United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Berardi's Fresh Roast, Respondent.	OSHRC Docket No. 16-1663

Appearances:

Elizabeth Ashley, Esquire, U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Secretary

Brian J. Leneghan, *pro se,* Berardi's Fresh Roast
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

In August of 2016, the Cleveland Area OSHA Office initiated an inspection of Berardi's Fresh Roast (Berardi's) after receiving a complaint alleging an employee had suffered an injury the previous month while operating a machine at the company's facility in North Royalton, Ohio. The inspection was conducted by Compliance Safety and Health Officer (CSHO) Peter Grakauskas. CSHO Grakauskas concluded the machine on which the employee had been injured was not properly guarded and the Secretary issued a Citation and Notification of Penalty to Berardi's alleging a serious violation of the machine guarding standard at 29 C.F.R. § 1910.212(a)(3)(ii). The Secretary proposed a penalty of $4988.00 for the citation. Berardi's timely contested the citation bringing this matter before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651-678 (the Act).

I held a hearing in this matter on February 14, 2017, in Cleveland, Ohio. I gave the parties the opportunity to file supplementary post-hearing written statements. Neither party chose to do so, resting on the testimony and arguments made at the hearing.

For the reasons discussed below, the citation is affirmed and a penalty $4988 is assessed.

JURISDICTION

At the hearing, the parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Act (Tr. 8). The parties also stipulated that at all times relevant to this action, Berardi's was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, (Tr. 8-9). Based on the parties' stipulations and the facts presented, I find Berardi's is an employer covered under the Act and the Commission has jurisdiction over this proceeding.

BACKGROUND

Berardi's is a small, family-owned business located in North Royalton, Ohio. It is operated by brothers Sean and Brain Leneghan.[1] The company roasts and packages coffee for end users. It employs between 10 and 16 individuals (Tr. 102).

Among the equipment at Berardi's facility is a Hayssen Supera bagging machine[2] (the Hayssen) (Tr. 16). This machine is used to fill and seal individual foil bags of coffee called "fractional packs." (Tr. 16, 83). The operator of the machine feeds a "foil" through the machine. A foil is a long tube of the bagging material. The operator sets the size of bag to be filled and starts the machine (Tr. 120). The machine fills the foil with a set amount of product. The jaws of the "end seal assembly"[3] close, crimping and heat sealing the foil, creating a bag of product (Tr. 20). A knife separates the bag from the foil (Tr. 20). The bags drop from the end seal assembly into a bin located on the floor directly below the end seal assembly (Tr. 16-17, 25; Exh. C-5). The machine has a counter that records the number of bags completed. The operator knows to stop the machine when it reaches the number of bags for the order being filled. The

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[1] Brain Leneghan represented Berardi's at the hearing and presented testimony. Sean Leneghan did not appear.

[2] A diagram of the machine is contained in Exhibit C-3. Photographs of the machine from various angles are contained in Exhibits C-1; C-2; and C-4.

[3] The term "end seal assembly" is taken from the machine diagram at Exhibit C-3.

Hayssen will run continuously until stopped by the operator (Tr. 120-21). Berardi's runs the Hayssen on average two days per week (Tr. 156).

At the time of the accident, the primary operator of the Hayssen was the injured employee. He has been with the company since 2011 and worked with the Hayssen since that time. Tim Allington also operated the Hayssen. Allington has been with the company over 20 years and was present when the Hayssen was installed (Tr. 81). Allington trained the injured employee to operate the machine (Tr. 126). This training took approximately one week and consisted of a hands-on demonstration and observation (Tr. 126). The training did not include a review of the operator's manual, although the injured employee was aware of the availability and location of it (Tr. 127).

It is undisputed that, on occasion, the bags stick to the jaws of the end seal assembly and do not drop into the bin, causing the foil above to start bunching up (Tr. 86, 128-30). The frequency with which this occurs varies greatly, but can happen multiple times per day (Tr. 82, 129). While the Hayssen is running, the operator stands in front of the machine (Tr. 23). The operator is separated from the operating mechanism by two transparent doors (Tr. 24; Exh. C-1). The doors are interlocked such that when open, the Hayssen stops (Tr. 24). Both Allington and the injured employee stated the proper procedure when a bag sticks is to open the interlocked doors, stopping the machine from running, take out the stuck bag, brush off the jaws, and restart the machine (Tr. 97-99, 128, 131-32). Both also testified they do not always follow this procedure. Rather, when a bag gets stuck, they will reach under the door through a gap between the bottom of the doors and the top of the bin[4] and grab the bag (Tr. 97, 131). Because the interlocked doors are not opened, the Hayssen continues to run. Doing so alleviates the need to restart the machine (Tr. 32). Allington testified although he generally follows the proper procedure, he has been circumventing the interlocked doors for many years and continued to do so after the accident (Tr. 98-99; see also Tr. 31-33).

According to the injured employee, he was circumventing the interlocked doors when he was injured. He testified several bags had stuck to the jaws on the day of the accident. On each of these occasions, he reached under the interlocked doors to grab the stuck bag. The "second or

[4] The doors do not extend all the way to the floor. There is a 19 ¾ inch space between the bottom of the doors and the floor through which the bin can be slid (Tr. 27; Exh. C-5). There is also a 6 ¾ inch gap between the top of the bin and the bottom of the door (Tr. 27). The distance from the bottom of the door to the end seal assembly is approximately 7 inches (Tr. 29).

third" time doing so, he "reached up too high and got caught." (Tr. 132). He suffered an avulsion of the fingertip and lost his fingernail (Tr. 132). He received emergency room treatment and returned to the facility that same day. Berardi's management told him to take several days off to heal. He returned to work the following Monday (Tr. 133).

Approximately one month after the accident, the Cleveland Area OSHA Office received a complaint alleging an employee had suffered an amputation injury. CSHO Grakauskas was assigned to conduct the inspection. His investigation involved a walk around inspection of the facility and short observation of the Hayssen in operation (Tr. 15-16). He took photographs and measurements of the Hayssen. He also interviewed employees, including Allington.

Based upon his observations, CSHO Grakauskas recommended Berardi's be issued a citation for violation of the standard at § 1910.212(a)(3)(ii) for failure to guard the end seal assembly, including the crimping jaw and knife, of the Hayssen. CSHO Grakauskas concluded because employees were able to and routinely did reach under the interlocked doors to grab bags stuck to the end seal assembly, they were exposed to potential lacerations or crushing injuries, including amputation. He concluded Berardi's should have been aware of this activity, given the frequency with which employees did it. Berardi's timely contested the citation, bringing this matter before the Commission.

THE CITATION

The Secretary alleges Berardi's violated the standard at § 1910.212(a)(3)(ii). That standard requires:

> The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

The citation alleges:

> On or about August 16, 2016, the employer failed to ensure that effective machine guarding was in place on the Hayssen Supera bagging equipment (model number 12-16r coffeepac). The interlocked door on the bagging portion of the equipment did not fully extend to the floor to prevent employees from reaching under it. Employees routinely place their arms on the underside of the machine to remove material and product. This act exposes them to the point of operation where the sealing of the bag takes place.

The Secretary alleges employees were exposed to laceration, crushing, and amputation injuries at the end seal assembly when removing stuck bags.

DISCUSSION

The Secretary has the burden of establishing the employer violated the cited standard. To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Group, Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Applicability of the Standard

Section 1910.212(a)(3)(ii) is found in *Subpart O—Machinery and Machine Guarding.* Section 1910.212 is captioned “General requirements for all machines.” This standard applies to all machines not covered by a more specific standard.[5]

The guarding requirements of § 1910.212(a)(3)(ii) apply when operation of the machine exposes an employee to injury at the point of operation. The point of operation is defined in § 1910.212(a)(3)(i) as the “area on a machine where work is actually performed upon the material being processed.” The work performed by the Hayssen is the filling and creating of fractional packs or bags of coffee. Bags are created at the end seal assembly. The end seal assembly is the point of operation as that term is used in the sited standard.

The issue for resolution is whether employees were exposed to injury at the end seal assembly during operation of the Hayssen. In *Rockwell Inter’l Corp.,* 9 BNA OSHC 1092, 1097 (No. 12470, 1980), the Commission addressed employee exposure to hazards associated with machine operation under § 1910.212(a)(3)(ii). The Commission held,

> The mere fact that it was not impossible for an employee to insert his hands under the ram of a machine does not itself prove that the point of operation exposes him to injury. Whether the point of operation exposes an employee to injury must be determined based on the manner in which the machine functions and how it is operated by the employees.

[5] Nothing in the record suggests a more specific standard is applicable to the Hayssen and I can find none.

Id. at 1097-98. In its subsequent decision in *Fabricated Metal Products, Inc*., 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997), the Commission further clarified,

> [I]n order for the Secretary to establish employee exposure to a hazard [he] must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger. We emphasize that, as we stated in *Rockwell*, the inquiry is simply not whether exposure is theoretically possible. Rather, the question is whether employee entry into the danger zone is reasonably predictable.

In both cases, the Commission vacated the citation on the grounds the likelihood of contact was too remote to establish employee exposure. Such is not the case here.

In the instant case, the undisputed evidence established bags routinely stick to the end seal assembly. Employees use one of two methods to remove the stuck bag – they either open the interlocked doors or reach under the doors and place their hands within inches of the point of operation while the machine continues to run. The fact both operators of the Hayssen admitted to doing so on more than one occasion, over a period of years, establishes entry into the zone of danger was reasonably predictable. The jaws of the end seal assembly heat to approximately 200 degrees and clamp shut to seal the bags; a knife sharp enough to cut skin cuts the bag at the point of operation (Tr. 20; Exh. R-7). The Secretary established Berardi's employees were exposed to injury at the point of operation of the Hayssen during the machine's operation. The sited standard applies.

Violation of the Terms of the Standard

It is undisputed there is no guard covering the end seal assembly. Once an employee reaches under the interlocked doors, nothing prevents contact with the end seal assembly, including the knife. It is also undisputed an employee can circumvent the interlocked doors by simply reaching under them. Because they can be circumvented, the interlocked doors are inadequate guarding under the standard. The terms of the standard were violated.

Employee Exposure

As previously addressed, nothing prevents an employee from placing his hand at the point of operation during machine operation. Employees have done so for many years preceding the issuance of the citation and continued to do so even after an employee was injured (Tr. 31, 33). Employee exposure to the hazard is established.

Employer Knowledge

The Secretary has the burden to establish Berardi's was aware of the violative condition. The evidence does not establish Berardi's had actual knowledge of the hazard.[6] Therefore, the Secretary must establish Berardi's had constructive knowledge of the hazard. To do so, the Secretary must show Berardi's could have known of the hazardous condition with the exercise of reasonable diligence. *Dun Par Engineered Form Co*., 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). "Reasonable diligence" includes the employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981). The Commission has held "[r]easonable steps to monitor compliance with safety requirements are part of an effective safety program." *Southwestern Bell Tel. Co.*, 19 BNA OSHC 1097, 1099 (No. 98-1748, 2000 (citations omitted), *aff'd without published opinion*, 277 F.3d 1374 (5th Cir. 2001). I find the evidence establishes Berardi's had constructive knowledge of the violative condition.

Allington testified both Sean and Brian Leneghan are on the shop floor daily (Tr. 103, 136). Allington testified both observe him working "all year round." (Tr. 106). Both Allington and the injured employee were candid in their testimony that they had been circumventing the interlocked doors for many years. Allington's admission he continued to do so even after the accident, suggests employees were not concerned about the hazard to which they may have been exposed. Both testified bags would stick with some regularity and at times frequently. By reaching under the interlocked doors, the operator avoided having to reset the machine. A reasonable inference can be drawn from this evidence that, rather than an isolated or aberrational event, employees circumvented the interlocked doors often. Given that management was on the shop floor every day, Berardi's should have been aware of the hazardous condition.

Berardi's responds that when the manufacturer installed the machine in 1992, it represented the guarding met "all their safety parameters, that it meets all their safety features." (Tr. 154; see also Exh. R-5; R-6). Berardi's made no alterations to the Hayssen since its installation. Berardi's argues it did all that was reasonable under the circumstances. I disagree.

[6] The evidence presented was insufficient to show Allington was a supervisor such that his knowledge of the violative condition can be imputed to Berardi's. The company has no system of employee hierarchy (Tr. 102). Employees do not have formal job titles. Allington testified he has no supervisory authority over other employees and cannot hire, fire, or discipline them (Tr. 101-02).

Even if the manufacturer had represented to Berardi's the machine met certain safety standards, it remained Berardi's responsibility to ensure the safety of its own employees. The materials supplied by the manufacturer upon which Berardi's relies contain a caveat stating the manufacturer does not guarantee it meets all "federal, state or local code[s]." (Exh. R-6). Further, the operator's manual placed into evidence by Berardi's warns against the circumventing of guards and points out the hazards associated with the end seal assembly (Exh. R-7). It was incumbent upon Berardi's to ensure guards were adequate and could not be circumvented. It did not. Berardi's had no rule specifically preventing the circumventing of the interlocked doors that it communicated to employees. There is no evidence Berardi's made any effort to ensure employees were following proper procedures through inspections or performance reviews. Berardi's failed to exercise reasonable diligence. Had it done so, it would have been aware of the violative condition.

Classification

The Secretary alleged the violation was serious. A violation is serious when "there is a substantial probability that death or serious physical harm could result" from the hazardous condition at issue. 29 U.S.C. § 666(k). The Secretary need not show that there was a substantial probability that an accident would occur; only that if an accident did occur, death or serious physical harm would result. As the Third Circuit has explained:

> It is well-settled that, pursuant to § 666(k), when the violation of a regulation makes the occurrence of an accident with a substantial probability of death or serious physical harm *possible*, the employer has committed a serious violation of the regulation. The "substantial probability" portion of the statute refers not to the probability that an accident will occur but to the probability that, an accident having occurred, death or serious injury could result, even in those cases in which an accident has not occurred or, in fact, is not likely to occur.

Secretary of Labor v. Trinity Industries, 504 F.3d 397, 401 (3d Cir. 2007) (internal quotation marks and citations omitted); *See also, Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984); *Mosser Construction*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010); *Dec-Tam Corp.*, 15 BNA OSHC 2072, 2087-2088 (No. 88-0523, 1993). The likelihood of an accident goes to the gravity of the violation, which is a factor in determining an appropriate penalty. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059,1993).

It is undisputed an employee could, and did, sustain a serious injury from contact with the end seal assembly. Berardi's makes much of the fact the injury is referred to in parts of CSHO Grakauskas's report as an amputation, when the injured employee sustained an avulsion or loss of tissue. Whether the employee sustained a complete loss of his finger or simply the tip is not material to any issue before me. The undisputed evidence established an employee could sustain a severe laceration (Exh. R-7). The evidence also established the potential for an employee to receive a crushing injury from the jaws (Exh. R-7). The jaws heat up, exposing employees to a potential burn hazard. The violation was serious.

Unpreventable Employee Misconduct

Berardi's argued any circumventing of the interlocked doors is contrary to proper operation of the Hayssen and, therefore, any resulting violation is the result of unpreventable employee misconduct. To prevail on the affirmative defense of unpreventable employee misconduct, an employer must show that it has (1) established work rules designed to prevent the violation, (2) adequately communicated those rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations have been discovered. *See, e.g., Stark Excavating, Inc.*, 24 BNA OSHC 2218 (Nos. 09-0004 and 09-0005, 2014), *citing Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007). The affirmative defense of employee misconduct applies in situations in which the behavior of the employee, not the existence of the violative condition, is at issue. The Commission has long-recognized that OSHA's machine guarding standards were designed to protect employees from common human errors such as "neglect, distraction, inattention or inadvertence of an operator[.]" *Slyter Chair, Inc.*, 4 BNA OSHC 1110, 1112 (No. 1263, 1976). "The plain purposes of the standard are to avoid dependence upon human behavior and to provide a safe environment for employees in the machine area from the hazards created by the machine's operation." *Akron Brick & Block Co.*, 23 BNA OSHC 1876, 1878 (No. 4859, 1976). Here, the violative conduct alleged is the inadequacy of the guard on the Hayssen, not the circumventing of the interlocked doors by the employees.

Even if Berardi's could properly raise the affirmative defense of employee misconduct in this matter, it has failed to prove each element of the defense. Berardi's presented no evidence of a safety and health program at its facility. Employees were aware of some safety rules posted at the time clock (Tr. 99, 135). But there was no evidence of the contents of those rules in the

record. Berardi's presented no evidence of a work rule specifically prohibiting the conduct of Allington and the injured employee that was communicated to employees. The Hayssen has warning signs affixed to all sides, but none specifically address the conduct at issue (Exh. R-1). Nor was there testimony that during his training of the injured employee Allington communicated such a prohibition. The operator's manual for the Hayssen contains a prohibition against "[r]eaching over, under, or through a guard, blocking it open, or tampering with a guard interlock" and states "Guard interlocks and fixed barrier guards are there to protect you. Do not alter them." (Exh. R-7). Although this might be a sufficiently specific rule, the injured employee testified he had not reviewed the operator's manual (Tr. 127). Berardi's presented scant evidence of a program to monitor or discipline employees. Allington testified he received an annual review, but he did not "pay attention to them" and could not "remember what it looks like." (Tr. 105-06). Leneghan testified the company has a disciplinary policy, but admitted the injured employee was never disciplined for his conduct. His testimony suggesting changing the duties of the injured employee after the accident was discipline strained credulity. Berardi's failed to establish the violation was the result of unpreventable employee misconduct.

PENALTY DETERMINATION

The Secretary proposed a penalty of $4988.00 in this case. The Commission, in assessing an appropriate penalty, must give due consideration to the gravity of the violation and to the size, history and good faith of the employer. *See* § 17(j) of the Act. The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994), *aff'd*, 937 F.2d 612 (9th Cir. 1991) (table); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) ("The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits."), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). In assessing a penalty, the Commission gives due consideration to all of the statutory factors with the gravity of the violation being the most significant. OSH Act § 17(j), 29 U.S.C. § 666(j); *Capform Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

The evidence establishes at least two employees were exposed to the hazard on a weekly basis. Because employees placed their hands near the point of operation frequently and had been doing so for many years, the occurrence of only one injury indicates the likelihood of injury is low. The severity of the injury is most probably a laceration, similar to that sustained by the injured employee, although a more significant injury could result. A moderate gravity based penalty is warranted. Evidence suggests Berardi's management was less than forthcoming during the inspection (Tr. 44; R-2). The company presented no documentary evidence of a comprehensive safety and health program. I find Berardi's is not entitled to a reduction in the gravity based penalty for good faith. The company is entitled to a reduction based on its small size and lack of past citations. Based on all these considerations, a penalty of $4988.00 is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1, Citation 1, alleging a violation of 29 C.F.R. § 1910.212(a)(3)(ii) is affirmed as a serious violation and a penalty of $4988.00 is assessed.

SO ORDERED.

/s/

Dated: March 24, 2017

HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia