



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
FIBRES SOUTH, INC.
Respondent.

OSHRC DOCKET
NO. 94-2688

**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 August 3, 1995. The decision of the Judge will become a final order of the Commission on September 5, 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 August 23, 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
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Petitioning parties shall also mail a copy to:

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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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: August 3, 1995

DOCKET NO. 94-2688

NOTICE IS GIVEN TO THE FOLLOWING:

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Background

Fibres South manufactures its product on its fiber line. The fiber line is a series of machines arranged in a line through which the product passes during manufacturing. The fiber line measures at least 100 feet in length (Tr. 27, 138-143). As part of its production process, Fibres South's fiber line uses polypropylene and polyethylene resins and other additives which it extrudes and spins into filament. The fiber line gathers them to form a bundle called a "tow." The filaments undergo a spin finish or lubrication process. The rollers on the Godet machines draw the tow after it goes through the spin finish (Exh. J-1).

Fibres South has two Godet machines on its fiber line, designated as the #1 Godet and the #2 Godet (also referred to as "Quads" or "Godet stands"). The #1 Godet rollers operate at up to 60 meters per minute. The #2 Godet rollers can operate at up to 175 meters per minute, but routinely operate at a normal production speed of 80 meters per minute (Tr. 30, 154).

The #2 Godet consists of seven cylindrical chrome rollers. Four rollers are on top, and three are on the bottom. The rollers, each measuring 11¼ inches in diameter, are attached in cantilever fashion to the back of the Godet stand and extend 37 inches to the front of the Godet stand. The horizontal distance between rollers is 10 inches. The diagonal distance between top and bottom rollers is approximately 6 inches. The bottom rollers are 22 inches from the floor at their lowest point (Exhs. C-21, C-22, C-23, C-29; Tr. 21-22, 138).

At the #2 Godet, the tow is threaded from right to left over the top of the first roller on the top set, under the first roller on the bottom set, over the second roller on the top set, etc., to the end of the Godet stand. After the rollers are threaded and turning, in-running nip points exist at both the right underside of each top Godet roller, and the right topside of each bottom roller. Under normal production conditions, the tow moves from the #1 Godet, through a steam oven to the #2 Godet where, due to the speed differential between the #1 and the #2 Godet and the heat of the oven, the tow is stretched to the desired diameter and proceeds down the line (Exhs. C-22, J-1; Tr. 145).

During production, one or more filaments of the tow may break. Broken filaments may form “wrap,” an accumulation of one or more filaments, at any point along the length of the Godet rollers. Wrap interferes with fiber production. Fibres South required its line operators to remove small wraps from the #2 Godet rollers by “cutting wrap” (Exhs. J-1; Tr. 31, 141-143, 169-171). Prior to the June 27, 1994 fatality, Fibres South’s employees cut wrap by reaching into the area on the #2 Godet rollers where the wrap had formed and “nicking” the wrap with a short-handled utility knife (box cutter). Operators removed wrap while the #2 Godet rollers ran at production speed (Tr. 32-33, 99-100).

Fibres South purchased its fiber line from Meccaniche Moderne (Meccaniche), an Italian manufacturer. In 1985 and 1986, Meccaniche representatives assisted Fibres South in assembling the line and achieving 24-hour production (Tr. 42, 200). Meccaniche had equipped the #2 Godet stand with a metal-framed plexiglass guard which covered the nip points in the front of the Godet rollers. The guard was equipped with an interlocked safety mechanism so that either raising up or pushing down on the plexiglass guard while the Godet rollers were operating at production speeds caused the rollers to stop immediately (Exh. C-19; Tr. 184-185).

Meccaniche also equipped the #2 Godet with “scraper blades” that were intended to cut wrap (Exh. J-1). The blades never worked as intended, so Fibres South required its employees to cut wrap by hand using a short-handled knife (Tr. 185-186). By late 1986 the plexiglass guard ceased to be used, and the employees began using the box knives to cut wrap (Tr. 140-145).

The #2 Godet was also equipped with a “trip bar” at the bottom of the machine located approximately 8 inches from the floor in front of the rollers (Exh. C-22; Tr. 23, 187). When depressed, the trip bar stopped the Godet rollers immediately. Before the 1994 fatality, Fibres South had tightened the bar to prevent employees from inadvertently stopping the machine (Tr. 24, 187).

The production process causes condensation at the #2 Godet, and a floor grate directly in front of the nip points of the machine was frequently slick with oil (Tr. 48, 160-161). Cordell Duke was a lead operator for Fibres South. He died on June 27, 1994, after being pulled into a nip point at the #2 Godet while he was attempting to cut wrap

(Tr. 35). Before Duke's death, at least four other Fibres South employees had been injured when they were pulled into nip points at the #2 Godet while attempting to cut wrap (Exhs. C-25, C-26, C-27, C-33).

Citation No. 1, Item 1

Alleged Serious Violation of §1910.147(c)(6)(i)

The Secretary alleges that Fibres South committed a serious violation of § 1910.147(c)(6)(i), which provides:

The employer shall conduct a periodic inspection of the energy control procedure at least annually to ensure that the procedure and the requirements of this standard are being followed.

Fibres South had a written energy control procedure in effect at the time of the OSHA inspection (Exh. J-1). The lockout/tagout standard requires that the periodic inspection include a review between the inspector and each authorized and affected employee of that employee's responsibilities under the energy control procedure. Section 1910.147(c)(5)(iii)(C) and (D). The employer must certify that the periodic inspections have been performed. Section 1910.147(c)(6)(ii).

OSHA Compliance Officer Leek testified that Hank White, Fibres South's maintenance superintendent, told him that Fibres South had not conducted periodic inspections although it used the lockout program (Tr. 49-50). Fibres South does not dispute this testimony. The Secretary has therefore established a violation of § 1910.147(c)(6)(i).

The Secretary asserts that the violation is serious. Section 17(k) of the Act states that a violation is serious if it creates "a substantial probability that death or serious physical harm could result." Leek testified that the employees' lack of training could result in a serious injury. A machine could start unexpectedly if it was not locked out according to the written energy control procedure, injuring an employee within the machine's zone of danger (Tr. 50). The violation is properly classified as serious.

Citation No. 2, Item 1

Alleged Willful Violation of §1910.212(a)(1)

The Secretary alleges that Fibres South committed a willful violation of § 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.

To make a prima facie showing that a cited standard was violated, the Secretary must prove that “(1) the standard applies, (2) the employer violated the terms of the standard, (3) its employees had access to the violative condition, and (4) the employer had actual or constructive knowledge of the violative condition.” *EBAA Iron Inc.*, 17 BNA OSHC 1051, fn. 4 (No. 92-3189, 1995). Section 1910.212(a)(1) is a general standard. It applies generally to protect employees who are exposed to point-of-operation hazards. Unlike specific standards, the Secretary must show that the hazard addressed by the general standard existed. *Con Agra Flour Milling Co.*, 16 BNA OSHC 1137, 1147 (No. 88-1250, 1993).

Fibres South does not dispute that the Secretary established that the hazard existed and that he proved the four elements of the violation. A review of the record demonstrates that the Secretary proved his prima facie case: (1) § 1910.212(a)(1) applies to all machines; (2) Fibres South did not provide a guard for the #2 Godet machine between 1986, when it discontinued use of the guard with which the machine was equipped, and the 1994 fatality; (3) Fibres South’s line operators had access to the machine’s unguarded nip points; and (4) Fibres South knew of this condition because it trained its line operators in the method used to cut wrap on the unguarded machine (Tr. 140-145). Fibres South raises two affirmative defenses: infeasibility and unpreventable employee misconduct.

Infeasibility

To establish the affirmative defense of infeasibility, an employer must show:

(1) The means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) there would have been no feasible alternative means of protection. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1874, 1994 CCH OSHD ¶ 30,485, p. 42,109 (No. 91-1167, 1994).

Gregory & Cook, Inc., 17 BNA OSHC 1189, 1190 (No. 92-1891, 1995).

Fibres South claims that, because § 1910.212(a)(1) is a general standard, the Secretary has the burden of proving that a feasible means of compliance existed. Fibres South relies on *Martin v. Miami Industries, Inc.*, 983 F.2d 1067 (6th Cir. 1992). *Miami Industries* was issued by the Sixth Circuit Court of Appeals. The present case arises in the Eleventh Circuit. Cases issued by the Sixth Circuit have no precedential value in the present case. The standard is sufficiently precise in targeting the hazard (“such as . . . points of operation, nip points, rotating parts, flying chips and sparks”). It suggests three types of guarding methods: barrier guards, two-handed tripping devices, and electronic safety devices. This specificity is absent from those other general standards which require the Secretary to meet an additional burden of proving feasibility. Fibres South has the burden of proof on the issue of infeasibility.

The first part of the Review Commission’s infeasibility test set out in *Gregory & Cook, supra*, requires the employer to prove that compliance with the standard would have been infeasible because either (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would have been technologically or economically infeasible after its implementation. Fibres South does not argue that guarding the #2 Godet machine would have been technologically or economically infeasible. Indeed, the #2 Godet machine came equipped with a guard supplied by its manufacturer. Fibres South instead relies on (b), claiming that “necessary work operations,” *i.e.*, cutting wrap, made implementation of a guard technologically and economically infeasible.

Fibres South contends that it was not technologically feasible to use the original plexiglass guard provided by Meccaniche because its line operators could not cut wrap while the guard was in place over the nip points. The company contends that it was not economically feasible to stop or slow the line before raising the guard to cut wrap because doing so would cause more wraps to develop and would waste material and time. Fibres South estimated that stopping or slowing down the line before raising the guard would result in 6 hours of down time for every 12-hour shift, and would waste raw materials (Tr. 145-147). Fibres South did not, however, offer “a particular dollar amount” or address the effect of using the guards “on the company’s financial position as a whole. Such specific information is necessary to establish that an employer’s existence as a company would have been adversely affected by these costs and to demonstrate that the guards were economically infeasible.” *Gregory & Cook, Inc.*, 17 BNA OSHC at 1191.

Furthermore, Fibres South’s estimate of the down time that would result from slowing or stopping the machines to cut wrap is contradicted by the record. Robert Brown, a former division manager for Fibres South, stated that after the line went to 24-hour production in early 1986, the number of wraps occurring during a shift decreased (Tr. 187):

As we went into 24-hour production, which helps solve a number of problems, there is a problem of stopping and starting the load extrusion line. It takes a while to achieve a steady state. We were more often able to reach production speeds.

If there were a wrap at that point, it would be a rare wrap that you could catch before it was a large wrap. But, on a smaller one, you could slow to stall speed, raise the guard, reach in and cut out a small wrap, and usually, the line would continue to run.

One of the line operators told Leek that the line operators “might go a whole night without one wrap developing” (Tr. 36). Fibres South has failed to establish that stopping the machines in order to cut wrap was economically infeasible.

Fibres South also failed to prove that guarding the Godet machines would have made cutting wrap technologically infeasible. Fibres South focuses on the plexiglass guard that Meccaniche had placed on the machine. But the line operators’ inability to cut wrap with that guard in place does not relieve Fibres South of its obligation to find some type of guard

that will work. "We expect employers to exercise some creativity in seeking to achieve compliance." *Gregory & Cook Inc.*, 17 BNA OSHC at 1191. After Duke's death, Fibres South devised a guard for the #2 Godet rollers that protects employees from the nip points while allowing employees to cut wrap at production speed using a long-handled knife (Exhs. C-30, C-31; Tr. 88, 154-155). Robert Brown, Fibres South's former division manager, testified that an employee of Meccaniche who was helping install the Godet machines told Brown of an alternative method of guarding the #2 Godet. The Meccaniche employee recommended (Tr. 194-195):

. . . cutting small holes in the plexiglass guard. Those holes would be aligned with the surface of the Godet over which no tow normally ran Aligned with that hole and just underneath the Godet or just above the Godet would be a piece of steel channel mounted to the frame.

Then, with basically about a two-by-two stick you would mount what's called a fillet wire, a type of hard coating that looks like a wire brush . . . He said that with small wraps, very small ones, you could put this wire brush in with the wires against the Godet and break the filaments, and many times they would catch up with the rest of the tow and continue to run.

The record establishes that there were at least two means of guarding the #2 Godet. Fibres South implemented the use of one of the guards after the fatality. Fibres South has failed to establish that guarding the #2 Godet made its necessary work operations either technologically or economically infeasible.

Unpreventable Employee Misconduct

Fibres South contends that the violation of § 1910.212(a)(1) was the result of unpreventable employee misconduct on the part of the deceased, Cordell Duke. Fibres South demonstrates a basic misunderstanding of this affirmative defense. The unpreventable employee misconduct defense refers to the action or actions of an employee. The Secretary did not cite Fibres South on how its employees were cutting wrap, but for failing to guard the #2 Godet. Regardless of how Duke cut wrap, the #2 Godet was unguarded in violation of § 1910.212(a)(1). See *Wheeling-Pittsburgh Steel Corporation*, 16 BNA OSHC 1781 (No. 91-2524, 1994). Fibres South has failed to establish this defense.

Whether the Violation Was Willful

The Secretary charges that Fibres South's violation of §1910.212(a)(1) is willful. A willful violation is one committed with intentional, knowing, or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety.

A willful violation is differentiated from others by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees. Logically, then, a willful charge is not justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts are not entirely effective or complete.

Falcon Steel Co., 16 BNA OSHC 1179, 1181 (No. 89-3444, 1993).

Leek gave five reasons as to why he recommended the Secretary charge Fibres South with a willful violation of § 1910.212(a)(1): (1) The #2 Godet came equipped with a guard that was not being used; (2) Fibres South told its line operators that the nip points were dangerous and instructed them to work around the hazard; (3) Fibres South knew that the plexiglass guard was not being used; (4) Fibres South did not provide another guard for the #2 Godet; and (5) employees had sustained injuries while using the #2 Godet prior to the fatality (Tr. 50-51).

None of these reasons tends to establish a willful violation. These five factors establish that the #2 Godet was unguarded and that Fibres South knew it. As such, they serve as proof that Fibres South committed a serious violation of the cited standard. But these factors do not show that Fibres South had a "heightened awareness of the illegality" of the unguarded machine. Fibres South committed a serious, not a willful, violation of § 1910.212(a)(1).

Penalty Determination

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that when assessing penalties, the Commission must give "due consideration" to four criteria: the size of the employer's business, the gravity of the violation, good faith, and prior history of violations." *Hern Iron Works*, 16 BNA OSHC 1619, 1624 (No. 88-1962, 1994).

Fibres South had no more than ninety employees at the time of Leek's inspection (Exh. J-1).¹ The record establishes that Fibres South acted with good faith during the inspection. No evidence was adduced regarding previous citations for violations of the Act.

The gravity of the violation is the most significant factor to be considered when assessing a penalty. "The gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *Id.* At least four line operators were exposed to the machine's nip points on a daily basis during their 12-hour shifts. The only precaution taken was instructing the employees on how to cut wrap. The likelihood of a serious injury occurring was high; several employees had been injured prior to the fatality.

Upon consideration of these factors, it is determined that the appropriate penalty for item 1 of Citation No. 1 is \$800.00. The penalty for item 1 of Citation No. 2 is \$4,000.00.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The foregoing 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:

1. Item 1 of Citation No. 1, alleging a violation of § 1910.147(c)(6)(i), is affirmed and a penalty of \$800.00 is assessed; and
2. Item 1 of Citation No. 2, alleging a violation of § 1910.212(a)(1), is affirmed as serious and a penalty of \$4,000.00 is assessed.



PAUL L. BRADY
Judge

Date: July 31, 1995

¹ Fibres South argues in its brief that the Secretary denied the company a 40% size-of-business adjustment to its proposed penalty for both citations. The Review Commission is the final arbiter of penalties in all contested cases. The penalties assessed in this case will be determined in accordance with the Act's statutory requirements.