United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. H-E-B, LP, Respondent.	OSHRC Docket No. 19-1832

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Before: First Judge Patrick B. Augustine, U. S. Administrative Law Judge

DECISION AND ORDER ON THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

I. Procedural History and Background

One of Respondent's employees was seriously injured while cutting a shoulder roast with a Biro meat-cutting band saw. According to the employee, the meat turned while he was cutting it, pulling his hand into the saw and causing a substantial laceration to his hand. The employee told the CSHO he was abiding by Respondent's so-called "Four-Inch" rule to avoid placing his hand in the zone of danger created by the band saw, which could not otherwise be guarded at the point of operation. The employee, however, was not using the push guard, which is attached to the table, to hold the meat in place while he cut it.

Complainant initiated an inspection in response to the incident described above. During its inspection, Complainant discovered Respondent had been previously cited four times for laceration and amputation injuries its employees suffered while using a meat-cutting band saw. Based on its inspection, Complainant issued to Respondent a willful citation under 29 C.F.R. § 1910.212(a)(3)(iii) ("section 212(a)(3)(iii)"), because Respondent failed to provide its employees with proper tools or equipment to prevent their hands from contacting the point of operation or entering the danger zone. *Resp't Motion for Summary Judgment* at Ex. A.

At the close of discovery, each party moved for summary judgment claiming they were entitled to judgment as a matter of law.[1] Respondent contends Complainant cited a standard that does not apply because it does not mandate the use of hand tools but instead institutes requirements for those tools if they are used. Complainant, on the other hand, contends the cited standard explicitly requires the use of hand tools under the set of facts presented here, which involves a piece of machinery whose point of operation cannot be feasibly guarded. Respondent seeks to vacate the citation, claiming the plain language of the standard requires it. Complainant, on the other hand, asserts the citation—from applicability to characterization—should be affirmed in its entirety as a matter of law.

The crux of this case is the proper meaning of section 212(a)(3)(iii). Based on the undisputed facts and the analysis provided below, the Court finds the standard does not apply, nor was it violated, as a matter of law. The plain language of the standard does not require the use of hand tools, as argued by Complainant, but only mandates they be "such as to permit easy handling of material without the operator placing a hand in the danger zone" and that they can only be used

1. Respondent styled its motion as "Motion for Judgment on the Pleadings or, in the Alternative, Motion for Summary Judgment". Because Respondent submitted evidence in support of its motion, it is *de facto* considered a motion for summary judgment. *See* Fed. R. Civ. P. 12(d). Motions for Judgment on the pleadings are limited to the four corners of the pleadings themselves. *Id.*

to supplement protection already required by 29 C.F.R. § 1910.212(a)(3)(ii) ("section 212(a)(3)(ii)"). This understanding of the standard is supported by decisions of the Commission and Fifth Circuit Court of Appeals, to which this case could be appealed, and Complainant's own guidance documents, which highlight the way in which the tools discussed in section 212(a)(3)(iii) supplement the primary guarding requirement but give no indication whatsoever such tools are mandatory. Further, as illustrated in Complainant's own guidance documents, the Court also finds the "tool" to which Complainant refers is not a tool as understood by section 212(a)(3)(iii) but is instead a guard subject to the requirements of section 212(a)(3)(ii). Accordingly, Citation 1, Item 1 shall be VACATED.

II. Stipulations and Jurisdiction

Based on the Complaint and Answer submitted in this case, the parties have submitted to the Commission's jurisdiction over this proceeding under § 10(c) of the Occupational Safety and Health Act, 29 U.S.C. § 659(c) ("Act"). *See Resp't Motion for Summary Judgment* at Ex. B & C. Further, Respondent admitted it is an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). *Id. B*ased on the above, the Court finds it has jurisdiction over this matter pursuant to section 10(c) of the Act. Further, the Court finds it has jurisdiction over this matter under section 10(c) by the timely filing of a Notice of Contest by Respondent. *Id.* The Court further finds Respondent was an employer engaged in business and commerce affecting interstate commerce within the meaning of section 3(3) and 3(5) of the Act.29 U.S.C. §§ 652(3) and (5).

III. Summary Judgment Standard

Summary judgment is appropriate if the pleadings, the discovery and disclosure materials on file, and any affidavits show there is no genuine issue as to any material fact and the movant is

entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56. The Supreme Court has held a party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion and demonstrating the absence of a genuine issue of material fact as to the issue(s) raised. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is material only if it might affect the outcome of the case, and thus precludes the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In deciding a motion for summary judgment, the Court is required to resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the nonmoving party. *Id*. at 255. If there is any evidence in the record from which a reasonable inference in favor of the nonmoving party can be drawn, summary judgment is improper. *Celotex*, 477 U.S. 317. Conversely, if a review of the entire record could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial and summary judgment is appropriate. *Matsushita Elec. Ind. Co. Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986). The judge's function in summary judgment cases is to determine whether there are genuine, material, disputed issues for trial; it is not to weigh the evidence. *Anderson*, 477 U.S. at 249; *see also St. Luke's Methodist Hosp. v. Thompson*, 182 F. Supp. 2d 765 (N.D. Iowa 2001), *aff'd*, 315 F.3d 984 (8th Cir. 2003) (where litigants concurrently pursue summary judgment, each motion must be evaluated independently to determine whether there exists genuine dispute of material fact and whether movant is entitled to judgment as matter of law).

IV. Discussion and Analysis

As stated above, Respondent contends Complainant cannot, as a matter of law, prove its *prima facie* case. Specifically, Respondent argues Complainant cannot prove either that the

standard applies or that it was violated.[2] Essentially, Respondent contends the plain language of section 212(a)(3)(iii) only mandates what is required *if* hand tools are used to feed or remove stock from a machine with an exposed point of operation. Complainant, on the other hand, argues the standard requires the use of hand tools when there is no feasible guarding mechanism for a machine's point of operation.

The Court agrees with Respondent for three reasons. First, the plain language of the cited standard is clear its application is contingent on the decision whether to use hand-feeding tools and is not mandatory in and of itself. Second, Commission and circuit court decisions support this reading of the cited standard. Finally, Complainant's own interpretive and guidance materials not only illustrate the non-mandatory nature of the cited standard but also indicate Complainant is being inconsistent by referring to the push guard attached to the Biro band saw as a hand-feeding tool subject to the requirements of section 212(a)(3)(iii).

i. Plain Language

Complainant alleged a willful violation in Citation 1, Item 1 as follows:

> 29 CFR 1910.212(a)(3)(iii): Special hand tools for placing and removing material(s) was [sic] not provided to permit easy handling of material without the operator placing a hand in the danger zone.
>
> At this workplace, employees cutting meat with a vertical band saw were not provided adequate tool(s) and/or equipment to prevent their hands from contracting [sic] the point of operation or entering the danger zone.

Citation and Notification of Penalty at 6.

While the foregoing is how Complainant characterizes the requirements of section 212(a)(3)(iii), the actual language of the cited standard is as follows:

> Special hand tools for placing and removing material shall be such as to permit easy handling of material without the operator placing a hand in the danger zone. Such

2. Respondent also asserts multiple other bases upon which summary judgment can be granted; however, since the Court finds these two elements sufficient to vacate the citation, it need not address the remaining bases.

> tools shall not be in lieu of other guarding required by this section, but can only be used to supplement protection provided.

See section 212(a)(3)(iii). Complainant contends this language explicitly requires the use of special hand tools if the point of operation cannot be feasibly guarded. The Court finds this is a generous interpretation of the standard. Interestingly, Complainant does not appear to suggest he is engaging in interpretation at all; rather, it appears Complainant believes the plain language of the standard requires the use of special hand tools. Because the Court finds otherwise, a review of the proper analysis of regulatory interpretation is appropriate.

The first step in ascertaining the meaning of a standard is the language of the provision. If there is no ambiguity in the provision, "[t]hen the regulation just means what it means—and the court must give it effect, as the court would any law." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). "[I]f there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense. Deference in that circumstance would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.* (citing *Christensen v. Harris County*, 529 U.S. 576, 588 (2000)). The determination of whether an ambiguity exists is not limited to a reading of the standard itself, but also requires the court to exhaust the traditional tools of construction, including the text, structure, and history of the disputed regulation. *Id.* (citing *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

First off, the Court finds there are two mandates within the cited standard: (1) special hand tools "shall be such as to permit easy handling of material without the operator placing a hand in the danger zone", and (2) special hand tools "shall not be in lieu of other guarding required by this section". Section 212(a)(3)(iii). Neither of those mandates indicate when or even whether special hand tools are required to be used in the first instance. In other words, the language of the standard

does not say, "Special hand tools *shall* be used when point of operation guarding is not feasible, etc." Instead, the standard indicates requirements for the design of the tools and a prohibition against using those tools as an alternative to the safeguarding mandated by section 212(a)(3)(ii). It says nothing about the use of such tools being mandatory under any circumstances.

Indeed, when compared to section (a)(3)(ii) and other standards under 29 C.F.R. § 1910.212 ("section 212"), the conditional nature of section 212(a)(3)(iii) becomes clearer.[3] The other standards under section 212 all follow a similar pattern:

> **1910.212(a)(1): "**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 . . . ." (emphasis added)
>
> **1910.212(a)(2):** "Guards *shall be affixed to the machine* where possible and secured elsewhere if for any reason attachment to the machine is not possible. (emphasis added)
>
> **1910.212(a)(3)(ii):** "The point of operation of machines whose operation exposes an employee to injury, *shall be guarded*." (emphasis added)
>
> **1910.212(a)(4):** "Revolving drums, barrels, and containers *shall be guarded* by an enclosure which is interlocked with the drive mechanism, so that the barrel, drum, or container cannot revolve unless the guard enclosure is in place. (emphasis added)
>
> **1910.212(a)(5):** "When the periphery of the blades of a fan is less than seven (7) feet above the floor or working level, the blades *shall be guarded*." (emphasis added)
>
> **1910.212(b):** "Machines designed for a fixed location *shall be securely anchored* to prevent walking or moving." (emphasis added)

Each of the foregoing standards either imparts a blanket requirement that equipment shall be guarded, or the standard indicates the conditions under which a guard or other protective measure shall be required. Section 212(a)(3)(iii), on the other hand, is more like the second sentence of section 212(a)(2), which states, "The guard shall be such that it does not offer an accident hazard

3. Although the standard is not explicitly expressed in the conditional "if", the Court uses the term 'conditional' because, as will be discussed later with regard to applicable case law, other courts have also seen the requirements of section (a)(3)(iii) as conditioned upon whether special hand tools were used. *See Southern Hens*, 930 F.3d 667 (5th Cir, 2019).

in itself." Both section 212(a)(3)(iii) and the second sentence of section 212(a)(2) discuss how the hand tools and guards "shall be"—i.e., their condition or function—but neither mandates the use of hand tools or guards.

The second sentence of the cited standard only serves to bolster the plain meaning of the first sentence. It states, "Such tools shall not be in lieu of other guarding required by this section, but can only be used to supplement protection provided." Section 212(a)(3)(iii). The first clause of the second sentence indicates the primacy of section 212(a)(3)(ii), which is the "other guarding required by this section", and specifically excludes special hand tools as being sufficient to provide the necessary protection. The second clause indicates such tools can only be used as a supplement to the guards required by section 212(a)(3)(ii). Just like the first sentence of section 212(a)(3)(iii), there is nothing in the second sentence requiring the use of special hand tools. Regardless of whether requiring the use of hand tools would be an intuitive and logical next step after being unable to feasibly comply with the primary guarding standard, the language of the standard simply does not impart such a requirement, nor can such a requirement be reasonably read into otherwise clear language. Instead, the term "supplement" indicates the purpose of such tools—to provide protection in addition to what is required and "can only be used" for that purpose. *Id.* Again, there is nothing mandatory about the second sentence of (a)(3)(iii) save for the standard's prohibition of using such tools as a substitute for a guard. The phrase "can only be used" connotes permission to use hand tools for a limited purpose but does not indicate their use is required.

When read as a whole, and in conjunction with the other standards under section 212, the Court finds the meaning of section 212(a)(3)(iii) to be clear. There is nothing in the standard that requires the use of special tools; instead, there are only requirements for how a special tool should protect the employee and that such a tool cannot be used as an alternative to the primary guarding

required by section 212(a)(3)(ii). Every other standard uses "shall" to indicate when/where a guard is required. *See generally* section 212. In some instances, the standard indicates a condition—i.e., when a fan's blades are less than 7 feet above the floor—for a guard to be required. *See id.* § 1910.212(a)(5). In others, the standard indicates what to do if compliance cannot be achieved using the prescribed method. *See id.* § 1910.212(a)(2). The same is true for a parallel standard under § 1910.213(i), which governs the guarding requirements for woodcutting bandsaws, specifically. In each of the three subparagraphs all the standards' requirements were expressed using the word "shall". *See id.* § 1910.213(i).

As illustrated above, and discussed in more detail in the next section, the primary guarding requirements are sections 212(a)(1) & (a)(3)(ii). There is no conditional or exceptional language within those standards and yet Complainant has historically recognized the inability to guard a point of operation in all instances and, thus, developed interpretive workarounds, including guarding by distance, to account for pieces of equipment, such as a bandsaw, that cannot be guarded at the point of operation. *See* Safeguarding Equipment and Protecting Workers from Amputations, OSHA 3170 (2001), *available at* www.osha.gov. Complainant indicated as much in its Response to Respondent's *Motion*, when it argues that a special hand tool "completes" the guarding process. Insofar as special hand tools complete the guarding process, we are not talking about the requirements of section 212(a)(3)(iii); instead, we are discussing alternative methods, other than a traditional "guard", to comply with sections 212 (a)(1) and (a)(3)(ii). Guarding by distance "completes" the guarding process in a similar, if not identical, fashion: Complainant permits manipulating a piece of stock by hand on a machine with an unguarded point of operation so long as the stock being worked upon is sufficiently long to provide an adequate distance buffer between the point of operation and an employee's hand. *See id*.

Perhaps this is due to the breadth of the primary guarding standard—section 212(a)(1)—which discusses "guarding methods" that appear to run the gamut from actual barriers to devices designed to keep your hands out of the danger zone by how they operate or by killing power to the machine. See 29 C.F.R. § 1910.212(a)(1). This is how Complainant reads the standard, as its own guidance indicates "guarding by location or distance and by feeding methods" are "other methods" to safeguard machines. *See* Safeguarding Equipment and Protecting Workers from Amputations, OSHA 3170 (2001), *available at* www.osha.gov. Indeed, this understanding appears in Complainant's Response, wherein Complainant recognizes there are alternative methods by which *guarding* can be completed. *See Compl't Response to HEB's Motion for Summary Judgment* at 9. Citing the guidance previously mentioned by the Court, Complainant points out the alternative scenarios under which distance, hand tools, or simple guarding might be ways for an employer to achieve (or "complete") compliance with its guarding obligation under either section 212(a)(1) or section 212(a)(3)(ii). *Id.*

This understanding of "alternative" methods of guarding, as it were, lends support to the plain reading of section 212(a)(3)(iii), discussed above. The plain language of the cited standard does not mandate the use of special hand tools as a general proposition or under a set of specified circumstances but only mandates what they must achieve if they are used. The bigger requirement, or "shall" as it were, under section 212(a)(3)(iii) is the prohibition against using special hand tools as the sole method of guarding.

Contrary to Complainant's assertion, Respondent is not arguing the foregoing methods are unnecessary or otherwise not required under certain circumstances. What Respondent is arguing is that paragraph section 212(a)(3)(iii) is not the method by which to hold it accountable. Instead, as the plain language, supplemented by Complainant's own interpretations and guidance,

indicates, section 212(a)(3)(iii) merely requires any tool used to feed or retrieve stock to/from the point of operation to be adequate for its purpose and prohibits such a tool from being the sole method of guarding a point of operation. The tools discussed in section 212(a)(3)(iii) may be used when literal compliance with section 212(a)(3)(ii) is not fully achievable, but that does not mean an employer is no longer obligated to comply with the guarding requirements of the standard. The appropriate vehicle for liability would be sections 212(a)(1) or (a)(3)(ii), depending on whether the term "guard" as used in section 212(a)(3)(ii) includes the guarding methods referenced in section 212(a)(1) and expanded upon in Complainant's "Safeguarding Equipment" guidance.

Based on the foregoing, the Court finds the requirements of section 212(a)(3)(iii) are clear based on the text and structure of the provision. The Court's citation to Complainant's guidance only serves to show Complainant's published materials support this conclusion. While section 212(a)(3)(iii) has mandatory elements, its purpose is to serve as a means through which guarding under sections 212(a)(1) or (a)(3)(ii) is completed or supplemented, not as a directive to use those means.

ii. Case Law

The foregoing reading is supported by both the Commission and Fifth Circuit Court of Appeals, both of whom have characterized section 212(a)(3)(iii) as conditional upon the actual use of special hand tools. While Complainant suggests the Commission views section 212(a)(3)(iii) as commanding the use of special hand tools, the case upon which he relies was issued by an ALJ, which has no binding effect on this Court. Nonetheless, the Court shall discuss all cases – those cited by the parties and others identified by the Court – to both illustrate the Court's and

Respondent's reading of the standard is correct and the courts have been fairly consistent in their treatment of the standard since it was first promulgated.[4]

In *Garrison & Associates, Inc.*, the Commission was asked whether an employer was properly cited under section 212(a)(3) for failing to provide point of operation guarding on its two press brakes. *See* 3 BNA OSHC 1110 (No. 4235, 1975). An employee was observed forming a piece of metal with his hands next to the point of operation, which was not guarded, though holding tools were provided. At the hearing OSHA argued the press brakes could be guarded by position, an area guard, dual controls, or a work rest. *Id.* The ALJ found the company could not possibly provide point of operation guarding and vacated the violation. The Commission reversed, holding guarding by position could be accomplished using the tools provided by the employer to hold small pieces of metal.[5] For all intents and purposes, the facts of that case were nearly identical to those presented here insofar as Respondent supplies its employees with a "tool"[6] that may or may not be used. In either case, the operative question was whether guarding, as required by section 212(a)(3)(ii), and permitted by section 212(a)(3)(iii), had been provided.

In *Diebold*, the Commission was confronted with a similar problem—the employer claimed impossibility of compliance with section 212(a)(3)(ii) on a press brake. *See* 3 BNA OSHC 1897 (No. 6767 *et al*, 1976), *rev'd on other grounds*, 585 F.2d 1327 (6th Cir. 1978). The Commission recognized, at least in the case of press brakes, literal compliance with section

4. In fact, the standard was promulgated as part of the initial tranche of National Consensus and/or established Federal standards brought over when the Act was first passed. Thus, not only has it been an established standard for nearly 50 years, but it has very little in the way of explanatory preamble. *See* Occupational Safety and Health Standards, 36 Fed. Reg. 10466 (May 29, 1971).

5. This was not only the position of the Commision, but also appears to be the interpretation espoused by OSHA at trial.

6. The Court uses quotation marks to note its disagreement with Complainant's contention that the push plate in question is a special handtool as described in section 212(a)(3)(iii). Rather, as will be discussed later in the section on Complainant's guidance and interpretations, the Court finds the push plate is, in fact, a guard under the definition provided by the standard and as indicated in the various diagrams included in Complainant's guidance materials.

212(a)(3)(ii) would not be possible and cited to *Garrison*, *supra* and another case, wherein it held compliance with section 212(a)(3)(ii) "can be achieved by means such as hand tools and work rests which keep the hands of employees at a safe distance from the point of operation." *Id.* Consistent with the Court's analysis on the plain language of the cited standard, the Commission noted:

> To the extent that these decisions were predicated on the inability of the employers to use guarding devices, they are not inconsistent with 29 C.F.R. § 1910.212(a)(3)(iii), which provides that hand tools may only supplement, and not substitute for, the guarding devices required by § 1910.212(a)(3)(ii). Indeed, Complainant has recognized that, in the case of press brakes, guarding devices cannot always be used. He has therefore, since this case was tried and argued, adopted the policy that the inability of an employer to use a guarding device on a press brake shall be considered a de minimis violation if hand tools or other means are used to maintain a safe distance between the operator's hands and the point of operation.[12] This enforcement policy is for all practical purposes consistent with our decisions.[13]

Id. (citing OSHA Field Information Memorandum #75–46, CCH E.S.H.G. para. 9915 (July 17, 1975) (emphasis in original). In other words, not only did the Commission read the requirements of section 212(a)(3)(iii) as conditional and a method by which compliance could be achieved with section 212(a)(3)(ii), but Complainant published guidance consistent with that understanding. In fact, it appears Complainant published a field memorandum indicating that "if hand tools or other means are used to maintain a safe distance" then the violation would be considered *de minimis*. *Id.* If the use of hand tools qualified merely as a *de minimis* violation of section 212(a)(3)(ii) under Complainant's own, albeit old,[7] policy, the Court has a hard time taking seriously his attempts to suggest the use of hand tools is somehow mandatory.

7. While the *Diebold* case is old, it is also worth noting the standard at issue has been around even longer, without any revision. Although Complainant has updated its guarding guidance since that time, as will be discussed below, the guidance both now and in the past use permissive language in describing the use of hand tools and at no time indicate their use is required.

In *Southern Hens, Inc.*, a case hotly debated by both parties, OSHA visited a poultry processing plant after a woman suffered a severe injury on a rotating machine while attempting to clean it. *Southern Hens, Inc.*, 930 F.3d 667. During the inspection that followed, the CSHO observed another employee cleaning an unguarded conveyor with a hand tool and eventually his own hands. *Id.* It was this violation that led to the issuance of a citation pursuant to 29 C.F.R. § 1910.212(a)(1) and a discussion of section 212(a)(3)(iii). Although section 212(a)(3)(iii) was not directly before the court, it nonetheless engaged in a discussion about it because the employee used a tool to clean the unguarded conveyor. The company provided its employees with hand tools to clean up conveyors but did not otherwise supply a guard. The court ultimately held the employer failed to prove the installation of a guard was infeasible and, thus, guarding by distance by using a hand tool was not permissible.

Both parties focus on a single paragraph within the decision to assert their version of the cited standard is the correct one. It reads as follows:

> Southern Hens' best authority to the contrary is the OSHA guidance document cited above, but it is not much help. The guidance expresses only qualified approval of guarding by distance: "Operators can use tools to feed work pieces into equipment to keep their hands away from the point of operation, but this should be done only in conjunction with the guards and devices described previously." Occupational Safety & Health Admin., *Safeguarding Equipment*. Also significant is the text of the standard itself, which provides that hand tools, if used, must "permit easy handling of material without the operator placing a hand in the danger zone" and "shall not be in lieu of other guarding required by this section, but can only be used to supplement protection provided." 29 C.F.R. § 1910.212(a)(3)(iii). Southern Hens' provision of the tool to Hunt satisfied neither condition.

Id. at 680-81. Respondent argues the Fifth Circuit's use of the phrase "if used" indicates section 212(a)(3)(iii) is a conditional standard. In other words, it only applies if an employer chooses to use a hand tool to feed and remove stock from a point of operation. Complainant, on the other hand, argues the foregoing passage proposes a choice between guarding by physical guards, by

distance, or through the use of hand tools, not a choice between using such preventative measures and providing no protection whatsoever.

The Court finds Respondent's reading of the passage is the more sensible one. First, the term "if used" is used specifically in reference to hand tools, not a choice between guarding options.[8] Second, the court appears to make no distinction between the use of hand tools and the concept of guarding by distance, which the court notes is given explicit approval in Complainant's own guidance document. Third, the court uses the phrase "if used" after discussing Complainant's guidance document, which states, "Operators *can use tools* to feed work pieces into equipment to keep their hands away from the point of operation, but this should only be done in conjunction with the guards and devices described previously." *Id.* (emphasis added). In other words, the court recognized Complainant's own guidance suggests the use of such tools are an *optional* method to comply with sections 212(a)(1) or (a)(3)(ii) and relied upon that guidance to characterize the requirements of the standard at issue in that case.

Complainant also contends the Commission has ruled section 212(a)(3)(iii) is mandatory in *Gen. Elec. Co.*, 1979 WL 28941 (No. 77-4476, 1979) (ALJ Martin). There are three problems with this case. First, it is not a decision rendered by the Commission and, thus, has no precedential value. Second, the decision was ultimately vacated by the Commission, albeit on different grounds, and thus carries even less weight. Third, the ALJ concludes without analysis that section 212(a)(3)(iii) was intended to be mandatory. Without analysis, ALJ Martin's decision carries little persuasive weight, and the Court refuses Complainant's invitation to rely on it.

Ultimately, the case law cited above – as found by the Fifth Circuit and the Commission and which has been consistent on a chronological timeframe - is in accord with the plain reading

8. Even if the phrase "if used" were employed in the manner suggested by Complainant, it would not benefit his case, as it would similarly suggest (a)(3)(iii) is not mandatory, but merely an option for compliance.

of the standard as non-mandatory. Further, that case law is predicated, in no small part, on Complainant's own guidance and interpretations, which further highlight the conditional nature of section 212(a)(3)(iii). Those guidance and interpretations are discussed in more detail in the next section.

iii. Complainant's Prior Guidance and Interpretations

There are two different documents the parties rely on in support of their motions for summary judgment: a 1977 Interpretive Letter sent to Vincent Biro, the manufacturer of the meat-cutting band saw at issue here, and Complainant's guidance document, entitled "Safeguarding Equipment and Protecting Workers from Amputations".[9] Each of them, in varying degrees, supports the plain reading of the cited standard discussed above.

The 1977 Interpretive Letter issued to Vincent Biro was issued in response to Mr. Biro's inquiries about the point of operation requirements on his meat-cutting band saws. Ultimately, OSHA responded that the saws should be governed sections 212(a)(1) and (a)(3)(ii).[10] After reviewing one of Biro's saws in operation at a local supermarket, OSHA concluded:

> That if during the operation of the bandsaw the safeguards provided by your company with respect to the working portion of the saw blade and the band wheels together with the tension device are used, maintained, and properly adjusted to insure no portion on the saw blade is exposed except the working portion between the bottom of the guide rolls (gage) and the table, it meets the intent of 29 CFR 1910.212(a)(1) and (3)(iii).

The Point of Operation Guarding on the Biro Power Meat Cutters (bandsaws), Standard Interpretations, Letter to Vincent Biro (October 11, 1977). Based on OSHA's observations, it determined the saw, with included safeguards, met the intent of sections 212(a)(1) and (3)(iii).

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9. The guidance cited by the parties is dated 2001; however, there is also a newer version of the document that was produced in 2007. For the most part, these documents are the same, save for the insertion of hyperlinks.
10. OSHA noted woodworking bandsaws are governed by section 213(i); however, it noted because all bandsaws operate in the same manner, a saw that complies with section 213(i) also complies with section 212.

First, the Court believes the reference to section 212(3)(iii) is a typo. In the paragraph prior to the one cited above, OSHA was discussing compliance with sections 212(a)(1) and 212(a)(3)(ii), which are the primary guarding standards under section 212. The reference to section 212(a)(3)(iii) in this context does not make sense, especially since the original request was about point of operation guarding, which is governed both by sections 212(a)(1) and 212(a)(3)(ii). Second, OSHA's conclusion regarding the sufficiency of the saw is incomplete, as there is no discussion as to the specific safeguards the Biro saw employed to protect against point of operation injuries.[11] Thus, this letter was of little assistance in ascertaining how Complainant historically interpreted section 212(a)(3)(iii).

The Safeguarding Equipment guidance, however, illustrated quite clearly how Complainant viewed the "requirements" of section 212(a)(3)(iii). After a thorough discussion of primary safeguarding methods, the guidance document goes on to discuss "other ways" to safeguard machines, including "guarding by location or distance and by feeding methods that prevent operator access to the point of operation." Safeguarding Equipment and Protecting Workers from Amputations, OSHA 3170 (2001). Under the rubric of Safeguarding by Feeding Methods, the guidance answers the question, "Can Workers use Hand-Feeding Tools?" *Id.* The answer: "Operators *can* use tools to feed work pieces into equipment to keep their hands away from the point of operation, but this should be done only in conjunction with the guards and devices described previously." *Id.* (emphasis added). In addition, the guidance also states such tools should be stored near the machine to "encourage" their use. *Id.* There is no mandate indicated in the

11. That said, as will be discussed in the final section on whether the standard was violated, the Court believes it is likely the OSHA representatives observed the attached push guard being used to hold the meat in place. In that respect there was no need to discuss section 212(a)(3)(iii), because OSHA determined the push guard was, in fact, a guard rather than a hand tool as described in section 212(a)(3)(iii).

guidance; only permission to use hand tools as an option and a prohibition against their use as the sole means of protection.

A review of Complainant's guidance and interpretive documents indicate there is no requirement to use hand tools in order to comply with section 212(a)(3)(iii). In fact, the guidance is designed to assist employers with the methods and tools they need to use to comply with the principal guarding requirements, such as §§ 1910.212(a)(1), (a)(3)(ii), and many other, more specific guarding requirements under Subpart O. The fact the Safeguarding guidance document was relied upon by the Commission and circuit court, as in *Diebold* and *Southern Hens*, suggests this understanding of the standard is not only the correct one, but also one Complainant has previously relied on. In addition to the foregoing, the guidance document and interpretive letter also serve an additional purpose: illustrating the piece of equipment Complainant is here characterizing as a hand-feeding tool is, in fact, a guard.

iv. The "Hand tool" is Actually a Guard

Separate and apart from the dispute over whether section 212(a)(3)(iii) requires the use of hand tools in situations such as this, the Court is somewhat confused by Complainant's insistence the piece of equipment at the center of this dispute is a hand tool. The 'tool' at issue is an adjustable plate that can be used to hold meat in place on a portion of the table that slides past the band saw, allowing the meat to be sliced at a predetermined width. *See Secretary's Motion for Summary Judgment* at 28. The plate, as shown in the photo, is attached to the table and creates a barrier between the employee's hand and the point of operation of the band saw while cutting (assuming it is used). *Id.* Because the Court finds the push plate is a guard instead of a hand tool, the Court finds this serves as an alternative basis upon which judgment should be granted as a matter of law.

Both the terms “guard” and “hand feeding tool” are defined terms. *See* 29 C.F.R. § 1910.211. A guard is defined as “a barrier that prevents entry of the operator's hands or fingers into the point of operation.” *Id.* § 1910.211(d)(32). A hand feeding tool, on the other hand, means “any handheld tool designed for placing or removing material or parts to be processed within or from the point of operation.” *Id.* § 1910.211(d)(38). This understanding is reiterated in Complainant’s guidance, “Safeguarding Equipment and Protecting Workers from Amputations”. In fact, the guidance document not only discusses the purpose of a guard vis-à-vis a hand feeding tool, it also provides illustrations that clearly indicate what is a guard and what is a hand feeding tool. The following images from the guidance document are illustrative:

Figure 21 Typical Hand-Feeding Tools

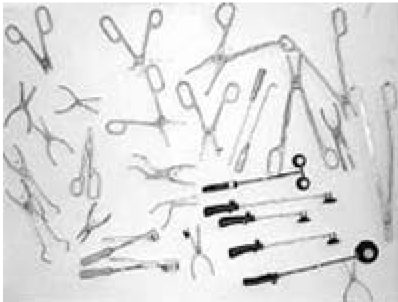
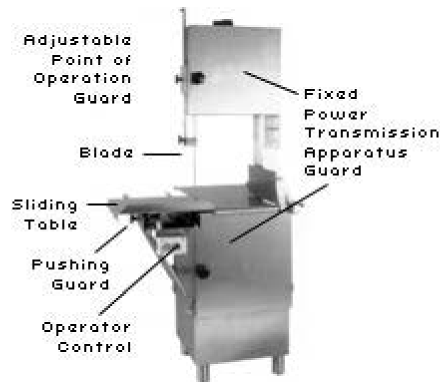


Figure 39 Stainless Steel Meat-Cutting Saw



Comparing the foregoing images to the picture of the meat-cutting saw at issue in this case, the Court is even more convinced section 212(a)(3)(iii) does not apply to the ‘tool’ that is the subject of this case. Figure 39 shows a meat-cutting saw that is basically the same as the one at issue in this case. The labels affixed to that figure show the guidance published by Complainant refers to the ‘tool’ as a ‘pushing guard’. This makes perfect sense because the definition of ‘guard’ refers to “a barrier that prevents entry of the operator's hands or fingers into the point of operation.” 29

C.F.R. § 1910.211(d)(32). Not only does the push guard provide a barrier that, if used properly, prevents entry of the operator's hands into the saw, but it is also "affixed to the machine" as required by 29 C.F.R. § 1910.212(a)(2).

On the other hand, Figure 21, which provides an illustration of typical hand-feeding tools, shows a bunch of hand-held clamps, tweezers, and other instruments that are neither barriers nor affixed to the machine in the same manner as the pushing guard shown on page 28 of Complainant's Motion for Summary Judgment. Those tools are clearly designed to be held by the operator of the machine and, by their appearance, show exactly why the language of section 212(a)(3)(iii) is concerned with (1) ensuring they are of sufficient size and appropriate shape to ensure the employee's hand does not enter the zone of danger; and (2) why they are, on their own, insufficient to comply with an employer's guarding obligations under section 212.

The Court finds the push guard attached to the meat-cutting saw at issue in this case is a guard, not a special hand tool used to feed or retrieve meat from the point of operation. The parties do not dispute the existence of the push guard, nor do they dispute how it is used. Thus, the Court's determination is one of law, not fact. Because the push guard is not a hand-feeding tool, its use is not governed by section 212(a)(3)(iii), but is instead governed by sections 212(a)(3)(ii) or 212(a)(1). On this basis, the Court finds the standard does not apply, nor was it violated, as a matter of law.

V. Conclusion

The Court's responsibility on a motion for summary judgment is two-fold: (1) determine whether there exists a dispute of material fact, and (2) decide whether the moving party is entitled to judgment as a matter of law. In so deciding, the Court does not weigh the evidence presented;

it merely determines whether a rational trier of fact could find for the non-moving party. In this case, the Court finds the law dictates the citation be vacated.

Contrary to Complainant's arguments, a determination that section 212(a)(3)(iii) is not mandatory by its own terms does not leave employers with the option to simply not provide guarding or protection. Instead, what is at issue here is whether section 212(a)(3)(iii) is the proper standard by which to hold employers responsible when physical point of operation guards are not feasible. Given Complainant's guidance and interpretations, it appears the appropriate standards to cite are either sections 212(a)(3)(ii) or 212(a)(1). Complainant has determined, when all other options have been exhausted, guarding by distance is appropriate for compliance with sections 212(a)(3)(ii) or 212(a)(1). One option for achieving compliance would be using a tool that complies with the requirements set forth in section 212(a)(3)(iii) insofar as it is not the only method being used to guard against contact with the point of operation. Such tools allow guarding by distance by placing the employees hand outside of the danger zone and away from the point of operation.

Ultimately, this case was about whether Respondent achieved proper guarding on its band saw, which should have been cited under sections 212(a)(1) or 212(a)(3)(ii). Had Respondent used hand tools, section 212(a)(3)(iii) would have been applicable insofar as the tool used was insufficient for maintaining proper guarding by distance or if it were being used as the sole means of protection from the danger zone. As noted by Complainant, nearly every other moving part on Respondent's saw that could feasibly be guarded was guarded. Thus, the remaining question was how to complete the guard, not whether the hand tool (that should have been used) complied with the requirements supplied by section 212(a)(3)(iii).

Further, this case was far simpler than Complainant made it out to be. As discussed in the final section, the push guard—although a 'tool' in the most general sense—was not a hand tool (1) under the definition provided in part 1910.211, (2) according to the plain language of the standard, or (3) according to Complainant's own guidance documents. The real question in this and any guarding case is whether adequate guarding was provided. The meat-cutting saw had an attached, adjustable guard, the use of which appears to be required by sections 212(a)(1) and (a)(3)(ii), both of which mandate the use of guards to prevent contact with the point of operation. Instead, Complainant fixated on section 212(a)(3)(iii), which only provides conditions for—but does not require—the use of hand tools.

VI. ORDER

Based on the foregoing, the Court finds Respondent is entitled to judgment as a matter of law. Complainant's Motion for Summary Judgment is DENIED. Respondent's Cross Motion for Summary Judgment is GRANTED on the basis set forth above. All other grounds raised by Respondent in its Cross Motion for Summary Judgment are DENIED. The Court hereby VACATES Citation 1, Item 1 and the associated penalty.

SO ORDERED.

/s/ *Patrick B. Augustine*

Date: February 1, 2021
Denver, Colorado

Patrick B. Augustine
First Judge, Denver OSHRC