



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Phone: (202) 606-5400
Fax: (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
GENERAL CUTLERY CO., INC.,
Respondent.

OSHRC DOCKET
NOS. 94-1933
94-2015

**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 October 27, 1995. The decision of the Judge will become a final order of the Commission on November 27, 1995 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 November 16, 1995 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
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction of 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) 606-5400.

FOR THE COMMISSION

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

Date: October 27, 1995

DOCKET NOS. 94-1933 & 94-2015

NOTICE IS GIVEN TO THE FOLLOWING:

Benjamin T. Chinni
Associate Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
1240 East Ninth Street
Cleveland, OH 44199

Carleton Reitz, President
General Cutlery Co., Inc.
1918 County Road 232
Freemont, OH 43420

Paul L. Brady
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309 3119

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safety violations under docket no. 94-2015, and four citations alleging health violations under Docket No. 94-1933. These cases were consolidated. General Cutlery's president, Carleton Reitz, represented the company *pro se* at the hearing held on June 6, 1995.

As a preliminary matter, General Cutlery questioned the validity of OSHA's inspection. It is contended that the compliance officers failed to follow proper procedure in conducting their inspections. Reitz's initial approach to the issue was tentative (Tr. 7): "First, we want to make it clear that we are not making an issue of the remarks that follow. We are not trying to criticize the inspection procedure as such, but we feel there is a minor lack of proper procedures." Later, Reitz was more forceful (Tr. 9):

"I feel that the inspection was not according to procedures and should, therefore, be in my book considered null and void." Reitz's statement will be treated as a motion to dismiss the Secretary's action.

General Cutlery argues that Gattis and Ulczynski did not hold opening and closing conferences, and conducted their walk-around inspections unaccompanied by General Cutlery representatives. The record fails to support General Cutlery's contention. Gattis and Ulczynski both testified that when they arrived at the facility, they held an opening conference which was attended by Ernie Maenstranzi, president at the time of the inspection, and David Reitz, General Cutlery's vice-president. Later on, Carleton Reitz joined the conference. General Cutlery's office manager, Donna Shumaker, attended the conference for a short time (Tr. 19, 73-76, 93). Maenstranzi, Carleton Reitz and David Reitz attended the closing conference (Tr. 76, 95). Gattis stated that at least one General Cutlery representative was with him at all times during his walk-around inspection (Tr. 21). The compliance officers' testimony is credible and persuasive.

Carleton Reitz's complaints regarding the holding of the conferences and the inspections may stem from his reduced role in the company at the time of the inspection. Reitz stated (Tr. 6):

I was not the cause of this. I would have gone to a hearing or preconference, but we had imported a fellow [Maenstranzi] who was supposedly well versed in cutlery, and we came to -- he had instituted this protest [the notice of contest] against my better judgment, and we have since had to part company. So, that leaves me with what he had intended to do.

The motion to dismiss is denied.

Docket No. 94-2015: Alleged Safety Violations
Citation No. 1

Item 1a: Alleged Serious Violation of §1910.147(c)(4)(i)

The Secretary alleges that a serious violation of §1910.147(c)(4)(i), which provides:

(4) "Energy control procedure." (i) Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section.

Activities covered by §1910.147 are "servicing and maintenance of machines and equipment in which the *unexpected* energization or start up of machines or equipment, or release of stored energy could cause injury to employees." Section 1910.147(a)(1).

The Secretary has the burden of proving the alleged violation by a preponderance of the evidence.

In order to prove a violation, the Secretary must show that the standard applied to the cited conditions, that the employer failed to comply with the terms of the standard, that employees had access to the cited conditions and that the employer knew or, with the exercise of reasonable diligence, could have known of those conditions. E.g., *Gary Concrete Prod., Inc.*, 15 BNA OSHC 1051, 1052 (No. 86-1087, 1991).

Kaspar Electroplating Corp., 16 BNA OSHC 1517, 1521 (No. 90-2866, 1993).

The violation is described in the citation as follows:

A lockout program was not developed, utilized, and documented for the control of potentially hazardous energy and the training of employees servicing and performing maintenance on equipment and machines that could be exposed to unexpected energy release.

The citation fails to identify the equipment or machine at issue, or where the equipment or machine was located. The record is no more helpful in establishing the specifics of the alleged violation. The totality of the Secretary's relevant evidence on this issue is as follows:

Q.: What type of machinery was in the plant that you inspected?

Gattis: They had some belt sanders. I think they had an 80-ton press. They had other pieces of equipment there that were utilized in the processing of their product which are knives, and I was told--

Q.: Who performed the maintenance work on that machinery?

* * *

Gattis: Carleton Reitz said he performed a lot of the maintenance himself.

Q.: Did the company have a written lockout program?

Gattis: They did not.

(Tr. 24-25).

Q.: Did you determine whether there was a hazard associated with the maintenance work performed on the machinery in the plant?

Gattis: Yes.

Q.: What was the hazard?

Gattis: There was one process taking place at that time that dealt with the servicing of a piece of equipment. In that case, it would be the electrical hazard.

Q.: Do you know what the voltage of the electricity going to that machine that you were referring to was?

Gattis: I would have to look at my file. It was either 240 or 480, but I'm not going to specify particularly until I've seen my file.

Q.: I'll show you a copy of your file and ask you if you can find that reference in file to refresh your recollection?

(Witness complies)

Q.: Have you been able to locate it?

Gattis: No.

(Tr. 26).

The Secretary failed to specify the machine to which he is referring, the servicing process which Gattis observed, the location of the machine, or even the voltage to which the employee was allegedly exposed. The only evidence adduced by the Secretary on this issue was Gattis' vague assertion that some

person was performing some unspecified servicing on a “piece of equipment,” which constituted an “electrical hazard.”

“Barely sufficient evidence may sustain a violation when not adequately rebutted.” *Kaspar Electroplating Corp.*, 16 BNA at 1521-1522. General Cutlery did not present any legally viable rebuttal, but it cannot be reasonably said there is enough evidence to rebut. The Secretary’s proof on this item fails to meet the standard of “barely sufficient evidence.” There is simply not enough evidence to establish that a violation of §1910.147(c)(4)(i) was committed. No violation is found.

Item 1b: Alleged Serious Violation of §1910.333(b)(2)(i)

The Secretary alleges that General Cutlery violated §1910.333(b)(2)(i) which provides:

The employer shall maintain a written copy of the procedures outlined in paragraph (b)(2) and shall make it available for inspection by employees and by the Assistant Secretary of Labor and his or her authorized representatives.

Paragraph (b)(2) of the standard provides that when an “employee is exposed to contact with parts of fixed electric equipment or circuits which have been deenergized, the circuits energizing the parts shall be locked out or tagged out or both. . . .”

Gattis observed an energized box on which Carleton Reitz was working. When Gattis asked Reitz if the energizing circuits had been locked out, Reitz replied, “No. I know what I’m doing. I don’t need a lockout” (Tr. 28-29). Gattis requested a copy of General Cutlery’s written procedure in accordance with §1910.333(b)(2)(i) and was told that the company did not have one (Tr. 28).

The Secretary has established the violation as alleged. The hazard to which employees were exposed was electrical shock or electrocution. The violation was serious.

Item 2a: Alleged Serious Violation of §1910.215(a)(2)

Section 1910.215(a)(2) provides:

(2) Guard design. The safety guard shall cover the spindle end, nut, and flange projections. The safety guard shall be mounted so as to maintain proper alignment with the wheel, and the strength of the fastenings shall exceed the strength of the guard, except:

(i) Safety guards on all operations where the work provides a suitable measure of protection to the operator, may be so constructed that the spindle end, nut, and outer flange

are exposed; and where the nature of the work is such as to entirely cover the side of the wheel, the side covers of the guard may be omitted; and

(ii) The spindle end, nut, and outer flange may be exposed on machines designed as portable saws.

The citation refers to a True Professional 6-inch bench grinder adjacent to the belt sanders in the manufacturing plant (Exh. C-1). Even though the bench grinder comes equipped with a safety guard, the bench grinder in question did not have a safety guard at the time of the inspection (Tr. 31). The hazard presented by the missing safety guard is that if the abrasive wheel burst, the fragments of the wheel could act as projectiles and injure nearby employees. A safety guard would contain the fragments and prevent injury (Tr. 31).

In response to this charge, Carleton Reitz testified, “[S]omebody must have taken the guard off to install another wheel at sometime or other; and, otherwise, the guards are on those on this particular one, the only one we own. The guards are always on there when it’s being used” (Tr. 160). General Cutlery offered no evidence to corroborate Reitz’s statement. Without corroboration, his statement is mere speculation. The bench grinder was available for use without the safety guard. The Secretary has established a serious violation of the cited standard.

Item 2b: Alleged Serious Violation of §1910.215(a)(4)

The Secretary alleges that General Cutlery violated 1910.215(a)(4), which provides:

(4) Work rests. On offhand grinding machines, work rests shall be used to support the work. They shall be of rigid construction and designed to be adjustable to compensate for wheel wear. Work rests shall be kept adjusted closely to the wheel with a maximum opening of one-eighth inch to prevent the work from being jammed between the wheel and the rest, which may cause wheel breakage. The work rest shall be securely clamped after each adjustment. The adjustment shall not be made with the wheel in motion.

Item 2b concerns the same bench grinder at issue in item 2a. Gattis testified there is no work rest on the bench grinder (Exh. C-1; Tr. 33). The purpose of the work rest is “to ensure that the tool is in a position so you can do what you’re intending to do with it and also to keep the tool from being inadvertently pulled into the wheel” (Tr. 34). The hazard presented by the absence of the work rest is that “there is a good potential of the tool being pulled into the wheel that’s rotating; fracturing, bursting up of

the wheel, explosion of the wheel, and portions of that wheel that have been burst to strike the user of the wheel” (Tr. 34).

The Secretary has established a serious violation of §1910.215(a)(4).

Item 3a: Alleged Serious Violation of §1910.215(b)(9)

The Secretary alleges that General Cutlery violated §1910.215(b)(9), which provides in pertinent part:

[T]he distance between the wheel periphery and the adjustable tongue or the end of the peripheral member at the top shall never exceed one-fourth inch.

Item 3a also refers to the True Professional bench grinder. Gattis stated there was no tongue guard on the bench grinder (Exh. C-1; Tr. 36). The hazard presented by the absence of the tongue guard is that “if there was an explosion of a wheel, it would prevent materials from coming out of the wheel and striking the operator” (Tr. 37).

The Secretary has established a serious violation of §1910.215(b)(9).

Item 3b: Alleged Serious Violation of §1910.215(d)(1)

The Secretary charges that General Cutlery violated §1910.215(d)(1), which provides:

(d) Mounting - (1) Inspection. Immediately before mounting, all wheels shall be closely inspected and sounded by the user (ring test) to make sure they have not been damaged in transit, storage, or otherwise. The spindle speed of the machine shall be checked before mounting of the wheel to be certain that it does not exceed the maximum operating speed marked on the wheel. Wheels should be tapped gently with a light nonmetallic implement, such as the handle of a screwdriver for light wheels, or a wooden mallet for heavier wheels. If they sound cracked (dead), they shall not be used. This is known as the "Ring Test".

Item 3b refers to the True Professional bench grinder. Gattis asked Carleton Reitz if General Cutlery had performed a ring test on the wheel. Reitz replied that “the wheel was just installed when the old one was no longer usable, and he had not performed a ring test on it” (Tr. 38). Reitz admitted at the hearing that no ring test had been performed on the bench grinder wheel, stating, “As far as I know, the ring test of a grinding wheel is pretty old fashioned” (Tr. 161).

The purpose of the ring test is to determine whether the wheel has any internal breaks. If a defective wheel is used, "there is a potential for its breaking down, the parts exploding out and injuring the user" (Tr. 39).

The Secretary has established a serious violation of §1910.215(d)(1).

Item 4: Alleged Serious Violation of §1910.305(b)(1)

Section 1910.305(b)(1) provides:

(b) Cabinets, boxes, and fittings - (1) Conductors entering boxes, cabinets, or fittings. Conductors entering boxes, cabinets, or fittings shall also be protected from abrasion, and openings through which conductors enter shall be effectively closed. Unused openings in cabinets, boxes, and fittings shall be effectively closed.

Gattis observed electrical disconnects adjacent to the 80-ton press in the manufacturing plant. Wires entered the bottoms of the disconnect boxes (Exhs. C-2, C-3, C-4; Tr. 40-41). The wires were unprotected from abrasion. The wires entering the disconnect boxes had no coverings at the point of entry (Tr. 42). Employees were working within 4 feet of the boxes (Tr. 43). The hazard created by exposing electrical wires to abrasion is electrical shock (Tr. 45).

The Secretary has established a serious violation of §1910.305(b)(1).

Item 5: Alleged Serious Violation of §1910.333(a)(1)

Section 1910.333(a)(1) provides:

(1) "Deenergized parts." Live parts to which an employee any be exposed shall be deenergized before the employee works on or near them, unless the employer can demonstrate that deenergizing introduces additional or increased hazards or is infeasible due to equipment design or operational limitations. Live parts that operate at less than 50 volts to ground need not be deenergized if there will be no increased exposure to electrical burns or to explosion due to electric arcs.

Gattis observed a box that had been burned out and which Carleton Reitz was in the process of repairing (Exh. C-5; Tr. 48). A small piece of wood had been wedged into the box, disengaging the automatic shut-off mechanism, which shuts off the power from the box to the machinery in case of an overload. Gattis traced the wiring from the box and found that it was connected to three belt sanders that were in use at the time (Tr. 49). The box was live, with a voltage of 240 volts. The hazard presented by

this condition is electrical shock or electrocution (Tr. 50). Carleton Reitz's only explanation for the violation was, "I'm capable of working electricity hot, I have done a lot of that. . ." (Tr. 163).

The Secretary has established a serious violation of the cited standard.

Citation No. 2

Item 1: Alleged Serious Violation of §1910.305(a)(2)(i)

The Secretary initially charged General Cutlery with a repeat violation of §1910.305(a)(2)(i). At the hearing, the court granted the Secretary's motion to amend the citation and complaint to allege a serious violation of that standard (Tr. 5). The cited standard provides:

(2) Temporary wiring. Temporary electrical power and lighting wiring methods may be of a class less than would be required for a permanent installation. Except as specifically modified in this paragraph, all other requirements of this subpart for permanent wiring shall apply to temporary wiring installations. (i) Uses permitted, 600 volts, nominal, or less. Temporary electrical power and lighting installations 600 volts, nominal, or less may be used only: (A) During and for remodeling, maintenance, repair, or demolition of buildings, structures, or equipment, and similar activities; (B) For experimental or development work, and (C) For a period not to exceed 90 days for Christmas decorative lighting, carnivals, and similar purposes.

Gattis testified that General Cutlery was using temporary wiring to operate the feeder for the 80-ton press (Exh. C-6; Tr. 52). The voltage of the power source was 440 volts. Wiring for a piece of permanent equipment must be hard-wired into the piece of equipment. Extension cords are not to be used (Tr. 53). Gattis explained the hazard created by using the temporary wiring (Tr. 54): "[T]he temporary wiring you can see the wire running to the left has some frays to it, and when you have wiring laying on the floor like that, there is a potential for people to walk over it, stomp on it. The integrity of the outer covering would break down and there would be a potential for a shock to an individual." The temporary wiring was on the floor in a location where there was heavy foot traffic (Tr. 54).

General Cutlery argues that the wiring used for feeder was not temporary. Reitz testified (Tr. 163):

The wiring is portable and it was done with cords for the simple reason that it controls the feeder and every time you set up a new operation, the feeder has to be moved. It had to be moved either backward or forward, sometimes to the right and sometimes to the left. And, the only way you can do that is with a portable cord.

General Cutlery's contention is not supported by the evidence. Examination of Exh. C-6 supports Gattis' testimony that the wiring was temporary. The Secretary has established a serious violation of §1910.305(a)(2)(i).

Item 2: Alleged Repeat Violation of §1910.305(g)(2)(iii)

The Secretary alleges that General Cutlery committed a repeat violation of §1910.305(g)(2)(iii), which provides:

(iii) Flexible cords shall be connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminal screws.

Exhibit C-7 is a photograph of an electrical conduit going up to a motor control box (Tr. 57). The wire was not attached to a tension releaser (Tr. 58).

General Cutlery contends that the box to which the electrical conduit was connected was not live. Carleton Reitz stated, "[T]hat box hasn't been connected for at least a couple of years" (Tr. 164). Gattis admitted that he did not determine if the box was live (Tr. 58). Without proof that the box was live, there is no proof that employees were exposed to a hazard.

The Secretary has failed to establish a violation of §1910.305(g)(2)(iii).

Citation No. 3

Items 1 and 2: Alleged "Other" Violations of §§1910.110(f)(2)(i) and (ii)

The Secretary alleges an "other" violation of §§1910.110(f)(2)(i) and (ii), which provide:

(2) General. (i) Containers in storage shall be located so as to minimize exposure to excessive temperature rise, physical damage, or tampering by unauthorized persons. (ii) Containers when stored inside shall not be located near exits, stairways, or in areas normally used or intended for the safe exit of people.

Gattis observed two liquid petroleum (LP) gas containers against a wall in a hallway of the administrative building. The containers were full (Exh. C-10; Tr. 64).

General Cutlery does not dispute that the containers were in the hallway. Carleton Reitz testified that the containers had been removed from a truck and placed in the hallway temporarily. "They should

have been taken back to the storage place, but they were not moved quickly enough, and they happened to be sitting there when the inspectors came” (Tr. 164-165).

The Secretary has established “other” violations of §§1910.110(f)(2)(i) and (ii).

Item 3: Alleged “Other” Violation of §1910.303(f)

The Secretary alleges that General Cutlery committed an “other” violation of §1910.303(f), which provides:

(f) Identification of disconnecting means and circuits. Each disconnecting means required by this subpart for motors and appliances shall be legibly marked to indicate its purpose, unless located and arranged so the purpose is evident. Each service, feeder, and branch circuit, at its disconnecting means or overcurrent device, shall be legibly marked to indicate

its purpose, unless located and arranged so the purpose is evident. These markings shall be of sufficient durability to withstand the environment involved.

Gattis observed unmarked boxes throughout the manufacturing plant, including those shown in Exhs. C-2, C-3, and C-4 (Tr. 68). There was also a larger junction box not shown that was unmarked (Tr. 68). General Cutlery admitted that the boxes were unmarked (Tr. 165).

The Secretary has established a violation of §1910.303(f).

Item 4: Alleged “Other” Violation of §1910.305(b)(1)

Section 1910.305(b)(1) provides:

(b) Cabinets, boxes, and fittings - (1) Conductors entering boxes, cabinets, or fittings. Conductors entering boxes, cabinets, or fittings shall also be protected from abrasion, and openings through which conductors enter shall be effectively closed. Unused openings in cabinets, boxes, and fittings shall be effectively closed.

Gattis observed an used opening in an electrical box adjacent to the 6-inch bench grinder in the manufacturing plant. The opening was not closed (Tr. 71).

The Secretary has established an “other” violation of §1910.305(b)(1).

Docket No. 94-1933: Alleged Health Violations

Citation No. 1

Item 1: Alleged Serious Violation of §1910.38(a)(1)

Section 1910.38(a)(1) provides:

(a) "Emergency action plan" - (1) "Scope and application." This paragraph (a) applies to all emergency action plans required by a particular OSHA standard. The emergency action plan shall be in writing (except as provided in the last sentence of paragraph (a)(5)(iii) of this section) and shall cover those designated actions employers and employees must take to ensure employee safety from fire and other emergencies.

Compliance officer Laura Ulczynski asked if General Cutlery had an emergency action plan. She testified, "The president had commented to myself that if there was a small fire, employees would be expected to respond to that fire" (Tr. 97). General Cutlery did not have an emergency action plan (Tr. 98). General Cutlery's attitude towards this standard was succinctly stated by Carleton Reitz (Tr. 147): "I wouldn't want to sound like a half-wit, so I would have difficulty presenting a procedure to get out of the building when they can see all the exits. We ignored that."

The hazard created by the failure to have an emergency action plan is that if a fire should occur, employees would not know what the exit route would be (Tr. 98). The Secretary has established a serious violation of §1910.38(a)(i).

Item 2: 1910.141(b)(2)(iii)

Section 1910.141(b)(2)(iii) provides:

(iii) Nonpotable water shall not be used for washing any portion of the person, cooking or eating utensils, or clothing. Nonpotable water may be used for cleaning work premises, other than food processing and preparation premises and personal service rooms: Provided, That this nonpotable water does not contain concentrations of chemicals, fecal coliform, or other substances which could create unsanitary conditions or be harmful to employees.

General Cutlery had sinks in the employees' restrooms at which they washed their hands. The water came from a cistern. Ms. Ulczynski tested the water in the ladies restroom (Tr. 100). The water tested positive for total coliform, a bacteria (Exh. C-12; Tr. 102). The hazard presented by washing one's hands in water containing coliform is that one could become sick (Tr. 104).

General Cutlery was in serious violation of §1910.141(b)(2)(iii).

Item 3: Alleged Serious Violation of §1910.178(p)(i)

Section 1910.178(p)(i) provides:

(p) Operation of the truck. (1) If at any time a powered industrial truck is found to be in need of repair, defective, or in any way unsafe, the truck shall be taken out of service until it has been restored to safe operating condition.

Employee James Carter operated a forklift for General Cutlery on a daily basis. The forklift did not have a functioning horn. A horn is needed for warning other in the area of the forklift's movement, especially at intersections and around corners (Exhs. C-14, C-15; Tr. 105-106).

General Cutlery did not really dispute that the forklift was used without a horn. Carleton Reitz testified that General Cutlery had bought the truck used and that it arrived without a horn (Tr. 148-149):

[A]nd we immediately ordered a horn, and the question here is, was the truck used without a horn. I can't be for sure. I doubt it. . . [T]o my knowledge, it was never used in service without a horn. It could have been. I can't vouch to that for sure, but I'm very sure that it was not used to an extent.

Ulczynski's positive testimony that the horn was not working and that James Carter used the forklift in that condition is credited. The Secretary has established a serious violation of §1910.178(p)(i).

Item 4: Alleged Serious Violation of §1910.178(q)(7)

Section 1910.178(q)(7) provides:

(7) Industrial trucks shall be examined before being placed in service, and shall not be placed in service if the examination shows any condition adversely affecting the safety of the vehicle. Such examination shall be made at least daily. Where industrial trucks are used on a round-the-clock basis, they shall be examined after each shift. Defects when found shall be immediately reported and corrected.

The forklift was used daily but was only inspected weekly (Tr. 106). The hazard associated with failing to inspect the forklift daily is that if the forklift malfunctions in some way, for example if the brakes fail, then the operator of the forklift or employees working around the forklift could be injured (Tr. 107).

The Secretary has established a serious violation of §1910.178(q)(7).

Item 5: Alleged Serious Violation of §1910.219(b)(1)

Section 1910.219(b)(1) provides:

(b) Prime-mover guards - (1) Flywheels. Flywheels located so that any part is seven (7) feet or less above floor or platform shall be guarded in accordance with the requirements of this subparagraph[.]

Most of the flywheel of General Cutlery's 80-ton press was less than 7 feet above the floor (Exh. C-16, C-17). The part of the flywheel that was less than 7 feet above the floor was only partially guarded. The part that was guarded was covered by a wire mesh with 1½ inch openings (Tr. 110). The Secretary argues that the wire mesh is inadequate to guard the flywheel because employees could stick their hands through the openings (Tr. 111, 143).

The Secretary's argument that the wire mesh is an inadequate guard is rejected. It is unlikely that an employee could insert a hand into the openings of the wire mesh. Ulczynski herself conceded that this was "an exaggeration" (Tr. 143). However, Exh. C-17 shows that the flywheel is completely unguarded between the top of the mesh guard and the 7-foot mark. The unguarded gap appears to be at least 6 inches. The cited standard requires that all of the flywheel under 7 feet must be guarded.

The Secretary has established that General Cutlery seriously violated §1910.219(b)(i) with respect to the portion of the flywheel that was less than 7 feet above the ground and unguarded by the wire mesh.

Item 6: Alleged Serious Violation of §1910.217(b)(4)(i)

Section 1910.217(b)(4)(i) provides:

(4) Foot pedals (treadle). (i) The pedal mechanism shall be protected to prevent unintended operation from falling or moving objects or by accidental stepping onto the pedal.

The 80-ton press was equipped with a foot pedal which operated the full revolution clutch. The pedal was not covered to prevent it from being inadvertently depressed. The hazard created by this condition is possible lacerations or amputations if an employee had his or her hands in the die when the pedal is inadvertently depressed (Tr. 112-113).

General Cutlery contends that the pedal does have a guard, but it is removed when the press is operated continuously at 90 strokes a minute. The guard is removed because otherwise it rubs against the ankle of the press operator (Tr. 151). Although the press was not being run at the time of the inspection, the pedal was unguarded (Tr. 144).

General Cutlery was in serious violation of §1910.217(b)(4)(i).

Item 7: Alleged Serious Violation of §1910.217(e)(1)(i)

Section 1910.217(e)(1)(i) provides:

(e) Inspection, maintenance, and modification of presses - (1) Inspection and maintenance records. (i) It shall be the responsibility of the employer to establish and follow a program of periodic and regular inspections of his power presses to ensure that all their parts, auxiliary equipment, and safeguards are in a safe operating condition and adjustment. The employer shall maintain a certification record of inspections which includes the date of inspection, the signature of the person who performed the inspection and the serial number, or other identifier, of the power press that was inspected.

Ulczynski asked Maenstranzi if he had records of inspections of the 80-ton press. "He stated that there were no records of any maintenance checks that were done" (Tr. 114). General Cutlery disputes this but adduced no evidence that it had a certification record of inspections.

The hazard associated with failure to inspect the press is lacerations or amputations if the press malfunctions. General Cutlery was in serious violation of §1910.217(e)(1)(i).

Citation No. 2

Item 1: Alleged Willful Violation of §1910.1200(e)(1)

The Secretary alleges that General Cutlery committed a willful violation of §1910.1200(e)(1), which provides:

(e) "Written hazard communication program." (1) Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following: (i) A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas); and, (ii) The methods the employer will use to inform employees

of the hazards of non-routine tasks (for example, the cleaning of reactor vessels), and the hazards associated with chemicals contained in unlabeled pipes in their work areas.

General Cutlery was using a number of hazardous chemicals at its plant, including Lectroetch CF-25 (Exh. C-19), Lectoetch LIC Immersion Cleaner (Exh. C-20), Metal Protective Oil (Exh. C-21), TASC (Exh. C-23), Clear-Cut 55 (Exh. C-24), and LP gas (C-22). The material data safety sheets (MSDSs) for these substances demonstrate that exposure to them can be harmful to employees, causing eye and skin irritation, respiratory damage, renal disorders, and central nervous system damage (Exhs. C-19 through C-24; Tr. 116-120).

Ulczynski asked Maenstranzi for a copy of the company's written hazard communication standard. Maenstranzi said he did not know whether General Cutlery had a written program, but Ulczynski's subsequent testimony on this issue indicates that General Cutlery did have a written program (Tr. 120): "[A]bout six days after the inspection, I contacted the Company president by phone to let him know that Carleton Reitz had presented a hazard communications program to OSHA in Toledo, to the area director there; that they did have a written hazard communication program." Ulczynski went on to say that she had never personally received a copy of the program (Tr. 120-121).

Having a written program does not satisfy the requirements of the standard, however. Section 1910.1200(e)(1) also requires the employer to "implement and maintain" the program. In its answer, General Cutlery states, "No program was implemented because we were not aware of any hazard [sic] materials being used. . . We do have data sheets available in our files for all of the materials used including propane." Employee Patricia Little testified that she worked with chemicals in the etching process. Ms. Little had never been trained in the use of the chemicals. She did not know what an MSDS is (Tr. 88).

General Cutlery states that it was unaware that it was using hazardous chemicals, yet it admits that it had MSDSs for its chemicals. The MSDSs themselves inform the employer of the hazards associated with exposure to the chemicals. General Cutlery's claim that it did not know it was using hazardous chemicals is rejected. The Secretary has established a violation of §1910.1200(e)(1).

The Secretary charged that the violation was willful.

To prove that a violation was willful, the Secretary must show that the violation "was committed voluntarily with either an intentional disregard for the requirements of the Act or with plain indifference to employee safety." *Sal Masonry Contrac., Inc.*, 15 BNA OSHC 1609, 1611, 1991-93 CCH OSHD paragraph 29,673, p. 40,208 (No. 87-2007, 1992) (quoting *A.C. Dellovade, Inc.*, 13 BNA OSHC 1017, 1019, 1986-87 CCH OSHD paragraph 27,786, p. 36,341 (No. 83-1189, 1987)). "A willful violation is differentiated from other classifications of violation by the employer's state of mind toward the requirements imposed by a standard." *Beta Constr. Co.*, 16 BNA OSHC 1435, 1444, 1993 CCH OSHD paragraph 30,239, p. 41,652 (No. 91-102, 1993), petition for review filed, No. 93-1817 (D.C. Cir. Dec. 3, 1993). The willfulness charge relates to the employer's "underlying state of mind" at the time it committed the violation and requires proof of a "greater degree of culpability" on the employer's part than the "simple knowledge or awareness of hazardous conditions that is a prerequisite for any violation." *Hackney, Inc.*, 15 BNA OSHC 1520, 1524, 1991-93 CCH OSHD paragraph 29,618, p. 40,109 (No. 88-391, 1992); *Bay State Refining Co.*, 15 BNA OSHC 1471, 1475, 1991-93 CCH OSHD paragraph 29,579, pp. 40,024-25 (No. 88-1731, 1992).

"If an employer has made a good faith effort to comply with the Act's requirements, a finding of willfulness is not justified, even though the employer's efforts are not entirely effective or complete. However, the test of good faith in this regard is an objective one--whether the employer's efforts to comply were reasonable under the circumstances." *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1541, 1991-93 CCH OSHD paragraph 29,617, p. 40,104 (No. 86-360, 1992) (consolidated cases). See also *R & R Builders, Inc.*, 15 BNA OSHC 1383, 1392-93, 1991-93 CCH OSHD paragraph 29,531, pp. 39,865-66 (No. 88-282, 1991) (despite employer's history of previous citations, the instant violations were improperly classified as willful, given the employer's "overall pattern of responsive behavior," both prior to and after the instant violations).

Atlantic Battery Company, 16 BNA OSHC 2131, 2138-2139 (No. 90-1747, 1994).

The Secretary had previously issued a citation to General Cutlery on May 23, 1991, alleging in item 6 of the citation that General Cutlery violated §1910.1200(e)(1) (Exh. C-28). The citation became a final order in November 28, 1991 (Exh. C-29). Two years later, OSHA inspected General Cutlery and issued a notice of failure to abate the 1991 violation of §1910.1200(e)(1) (Exh. C-30).

Respondent's view of its violation of §1910.1200(e)(1) is expressed in its post-hearing brief in capital letters as follows:

IT WOULD SEEM THAT OSHA COULD BE A LOT MORE CONSIDERATE WHEN THEY ENTER A PLACE WHERE ITEMS ARE USED THAT THEY CONSIDER A HAZARD ASK THAT A PROGRAM BE IMPLEMENTED INSTEAD OF SIMPLY

PLACING A HEAVY PENALTY. AFTER ALL OUR INTERPRETATION OF A HAZARD COULD BE DIFFERENT.

Despite the previous citation for violating §1910.1200(e)(1), General Cutlery made no attempt to comply with the standard, and argues that it interprets hazards differently from OSHA. Yet it is admitted the MSDSs which detail why the substances being used are hazardous. General Cutlery is not required to “interpret” whether a substance is hazardous; all it needs to do is read the MSDSs to determine whether a chemical is considered hazardous.

General Cutlery has shown a greater degree of culpability than simple knowledge of the existence of the hazardous condition. General Cutlery had been cited for this same violation before. It knew that it had not implemented a hazard communication program. General Cutlery cavalierly decided that none of the chemicals it uses are hazardous, and refused to train its employees working with hazardous chemicals. The Secretary has established a willful violation of §1910.1200 (e)(1).

Citation No. 3

Item 1: Alleged Repeat Violation of §1903.2(a)(1)

The Secretary alleges that a repeat violation of §1903.2(a)(1), which provides:

(a) - (1) Each employer shall post and keep posted a notice or notices, to be furnished by the Occupational Safety and Health Administration, U.S. Department of Labor, informing employees of the protections and obligations provided for in the Act, and that for assistance and information, including copies of the Act and of specific safety and health standards, employees should contact the employer or the nearest office of the Department of Labor. Such notice or notices shall be posted by the employer in each establishment in a conspicuous place or places where notices to employees are customarily posted. Each employer shall take steps to insure that such notices are not altered, defaced, or covered by other material.

Ulczynski asked to be shown the OSHA notice. General Cutlery’s representatives told her that it did not have the notice posted (Tr. 126). General Cutlery argues that it had three OSHA notices posted, but its evidence is confused and contradictory (Tr.154):

Carleton Reitz: I know it’s posted on the big building, and I was under the impression, and I still am, that it was posted on the side of the time clock on the small building. So there should be three of them out there.

David Reitz: No, it was on the locker.

Carleton Reitz: On the locker. I thought it was on the time clock. Anyway, you guys told me it was posted. That's all I know. I saw it. I don't remember just where I saw it but it's there. If somebody didn't see it, I don't know. I know there are three posters or should have been three posters.

There was no photographic exhibits offered or testimony from employee witnesses in support of the claim that the OSHA notice was posted. Based on Ulczynski's credible testimony, the Secretary has established the violation of §1903.2(a)(1).

The Secretary alleges that the violation is a repeat violation.

Under Commission precedent, a violation is repeated if, at the time of the alleged violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD 23,294, p. 28,171 (No. 16183, 1979). The Secretary makes a prima facie showing that the violations are substantially similar by introducing evidence that both violations are of the same standard. The employer then has the burden of rebutting the evidence of similarity. *E.g.*, *Stone Container Corp.*, 14 BNA OSHC 1757, 1762, 1987-90 CCH OSHD 29,064, p. 38,819 (No. 88-310, 1990).

Capform, Inc., 16 BNA OSHC 2040, 2045 (No. 91-1613, 1994).

The Secretary cited General Cutlery in 1991 for violation of the same standard (Exh. C-31), which became a final order pursuant to a settlement agreement (Exh. C-29). The violations are substantially similar; both times General Cutlery was cited for failing to post the OSHA notice. The Secretary has established a repeat violation of §1903.2(a)(1).

Items 2a and 2b: Alleged Repeat Violations of §§1910.1200(f)(5)(i) and (ii)

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

(5) 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.

Ulczynski observed unmarked containers of metal protective oil. The oil was in a 5-gallon metal can, two metal pans and two plastic containers (Exh. C-32; Tr. 129). The MSDS for metal protective oil states that exposure to the oil may result in the following physiological results (C-21): "Drowsiness, narcosis, and unconsciousness." The containers were not marked with either the identity of the chemical or the appropriate hazard warnings for the metal protective oil.

The Secretary cited General Cutlery for violations of §§1910.1200(f)(5)(i) and (ii) in 1991 (Exhs. C-33, C-34). The citation for these violations became a final order (Exh. C-29). The violations were substantially similar to the violations cited in the present case. The Secretary has established repeat violations for items 2a and 2b.

Item 3: Alleged Repeat Violation of §1910.1200(g)(1)

Section 1910.1200(g)(1) provides:

(g) "Material safety data sheets." (1) Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet in the workplace for each hazardous chemical which they use.

Ulczynski asked for copies of the MSDSs for propane, Clear-Cut 55, TASC, Lectroetch CF-25 Electrolyte, Lectroetch Immersion Cleaner, and a coolant. General Cutlery did not have the MSDSs readily available, but provided Ulczynski with some of the MSDSs at the closing conference. These copies had been faxed in by the manufacturers during the OSHA inspection (Tr. 133-134).

The Secretary had cited General Cutlery for violating §1910.1200(g)(1) in 1991. The citation became a final order (Exhs. C-29, C-34). It was in repeat violation of the cited standard.

Item 4: Alleged Repeat Violation of §1910.1200(h)

Section 1910.1200(h) provides:

(h) "Employee information and training." (1) Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability,

carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and material safety data sheets. (2) "Information." Employees shall be informed of: {I} The requirements of this section; {ii} Any operations in their work area where hazardous chemicals are present; and, {iii} The location and availability of the written hazard communication program, including the required list(s) of hazardous chemicals, and material safety data sheets required by this section.

General Cutlery did not provide its employees with information or training on hazardous chemicals (Tr. 136). Employee Patricia Little stated that she had never received any kind of training in working with hazardous chemicals (Tr. 88).

The Secretary had previously cited General Cutlery for this same violation in 1991 (Exh. C-35), which became a final order of the Commission (Exh. C-29). The Secretary has established a repeat violation of §1910.1200(h).

Citation No. 4

Item 1: Alleged "Other" Violation of §1904.2(a)

The Secretary alleges that General Cutlery committed an "Other" violation of §1904.2(a), which provides:

(a) Each employer shall, except as provided in paragraph (b) of this section, (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred. For this purpose form OSHA No. 200 or an equivalent which is as readable and comprehensible to a person not familiar with it shall be used. The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

Ulczynski requested a copy of General Cutlery's OSHA 200 log during the opening conference. David Reitz told her "that unless injuries involved days away from work, that they did not need to be recorded on the OSHA 200 log" (Tr. 138). General Cutlery did not have an OSHA 200 log as required by the standard (Tr. 138). The Secretary adduced evidence showing that at least three employees had sustained recordable injuries in the past five years (Tr. Exhs. C-36, C-37, C-38).

The Secretary has established an "other" violation of §1904.2(a).

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. 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.

General Cutlery employed 17 employees at the time of the inspection (Tr. 17). It has shown no good faith in its dealings with OSHA, but instead has demonstrated an obstinate refusal to take seriously the requirements of the Act. The company faciley dismisses standards that it finds inconvenient as ridiculous and unnecessary. Despite a history of violating OSHA’s standards and being fined for it, General Cutlery has given no indication that it understands that it must comply with federal law even if there is disagreement with it. General Cutlery balks at compliance that is as simple as marking containers of hazardous chemicals or maintaining an OSHA 200 log. General Cutlery will be given no consideration for good faith, and its previous history of violations will be weigh against the company. Giving due consideration to General Cutlery’s small size, lack of good faith, previous history of violations, and the gravity of each specific violation, it is determined that the following penalties shall be assessed:

Docket No. 94-2015

Citation No. 1

| <u>Item</u> | <u>Standard</u> | <u>Penalty</u> |
|-------------|-------------------|----------------|
| 1b | 1910.333(b)(2)(i) | \$500 |
| 2a | 1910.215(a)(2) | \$500 |
| 2b | 1910.215(a)(4) | \$500 |
| 3a | 1910.215(b)(9) | \$500 |
| 3b | 1910.215(d)(1) | \$500 |
| 4 | 1910.305(b)(1) | \$1,000 |

| <u>Item</u> | <u>Standard</u> | <u>Penalty</u> |
|-------------|-----------------|----------------|
| 5 | 1910.333(a)(1) | \$2,000 |

Citation No. 2

| <u>Item</u> | <u>Standard</u> | <u>Penalty</u> |
|-------------|-------------------|----------------|
| 1 | 1910.305(a)(2)(1) | \$1,000 |

Citation No. 3

| <u>Item</u> | <u>Standard</u> | <u>Penalty</u> |
|-------------|--------------------|----------------|
| 1 | 1910.110(f)(2)(i) | -0- |
| 2 | 1910.110(f)(2)(ii) | -0- |
| 3 | 1910.303(f) | -0- |
| 4 | 1910.305(b)(1) | -0- |

Docket No. 94-1933

Citation No. 1

| <u>Item</u> | <u>Standard</u> | <u>Penalty</u> |
|-------------|---------------------|----------------|
| 1 | 1910.38(a)(1) | \$800 |
| 2 | 1910.141(b)(2)(iii) | \$600 |
| 3 | 1910.178(p)(1) | \$600 |
| 4 | 1910.178(q)(7) | \$600 |
| 5 | 1910.219(b)(1) | \$1,000 |
| 6 | 1910.217(b)(4)(i) | \$1,000 |
| 7 | 1910.217(e)(1)(i) | \$1,000 |

Citation No. 2

| <u>Item</u> | <u>Standard</u> | <u>Penalty</u> |
|-------------|-----------------|----------------|
| 1 | 1910.1200(e)(1) | \$7,000 |

Citation No. 3

| <u>Item</u> | <u>Standard</u> | <u>Penalty</u> |
|-------------|---------------------|----------------|
| 1 | 1903.2(a)(1) | \$800 |
| 2a | 1910.1200(f)(5)(i) | \$1,000 |
| 2b | 1910.1200(f)(5)(ii) | \$1,000 |
| 3 | 1910.1200(g)(1) | \$2,000 |
| 4 | 1910.1200(h) | \$2,000 |

Citation No. 4

| <u>Item</u> | <u>Standard</u> | <u>Penalty</u> |
|-------------|-----------------|----------------|
| 1 | 1904.2(a) | \$2,000 |

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 the citations in these consolidated cases be disposed of as follows:

Docket No. 94-2015

Citation No. 1

| <u>Item</u> | <u>Standard</u> | <u>Penalty</u> | <u>Disposition</u> |
|-------------|-------------------|----------------|--------------------|
| 1a | 1910.147(c)(4)(i) | -0- | Vacated |
| 1b | 1910.333(b)(2)(i) | \$500 | Affirmed |
| 2a | 1910.215(a)(2) | \$500 | Affirmed |
| 2b | 1910.215(a)(4) | \$500 | Affirmed |
| 3a | 1910.215(b)(9) | \$500 | Affirmed |
| 3b | 1910.215(d)(1) | \$500 | Affirmed |
| 4 | 1910.305(b)(1) | \$1,000 | Affirmed |
| 5 | 1910.333(a)(1) | \$2,000 | Affirmed |

Citation No. 2

| <u>Item</u> | <u>Standard</u> | <u>Penalty</u> | <u>Disposition</u> |
|-------------|---------------------|----------------|---------------------|
| 1 | 1910.305(a)(2)(1) | \$1,000 | Affirmed as serious |
| 2 | 1910.305(g)(2)(iii) | -0- | Vacated |

Citation No. 3

| <u>Item</u> | <u>Standard</u> | <u>Penalty</u> | <u>Disposition</u> |
|-------------|--------------------|----------------|--------------------|
| 1 | 1910.110(f)(2)(i) | -0- | Affirmed |
| 2 | 1910.110(f)(2)(ii) | -0- | Affirmed |
| 3 | 1910.303(f) | -0- | Affirmed |
| 4 | 1910.305(b)(1) | -0- | Affirmed |

Docket No. 94-1933

Citation No. 1

| <u>Item</u> | <u>Standard</u> | <u>Penalty</u> | <u>Disposition</u> |
|-------------|---------------------|----------------|--------------------|
| 1 | 1910.38(a)(1) | \$800 | Affirmed |
| 2 | 1910.141(b)(2)(iii) | \$600 | Affirmed |
| 3 | 1910.178(p)(1) | \$600 | Affirmed |
| 4 | 1910.178(q)(7) | \$600 | Affirmed |
| 5 | 1910.219(b)(1) | \$1,000 | Affirmed |
| 6 | 1910.217(b)(4)(i) | \$1,000 | Affirmed |
| 7 | 1910.217(e)(1)(i) | \$1,000 | Affirmed |

Citation No. 2

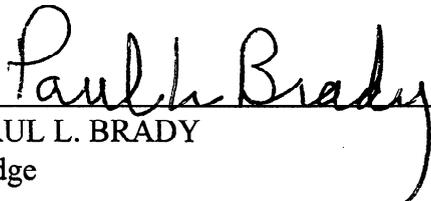
| <u>Item</u> | <u>Standard</u> | <u>Penalty</u> | <u>Disposition</u> |
|-------------|-----------------|----------------|--------------------|
| 1 | 1910.1200(e)(1) | \$7,000 | Affirmed |

Citation No. 3

| <u>Item</u> | <u>Standard</u> | <u>Penalty</u> | <u>Disposition</u> |
|-------------|---------------------|----------------|--------------------|
| 1 | 1903.2(a)(1) | \$800 | Affirmed |
| 2a | 1910.1200(f)(5)(i) | \$1,000 | Affirmed |
| 2b | 1910.1200(f)(5)(ii) | \$1,000 | Affirmed |
| 3 | 1910.1200(g)(1) | \$2,000 | Affirmed |
| 4 | 1910.1200(h) | \$2,000 | Affirmed |

Citation No. 4

| <u>Item</u> | <u>Standard</u> | <u>Penalty</u> | <u>Disposition</u> |
|-------------|-----------------|----------------|--------------------|
| 1 | 1904.2(a) | \$2,000 | Affirmed |



PAUL L. BRADY
Judge

Date: October 16, 1995