



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,

v.

OHIO PIZZA PRODUCTS - PRESTO FOODS
Respondent.

OSHRC DOCKET
NO. 92-2053

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on May 7, 1993. The decision of the Judge will become a final order of the Commission on June 7, 1993 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before May 27, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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200 Constitution Avenue, N.W.
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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.
Ray H. Darling, Jr.
Executive Secretary

Date: May 7, 1993

DOCKET NO. 92-2053

NOTICE IS GIVEN TO THE FOLLOWING:

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Safety and Health Administration (OSHA) compliance officer James Denton on May 27 and 28, 1992, at Presto's Dayton, Ohio, facility.

The Secretary charges Presto with committing a willful violation of § 1910.212(a)(1) by failing to provide a method of machine guarding to protect employees in the machine area from hazards created by the machine's ingoing nip point. Presto contends that any violation of the cited standard was the result of unpreventable employee misconduct on the part of its employees.

Background

Presto incorporated in 1978, although the company had been operating for "several years" before that (Tr. 228).² Presto's operation consists of a food warehousing department and a bakery department (Tr. 94-95). The bakery department is housed in a relatively small room, covering approximately 800 square feet. The department contains a series of machines used to make pizza pie shells from scratch (Tr. 12, 95, 331). From eight to eleven employees work in the bakery department at any given time (Tr. 11).

The dough is initially prepared and placed in a mixer machine. From there it is put in a divider machine, where it is separated into individual dough balls. Different sizes of dough balls are created, depending upon the order being run. After being divided, the dough balls are put into a proofer machine³, where they are heated and softened (Tr. 12). The dough balls are then dropped down a chute and onto a conveyor belt, which carries the dough balls into the dough sheeter machine (Tr. 14-15). The dough sheeter flattens the balls of dough. The flattened dough is next given its final shape and is wrapped in foil and stacked (Tr. 11).

² John Vorhees, Presto's vice-president and director of marketing, testified at the January 13, 1993, hearing that he had worked at Presto "about 22 years" (Tr. 289).

³ At several points during the hearing, the proofer machine was referred to as the "poofer" machine.

Presto's First OSHA Inspection

On October 22, 1991, compliance officer James Denton inspected Presto's bakery department (Tr. 93). As a result of the inspection, the Secretary issued Presto two citations. The first citation alleged serious violations of seven separate standards of the Act, including a violation of § 1910.212(a)(1) for failing to guard the ingoing nip point of the dough sheeter. At that time, Presto's dough sheeter was 50 to 70 years old (Exh. P-1; Tr. 321). Presto initially abated the violation by modifying the guard on the dough sheeter. Later, Presto decided to replace the dough sheeter altogether.

Presto's New Dough Sheeter

Presto contacted Pollin USA and asked the company for advice on which machine to buy. Pollin USA recommended that Presto purchase a Jagum Double Sheeter⁴ (Tr. 320-321). Presto did so, at a cost of approximately \$14,000.00 (Tr. 329). The Jagum Double Sheeter (sheeter) consists of two separate units each with its own electrical system (T. 322). Presto set up one unit against the proofer machine, from which a conveyor belt carried the dough balls to the sheeter's first set of rollers (Tr. 106, 322). After the dough balls came through the first set of rollers, they were conveyed through a second set of rollers for a final flattening (Tr. 106).

On the Monday following the Friday installation of the sheeter, bakery department employee John (Jack) Fahnestock was operating the sheeter. While operating the machine, the first set of rollers caught his hand and mashed it as he attempted to nudge one of the dough balls under the guard and through the rollers (Tr. 14-15). Approximately two weeks after Fahnestock's accident, employee Gail Rohrback's hand was caught in the sheeter's rollers as she attempted to nudge a dough ball under the guard and through the rollers (Tr. 21-22). Both employees required medical attention for their hand injuries (Tr. 66, 68, 328).

⁴ Denton indicated that the Jagum Double Sheeter was actually intended for use in the making of pita bread (Tr. 105).

Presto's Second OSHA Inspection

In response to a complaint regarding the two accidents, Denton returned to Presto's bakery department on May 27 and 28, 1992. Denton believed that the new sheeter was inadequately guarded. As a result of Denton's second inspection, the Secretary issued the citation for a willful violation of § 1910.212(a)(1) that gave rise to this case.

Alleged Violation of § 1910.212(a)(1)

The Secretary alleges that Presto violated § 1910.212(a)(1), which 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, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are--barrier guards, two-hand tripping devices, electronic safety devices, etc.

The first set of rollers on the sheeter was guarded on top by a set of metal bars (Exh. P-4, P-5, P-6). The bars were $1\frac{3}{4}$ inches apart (Tr. 113). The opening from the conveyer belt to the bottom of the guard (the opening through which the dough balls passed) was $2\frac{7}{8}$ inches high. The distance from the front of the guard to the ingoing nip point created by the rollers was also $2\frac{7}{8}$ inches (Exh. P-7; Tr. 112-113). The smaller dough balls passed easily under the guard. The larger dough balls, however, had trouble clearing the guard and sometimes became stuck (Exh. P-7; Tr. 20, 118-119, 261). The operator would stand at either side of the sheeter as the dough balls moved along the conveyer belt (Tr. 118).

The gaps between the bars guarding the second set of rollers was $1\frac{3}{4}$ inches wide. The ingoing nip point of the second set of rollers was 5 inches from the end of the guard (Exh. P-8; Tr. 125). The guards on the sheeter were electrically interlocked. If the guards were lifted slightly, the machine would shut down (Tr. 310).

Denton testified that the guards on the sheeter were inadequate to protect Presto's employees from the hazard created by the ingoing nip points of the rollers. By the second day of Denton's inspection, Preston had rigged up a temporary guard using cardboard and

tape. Denton found that the cardboard guard failed to abate the hazard. Employees still had access to the ingoing nip points of the sheeter (Exhs. P-5, P-6; Tr. 114).

Presto argues that it dealt with the hazard created by the sheeter by providing its employees with a wooden paddle, with which they were supposed to push through the jammed dough balls (Tr. 32). When Barb Lail, Presto's former bakery department manager was asked if the paddle was ever used, she replied, "No, not that I know of" (Tr. 45). Rohrback, one of the injured employees, testified that the wooden paddle "wasn't used very much" (Tr. 69), and that she never saw the paddle when she operated the sheeter: "It was not available to me" (Tr. 75); "It was on the shelf, but it was never used around me, and I never used it" (Tr. 76). In any event, providing employees with a wooden paddle does not meet the guarding requirements set out in § 1910.212(a)(1).

The Secretary asserts that the dimensions of the guards in relation to the ingoing nip points of the sheeter establishes that the sheeter was inadequately guarded.

To establish a violation of a standard, the Secretary must show 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 could have known of it with the exercise of reasonable diligence.

Seibel Modern Manufacturing & Welding Corp., 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991).

It is undisputed that § 1910.212(a)(1) applies to the sheeter machine. The standard's terms were not met because Presto's employees were not protected from the hazard created by the sheeter's ingoing nip points. The hand injuries sustained by Fahnestock and Rohrback vividly illustrate the fact that Presto's employees had access to the ingoing nip points. Finally, Presto was aware that its employees had been injured, and the manner in which the accidents occurred.

Presto's Unpreventable Employee Misconduct Defense

The Secretary has established a *prima facie* case that the alleged violation occurred. Presto defends itself by claiming that the violation was the result of unpreventable employee

misconduct. “In order to establish the affirmative defense of unpreventable employee misconduct, an employer must show that the action of its employee was a departure from a uniformly and effectively communicated and enforced work rule.” *H. B. Zachry Company*, 7 BNA OSHC 2202, 2206, 1980 CCH OSHD ¶ 24,196 (No. 76-1393, 1980).

Presto contends that it had warned the bakery department employees not to stick their hands in the sheeter. John Vorhees, Presto’s vice-president and director of purchasing, testified that, after Fahnestock’s accident, Presto warned its employees “to keep their hands out of the machine, that if an item gets stuck in it, shut the machine off and raise the lid, take the piece out and do the process over” (Tr. 295). Kimberly Weaver, the bakery department’s assistant manager, concurred with Vorhees’s testimony that the employees were warned not to use their hands to unjam the dough balls. Presto had posted signs which told employees to unplug the sheeter and remove the dough if the sheeter jammed (Tr. 38). Weaver testified that she always obeyed these instructions, and described the process she followed when the sheeter jammed (Tr. 256-257): “[First, I] [s]hut off the proofer. . . . Then, I turn off the sheeter. Then, I unplug it, raise up the thing, take the dough ball out, plug it up, turn it on. Then, turn the proofer back on.”

Other bakery department employees were not as attentive to the warning not to put their hands in the sheeter. Barbara Lail, the bakery department manager, testified that she observed several employees nudged the dough balls under the guard with their hands (Tr. 52). At first Lail denied that she also did this, but later admitted that she herself nudged the dough balls under, even though she knew it was wrong (Tr. 53). Lail had no knowledge of the OSHA standards in general or the machine guarding standards in particular (Tr. 34). This is damaging testimony to Presto’s unpreventable employee misconduct defense, considering that Lail was the department manager at the time. Rohrback testified that after Fahnestock was injured, Presto “told us to be careful and do not stick our hands in the machine” (Tr. 70). Despite this warning, Rohrback did just that when Weaver called her over to watch the sheeter while Weaver took a break: “When they were coming down the chute, they started getting lined up, getting messed up. I went down like that [pushing on the dough balls], and it grabbed my hand” (Tr. 63).

Why did the employees disregard the warning to unplug the machine and remove the dough instead of nudging it through with their hands? In *Rockwell International Corporation*, 9 BNA OSHC 1092, 1098, 1980 CCH OSHD ¶ 24,979 (No. 12470, 1980), the Review 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.” Weaver testified that in the first two weeks of use, the sheeter jammed on “maybe every tenth or twelfth dough ball” (Tr. 260). The proofer produces a dough ball approximately once every six seconds (Tr. 255). Thus, when orders of the large-size dough balls were running, the sheeter would jam about once every minute.

Despite the company’s attempt to downplay the importance of its production quota, the employees at least believed that production was of concern to Presto (Tr. 24-25, 257, 270). Rather than go through the eight-step process that Weaver described, employees would take the easier course, which was to push the dough balls under the guard. Although they were told not to do this, the warning was not enforced. Lail, who supervised the bakery department employees violated the warning herself. Phil Weeda, president of Presto, appointed himself safety director of the company after the first OSHA inspection (Tr. 315). Despite being safety director, Weeda stated that, “Frankly, I rarely ventured into [the bakery] department” (Tr. 340).

No real effort was made by Presto to enforce its warning to unplug the sheeter in case of jamming. If the sheeter’s operators had complied with this warning, they would have been turning off the proofer, turning off the sheeter, unplugging it, lifting the guard, removing the dough, plugging in the sheeter, turning it on, and turning on the proofer once a minute. Weaver testified that this process took about a minute (Tr. 256). Thus, for every minute of production, there was a minute for unjamming the sheeter. It is not surprising that Presto’s employees ignored the admonition to unplug the machine and attempted to unjam the sheeter by hand.

Presto’s unpreventable employee misconduct defense must fail. The fact that Presto’s “rule” against employees sticking their hands in the sheeter was routinely violated, with no apparent consequences, argues against its effective communication and enforcement. The

employees behavior was neither unforeseeable nor idiosyncratic. It was a natural automatic reaction to the sheeter's recurrent malfunctioning.

Presto also asserts that the jamming problem only occurred over the first two weeks of the sheeter's use. After that, Weaver and Vorhees raised the guard, eliminating the jamming problem (Tr. 272). Presto characterized this two-week period as part of the "fine-tuning" operation, and apparently thinks that its failure to adequately guard the sheeter during this time period should not count against it. There is no grace period allowed in OSHA law. The Secretary has established that Presto violated § 1910.212(a)(1).

Was the Violation Willful?

The Secretary charged that the violation was willful.

Under long-standing Commission precedent, to establish a willful violation, it is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation, serious or nonserious. A willful violation is differentiated by heightened awareness of the illegality of the conduct or condition and by a state of mind of conscious disregard or plain indifference. *Williams Enterp.*, 13 BNA OSHC [1249,] 1256, 1986-87 CCH OSHD [¶ 27,893,] p. 36,589. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Also, a willful violation/charge is not justified if an employer has made a good faith effort to comply with the standard, even though the employer's efforts are not entirely effective or complete. *Id.*, 13 BNA OSHC at 1257, 1986-87 CCH OSHD at p. 36,589. *See also, R.D. Anderson Constr. Co.*, 12 BNA OSHC 1665, 1986-87 CCH OSHD ¶ 27,500, p. 35,641 (No. 81-1469, 1986)(numerous steps taken to comply with asbestos standard preclude willful finding).

Dec-Tam Corporation, 15 BNA OSHC 2072, 2076, 1993 CCH OSHD ¶ ___, (No. 88-523, 1993).

The Secretary contends that Presto's violation of § 1910.21(a)(1) was willful because Presto failed to modify the sheeter, even after two of its employees were injured in the same manner. What is at issue here is, in essence, the employer's attitude towards safety. "The willfulness charge relates to the employer's state of mind when it committed the violation."

Dec-Tam Corporation, Id. The record establishes that Presto's attitude towards safety was less than exemplary.

First, Presto is laboring under a misperception regarding OSHA. Phil Weeda testified that he initially believed that Denton's first visit was in response to an inquiry Presto had made with its congressman in October of 1991 (Exh. R-1; Tr. 312):

On several occasions, [Thomas Weeda] had expressed to me that we were getting up to the size that the federal rules and regulations might apply to us when we get 50 or more employees, and we had never been at that strength before.

Anyhow, upon reading something regarding a family leave bill, he brought it up again and said he had intentions to write Tony Hall to ask him--who is our congressman--and ask him for some help in getting some information to us so that we would know where we stood and do the things we needed to comply.

The Occupational Safety and Health Act was enacted on December 29, 1970. Section 34 of the Act provides, "This Act shall take effect one hundred and twenty days after the date of its enactment." Thus, employers were obligated to comply with the Act starting in the first half of 1971. Presto was doing business as early as 1972 (Tr. 289), and has been incorporated since 1978. The Act covers employers employing "one or more employees." 29 C.F.R. § 1975.4(a). The Act applied to Presto the day it began doing business, yet Presto had ignored its obligations under the Act for almost 20 years until it made its inquiry to Congressman Hall.

Furthermore, Presto's attitude towards employee safety is lax. Phil Weeda testified that he "felt somewhat betrayed that somebody had found a way to violate the guards" (Tr. 343). He had a "sense of anger" when Fahnestock was injured because, "Here we are, the first day, someone is being careless and creating or causing an accident" (Tr. 329). Yet Weeda took no steps to modify the sheeter following either Fahnestock's or Rohrback's accidents. Weeda seemed to take their injuries as personal affronts, violating the integrity of Presto's new "state-of-the-art" machine. His reaction was not concern for his employees' safety, but anger at them for, in his view, injuring themselves.

While Presto's attitude towards safety is not ideal, it does not provide the basis for the finding of a willful violation. Presto did show a willingness to abate the violations found

during the initial inspection. The fact that Presto bought a new machine which it believed to be safer than the old one betokens some concern for employee safety. Presto's problem came from placing too much reliance on the manufacturer's safety features, and not paying enough attention to how the machine was actually operated. Still, Presto did not consciously disregard § 1910.212(a)(1). It believed that the guards on the machine were adequate, and that the hand injuries to its employees could be prevented by issuing a general warning to its employees. Presto was mistaken in this belief, but it did not demonstrate the "heightened awareness" of the violation required for a finding of a willful violation.

Presto's Violation Was Serious

[W]hen a respondent is charged only with a willful violation and the evidence establishes a violation which is not willful, a nonserious violation may be affirmed but, ordinarily, a serious violation may not be. An exception to this rule exists when the issue of whether the violation is serious is tried by the express or implied consent of the parties.

Toler Excavating Company, 3 BNA OSHC 1420, 1421, 1975 CCH OSHD ¶ 19,875 (No. 2637, 1975) (footnote omitted).

In the present case, the violation of the cited standard resulted in injuries to two employees. Both Fahnestock and Rohrback required medical attention for their injuries. Rohrback missed one week of work as a result of her injury. She continues to experience numbness and cramping in her hand (Tr. 66). The OSHA inspection was conducted in response to a complaint regarding the injuries sustained by the two employees. Presto was aware that the injuries were caused by the sheeter. The hazard to which the violation exposed Presto's employees was explicitly litigated. Presto impliedly consented to trial of the seriousness of the violation, which was a central issue in the case.

Under § 17(k) of the Act, a violation of a standard is serious "if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use. . ." The hazard of getting one's hand caught between the rollers of the sheeter is serious.

PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSAHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act, in determining the appropriate penalty the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

Presto employs approximately 50 employees. It had been issued citations approximately seven months before the one issued in the present case. Despite Presto's lax attitude towards safety in general, the company demonstrated good faith in dealing with OSHA during the inspection. The gravity of the violation is moderate, as it exposes employees to the possibility of some lingering hand damage.

Upon consideration of these factors, it is determined that a penalty of \$2,100.00 is appropriate.

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 ORDERED:

That the citation alleging a willful violation of § 1910.212(a)(1) is affirmed as serious, and a penalty of \$2,100.00 is hereby assessed.

/s/ Nancy J. Spies
NANCY J. SPIES
Judge

Date: April 7, 1993