

Secretary of Labor,
Complainant,

v.

OSHRC Docket No. **00-0509**

Selkirk, Inc., a Division of
U. S. Industries, Inc.,
Respondent,

and

Sheet Metal Workers' International
Association, Local Union # 456,
Authorized Employee
Representative.

Appearances:

Janice Thompson, Esq.
U. S. Department of Labor
Office of the Solicitor
Cleveland, Ohio
For Complainant

Douglas J. Suter, Esq.
Isaac, Brant, Ledman & Teetor
Columbus, Ohio
For Respondent

Joseph E. Christman
Sheet Metal Metal Workers Local 456
Shawnee, Ohio
For Authorized Employee
Representative

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Selkirk, Incorporated, A Division of U.S. Industries, Incorporated, contests a citation issued to it by the Secretary on February 9, 2000. The Secretary issued the citation following an inspection conducted by Occupational Safety and Health Administration (OSHA) compliance officer Jeffrey See on January 27, 2000.

The citation alleges a willful violation of § 1910.212(a)(3)(ii), for failure to adequately guard the point of operation of a Lown roller. The Secretary proposed an amended penalty of \$63,000.00.

A hearing was held on September 20 and 21, 2000, in Columbus, Ohio. The parties have filed post-hearing briefs. Prior to the hearing, Selkirk asserted the affirmative defenses of unpreventable employee misconduct and infeasibility. In its post-hearing brief, Selkirk does not refer to these defenses and appears to concede that the Lown roller was in noncompliance with the cited standard. Selkirk urges only that the undersigned “reclassify Citation 1, Item 1, from a willful violation to a serious violation” (Selkirk’s brief, p. 10).

For the reasons set out below, the undersigned affirms item 1 of the citation as a willful violation of § 1910.212(a)(3)(ii).

Background

Selkirk operates a plant in Logan, Ohio, where it fabricates metal. In its PS department, Selkirk produces stainless steel pipe of varying diameters for household appliances and overhead air vents. Selkirk has three pipe rolling machines: the Lown roller, the hydraulic Montgomery roller, and the 5-inch diameter roller. Since the mid 1990s, the smallest diameter pipe run on the Lown roller is 6 inches. Because of a large gap left for the welder, the 6-inch pipe is also run in reverse to tighten the cylinder and close the gap. Running the 6-inch pipe on the Lown roller was the only procedure that required reverse operation of the pipe rolling machine at the time of the OSHA inspection. The Lown roller had also been used to run 5-inch pipe in reverse until 1994, when an employee was injured running a 5-inch pipe. The reverse operation of the Lown roller creates in-running rolls in the back of the machine (Tr. 49-51, 75-76, 79, 106, 126, 172-175, 244-247).

On July 26, 1999, Selkirk employee David Bookman was operating the Lown roller in reverse while rolling a 6-inch pipe. The glove on Bookman’s left hand was caught in the rollers, which resulted in Bookman’s left hand being pulled into the rollers and crushed. Part of Bookman’s little finger was amputated, and he suffered loss of feeling in his ring and middle finger. The Lown roller was unguarded at the time of Bookman’s accident (Tr. 128-130).

On January 27, 2000, compliance officer Jeffrey See conducted an inspection of the Lown roller. It was still unguarded while being operated in reverse (Tr. 191-192). On January 31, 2000, Selkirk moved the reverse foot pedal to a remote location and installed a guard on the side of the roller to prevent employees from reaching into the roller during reverse operation of the Lown roller (Exh. C-4, p.1).

The Citation

The Secretary has the burden of proving her case by a preponderance of the evidence.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The Secretary charges Selkirk with a willful violation of § 1910.212(a)(3)(ii), which provides:

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.

Applicability

Selkirk does not dispute the application of § 1910.212(a)(3)(ii) to the Lown roller. The record establishes that the point of operation of the Lown roller exposed its operators to injury when it was operated in reverse. The cited standard applies.

Noncompliance

It is undisputed that, at the time of the inspection, Selkirk had not designed and constructed a guarding device so as to prevent the operator from having any part of his or her body in the danger zone during the operating cycle. It was not until January 31, 2000, four days after compliance officer See's inspection, that Selkirk moved the reverse foot pedal and installed a guard on the side of the roller (Exh. C-4, p.1). Selkirk was in noncompliance with § 1910.212(a)(3)(ii).

Exposure

In *Rockwell International Corporation*, 9 BNA OSHC 1092, 1098 (No. 12470, 1980), the Commission stated, "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." Selkirk contends that the Lown roller functions properly in reverse without its operator placing his or her hands on the pipe as it is being rolled. Selkirk also contends that it trains its

Lown roller operators to process the 6-inch pipes in reverse without touching the pipe. Several of Selkirk's employees testified that they do not touch the 6-inch pipe during the reverse operation (Tr. 246-247, 297-298, 315-316, 326).

Even though Selkirk does not argue in its brief that the operators who were injured were engaging in unpreventable employee misconduct, its statement that its operators are trained so as to eliminate their exposure to the in-running rolls amounts to such a defense. In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. E.g., *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F.3d 401 (6th Cir. 1997).

Selkirk failed to successfully communicate this rule to all of its employees. Operator Martin Redfern stated, "I was trained by one of the PS assemblers, and I was trained to roll 5- and 6-inch pipe in reverse with your hand putting pressure down on the pipe to get it to roll tight" (Tr. 100). It was only after a 1994 accident that welder Conny Potter showed Redfern how to process the 6-inch pipe without touching it (Tr. 105).

Bookman testified, "I was instructed to put slight pressure in the reverse mode on top of the pipe, and it made sense to me at the time because, you know, it's not tight enough; and that way, by putting pressure on it, it's going to draw a little more tension onto the metal" (Tr. 126-127).

Selkirk press inspector and authorized employee representative Joseph Christman had operated the Lown roller for approximately 12 years. The last time prior to the hearing that he had operated the Lown roller was in 1998. At the time of the hearing, Christman still thought it was proper to place his hands on the pipe while rolling it in reverse (Tr. 173-174):

My hands would be on both ends [of the pipe], and I would allow the material to slide through my hands. And, on the reverse, ordinarily, I would pull back on it to keep the edges of the metal from overlapping, because if they overlap on that reverse roll, it will make a flat area, and that makes it hard for the welder to weld the seam. But, each operator has a different way of operating the machine.

Selkirk failed to train at least three of its employees not to touch the pipe while operating the Lown Roller in reverse mode. In fact, Redfern and Bookman both testified without

contradiction that they had been taught to press down on the pipe to prevent overlapping the edges of the pipe and making a flat spot. Bookman specifically remembered thinking how it made sense to push on the metal to close it up (Tr. 147). There was no evidence that Selkirk took any steps to enforce its rule prohibiting the Lown roller operators from touching the metal until Bookman's accident.

No physical barrier existed to prevent the Lown roller operators from placing their hands on the pipe during processing. The training that was intended to prevent the operators from touching the pipe was not uniformly given to all operators and was not enforced. The operators were exposed to the hazard of having their hands pulled into the rollers while operating the machine in reverse.

Knowledge

Selkirk knew that the Lown roller exposed its operators to the possibility of crushing and amputation injuries when they operated the machine in reverse. In 1991, the Ohio Bureau of Workers' Compensation, Division of Safety & Hygiene, conducted a safety survey of the Logan facility. Item 32 of the survey states, "Guard in-running rolls," and refers to § 1910.212 (Exh. C-6).

After Redfern's 1994 accident, Selkirk supervisor Robert Russell filed an accident report with Selkirk, in which he stated, "The poor design of roller and/or method we use to roll small diameter pipe" contributed most directly to the accident (Exh. C-7, p. 1). Russell reported, "The potential still exists that this could happen" (Exh. C-7, p. 2). Selkirk discontinued running 5-inch pipe in reverse on the Lown roller, but continued to run the 6-inch pipe. Selkirk realized that running the 6-inch pipe in reverse still created in-running rolls that presented a hazard to employees. The violative condition of the Lown roller was made apparent again on July 26, 1999, when Bookman sustained his hand injury. Selkirk knew that the Lown roller was not guarded in compliance with § 1910.212(a)(3)(ii).

The Secretary has established that Selkirk committed a violation of § 1910.212(a)(3)(ii). She charges that Selkirk's violation of the standard was willful.

Willful Classification

A willful violation is one "committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Falcon Steel Co.*, 16 BNA OSHC 1179, 1181, 1993-95 CCH OSHA ¶30,059, p. 41, 330 (No. 89-2883, 1993)(consolidated); *A.P. O'Horo Co.*, 14 BNA

OSHC 2004, 2012, 1991-93 C.H. OSHA ¶ 29,223, p. 39,133 (No. 85-0369, 1991). A showing of evil or malicious intent is not necessary to establish willfulness. *Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1891, n.3, 1995-97 C.H. OSHA ¶ 31,228, p. 43,788, n.3 (No. 92-3684, 1997), *aff'd* 131 F.3d 1254 (8th Cir. 1997). A willful violation is differentiated from a nonwillful violation by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees. *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 C.H. OSHA ¶ 29,240, p. 39,168 (No. 82-630, 1991)(consolidated). A willful violation is not justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts were not entirely effective or complete. *L.R. Willson and Sons, Inc.*, 17 BNA OSHC 2059, 2063, 1997 C.H. OSHA ¶ 31,262, p. 43,890 (No. 94-1546, 1997), *rev'd on other grounds*, 134 F.3d 1235 (4th Cir. 1998); *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 C.H. OSHA ¶ 27,893, p. 36,589 (No. 85-355, 1987). The test of good faith for these purposes is an objective one; whether the employer's efforts were objectively reasonable even though they were not totally effective in eliminating the violative conditions. *Caterpillar, Inc. v. OSHRC*, 122 F.3d 437, 441-42 (7th Cir. 1997); *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC at 2068, 1991-93 C.H. OSHA at p. 39,168; *Williams Enterp., Inc.*, 13 BNA OSHC at 1256-57, 1986-87 C.H. OSHA at pp. 36, 589.

A.E. Staley Manufacturing Co., 19 BNA OSHC 1199, 1202 (Nos. 91-0637 & 91-0638, 2000).

Selkirk argues that it made a good faith effort to comply with the standard. The company contends that it took numerous steps to guard the Lown roller while being used for the reverse operation.

After Bookman's 1999 accident, Selkirk shut down and locked out the Lown roller while it conducted an investigation into the accident (Tr. 62, 248, 341). Selkirk determined during its investigation that Bookman had improperly operated the roller by placing his hand on the metal pipe while running the machine in reverse (Tr. 248, 341-342). Selkirk's safety environmental coordinator Dina Kunzler met with Selkirk's supervisors and instructed them to emphasize in their safety training classes that the Lown roller operators were not to put their hands on the metal while operating the machine in reverse (Tr. 342). The record does not indicate whether the supervisors systematically retrained the operators as instructed by Kunzler. As noted, most of Selkirk's employee witnesses testified that they already knew not to place their hands on the pipe while the Lown roller was in reverse. Redfern stated that Potter showed him how to run the pipe without touching it after his 1994 accident. Although Potter showed Redfern how to avoid using his hands,

Potter had too many people on second shift “to help them all” (Tr. 319). Redfern was not retrained after the 1999 accident (Tr. 10). Christman was not retrained, but he was no longer a Lown roller operator at the time of Bookman’s accident. Bookman claimed he received no additional training after his accident. He stated that he figured out for himself how to run the pipe without touching it during the reverse operation (Tr. 132-133, 157-158).

At the time of Bookman’s accident, two small red signs were affixed to the Lown roller that cautioned employees not to put their hands near the roller while it was in operation (Tr. 300-301). Those signs were not conspicuous, especially for someone instructed to guide or press on 6-inch pipe when operating in reverse. Selkirk posted additional, and larger, safety signs on the roller warning operators not to place their hands on the metal after Bookman’s accident (Exh. C-4, pg. 10A; Tr. 248-249).

Selkirk issued and posted a written safety alert on August 8, 1999, which stated (Exh. C-4, p. 2):

SAFETY ALERT

PS SUPERVISORS:

As you know, David Bookman suffered a serious injury on the roller in PS. It was brought to our attention during the investigation that he was instructed to place his hand on top of the metal and press down, which resulted in his hand being pulled into the roller. Signage will be placed at the rollers reminding employees that their hands must be kept clear of this area.

Please as soon as possible conduct a department meeting instructing everyone on the correct procedure. It deeply concerns me that someone else may be practicing this unsafe act which may lead to another injury.

Thanks,
Dina Kunzler

Selkirk elaborates in its brief on its purported good faith efforts to comply with the cited standard (Selkirk’s brief, pp. 7-9; citations to the transcript and footnote omitted):

According to Dina Kunzler and the Selkirk employees, Dina Kunzler was back at the Lown Roller almost daily, brainstorming with the roller operators, maintenance personnel and others including the PS Department Safety Committee Representative and the Group Leader, trying to find a way to guard the Lown Roller...

Everyone agreed that fixed barrier guarding and light curtains would not work as a means to guard the reverse operation of a power roller...

Dina Kunzler searched on the Internet for guarding ideas, attempted to contact the manufacturer of the Lown Roller, contacted other roller manufacturers, contacted the Ohio Bureau of Workers' Compensation, Division of Safety & Hygiene, and contacted guarding experts seeking some advice on how to reverse operation on the guard to the Lown Roller...

On October 13, 1999, a representative of Rockford suggested two hand controls as a guarding method and Dina Kunzler immediately issued a work order for two hand controls. ... However, the Selkirk employees then explained to Dina Kunzler and the Maintenance Supervisor that two hand controls would not work...

According to Dina Kunzler and the Selkirk employees, prior to OSHA Compliance Officer Jeff See's OSHA inspection in January of 2000, the Selkirk employees came up with the idea of moving the foot pedal for the reverse operation as the most effective way of keeping the operator's hands out of the roller area during the reverse operation...

At or around this time, the Plant Manager died of a massive heart attack and the Maintenance Supervisor retired...

Prior to the OSHA inspection, Dina Kunzler went back to the Lown Roller (estimated to be January 9, 2000) and told the new maintenance person she wanted the foot pedal moved for the reverse operation on the Lown Roller and the new maintenance person told her he would take care of it...

After January 9, 2000, Dina Kunzler was out of Selkirk's Logan, Ohio, plant conduction safety training in Ohio, thinking the foot pedal was being moved on the Lown roller...¹

Nelson Redd and James Brien are the representatives of the Ohio Bureau of Workers' Compensation, Division of Safety & Hygiene, and of Rockford Industries, respectively, with whom Kunzler claimed she consulted. Both of them deny that they held discussions with Kunzler relating

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At the hearing, Kunzler testified that she discussed guarding the Lown roller with Nelson Redd of the Bureau of Worker's Compensation, Division of Safety & Hygiene, and with James Brien, a sales engineer with Rockford Industries, which manufactures safety devices (Tr. 344-345, 360). Subsequent to the hearing, the Secretary moved to strike as hearsay the testimony of Kunzler regarding any purported discussions she had with Redd and Brien relating to the guarding of the Lown roller. The Secretary also moved to admit (1) exhibit C-13, a copy of See's post-it notes indicating the time of receipt of voice mail messages left to him by Redd and Brien; (2) exhibit C-14, a video cassette of Brien's voice message and Redd's voice message to See; and (3) the September 27, 2000, deposition of Brien. Statements made by Redd and Brien in C-14 and by Brien in his deposition contradict Kunzler's assertions that she consulted with them on the guarding of the Lown roller.

Selkirk did not file a response to the Secretary's motions. It is noted that in its brief Selkirk cites Kunzler's claims of consultations with Redd and Brien as evidence of its good faith efforts to comply with § 1910.212(a)(3)(ii).

The undersigned now denies the Secretary's motion to strike Kunzler's testimony with regard to conversations she had with Redd and Brien and grants the Secretary's motion to admit exhibits C-13, C-14, and the deposition of Brien, which is entered into the record as C-15.

to the guarding of the Lown roller (Exh. C-14; Deposition of James Brien, J-31, pp. 7-10). Kunzler's testimony is not credited with regard to her purported consultations with Redd and Brien.

Even if one were to accept the account in Selkirk's brief as correct, Selkirk has failed to establish that it made adequate good faith efforts to comply with § 1910.212(a)(3)(ii). Selkirk was on notice as of 1991, when the Ohio Bureau of Workers' Compensation notified it that it needed to guard in-running rolls, that the Lown roller exposed employees to crushing injuries when operated in reverse. This notice became a heightened awareness with the 1994 accident in which Redfern was injured. Even though Selkirk discontinued running 5-inch pipe on the Lown roller, it did not face the core issue of how to guard its employees from exposure to the in-running rolls.

It is true that Selkirk took some steps to address employee exposure to the Lown roller after Bookman's July 1999 accident. Selkirk's efforts in training its employees and in posting signage are, however, inapposite to the cited standard. Section 1910.212(a)(3)(ii) addresses guarding; it is not a training or signage standard. The crucial factor is that the Lown roller operators continued to use the machine in its violative condition with the full knowledge of Selkirk's management personnel. Selkirk's intended retraining, its new signs, and its "brainstorming" did nothing to actually protect employees from the in-running rolls between the time of Bookman's accident and January 31, 2000, when the machine was finally guarded.

Selkirk attempted to excuse its noncompliance with the standard despite its heightened awareness of the condition by blaming it on turnover in management personnel. The Review Commission has addressed this argument elsewhere:

Caterpillar attempts to evade responsibility for its violative conduct by pointing to the ignorance of its new supervisory personnel. This ignorance, however, derives solely from Caterpillar's failure to convey to these supervisors relevant and available information it possessed and which, under the Act, it was responsible for disseminating to those entrusted with the safety and health of its employees. Accordingly, we conclude that Caterpillar's heightened awareness of the stud pulling hazard, established by imputing to it the knowledge of the former supervisor Parker and former superintendent Seeyle, remains with the corporation and was not affected by any turnover in personnel

Caterpillar, Inc., 17 BNA OSHC 1731, 1732-1733 (No. 93-373, 1996).

Selkirk cites several cases in support of its contention that the steps it took to address the in-running rollers were good faith efforts sufficient to avoid a willful classification. The cases cited by Selkirk are distinguishable from the present case.

Selkirk cites *Dillingham Construction Pacific Basin LTD.*, 19 BNA OSHC 1069 (No. 99-0787, 2000), an unreviewed administrative law judge decision with no precedential value. It is interesting to note, however, that the judge bases his determination that the employer's violation of the cited construction standard was not willful on the finding that the foreman was not aware of the existence of the violated standard. In the instant case, Selkirk was notified in 1991 of the hazard of in-running rollers, and was specifically informed that this hazard violated § 1910.212 (Exh. C-6).

Selkirk next cites *R.D. Anderson Construction Co., Inc.*, 12 BNA OSHC 1665, 1669 (No. 81-1469, 1986), in which the Commission declined to classify the employer's violation of the asbestos standard as willful. The employer had failed to conduct initial monitoring of the worksite for asbestos before making floor cuts, even though it had some reason to think that asbestos was present. The Commission noted that the employer had ordered additional safety equipment for its employees after the first floor cuts were made. The Commission stated, "Clearly, Anderson was taking steps necessary to comply with the asbestos standard in the event additional floor cuts were made." The employer in *Anderson* was not engaged in a continuing violation, as Selkirk was in the present case. Anderson realized its mistake and took steps to comply with the standard on the next occasion when the standard came into play. The Lown roller, however, was in continuous violation of § 1910.212(a)(3)(ii). Selkirk had the option of locking out the machine until it achieved compliance with the standard, but chose instead to continue to expose its operators to the hazard while searching for a solution to the guarding problem.

Finally, Selkirk cites *General Dynamics Land Systems Division, Inc.*, 15 BNA OSHC 1275, 1288 (No. 83-1293, 1991) *aff'd* 985F.2d (6th Cir. 1993), a pre-standard confined space case. In *General Dynamics*, the Commission declined to classify the employer's § 5(a)(1) violation as willful. One of the key factors in its decision was that it was a violation of the general duty clause, which "prescribes no specific abatement method." In the present case, Selkirk knew that it was required to guard the point of operation of the Lown roller. While the abatement method is not described with the specificity of some OSHA standards, Selkirk was on notice that it was required

to provide a guarding device “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 Secretary has established that Selkirk committed a willful violation of § 1910.212(a)(3)(ii). Its failure to guard the Lown roller was the result of knowing disregard for the requirements of the Act. Since 1991, Selkirk knew that the rollers of the Lown roller presented a hand-crushing hazard to its operators. It was apprised of the specific standard that addresses that hazard. Selkirk kept the machine in continuous operation (except for a few days while it investigated Bookman’s accident), potentially exposing 16 operators on two shifts to the crushing hazard (Exhs. C-1 and C-2).

The Secretary proposed an amended penalty of \$63,000.00 (Tr. 211). The undersigned finds that this penalty is excessive. Selkirk employed approximately 200 people at its Logan, Ohio, plant and more than 400 people company-wide at the time of the inspection (Tr. 22). Selkirk had no history of violations during the 3 years prior to the January 2000 inspection (Tr. 211). The gravity of the violation is high. Bookman had part of one of his fingers amputated, and he had permanent nerve damage in two other fingers.

Despite the willful classification, however, the undersigned recognizes that Selkirk was in the process of addressing the problem. Achieving compliance with § 1910.212(a)(3)(ii) was not given the high priority that it should have been, but it was a goal that Selkirk eventually intended to reach. While Selkirk failed to give sufficient emphasis to guarding the Lown roller, it was not ignoring the issue. It is determined that the appropriate penalty for Selkirk’s willful violation of § 1910.212(a)(3)(ii) is \$30,000.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED that item 1 of citation No. 1, alleging a willful violation of § 1910.212(a)(3)(ii), is affirmed, and a penalty of \$30,000.00 is assessed.

NANCY J. SPIES
Judge

Date: February 9, 2001