

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

Secretary of Labor,
Complainant,
v.
Sanderson Farms, Inc.,
Respondent.

OSHRC Docket No. **07-1623**

Appearances:

Robert M. Lewis, Jr., Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia
For Complainant

Darren S. Harrington, Esq., Barnes & Harrington, P.C., Dallas, Texas
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Sanderson Farms, Inc., processes poultry at several plants in Mississippi, Texas, and Louisiana. On April 24, 2007, one of its employees died in an accident at its Collins, Mississippi, plant. Occupational Safety and Health Administration (OSHA) compliance officer Priscilla Jordan investigated the accident and inspected the Collins plant from April 25 through May 3, 2007. As a result of OSHA's inspection, the Secretary issued a citation to Sanderson Farms on September 11, 2007, alleging violations of seven standards of the Occupational Safety and Health Act of 1970 (Act).

The citation alleges Sanderson Farms violated the following standards:

Item 1: § 5(a)(1), failing to ensure it removed pallets containing frozen chicken from a storage rack prior to allowing employees to repair the rack;

Item 2: § 1910.176(b), failing to store material so it did not create a hazard;

Item 3: § 1910.212(a)(5), failing to guard fan blades;

Item 4: § 1910.219(c)(4)(i), failing to guard a projecting shaft end;

Item 5: § 1910.305(b)(1), failing to close openings through which conductors enter;

Item 6a: § 1910.1200(f)(5)(i), failing to identify a hazardous substance in a container; and

Item 6b: § 1910.1200(f)(5)(ii), failing to provide appropriate hazard warnings on a container of a hazardous substance.

Sanderson Farms timely contested the citation. The undersigned held a hearing in this matter in Hattiesburg, Mississippi, on March 13 and 14, 2008. At the hearing the parties stipulated to jurisdiction and coverage. The Secretary withdrew item 1 of the citation.¹

Sanderson Farms contends it complied with all of the cited standards. With regard to item 2, Sanderson Farms argues that any violation found resulted from employee misconduct on the part of the deceased employee. The parties submitted post-hearing briefs.

For the reasons discussed below, the undersigned affirms item 2 of the citation and assesses a penalty of \$6,300.00, and vacates items 3, 4, 5, 6a, and 6b.

Background

Sanderson Farms's facility in Collins, Mississippi, is a "live kill" plant, where chickens are slaughtered at the plant (in two slaughter shifts a day, followed by a clean-up shift). The facility sits on 52 acres of land (Tr. 24, 265). Sanderson Farms maintains two large freezers (designated the north and south freezer) there. The temperature in the freezers ranges from 0° to -20° Fahrenheit.

Sanderson Farms stores poultry in the freezers on pallets using a pallet "rack" system, which was already in place in 1982 when Sanderson Farms bought the facility.² Employees use two types of pallets in its rack system. Employees can place an estimated 50 to 60 boxes of chicken on a shipping pallet, which measures 40 inches by 48 inches. Shipping pallets are then stacked on a larger (54 inches by 56 inches) "freezer pallet" sitting on the ground. The stacked freezer and shipping

¹ Item 1 may have been duplicative of item 2. Item 1 alleged Sanderson Farms violated the general duty clause of § 5(a)(1) when McDonald cut a damaged rack leg with his torch without first removing the pallets of chicken. The Secretary suggested one form of abatement was to remove pallets of chicken from any rack with visible damage as soon as the damage is detected.

² The age of the rack system is uncertain. No manufacturer's name appears on the rack system. When compliance officer Jordan requested information on the rack system, Sanderson Farms contacted one of its retired maintenance workers who stated the racks had been built in 1962 (Tr. 49). Division manager Daniel Nicovich testified he had been told the rack system dates back to 1974 (Tr. 263).

pallets are then lifted into place using a forklift. A loaded freezer pallet may weigh from 2200 to 2500 pounds (Tr. 39, 263, 269, 277, 300). The total capacity for both freezers is approximately one million pounds of chicken. The freezers were not full at the time of the inspection (Tr. 240-241, 301-302).

On April 23, 2007, Sanderson Farms maintenance employees Harvey McDonald and James Whitehead began making ongoing repairs to the rack legs in its freezers. Following accepted procedures, Donald Ray King, the shipping superintendent, gave the maintenance employees permission to use one of his department's forklift operators, Adrian Eley, to remove pallets from the racks before McDonald and Whitehead cut off damaged sections and welded new legs onto the racks. Eley did this throughout his shift that day. After Eley removed the pallets with the forklift, McDonald or Whitehead used a torch to cut off the damaged leg, and the other welded a new leg in place (Tr. 175). The next day, April 24, Eley continued removing pallets from racks designated by McDonald and Whitehead for repair. After working for some time, McDonald and Whitehead agreed to take a short break. As they exited the freezer, McDonald told Whitehead he was going back to turn off the welding gas bottles. Although no one knows for certain what happened next, the parties posit that after returning to the freezer McDonald began to cut a bent-up leg on the first rack on the east side, which had not yet been cleared of pallets. The pallets collapsed, trapping McDonald while his cutting torch was on. No one observed the falling pallets or McDonald's actions immediately before they fell. The torch started a fire. An employee working in a box assembly room noticed smoke and called her supervisor, who determined the smoke was coming from the freezer room. Several people came to McDonald's aid, but he died of smoke inhalation and burns (Tr. 9).

Items of the Serious Citation

The Secretary has the burden of proving the violation 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., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Item 2: Alleged Violation of § 1910.176(b)

The Secretary contends Sanderson Farms violated § 1910.176(b), which provides:

Storage of material shall not create a hazard. Bags, containers, bundles, etc., stored in tiers shall be stacked, blocked, interlocked, and³ limited in height so that they are stable and secure against sliding or collapse.

Sanderson Farms argues the Secretary failed to prove the pallets of chicken were not stable and secure against sliding or collapse or that there was employee exposure to any such sliding or collapse. Sanderson Farms asserts McDonald's tragic death resulted from his own misconduct. Had McDonald followed Sanderson Farms's established work rule, which required clearing the racks before cutting damaged legs, the company argues, he would not have been exposed to any hazard.

Assessment of the stored materials's stability and security includes the storage system that holds it.

Sanderson Farms's Rack Storage System

Each freezer storeroom has a center aisle with racks positioned between it and the side walls. The racks are located on both sides of the aisle. Forklift operators stack the pallets from the center aisle, starting at the side walls and moving inward toward the center of the room. The pallet racks are perpendicular to the main forklift aisle.

The pallet rack system consists of a series of parallel vertical steel rack frames that create bays to receive the pallets. The distance between the rack frames is a little more than the width of a 54-inch freezer pallet. In length, the rack frames extend from the center aisle back almost to the outside walls. In height, they extend from the floor to the ceiling. The frames are attached to the

³ Both the citation and Sanderson Farms's brief (p. 5) quote the standard incorrectly, in the disjunctive (Material "shall be stacked, blocked, interlocked, *or* limited in height . . ."). The standard is written in the conjunctive (Material "shall be stacked, blocked, interlocked *and* limited in height . . ."), requiring employers to comply with each of the four actions listed. The material must be stacked and blocked and interlocked and limited in height in order to meet the terms of the standard.

floor and the ceiling by plates secured by bolts or pins. The rack frames have horizontal bracing and diagonal (or “arrow”) cross bracing.

To allow the pallets to be stored above the floor level, long horizontal, steel L channels extend back for the full length of the rack frames. The L channels occur on the inside and outside of the vertical rack frames. The L channels rest on and are bolted to horizontal angle iron supports. The angle iron supports are welded to the rack frames. L channels occur at the height of 7 feet and 14 feet. The L channels are aligned so that an L channel on one vertical rack frame is level with the L channel on the parallel vertical frame.

These long horizontal L channels create a support lip 3½ inches wide that extends out and under both sides of the 54-inch pallet. The L channels accommodate five pallets, loaded back to front at the 7 foot and the 14-foot levels. A total of ten pallets can be stored in racks above the floor. Between five to six pallets can be stored on the floor. As noted, each pallet weighs from 2200 to 2500 pounds.

The legs of the rack frames are often damaged and repaired. Roy Thompson, whose career at the Collins facility (35 years) predates Sanderson Farms’s ownership of it, stated to OSHA (Exh. C-22):

It was last Thursday I did a visual inspection, I saw two or three broken and I asked them to get them repaired, in the south and the north [freezers]. It’s a pretty common practice that we repair them all the time. They are hit by a forklift or a pallet on a forklift.

Over the years, many legs have required repair. New steel legs have been welded in place of the original legs or they were welded beside the place the legs originally stood (*See, e.g.*, Exhs. C-2, C-6, C-7).

Placement of Freezer Pallets in the Rack Frame

Sanderson Farms constructs the larger wooden freezer pallet so that two edges of the pallet can rest on the 3½-inch lip of the L channels. The loaded pallet is thus suspended between the lips of the two parallel L channels in each bay. The pallet may bow between the L channels (Exh. C-9, C-10, C-11). Unless the frames have a twisted or broken bent-up leg, the rack frames are supported at the floor and ceiling. The frames are not connected to each other (except by the suspended

pallets). After the pallets are set into the racks, the movement of one side of the pallet and frame may cause the other side of the pallet or frame to move.

Roy Thompson would inspect the freezers a “couple of times a month” (Tr. 290). Prior to the accident when he inspected the freezers, he identified two or three or more in need of repair in the north and south freezers. This did not include the one bent up and other twisted legs on the frame involved in the accident (Exh. C-3, C-22; Tr. 280, 281).

Ongoing Use and Repair of Rack Frames

Sanderson Farms does not immediately unload pallets identified as resting on damaged frames, although space existed to relocate the pallets. According to Sanderson Farms’s brief, Eley would not have unloaded the damaged pallet rack unless McDonald intended to work on the legs that work shift (Resp’d. brief, p. 4). Some of the damaged legs do not support the frames such as the leg McDonald worked on before the accident (even if the leg was not bent quite as high before he began the work) (Exh. C-3, C-8; Tr. 28, 30, 282). Further, until the damage is identified and a repair request is approved, the rack is available for use.

The leg repairs lacked uniformity. Some repairs may not have brought the legs back into their original alignment (*See* Exh. C-6, C-7). Roy Thompson explained the original legs were made of 3 inch by ¼-inch “channel lock” (Tr. 296). Thompson noted that Sanderson Farms did not have a procedure on how to repair the damaged legs. He believed the only requirement was for welders to use I-beam replacement material (Tr. 296). It is clear from the photographs that welders used a variety of materials, including I-beams and channel material to replace the legs. To use the various materials, welders welded the legs into different configurations, even on the same rack frame (Exh. C-2, C-6, C-7; Tr. 50).

Additionally, some of the freezer pallets have broken slats or missing parts (Exh. C-1, C-9; Tr. 37). A photograph shows that the anchor support for a L channel has a rusted-out hole and a missing bolt (Exh. C-4). Cross or horizontal bracing is missing from some frames (Exh. C-2, C-7; Tr. 29, 40-41). Nevertheless, there is no contention the freezer pallets, or the frames onto which the pallets are placed (even if dilapidated in some instances) cannot support their intended weight. The allegation is that the pallet and frame system allow little margin for error, perhaps a few inches, depending on how the pallets are set in the L channels. A damaged or an incorrectly set freezer

pallet on the 3½-inch lip of the L channel, or a bent and unattached leg frame, or repaired legs attached with different materials aligned by different welds, could affect the security and the stability of the pallet resting on the L channel. Forklifts operate in the area creating vibrations. Forklifts or pallets on forklifts regularly hit the legs with enough force to bend, twist, or jar the steel.

Noncompliance with the Terms of the Standard

Sanderson Farms concedes boxes and pallets stored in the racks occasionally fall (Tr. 38, 173, 238, 309, 313). Maintenance manager Thompson testified the pallets in the Collins plant fall “probably a couple of times” a year (Tr. 278).

It is Sanderson Farms’s position that “the only evidence that a pallet occasionally falls is related to the pallet or rack being struck by a forklift . . .” (Resp. brief, p. 4). This position is not supported by the testimony of the company’s own witnesses. Roy Thompson was asked what causes a pallet to fall. He responded, “Usually, the way it was set in the rack system or being hit by a forklift driver or something” (Tr. 278). Thompson explained to OSHA (Exh. C-22):

Yes I have heard of them falling, not heard, walking through the freezer looking at them I ha[ve] seen some that had fallen. I saw the last one in the south freezer . . . I haven’t seen a whole pallet on the floor. I have seen boxes on the floor, where it sunk a little bit. Product not fully froze and one sink[s] down a little bit and one would fall that way.

Daniel Nicovich, Sanderson Farms’s division manager, was also asked about the causes of pallets falling. He stated, “The forklift driver doesn’t set them properly, has them too far here, there, and yonder, or he may come in and bump them with another pallet, because he’s filling the rack up, and they may fall, that sort of thing” (Tr. 239). Donald Ray King, the shipping superintendent, testified a pallet could fall if it were not loaded properly (Tr. 313). King earlier told OSHA (Exh. C-21):

I have never seen one fall personally. I have been in there and they have been on the floor. It depends. They could not load it right, they could have put it on the edge and it slipped off, you never know. It’s been awhile, I just walk in and look. We have to empty that rack and pick it up, with the forklift, one that fell.

The record establishes that pallets are as likely to fall from being improperly set in the racks as they are from forklifts striking the racks. Forklift operators are required to immediately retrieve

fallen pallets or fallen boxes. If supervisors found fallen product on the floor, one must assume the fall was not the result of forklift activity (Tr. 310).

Assuming *arguendo*, that pallets at the Collins plant fall only when forklifts strike the racks in which they are stacked, noncompliance with the standard is still established. The Commission has held that stacked material must be stable and secure even when struck by forklifts. In *Clement Food Co.*, 11 BNA OSHC 2020 (No. 80-607, 1984), the administrative law judge affirmed a violation of § 1910.176(b), finding the employer did not stack boxes so as to be stable and secure. On review, the respondent argued “that the judge erred chiefly on the ground that the stack was not inherently unstable because an outside force would need to be applied to it to cause a collapse.” *Id.* at 2122. The Commission stated (*Id.*):

We do not agree with Clement that the item should be vacated. The stack of boxes was not interlocked or blocked, its top tier was leaning, and the administrative law judge credited the compliance officer’s testimony that the shock of being struck by a forklift truck or vibrations from nearby machinery could cause the top tier to fall. This standard is not limited by its words to stacks so unstable that they might collapse of their own weight.

Sanderson Farms did not block or interlock the pallets (Tr. 38). Approximately 30 percent of the pallets were shrink-wrapped for shipping, which would assist to keep the boxes of chicken in place on the pallets (Tr. 300). The pallets that were not shrink-wrapped held loose boxes of chicken that were more likely to shift and cause the tiers to become unstable. Not all of the chicken stacked on the pallets was frozen, which also caused instability (Tr. 38, 45, 291). Exhibits C-9 and C-10 are copies of photographs showing boxes stacked at least nine tiers high. It is apparent in the photographs that the edges of the boxes are not flush, and the tiers lean as they rise. It is undisputed that, prior to the pallet collapse that gave rise to the instant case, pallets or partial pallets had fallen at the Collins facility on regular occasions.

With such a small margin of error and with the deteriorated condition of the rack system, whether the precipitating cause of the collapse was improper loading or a forklift striking the rack is irrelevant. In either case, the pallets were not “stable and secure against sliding or collapse.” Sanderson Farms failed to comply with the terms of the standard.

Employee Exposure

Sanderson Farms contends there was no employee exposure to falling pallets. It claims, “[b]ecause the employees consistently followed the safe work practice of not working in the vicinity of a forklift while the forklift operator was loading or unloading pallets no employees were exposed to a zone of danger when a pallet did, in fact, fall” (Sanderson Farms’s brief, p. 8).

As discussed in the previous section, pallets or sections of pallets would fall as the result of improper loading or other causes, as well as from forklifts striking the racks. Therefore, any employee present in the freezer near an improperly loaded stack of pallets was in the zone of danger.

The Secretary may prove employee exposure to a hazard by showing that, during the course of their assigned working duties, their personal comfort activities on the job, or their normal ingress-egress to and from their assigned workplaces, employees have been in a zone of danger or that it is reasonably predictable that they will be in the zone of danger. . . . The zone of danger is determined by the hazard presented by the violative condition, and is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent.

RGM Construction Co., 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995) (citations omitted).

Employees entering the freezers on a regular basis to perform assigned duties include forklift operators, those taking inventory, ice cleaners, maintenance workers, and refrigeration employees (Tr. 42). As they load or unload the pallets in the frames, forklift operators pick up any fallen pallets or boxes. They were all within the zone of danger created by the tiers of stacked pallets.

In addition, Sanderson Farms’s policy of keeping employees out of the “vicinity” of a forklift when it is moving pallets is not adequate to keep those employees out of the zone of danger. The instruction to keep out of the vicinity of the forklifts is vague. Marshall Timothy Walker, a refrigeration maintenance worker, stated the rule as, “If a forklift driver is in a hurry, you stay away from them” (Tr. 318). When asked how far away, Walker answered, “I don’t know if – I really couldn’t say that there’s – they don’t say footage. Forklifts move. But, I mean, it’s not a foot, you just maintain a respectable safe distance” (Tr. 326). When asked the same question, Nicovich, who is responsible for safety at the Collins plant, responded (Tr. 260):

None of the forklifts run very fast, that’s a safety violation. So you move three or four feet away as they are going when they are in motion, you know. Forklift is

coming through here, I'm going to move three or four feet away in one direction or another.

As stated, Exhibit C-9 shows a shipping pallet with tiers of boxes stacked nine high and raised 7 feet or 14 feet above the ground. Each full pallet weighs as much as 2200 to 2500 pounds. If a pallet or some of its boxes suddenly slips or collapses, they could potentially fall beyond the 3 or 4-foot clearance prescribed by Sanderson Farms. Additionally, movement on one frame and one side of the pallet can cause an adjoining area to move.

The Secretary has established Sanderson Farms's employees working in the freezers are exposed to the hazard of being struck by falling pallets.

Knowledge

Sanderson Farms had actual knowledge that not all pallets were shrink wrapped or had other stabilizing support, that it did not immediately unload its damaged racks, and that pallets had fallen on several occasions prior to McDonald's accident. The company knew of the violative condition.

The Secretary has established a serious violation of § 1910.176(b).

Employee Misconduct

Sanderson Farms contends that if a violation of § 1910.176(b) is found, it resulted from McDonald's misconduct. 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. *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F. 3d 401 (6th Cir. 1997).

Sanderson Farms has a policy that employees unload pallets before cutting and welding the frame legs (Tr. 173). McDonald apparently did not abide by that policy. He perhaps shared his supervisor's opinion that it was "highly unlikely" a broken leg could cause the pallets to fall (Tr. 292). While McDonald may have disregarded Sanderson Farms's policy of waiting until all the pallets were cleared from a rack before repairing it, the violation of the standard did not result from McDonald's actions. The affirmative defense requires the employer to prove it had an established work rule designed to prevent the violation. In this instance, the violation was failing to store tiers

and pallets so they were stable and secure against sliding or collapse. Had McDonald never entered the freezer that day, Sanderson Farms's violative conduct would remain. The employee misconduct defense is rejected.

Item 3: Alleged Violation of §1910.212(a)(5)

The Secretary alleges Sanderson Farms violated § 1910.212(a)(5), which provides:

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. The guard shall have openings no more than one-half (½) inch.

During Jordan's inspection, she observed a fan operating in the pre-price box room. The center face plate on the fan was missing, leaving a gap of about 4 or 5 inches in diameter. Jordan believed the missing face plate exposed employees to the moving fan blades. Sanderson Farms removed the fan from service during Jordan's inspection (Exhs. C-13, C-14; Tr. 51-53).

Sanderson Farms contends there is no proof the fan was less than 7 feet above the floor; only the hub (and not the blades) of the fan was unguarded; and there was no employee exposure to the fan because the nearest workstation was more than 13 feet from the fan.

Applicability

The fan was fixed, not oscillating, and was suspended from a ceiling joist with a J-hook. It is unknown whether the fan was turned on by using a switch or by plugging its cord into an electrical outlet (Exh. R-4a; Tr. 160-161, 219, 246). Although she had a measuring tape with her, Jordan did not measure the distance from the floor to the periphery of the fan's blades, the opening where the face plate was missing, or the distance from the fan to the nearest work station. She did not take a photograph showing the position of the fan in relation to the floor (Tr. 101-102). Sanderson Farms, likewise, took no measurements of the distance between the floor and the periphery of the blades or of the center opening. The company did measure the distance between the joist from which the fan hung and the nearest employee work station as 164½ inches (Tr. 162).

The cited standard applies only if the periphery of the fan's blades is less than 7 feet above the ground. The Secretary attempts to establish this essential measurement based upon Jordan's estimate of the fan's height. Jordan stated she is 6 feet tall barefoot, and that as she stood in front of it, she could look directly into it (Tr. 53). The problem with this approach is apparent when her

testimony is contrasted with that of Scott Rushing, Sanderson Farms's manager of corporate safety and health (Tr. 129). Rushing is 5 feet, 11 inches tall. He testified that he had to look up to see the front of the fan (Tr. 231): "I don't think I could touch it with my hand. In fact, I know I can't touch it with my hand. And that's probably about an eight-foot reach, and it's a little bit of distance above that." Somewhere between Jordan's estimate of the distance between the floor and the fan at 6 feet and Rushing's estimate at more than 8 feet lies the estimate of Nicovich, who is 6 feet, 4 inches tall. Nicovich testified the fan was approximately 6 inches above his eye level (Tr. 245-256). Further complicating these estimates is the fact the standard focuses on the distance from the floor to the periphery of the fan's blades. Because no measurements of the fan were taken, it is unknown how large the fan is. Rushing estimated the fan was 2 to 3 feet in diameter, leaving a margin of error of 12 inches (Tr. 231). When the witnesses state they were looking directly into the fan, or looking up 2 feet or 6 inches, it is not clear if they mean they are looking at the center of the fan, at the perimeter, or somewhere in between. The conflicting testimony prevents a conclusive determination of the fan's height.

It is the Secretary's burden to establish each and every element of the violation by a preponderance of the evidence. In order to establish the cited standard applies to the cited fan, the Secretary must prove the periphery of the fan is less than 7 feet above the ground. When the standard incorporates specific distances as a prerequisite to its application, the measurement is crucial. Considering the contradictory nature of the testimony, and absent an actual measurement taken by Jordan to establish the distance was less than 7 feet, the Secretary has failed to prove her case. Item 3 is vacated.

Item 4: Alleged Violation of § 1910.219(c)(4)(i)

The Secretary alleges a violation of § 1910.219(c)(4)(i), which provides:

Projecting shaft ends shall present a smooth edge and shall not project more than one-half the diameter of the shaft unless guarded by nonrotating caps or safety sleeves.

The citation alleges Sanderson Farms allowed an unguarded rotating shaft on the tender pull box conveyer.

Applicability

Sanderson Farms does not dispute the application of § 1910.219(c)(4)(i) to the cited shaft.

Compliance with the Terms of the Standard

Jordan used a metal tape to measure the diameter of the shaft and found it to be $\frac{3}{4}$ of an inch. The length was $1\frac{1}{4}$ inches. Jordan calculated the shaft projected $\frac{7}{8}$ of an inch more than allowed by the standard (Exh. C-15; Tr. 60-61). The end of the shaft was cut off during the inspection (Tr. 112).

Sanderson Farms contends Jordan's measurements are inaccurate. Nicovich used a caliper to measure the diameter of the shaft and found it to be $1\frac{3}{8}$ inches. With this measurement, Sanderson Farms argues the shaft end projected, at most, $\frac{1}{16}$ of an inch too far (Tr 188-190).

Based upon the photographic and other exhibits, it is determined Sanderson Farms's measurements are more accurate. If the shaft end projects $\frac{1}{16}$ inch farther than the standard allows, a real issue is raised concerning employer knowledge of the violative conditions (Tr. 112). It is unnecessary to reach that issue.

Employee Exposure

Jordan did not measure the distance between the projecting shaft end and the nearest employee workstation. Jordan declined to estimate the distance (Tr. 111):

- Q.: Can you approximate it? I know you don't like doing that.
- Jordan: I really can't. I'm not really good at approximating distance.
- Q.: Would it be fair to say that it might be over 13 feet?
- Jordan: I don't know.
- Q.: Okay. Would you want to venture an estimate of the walkway that was next to the shaft, how wide that might be?
- Jordan: We did not measure it.

Sanderson Farms provided the measurements omitted by the Secretary. The walkway next to the shaft end at issue is 10 feet wide. The nearest employee workstation is on the opposite side of the walkway, over 13 feet away (Tr. 190, 250).

[I]n 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 not simply whether exposure is theoretically possible. Rather, the question is whether employee entry into the zone of danger is reasonably predictable.

Fabricated Metal Products, Inc., 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (citations and footnotes omitted).

The Secretary has failed to show it was reasonably predictable the employees would enter the zone of danger created by the projecting shaft end. At the hearing, Jordan offered no testimony regarding how employees are exposed the hazard. Item 4 is vacated.

Item 5: Alleged Violation of § 1910.305(b)(1)

Section 1910.305(b)(1) provides:

Conductors entering cutout boxes, cabinets, or fittings shall be protected from abrasion, and openings through which conductors enter shall be effectively closed.

During her inspection, Jordan discovered an electrical box in a maintenance area storage room with a missing breaker. The electrical box controlled the upstairs lights, which are left on at all times (Exhs. C-18 & C-19; Tr. 65-67, 255, 195).

Applicability

It is undisputed § 1910.305(b)(1) applies to the cited electrical box.

Compliance with the Terms of the Standard

It is also undisputed that the breaker was missing from the electrical box; thus one opening through which a conductor enters was not effectively closed. The terms of the standard were violated.

Employee Exposure

Maintenance employees had access to the electrical box. Any employee opening the box could contact an exposed, energized circuit (Tr. 70). Sanderson Farms suggests the breaker was missing because it was taken by an employee for use in his or her own home (Tr. 303-304). The speculation indicates employees may have had further access to the electrical boxes.

The Secretary has established employee exposure to the missing breaker.

Knowledge

Sanderson Farms had no actual knowledge the breaker was missing in the electrical box. Sanderson Farms conducts regular inspections of the electrical boxes (Exh. R-8). The doors to the electrical boxes are closed; missing breakers are not in plain view (Tr. 196). Of the numerous electrical boxes in the plant inspected by Jordan, only one breaker in one box was missing (Tr. 194, 328). Walker testified that sometimes blanks get old and fall off. Otherwise, the rule is to replace a breaker if one is taken out (Tr. 328).

There is no evidence showing Sanderson Farms failed to exercise reasonable diligence in discovering the missing breaker. The Secretary failed to establish evidence of constructive knowledge. Item 5 is vacated.

Items 6a and 6b: Alleged Violations of § § 1910.1200(f)(5)(i) and (ii)

Sections 1910.1200(f)(5)(i) and (ii) provide:

Except as provided in paragraphs (f)(6) and (f)(7) of this section, the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with the following information:

- (i) Identity of the hazardous chemical(s) contained therein; and
- (ii) Appropriate hazard warnings, or alternatively, words, pictures, symbols, or combination thereof, which provide at least general information regarding the hazards of the chemicals, and which, in conjunction with the other information immediately available to employees under the hazard communication program, will provide employees with the specific information regarding the physical and health hazards of the hazardous chemical.

In the engine room, Jordan found a one-pound Folger's coffee can containing a paint brush soaking in 1 to 1½ inches of mineral spirits. A Sanderson Farms supervisor told Jordan that two employees, Walker and Glover, had been painting the night before. Walker's personal locker was in the engine room. He had taken the coffee can from his work area and stored it next to his locker because he did not want anyone stealing his brush. The Folger's coffee can was not labeled with information that the can contained mineral spirits and was not labeled with a hazard warning (Tr. 71-72, 319, 323).

Applicability

The hazardous communication standard (HCS) is designed to transmit information to employees regarding the chemicals they encounter at work. Coverage is based on the intrinsic properties of the substance. Here, without question, mineral spirits is a hazardous chemical. Sanderson Farms argues, however, the cited standards do not apply to this use of the mineral spirits because it is exempted from the HCS by § 1910.1200(b)(5)(v), which provides:

This section does not require labeling of the following chemicals:

...

(v) Any consumer product or hazardous substance as those terms are defined in the Consumer Product Safety Act (15 U. S. C. 2051 *et seq.*) and Federal Hazardous Substances Act (15 U. S. C. 1261 *et seq.*) respectively, when subject to a consumer product safety standard or labeling requirement of those Acts, or regulations issued under those Acts by the Consumer Product Safety Commission [.]

Sanderson Farms contends mineral spirits are a consumer product as defined in the Consumer Product Safety Act (CPSA) and are subject to a consumer product safety standard. “Mineral spirits” is defined as “a flammable petroleum distillate that boils lower than kerosine and is suitable for use as a solvent and thinner especially for paints and varnishes.” *Webster’s Third New International Dictionary for the English Language, Unabridged*. Mineral spirits are available to consumers at hardware stores and art supply stores.

The CPSA provides (15 U.S.C. 2052):

(a) For purposes of this chapter:

1. (1) The term “consumer product” means any article, or component part thereof, produced or distributed

(i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or

(ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include — [(A) through (I)]⁴

Mineral spirits may be purchased by consumers. It does not fall under any of the exclusions listed in sections (A) through (I). The Consumer Product Safety Commission has issued a consumer product safety standard regulating the use of mineral spirits. The standard at 16 C. F. R. § 1700.14(a)(15) provides:

The Commission has determined that the degree or nature of the hazard to children in the availability of the following substances, by reason of their packaging, is such that special packaging meeting the requirements of § 1700.20(a) is required to protect children from serious personal injury or serious illness resulting from handling, using, or ingesting such substances, and the special packaging herein required is technically feasible, practicable, and appropriate for these substances:

. . .

15) *Solvents for paint or other similar surface-coating material.* Prepackaged liquid solvents (such as removers, thinners, brush cleaners, etc.) for paints or other similar surface-coating materials (such as varnishes and lacquers), that contain 10 percent or more by weight of benzene (also known as benzol), toluene (also known as toluol), xylene (also known as xylol), petroleum distillates (such as gasoline, kerosene, mineral seal oil, mineral spirits, naphtha, and Stoddard solvent, etc.), or combinations thereof, and that have a viscosity of less than 100 Saybolt universal seconds at 100 °F., shall be packaged in accordance with the provisions of § 1700.15 (a) and (b).

Sanderson Farms bears the burden to prove Walker’s mineral spirits fall within the HCS exception as a consumer product. The Review Commission has held that “in order to qualify for the [HCS] exception, an employer need only demonstrate that its employee’s use and exposure is

⁴ The (A) through(I) exclusions are not applicable here. They are [15 U.S.C. 2052]:

- (A) any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer,
- (B) tobacco and tobacco products,
- (C) motor vehicles or motor vehicle equipment . . . ,
- (D) pesticides . . . ,
- (E) any article which, if sold by the manufacturer, producer, or importer, would be subject to the tax imposed by section 4181 of the Internal Revenue Code of 1986 [26 U.S.C. 4181] (determined without regard to any exemptions from such tax provided by section 4182 or 4221, or any other provision of such Code), or any component of any such article,
- (F) aircraft, aircraft engines, propellers, or appliances . . . ,
- (G) boats which could be subjected to safety regulation . . . vessels, and appurtenances . . . ,
- (H) drugs, devices, or cosmetics . . . , or
- (I) food

‘comparable’ to that of a consumer.” *Safeway Store No. 914*, 16 BNA OSHC 1504, 1511 (No. 91-373, 1993). Walker is a maintenance worker in the refrigeration department, where he performs most of his duties (Tr. 317-320). Prior to Jordan’s inspection, Sanderson Farms installed a new hoist in the old pre-price room and needed to have weight scales painted on it (Tr. 322). At the time of Jordan’s inspection, Walker stated, he “was doing a specific job that James Spencer had put me on” (Tr. 320). Walker was “painting weight scales on some shelves and stuff” (Tr. 319). Although Walker also kept a small labeled spray bottle of mineral spirits, the record does not disclose any details of its use (Tr. 326). Walker’s use and exposure to the mineral spirits was comparable to that of a typical consumer. Walker was using approximately 1 to 1½ inches of mineral spirits in a small can to keep his brush from drying out while he took a break from painting. The occasional use of a small amount of mineral spirits is consistent with use and exposure by a consumer. If the Secretary had rebutted Sanderson Farms’s claim with evidence that Walker used mineral spirits on a routine basis or in an amount greater than that used by a consumer, the exception would not apply. As the record stands, however, Sanderson Farms has qualified for the HCS exception.

Under Walker’s limited use, Sanderson Farms established the mineral spirits qualify as a consumer product and are thus excepted by § 1910.1200(b)(5)(v) of the HCS. Sections 1910.1200(f)(5)(i) and (ii) do not apply to the cited condition. Items 6a and 6b are vacated.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer’s business, history of previous violations, the employer’s good faith, and the gravity of the violation. Gravity is the principal factor to be considered. Sanderson Farms employs approximately 9,000 employees company-wide (Tr. 47). Between 850 and 900 employees work at the Collins, Mississippi, plant (Tr. 208). The company had not received an OSHA citation in the three years prior to the inspection at issue (Tr. 46). Sanderson Farms has a written safety program, although it is not always specific. The employer cooperated with the inspection and made some immediate corrections. The gravity of the affirmed violation is high. Sanderson Farms’s pallets weighed several thousand pounds and could fall in the freezers on the maintenance and other employees from an rack system which was

deteriorated and subject to forces allowing little margin for error. It is determined the appropriate penalty for the violation is \$6,300.00

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1 of the citation is withdrawn by the Secretary and is vacated;
2. Item 2 of the citation, alleging a violation of § 1910.176(b), is affirmed and a penalty of \$6,300.00 is assessed;
3. Item 3 of the citation, alleging a violation of § 1910.212(a)(5), is vacated;
4. Item 4 of the citation, alleging a violation of § 1910.219(c)(4)(i), is vacated;
5. Item 5 of the citation, alleging a violation of § 1910.305(b)(1), is vacated; and
6. Items 6a and 6b, alleging violations of §§ 1910.1200(f)(5)(i) and (ii), are vacated.

/s/
NANCY J. SPIES
Judge

Date: August 12, 2008