UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR
Complainant

v.

DIETRICH INDUSTRIES, INC.,

Respondent

Docket Nr. 97-0803

Appearances

For Complainant:
Patrick L. DePace, Esq
Office of the Solicitor
U.S. Department of Labor
Cleveland, Ohio

For Respondent:
Robert B. Cottington, Esq
Reed Smith Shaw & McClay
Pittsburgh, Pennsylvania

Before:
JOHN H FRYE, III, Judge

DECISION AND ORDER

James Coyle caught his finger in a pinch point of the RBI 28's stacker table on November 6, 1996. The resulting injury required treatment at the local hospital. OSHA inspected the factory where Mr. Coyle works the following February and issued the following serious citation, seeking a penalty of $1875.

> 29 CFR 1910.212(A)(3)(ii): Point(s) of operation of machinery were not guarded to prevent employee(s) from having any part of their body in the danger zone(s) during operating cycle(s):
>
> The RBI 28 machine did not have guarding on the points of operation and the loading table.

The RBI 28 is some 85 feet long. It receives coils of steel at one end that it unrolls, flattens, and cuts into preset lengths. The RBI 28 drops each length of cut steel onto a stacker table. It does this by rotating 'L' shaped fingers holding the cut steel from underneath so that the steel falls onto the stacker table. The stacker table is between four and five feet from the closest operator's station. Mr. Coyle was adjusting the stacker table when the RBI 28 cycled and pinched his finger between the machine's frame and one of its fingers.

Dietrich points out that Mr. Coyle was violating the RBI 28's operating procedure by adjusting the stacker table while it was operating, and Mr. Coyle acknowledges that he was supposed to turn the RBI 28 off or put it into 'thread' cycle before adjusting the stacker. Either action would have prevented the injury to his finger. But, in order to save time and increase output, he didn't do that. He said that it was sometimes necessary to keep the RBI 28 running while adjusting the stacker and that his foreman knew that. Mr. Mock, the foreman, said that he never saw Mr. Coyle in the stacker area with the machine running, although he once saw another employee there and immediately corrected him.

The Commission has said that

> ... under *Giles & Cotting* [3 BNA OSHC 2002 (1976)] and *Rockwell* [9 BNA OSHC 1092 (1980)], in order for the Secretary to establish employee exposure to a hazard she must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.

Secretary v. Fabricated Metal Products, Inc., Docket No. 93-1853 (Slip op. Nov. 7, 1997.)

Mr. Coyle said that operational necessity forced him into the zone of danger, while Dietrich urges that it was his own misconduct that placed him there. Dietrich relies on the testimony of Mr. Good, the Plant

Engineer, who said that there is absolutely no reason for an employee to be in the stacker area with the machine running, as well as Mr. Mock. The most favorable interpretation of this evidence for the Secretary requires the conclusion that it is in equipoise. Given that the Secretary bears the burden of persuasion, this conclusion demands judgment for Dietrich.

One other point remains. This case was heard under the Commission's EZ Trial Rules. Counsel for the Secretary objected that he had not been informed that Dietrich contemplated raising the affirmative defense of employee misconduct and had not provided him with copies of documents related to it that would be offered in evidence. Counsel for Dietrich noted that the defense had been mentioned in the context of settlement discussions with another attorney in the Solicitor's office. Counsel for the Secretary, although aware of the settlement discussions, regards this as insufficient notification to satisfy the requirements of the Commission's rules.

Rule 207(b) requires a respondent to disclose any affirmative defenses at the prehearing conference. Counsel does not assert that this disclosure was made. However, the Solicitor's office was on notice that Dietrich would raise the defense of employee misconduct, and the Compliance Officer was provided a copy of the Job Safety Analysis for the RBI 28. So the defense did not take the Solicitor by surprise. I conclude that to require literal compliance with the rules in these circumstances would elevate form over substance contrary to the intent of the EZ Trial Rules.

While on the subject of procedural irregularities, I must note that counsel for the Secretary did not provide any evidence that Dietrich is an employer as contemplated by ' 3(3) and (5) of the Occupational Safety and Health Act, as amended. This omission is jurisdictional, and also demands judgment for Dietrich.

CONCLUSION OF LAW

Dietrich Industries, Inc., was not in violation of 29 CFR 1910.212(a)(3)(iii).

ORDER

Citation 1, item 1, is dismissed.

JOHN H FRYE, III
Judge, OSHRC

Dated:
Washington, D.C.