United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 North Speer Boulevard, Room 250
Denver, Colorado 80204-3582

Phone: (303) 844-3409 Fax: (303) 844-3759

SECRETARY OF LABOR, Complainant, v. WHITE WAVE, INC., Respondent.	OSHRC DOCKET NO. 03-0963

APPEARANCES:

For the Complainant:
Oscar L. Hampton, III, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:
James J. Gonzales, Esq., Holland & Hart LLP, Denver, Colorado

Before: Administrative Law Judge: Sidney J. Goldstein

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, White Wave, Inc. (White Wave), at all times relevant to this action maintained a place of business at 6123 Arapahoe Road, Boulder, Colorado, where it was engaged in manufacturing soyfood products. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On February 26, 2003, the Occupational Safety and Health Administration (OSHA) initiated an inspection of White Wave's Boulder work site. As a result of that inspection, White Wave was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest White Wave brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On December 4-5, 2003, a hearing was held in Denver, Colorado. At the hearing the Secretary withdrew citation 1, item 1, alleging a violation of §29 C.F.R. 1910.23(c)(1). Item 2, was amended to allege an "other than serious" violation of §29 C.F.R. 1910.26(a)(1)(v), with a proposed penalty of $800.00. Respondent withdraws its contest to that item as amended. Item 3, alleging a violation of §29

C.F.R. 1910.38(a)(5)(iii) was withdrawn. The Secretary withdrew instance (a) of item 5, instance (b), alleging a violation of §29 C.F.R. 1910.212(a)(5) was recharacterized as an "other than serious" violation, with a proposed penalty of $800.00, and Respondent's notice of contest was withdrawn. Item 6, alleging a violation of §29 C.F.R. 1910.305(g)(1)(iii)(A) was withdrawn (Tr. 5-7). Other than serious citation 2, item 1 remains at issue. The parties have submitted briefs on the matters remaining at issue and this matter is ready for disposition.

Alleged Violation of §1910.212(a)(1)

Serious citation 1, item 4 alleges:

29 CFR 1910.212(a)(1): Machine guarding was not provided to protect operator(s) and other employees from hazard(s) created by rotating parts:

a) White Wave, Inc. @ 6123 Arapahoe Ave., Boulder, CO: On or before February 26, 2003, the employer did not ensure that the Incline Bean Auger in the Tofu Room was appropriately guarded in that, the auger guard had a measured opening(s) of approximately 4 inches. The condition exposed employees to the hazards such as those created by rotating unguarded auger blades.

The cited standard provides:

> 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, in-going nip points, rotating parts, flying chips and sparks. Examples of guarding methods are – barrier guards, two-hand tripping devices, electronic safety devices, etc.

Facts

OSHA Compliance Officer (CO) Eduardo Rojo testified that White Wave's bean auger is used in the tofu room to transport beans into an elevated hopper for further processing (Tr. 64, 73; Exh. C-1; R-12). An employee pours a 60-pound bag of beans into a bin at the base of a stainless steel tube while the auger is running (Tr. 73-74, 186, 206-07). The spiral auger blade turns, catches the beans, and pulls them up a tube, or stem to the hopper (Tr. 65, 184). The operator reaches over and to the side of the auger to turn it on and off (Tr. 197-98, 202-04, 207-08; Exh. C-2). At the time of the inspection, the incline bean auger in the tofu room was guarded with a wire mesh intake guard located at the lower end of the auger (Tr. 65; Exh. R-12). The intake guard was supplied by the manufacturer, and had not been altered (Tr. 127, 227; Exh. R-13, R-14). Rojo testified that the guard was inadequate, in that the mesh of the cage guard created openings measuring 4½ inches by 3 inches. The mesh cage would not prevent an employee from making contact with the auger blade (Tr. 66, 70). Rojo stated that should an employee place a finger or hand inside the cage, the digit or limb could be amputated (Tr. 65). Rojo did not observe the operation of the auger (Tr. 75).

Sidney Garcia, crew leader in White Wave's tofu area, stated that he fills the auger bin with soy beans (Tr. 181). Garcia has been instructed not to put his hands into the auger bin (Tr. 184). At no time does the task require him to reach into the bin (Tr. 184). Moreover, Garcia stated, the cage around the auger physically prevented him from reaching into the auger, as his hand would not fit through the cage (189-190, 192). No one has ever been hurt using the auger (Tr. 188).

Kortney Dockter, White Wave's plant manager (Tr. 216), testified that he measured the spaces created by the wire mesh of the cage, and found that they were 3 x 3 inches (Tr. 233, 237). Kathryn Speidel, White Wave's quality assurance supervisor, testified that in her contemporaneous notes of the inspection, she wrote that the openings on the cage guard were 3 x 3 inches, as measured by the OSHA CO (Tr. 258-59). Complainant's videotape of the inspection shows the CO measuring the length of the cage at 22 inches (22 divided by 7, the number of gaps in the cage guard, equals about 3 inches); the width of the gap between the cage wires measured approximately 2 1/4 inches (Tr. 145-47; Exh. C-1).

Discussion

To establish a violation, the Secretary must prove by a preponderance of the evidence that (1) the cited standard applies; (2) its terms were not met; (3) employees had access to the violative condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *See Mosser Constr. Co.*, 15 BNA OSHC 1408, 1411, 1991-93 CCH OSHD ¶29,546, p. 39,902 (No. 89-1027, 1991).

To show exposure under Commission precedent, the Secretary must show either that Respondent's employees were actually exposed to the violative condition or that it is "reasonably predictable by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1074, 1998 CCH OSHD P31,463, pp. 44,506-07 (No. 93-1853, 1997). Specifically, the Commission has held that the mere fact that it is not impossible for an employee to insert his hands into a machine's point of operation does not prove exposure. Whether the point of operation exposes an employee to injury must be determined by the manner in which the machine functions and the way it is operated by the employees. *Rockwell International Corporation*, 9 BNA OSHC 1092, 1097-98, 1980 CCH OSHD ¶24,979, 30,846 (No. 12470, 1980). *See also, Jefferson Smurfit Corp.*, 15 BNA OSHC 1419, 1421-23, 1991-93 CCH OSHD ¶29,551, p. 39,954 (No. 89-553, 1991) [violation of section 1910.212(a)(1) cannot be found where operator would have no reason to put hands close enough to unguarded parts of machinery to be exposed to hazard]; *Armour Food Co.*, 14 BNA OSHC 1817, 1824, 1987-90 CCH OSHD ¶29,088, pp. 38,883-84 (No. 86-247,

1990) [employees had no reason to put their hands in danger zone and it would have been difficult for them to do so].

Here, Complainant showed only that the auger operator worked within arm's length of the rotating auger. The evidence fails to show that the operator would have any reason to put his hands inside the caged guard, or that it was reasonably predictable that he might inadvertently do so. On the contrary, this record suggests that it would have been difficult for the employee to make contact with the auger's point of operation except deliberately. Item 4 is vacated.

Alleged Violation of §1910.37(q)(1)

Other than serious citation 2, item 1 alleges:

29 CFR 1910.37(q)(1): Exit(s) or access to exit(s) were not marked by readily visible signs:

(a) White Wave, Inc. @ 6123 Arapahoe Ave., Boulder, CO: On or before February 26, 2003, the employer did not ensure that the exit (eastside door) of the employee's break room was marked by a readily visible sign.

(b) White Wave, Inc. @ 6123 Arapahoe Ave., Boulder, CO: On or before February 26, 2003, the employer did not ensure that the exit (westside door) of the main office was marked by a readily visible sign.

(c) White Wave, Inc. @ 6123 Arapahoe Ave., Boulder, CO: On or before February 26, 2003, the employer did not ensure that the exit (southside door) of the boiler room was marked by a readily visible sign.

The cited standard provides:

> Exits shall be marked by a readily visible sign. Access to exits shall be marked by readily visible signs in all cases where the exit or way to reach it is not immediately visible to the occupants.

Facts

It is undisputed that there were no exit signs over the three cited interior doors (Tr. 109; Exh. C-2). Two of the doors led from a washroom; one opening into the main office where an exit discharged to the outside, and the other leading to the cafeteria, where a second discharge exit was located (Tr. 35-45; Exh. C-1, C-2). The door from the maintenance room leading to the boiler room was not marked to indicate that an exit discharging to the outdoors could be accessed through the boiler room (Tr. 47-51; Exh. C-1, C-2). Mr. Dockter testified that the exit sign over the discharge exit in the boiler room was visible if one stood in the doorway between the maintenance room and the boiler room (Tr. 226-27). Ms. Speidal testified that contractors coming to the plant are informed of the location of exits (Tr. 288-89).

Discussion

White Wave maintains that the alleged violation may not be affirmed as the cited standard has been rescinded. Respondent correctly notes that the cited regulation is no longer in effect. The final rule amending Subpart E, **Means of Egress** was published on November 7, 2002. *See* 67 Fed. Reg. 67949. However, as introduction, the final rule states:

> On September 10, 1996, OSHA published a proposed rule in the **Federal Register** (61 FR 47712) proposing to revise subpart E of part 1910. OSHA proposed to rewrite the existing requirements of subpart E in plain language so that the requirements would be easier to understand by employers, employees, and others who use them. The proposal did not intend to change the regulatory obligations of employers or the safety and health protection provided to employees by the original standard.

As noted in the Federal Register, Respondent's obligations under §1910.37 were not affected by the rewriting of subpart E. Both the original and the amended subpart require the employer to mark exits with readily visible signs. *See*, 29 C.F.R. §1910.37(b)(2), which states: "Each exit must be clearly visible and marked by a sign reading 'Exit'." That White Wave was cited under the precursor to the current parallel standard is a clerical error which affects neither the theory nor the facts at issue, both of which were fully tried at the hearing. Respondent's counsel was aware of the non-substantive revision of Subpart E; Respondent was not, therefore, prejudiced in the preparation of its case. The citation is amended *sua sponte* to reflect the current designation of the cited regulation – §1910.37(b)(2).

The evidence establishes that both doors out of the washroom were exits as defined by the standard, *i.e.* part of the exit route providing a way of travel to the exit discharge, *See,* **Definitions.** 29 C.F.R. §1910.34(c)[2003]; 29 C.F.R. §1910.35(c) [2002]. The doors were not marked "Exit." The doorway from the maintenance room to the boiler room was an exit, but was not marked with an exit sign; the exit sign in the boiler room could not be seen unless one was standing in the maintenance room doorway. White Wave's argument, that the way to the exits were readily apparent to employees and contractors who are familiar with the facilities is irrelevant. The requirements of the standard are unambiguous. Because the employer may not use the adjudicatory process to challenge the wisdom of a required safety measure, *See, Austin Engg. Co.*, 12 BNA OSHC 1187, 1188, 1984-85 CCH OSHD ¶27,189, p. 35,099 (No. 81-168, 1985), citation 2, item 1 will be affirmed.

ORDER

1. Serious citation 1, item 1, alleging violation of §29 CFR 1910.212(a)(1) is VACATED.

2. Other than serious citation 2, item 1, alleging violation of §29 CFR 1910.37(q)(1), is amended *sua sponte*, and is AFFIRMED as a violation of §1910.37(b)(2), without penalty.

/s/
Sidney J. Goldstein
Judge, OSHRC

Dated: February 26, 2004