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

Secretary of Labor, Complainant v. Tarkett Alabama, Inc., Respondent.	OSHRC Docket No. **15-1673**

Appearances:

Latasha T. Thomas, Esquire, U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee
For the Secretary

John Coleman, Esquire, Burr & Forman, LLP, Birmingham, Alabama
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

This proceeding is 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). Tarkett Alabama, Inc., (Tarkett) is a manufacturer of flooring products. Beginning on April 29, 2015, Compliance Safety and Health Officer (CSHO) Jennifer McWilliams conducted an inspection of Tarkett at its Florence, Alabama, facility located at 430 County Road 30. The inspection was initiated following an accident in which an employee had been seriously injured when he was caught in a rotating shaft on a turret winder. Based upon CSHO McWilliams's inspection, the Secretary of Labor, on September 10, 2015, issued a Citation and Notification of Penalty with one item to Tarkett alleging a serious violation of 29 C.F.R. § 1910.212(a)(1) for failure to properly guard the turret winder on two machines, one of which was the machine involved in the accident. The Secretary proposed a penalty of $7,000.00 for the Citation. Tarkett timely contested the Citation. Both the violation and penalty are at issue.

I held a hearing in this matter on June 23, 2016, in Birmingham, Alabama. The parties filed post-hearing briefs on August 19, 2016.[1]

For the reasons discussed below, the citation is vacated.

Jurisdiction and Coverage

At the hearing, the parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Act. The parties also stipulated at the hearing that at all times relevant to this action, Tarkett was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act (Tr. 7). Based on the record and the parties' stipulations, I find the Commission has jurisdiction of this action and Tarkett is an employer covered under the Act.

Background

Tarkett is a manufacturer of luxury vinyl flooring materials located in Florence, Alabama. It has approximately 450 employees. A portion of the workforce is represented by the United Steelworkers. The facility in Florence runs multiple shifts per day.

The LVT and Film Laminator Turret Winders

The final stages of the production process at Tarkett's Florence, Alabama, facility involve rolling the product into rolls on large cardboard cores. This is done by a machine called a turret winder. Turret winders fall under the general category of plastic film and sheet winding machinery (Exh. R-8a). The two turret winders at issue were located at the end of the luxury vinyl tile (LVT) laminate line and the film laminator line.[2] They are nearly identical machines that function in the same manner; the only difference is the product they produce.

The American National Standard Institute (ANSI) standard for Plastic Film and Sheet Winding Machinery defines a turret winder as "an arrangement of two or more parallel winding positions spaced around a common axis of rotation that is used to wind the [product]." (Exh. R-

[1] To the extent either party failed to raise any other arguments in its post-hearing brief, such arguments are deemed abandoned.

[2] Exhibit C-3c contains a photograph of the production line; Exhibit R-8b contains a schematic drawing of the production line.

8a at p. 13[3]; C-3e). The turret winders have a total of four shafts. On two shafts opposite one another on the axis are placed cardboard cores. Those two shafts spin to wind the product. During the process, the product is wound on the outermost shaft, or the shaft on the right in the diagrams contained in Exhibits C-3d, R-3, and R-8b. The other two shafts act as guides for the product (see Exhs. C-3d and R-3).[4]

During normal operation, the product is wound onto the cardboard core until it reaches a set diameter. At that point, the product trips a light curtain that starts the transfer process. First, the outermost shaft stops spinning as the "enveloper" closes on the inside shaft or the shaft on the left in the diagram at Exhibits C-3d, R-3, and R-8b (Tr. 125; 156; Exh. R-15). While the enveloper holds the product against the inside shaft, a knife cuts the product (Tr. 126). The enveloper opens, causing the outermost shaft to spin again, winding the last section of product onto the shaft (Tr. 127; 156). The inside shaft then begins to spin, starting the process of winding the product onto that core (Tr. 127; 156). As that happens, the outermost shaft stops spinning and is ready to be removed and replaced with a shaft containing an empty core. It takes 20 - 40 minutes to fill a roll (Tr. 166).

The process described above is automatic with the exception of removal and replacement of the outermost shaft. Two employees, called cutter operators, perform that part of the process manually. Once the shaft has stopped spinning, an employee cuts a sample, places the sample "on the back handrail," and tapes down the loose end (Tr. 128). The employees open the chucks[5] that hold the shaft in place and move a hoist into position to lift the shaft (Tr. 129). A hoist is necessary because a full roll can weigh in excess of 1,000 pounds (Tr. 142). The roll is moved onto a pallet to the side of the machine (Tr. 132). A prepared shaft is then placed by the two employees into position on the turret arms and the chucks are closed (Tr. 132; 170). When empty, the shaft weighs 65 – 70 pounds and, therefore, is too heavy for one employee to lift (Tr. 142). At that point, one operator walks to the control panel on the side of the turret winder (see Exh. C-3e) and presses the "green accept button." (Tr. 133; 170). This causes the turret winder

[3] Exhibit 8a is paginated "8a" – "8s." To avoid confusion (and having two Exhibits identified as 8b), this decision will refer to numerical pagination such that marked page "8a" corresponds to page "1", etc.

[4] For a description of the machine see Tr. 33-40. See also Exhibits C-3e and C-3i.

[5] The ANSI standard defines "chuck" as "a device used to support an arbor or core, for rotation to wind the [product]; generally used in pairs, one supporting and driving and one supporting and idling, at the ends of the arbor, or core." (Exh. R-8a at p. 12).

to rotate so that the inside shaft is now in the outermost position and the empty shaft is in the inside position (Tr. 133). The rotation takes 30 seconds (Tr. 124). The accept button must be held for 45 seconds to initiate the process (Tr. 170). While one employee holds the accept button, the other employee is preparing a new shaft with an empty core (Tr. 133; 170).

The LVT turret winder was installed at the facility in 2012 (Tr. 118).[6] David Hensley, Tarkett's process engineer, who was involved with the installation, testified Tarkett performed a hazard assessment when the equipment was installed (Tr. 136). Several safety devices were added (Tr. 138). The original equipment for the turret winder included a lift table and safety mat (Tr. 136-37). The lift table was eliminated; Tarkett opted instead to use the hoist to remove the full roll of product (Tr. 136). The safety mat, depicted in Exhibit C-3b, was placed inside the footprint of the turret winder. The purpose of the safety mat is to stop the turret winder from rotating if an employee steps on it (Tr. 36). It does not stop the shaft from spinning (Tr. 36). According to Hensley, the safety mat was not placed outside the footprint of the turret winder "because the potential for a hazard was very low, being struck by the turret. The speed of the turret is extremely slow." (Tr. 140).

The Accident

On April 27, 2015, a cutter operator was seriously injured while troubleshooting the turret winder at the end of the LVT line (Exh. C-1). There is little factual dispute regarding the events surrounding the accident.[7] On that night, the LVT turret winder had not been operating properly. At the point immediately after the product is cut, rather than beginning to wind around the cardboard core on the inside shaft, the product was falling off the spinning core (Tr. 44; Exh. C-2 p. 3). CSHO McWilliams testified Kirk Meinershagen, Tarkett's environmental health and safety manager, told her this had happened previously (Tr. 56).

According to CSHO McWilliam's notes, Jackie Gist, Tarkett's maintenance superintendent, was present at the time of the accident (Exh. C-2 p. 3). Although not entirely clear, it can be inferred he was there to determine the cause of, and correct, the malfunction. Both he and the injured employee were observing the machine when Gist "squatted down to look

[6] No similar evidence was presented regarding the age or installation of the film laminator.

[7] In fact, there is little evidence in the record regarding the accident. There are no first- hand accounts as neither the injured employee nor any other witness to the accident was called to testify by either party.

at bottom rolls to see if anything was wrong" (Exh. C-2 p. 3). As he stood up, he saw the injured employee caught up in the product winding around the inside shaft (Exh. C-2 p. 3).

The injured employee had entered the machine to place the product back on the inside cardboard core (Tr. 44). To do so, he crawled under the full roll of material and into the area containing the safety mat (Tr. 147; Exh. C-2 p. 3). He would then have had to crawl under the axis of the turret winder to reach the inside shaft, some 50 inches from the outermost shaft (Tr. 148). Because the inside shaft necessarily would have been spinning at this point in the operation, the injured employee apparently attempted to attach the product to the spinning cardboard core. He became entangled and was wrapped in four revolutions of product (Exh. C-1). Other employees cut the injured employee out of the product while awaiting emergency personnel.

As a result of the accident, the employee suffered multiple severe injuries. He sustained broken bones in his arms, legs, and ribs and severed an artery (Tr. 44). He was unable to walk unassisted for more than four months and has undergone several surgeries (Tr. 53).

CSHO McWilliams testified her investigation revealed the injured employee had not been instructed to enter the turret winder (Tr. 56; Exh. C-2 p. 3). The evidence is uncontroverted that employees are trained to call maintenance when a machine is malfunctioning and are instructed not to enter the machine (Tr. 66; 172). Hensley testified there is no reason to enter the machine in the manner the injured employee did and he was unaware of anyone having done so before (Tr. 148). Mark Smith, a cutter operator (the same position as the injured employee), testified there is no reason to enter the turret winder while it is running and he has never done so (Tr. 171). He testified he has been trained to call maintenance if the machine in malfunctioning (Tr. 172).

The Inspection

Tarkett notified the OSHA Birmingham Area Office of the accident and CSHO McWilliams[8] was assigned to investigate (Tr. 13). CSHO McWilliams went to Tarkett's facility on April 29, 2015 (Tr. 15). She first met with Meinershagen and several other members of Tarkett's management (Tr. 15; 25). A representative of the United Steelworkers was also present

[8] CSHO McWilliams has been a CSHO since 2009 (Tr. 13). She holds a Bachelor of Science degree in mechanical engineering and an MBA (Tr. 12). Prior to working for OSHA, CSHO McWilliams held a variety of jobs with private industry (Tr. 13).

(Tr. 15). Prior to going out on the floor of the facility, a member of management drew a diagram of the machine involved in the accident to demonstrate to CSHO McWilliams how the machine operated (Tr. 16). After the demonstration, CSHO McWilliams conducted a walk around inspection of the facility accompanied by several members of management and the union representative (Tr. 17).

CSHO McWilliams inspected and photographed the LVT and film laminator turret winders (Tr. 17; 30-32; 47; Exhs. C-3; C-3a – 3i). During the time she was at the facility, both machines were shut down and locked out (Tr. 24). CSHO McWilliams never saw either machine in operation. Rather, Meinershagen explained to CSHO McWilliams how the machines operated (Tr. 26-27).

CSHO McWilliams identified two hazards associated with the turret winders. Because both machines operate in the same manner, she concluded both pose the same hazards (Tr. 47-49; 53). CSHO McWilliams testified employees are exposed to the spinning shafts, as in the manner the injured employee was exposed (Tr. 45; 52). Employees are also exposed to the hazard of being struck by the turret arms as the turret winder rotates the inside shaft to the outermost position (Tr. 45-46; 52). Based upon this conclusion, CSHO McWilliams recommended a citation alleging a violation of 29 C.F.R. § 1910.212(a)(1) be issued to Tarkett for not providing guarding to prevent exposure to these two hazards. Tarkett timely contested the citation.

DISCUSSION

The Citation

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).

The cited standard at 29 C.F.R. § 1910.212(a)(1) reads,

> 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.

The alleged violation description contained in the citation reads:

(a) On or about 4/29/15 – at the LVT Laminate Line, the turret winder was not guarded to prevent employees from being caught-in rotating shafts and not adequately guarded to prevent employees from being struck-by a rotating roll and/or the turret arms.
(b) On or about 4/29/15 – at the Film Laminator, the turret winder was not guarded to prevent employees from being caught-in rotating shafts and not adequately guarded to prevent employees from being struck-by a rotating roll and/or the turret arms.

The citation identified two identical hazards on both pieces of equipment. The Secretary alleges the rotating shafts on which the material is wound pose a caught-in hazard. The employee is also exposed to the hazard of being struck by the turret arm as it rotates the inside shaft into the outside winding position.

Applicability of the Standard

Section 1910.212(a)(1) 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. The citation alleges the turret winders were not equipped with guards to protect employees from rotating parts. There is no dispute, to the extent the rotating shafts and turret arms expose employees to injury, the turret winders must be equipped with guards. The cited standard applied to the cited conditions.

Violation of the Terms of the Standard

There is also no real factual dispute the spinning shafts on both machines were not guarded. Nor do the parties dispute there was no type of guarding to protect employees from the being struck by the rotating turret arms. To the extent the Secretary has established employees were exposed to these two hazards, he has established Tarkett failed to comply with the terms of the standard.

Employee Exposure

The key issue in dispute is whether the Secretary has met his burden to establish employees were exposed to a hazard as alleged in the citation. Because § 1910.212(a) is a performance standard, the Secretary must establish the hazard addressed by the standard existed.

Con Agra Flour Milling Co., 16 BNA OSHC 1137, 1147 (No. 88-1250, 1993). In this case, the Secretary must establish employee exposure to rotating parts.

In *Fabricated Metal Products, Inc*., 18 BNA OSHC 1072 (No. 93-1853, 1997), the Commission considered the question of employee exposure to the hazards posed by inadvertent contact with rotating machine parts. The Commission considered its prior holding in *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976), and *Rockwell Inter'l Corp.,* 9 BNA OSHC 1092 (No. 12470, 1980). In *Gilles & Cotting* the Commission addressed the general question of employee exposure to hazards. The Commission set forth a test for employee exposure based on the principle of "reasonable predictability." 3 BNA OSHC at 2003. The Commission held that the Secretary bore the burden of proving "that employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger." *Id*. In *Rockwell Inter'l Corp.,* 9 BNA OSHC 1092 (No. 12470, 1980), the Commission specifically address employee exposure to hazards associated with machine operation. 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.

Id. at 1097-98. Based on these two prior holdings, the Commission concluded,

> in order for the Secretary to establish employee exposure to a hazard she 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.

Fabricated Metal Products, 18 BNA OSHC at 1074 (citations omitted). The Commission agreed with the judge the likelihood of contact was too remote to establish employee exposure. The Commission based this finding on evidence employees were never less than 18 inches from the rotating part during the course of their work, the CSHO never observed employees closer than 2 feet from the part even when walking past the machine, and that the parts were sufficiently blocked to prevent contact even in the event of a slip or fall.

In the instant case, the Secretary alleges employee exposure to rotating parts at two locations. The Secretary alleges exposure to the inside spinning shaft while troubleshooting and inadvertent contact with either the spinning outermost shaft or the rotating turret arms by employees working in the area. Although the Secretary established it is theoretically possible for employees to be exposed to the hazard at those locations, he failed to establish such exposure was reasonably predictable.

With regard to the hazard posed by the inside spinning shaft, the Secretary rests exclusively on evidence of the accident. CSHO McWilliams conceded at no time during normal operation would an employee be in the area, exposed to the spinning shaft (Tr. 100). CSHO McWilliams testified at initial set up of the machine, an employee enters the machine to place the material on the core, but at that time, the shaft is not spinning (Tr. 100-02). She testified an employee may need to enter for trouble shooting or maintenance of the machine (Tr. 100). The Secretary presented no evidence such activity was ever performed at a time when the equipment was not shut down. Both Hensley and Smith testified there is no occasion on which an operator enters the machine during production[9] and neither was aware of any instances when anyone had done so (Tr. 148; 171-72).[10] The Secretary has failed to meet his burden to establish a caught in hazard at the inside shaft.

In so holding, I am not insensitive to the potential dangers posed by the machinery involved or the devastating physical consequences of the accident for the injured employee. The burden to prove all the elements of the alleged violation rests with the Secretary. Merely pointing to the fact an employee was grievously injured to prove exposure under this standard is simply not enough. Where the Secretary puts forth no evidence that the employee exposure was part of normal operations and that no one had ever before entered the machine in the manner

[9] This is not to say, as Tarkett suggests, exposure can only occur during "production." The Commission has held § 1910.212 applies during "inspection, cleaning, and maintenance" because the standard establishes requirements for protection of employees in the machine area from hazards without regard to whether the hazards are created during production or non-production. *General Electric Company*, 10 BNA OSHC 1687 (No. 77-4476, 1982). The evidence here establishes entry into the machine occurs only when the machine is shut down and, therefore, there is no rotating part to which employees are exposed at that time.

[10] There was some suggestion by CSHO McWilliams employees had been instructed to enter the machine on other occasions (Tr. 75). The comment was made in passing and, without more detail, simply does not satisfy the Secretary's burden. In ruling on Tarkett's motion for summary judgment, I considered documentary evidence similarly suggesting other exposure, but none of that evidence was presented at the hearing and is not before me now.

done here for any reason, I am constrained to find the exposure was idiosyncratic and not reasonably predictable.

Exposure to rotating parts on the exterior of the turret winder is a more difficult issue. Two employees are required to operate the turret winder. While those two employees are in direct contact with the outermost shaft, the evidence is uncontroverted the shaft is not spinning and the turret arms are not rotating. There is no employee exposure to a rotating part at that time. Once the turret arms begin to rotate and the shaft begins to wind the product, an area exists within the radius of the rotating turret arms and the outermost spinning shaft in which an employee could stand and potentially contact either (Exhs. R-8b; C-3c; C-3e; C-3g; C-3h; and C-3i). The ANSI Standard for Plastic Film and Sheet Winding Machinery refers to the need for warnings or other protection in this unloading area to prevent employees from entering the area (Exh. R-8a at p. 18). Section 5.4.4.4, titled "Unloading Area (Winder)" states,

> The floor area where unloading devices deposit the wound roll or the maximum extension of the turret including a full roll in front of the winder shall be color-coded. Interlocked physical barriers and/or presence sensing device(s) shall be provided to prevent or stop all motions associated with an automatic roll change sequence except for the web winding motion when personnel are within the winder unloading area. Exiting this area shall not re-start the sequence.

Id.[11] Section 5.4.4.6, titled "Warning Signal," calls for an alarm to activate when a machine component, such as the turret, is about to move. *Id*. Tarkett provides no protection from the rotation of the turret arms in this area. Nor does Tarkett prevent an employee from contacting the outermost shaft while it winds the product by preventing entry into the area or stopping the shaft from spinning should an employee enter the area.

What is lacking in the record is evidence an employee ever enters (or has ever entered) the area within the radius of the rotating turret arms or the spinning outermost shaft. The machine requires two employees to operate the turret winder. There is no evidence any other employees are in the area surrounding the turret winder other than the two operators.[12] When in operation, affirmative activity on the part of the cutter operator is required to restart the spinning

[11] Tarkett argues the requirements of Section 5.4.4.4 apply only to machines that have an automatic roll change sequence. The Secretary was silent on the applicability of the ANSI standard. Whether the specific provisions of the ANSI standard apply is not relevant to the inquiry here. I have considered it only to the extent it establishes recognition of the hazard posed in the unloading area. Such a hazard would exist only if employees are in that area when the turret is in motion.

[12] There is no evidence employees need to walk past the area as they move about the facility.

of the outermost shaft and rotation of the turret arms. The cutter operator responsible for holding the button that starts the turret arm rotation must stand at the control panel located outside any zone of danger posed by the turret winder. The record is unclear where the second employee is, or what he or she is doing, during the 30 seconds the turret arm is in rotation. Smith, who operates the turret winder, testified first both operators stand at the control panel as the button is pressed (Tr. 170). He later testified while the button is being pressed, he is moving the overhead crane back into position (Tr. 170). He stated when doing so he is 3 - 5 feet from the spinning roll, off to the side (Tr. 170). Hensley testified while one operator is at the control panel, the other operator is preparing a shaft with a new cardboard core (Tr. 133). He stated neither employee stands in the radius of the rotation of the turret winder (Tr. 133). The Secretary presented no evidence to the contrary. The record contains no evidence establishing where either operator stands during the 20 - 40 minutes it takes to wind the product. CSHO McWilliams never saw the machine in operation and provided no evidence of when or why an employee would be in this area either during the rotation of the turret arm or while the product is being wound.

It is ultimately the Secretary's burden to establish employee exposure to a hazard. Under Commission precedent, this requires more than showing "it may be physically possible for an employee to come into contact with the unguarded machinery in question." *Jefferson Smurfit Corp.,* 15 BNA OSHC 1419, 1421 (No. 89-0553, 1991). The Secretary must also show "employees are exposed to a hazard as a result of the manner in which the machine functions and the way it is operated." *Id. citing Armour Food Co.,* 14 BNA OSHC 1817, 1821 (No. 86-247, 1990) and *Rockwell Inter'l*, 9 BNA OSHC at 1097-98. The record contains sufficient evidence to conclude it is physically possible for an employee to come in contact with the turret arm or the spinning shaft. The record contains a dearth of evidence of a reasonable likelihood they would be in a position to do so. The Secretary has failed to meet his burden to establish employee exposure.[13] The citation is vacated.

[13] Tarkett contends the rotation of the turret arms is so slow the likelihood of injury from being struck by it is remote. Given my holding that employees are not exposed to the hazard posed by the turret arms, it is unnecessary to reach that issue.

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 Item 1 of Citation 1 is VACATED.

SO ORDERED.

/s/

Dated: September 27, 2016

HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia