the least a nonserious injury. The compliance officer also testified that the Respondent should have known about the conditions involving the lack of training. The judge found a nonserious violation of 29 CFR 1910.1200(h) and the preponderance of the evidence and substantial evidence supports that finding.

The remaining item to be considered is the appropriate penalty for the nonserious grouped violations of 29 CFR 1910.304(f)(4) and 29 CFR 1910.305(g)(1)(iii)(b). N.C.G.S. 95-138 states the following with respect to penalty assessment by the Board:

> . . . the Board in case of an appeal, shall have authority to assess all civil penalties provided by this Article, giving due consideration to the appropriateness of the penalty with respect to the following factors:
>
> (1) Size of the business of the employer being charged,
>
> (2) The gravity of the violation,

(3) The good faith of the employer, and

(4) the record of previous violations; provided that for purposes of determining repeat violations, only the record within the previous three years is applicable.

. . . the report, decision, or determination of the Board on appeal shall specify the standards applied in determining the reduction or affirmation of the penalty assessed by the Commissioner.

After giving due consideration to the size of Respondent's business, the gravity of the violation, the good faith of Respondent and Respondent's history of violations, the Board finds that a penalty of $250.00 is appropriate for the nonserious grouped violations of 29 CFR 1910.304(f)(4) and 29 CFR 1910.305(g)(1)(iii)(b). The Board further finds that the assessment of no penalties for the nonserious violations that it affirmed in Citation Two was calculated after giving due consideration to the four factors quoted above.

ORDER

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's January 11, 1994 Order in this cause be, and hereby is, **REVERSED** with respect to the holding affirming Citation One, Item 1a and 1b as serious violations and Respondent is found to have committed nonserious violations of 29 CFR 1910.304(f)(4) and 29 CFR 1910.305(g)(1)(iii)(b) and is **ORDERED** to pay a penalty of $250.00 to the Department of Labor.

The Review Board further **ORDERS** that the Hearing Examiner's decision is affirmed in all other respects.

This the 30th day of July, 1996.

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KENNETH K. KISER, MEMBER

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L. MCKAY WHATLEY, DESIGNATED MEMBER