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Secretary of Labor, :  
Complainant, :  
v. :  
IBP, Inc., :  
Respondent. :

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OSHRC Docket No. **97-2053**

Appearances:

Oscar Hampton, Esquire  
Office of the Solicitor  
U. S. Department of Labor  
Kansas City, Missouri  
For Complainant

Rosanne Lienhard, Esquire  
IBP, Inc.  
Dakota City, Nebraska  
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

**DECISION AND ORDER**

IBP, Inc. (IBP), is a corporation engaged in beef packing, slaughter, and processing in Emporia, Kansas. The Occupational Safety and Health Administration (OSHA) conducted an inspection at respondent's facility on September 23, 1997, and September 24, 1997. As a result of this inspection, respondent was issued a citation. Respondent filed a timely notice contesting this citation and the proposed penalty. A hearing was held in Kansas City, Missouri, on June 2, 1998.

Background

On August 25, 1997, respondent's paunch auger operator dropped his knife into the rotating auger. When he tried to retrieve his knife, the auger caught his right hand and amputated his right arm above the elbow. As a result of this incident, OSHA conducted its inspection which began on September 23, 1997.

The citation issued to IBP as a result of this inspection alleges a serious violation as follows:

29 CFR 1910.212(a)(1): Machine guarding was not provided to protect operator(s) and other employees from hazard(s) created by rotating auger flighting(s):

On or about August 25, 1997, employees were exposed to hazards from rotating auger flighting. The paunch auger, located in the paunch room, was inadequately guarded. The guarding provided did not prevent entry of hands or fingers into the

paunch auger's rotating flighting. The guard openings measured as follow [sic]:

- (a) 18" from the edge of guarding to the auger entrance,
- (b) 14" from the top of the auger to guarding,
- (c) 24" from the back side of the auger to guarding,
- (d) and the guard openings were approximately 3" x 5 1/2",
- (e) width of paunch auger was 24".

At the time of the inspection a second guard was also installed on the paunch auger. The guard was located inside/below the original guard. The inner guard did not prevent entry of hands or fingers into the paunch auger's rotating flighting. The openings of the inner guard measured as follow [sic]:

- (a) 5" from the edge of guard to auger,
- (b) 5" from the top auger to guard,
- (c) 5" from the back side of auger to guarding,
- (d) and the guard openings were 4 1/2" x 4 1/2".

A rotating auger is used in respondent's paunch room operation to process inedible cattle paunch material. Stomachs enter the paunch room from the right on hooks attached to a moving overhead chain. Two operators work in this room. An operator cuts open the stomach, allowing the paunch material to drop onto the hopper. At the bottom of the hopper is a 12-inch cylindrical auger. The material enters the auger and is transferred down a chute into a blow tank in the basement. The hopper table is inclined to allow the paunch material to flow toward the auger. A constant flow of water runs on the table. This pushes the material down the incline. Two hoses hanging above the table are used by the operator to move material that backs up en route to the auger. One hangs to the right of the auger, and one hangs directly over the auger. The operator usually stands just to the right of the auger while cutting the stomachs. While the floors are wet, the operator stands on anti-skid grating.

### Discussion

On August 25, 1997, a wire guard covered the top of the auger. Evidence presented at the hearing varied as to the exact size of the openings on that date. Jack Shaffer, an OSHA compliance officer, measured the distance from this guard to the back of the auger as 24 inches. He measured the distance from the auger to the point where the paunch material enters the guard as 18 inches. He testified that the guard openings on August 25, 1997, were 6 inches x 6 inches. The citation

listed the openings as 3 inches x 5.5 inches. After August 25, 1997, and prior to the inspection, which began on September 23, 1997, respondent installed a second guard closer to the auger. This inner guard was 5 inches from the auger with openings of 4.5 inches x 4.5 inches.

Respondent's counsel admitted in her brief that the guard openings on August 25, 1997, were approximately 3 inches x 5.5 inches. Giving the respondent the most favorable interpretation of the measurements, the openings were at least 3 inches x 5.5 inches on August 25, 1997, and during the inspection.

The openings were wide enough to allow the operator's hand to easily pass through the guard and contact the auger. There is no dispute that on August 25, 1997, respondent's paunch room operator dropped his knife into the auger and reached through the wire guard openings to retrieve it. When he reached for the knife, the operator's right hand was caught by the rotating auger, amputating his arm 3 inches above the elbow.

The Secretary has the burden of proving the violation:

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

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

Section 1910.212 sets general machine guarding requirements for all machines. The cited standard clearly applies to respondent's paunch operation. The provisions of 29 C.F.R. § 1910.212(a)(1) address the types of guarding required as follows:

(a) *Machine guarding--(1) Types of guarding.* 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 Review Commission has consistently held that:

To prove a violation of section 1910.212(a)(1), the Secretary must show that a hazard within the meaning of the standard exists in the employer's workplace. In order to meet this burden, "the Secretary must establish that employees are exposed

to a hazard as a result of the manner in which the machine functions and the way it is operated.” *Jefferson Smurfit Corp.*, 15 BNA OSHC 1419, 1421, 1991-93 CCH OSHD ¶ 29,551, p. 39,953 (No. 89-0553, 1991).

*Caterpillar, Inc.*, 18 BNA OSHC 1005 at 1007, 1997 CCH OSHD ¶ 31,386, p. 44,335 (No. 93-3405, 1997).

Recently, in a case involving 29 C.F.R. §1910.212, the Review Commission restated the standard of employee exposure to hazards.

. . . 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.

. . . the inquiry is not simply into whether exposure is theoretically possible (footnote omitted). Rather, the question is whether employee entry into the danger zone is reasonably predictable. *Gilles & Cotting*, 3 BNA OSHC at 2003, 1975-76 CCH OSHD at p. 24,425.

*Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1997 CCH OSHD ¶ 31,463, p. 44,506 (No. 93-1853, 1997).

In *Gilles & Cotting, supra* at 2003, the Review Commission adopted the “rule of access based on reasonable predictability” to determine employee exposure to an unsafe condition, rather than “a rule requiring proof of actual exposure.” This rule, established in 1976, remains today as the test for employee exposure to an unsafe condition.

The purpose of the machine guarding provided by IBP in the paunch room operation was to protect employees from the hazard of the rotating parts of the auger. Clearly, the guarding in place on August 25, 1997, and the modified guarding found on September 24, 1997, do not protect employees from the hazard of rotating auger parts. Employees can reach through the 3-inch x 5.5.-inch openings inadvertently or intentionally and contact such parts.

While the guarding prevents the torso from auger contact, it gives employees a false sense of protection of their upper extremities. The auger guard installed by IBP gives the appearance of a protective guard but, in fact, offers little or no protection for employees’ arms and hands, which may easily pass through the wire grate openings.

The paunch room operators are working well within the zone of danger with access to the rotating auger parts. It is reasonably predictable that employees in this location will work within

arm's length of the rotating auger. The guarding provided no protection for employees' arms or hands. In this operation, the paunch room operators are not only working in the zone of danger with predictable access to the hazardous condition, but they are actually exposed to the violative condition.

Respondent knew or, with the exercise of reasonable diligence, could have known of the violative conditions. Gerald Huddleston, respondent's plant engineer, reviews all machine guarding in the plant every two months. He observed the paunch room operation four to five times during the past year. He saw the guarding in place and knew the condition of the guarding. Respondent does not deny that it knew of the condition of the auger guarding on August 25, 1997, or during the inspection on September 23, 1997. It argues, however, that it felt that the guarding was adequate; that there was no need for an employee to reach through the guard; and that employees are instructed to keep body parts away from the auger.

As discussed above, the physical guarding was not adequate to protect employees' arms and hands from contact with the rotating auger parts. Employees had access to this condition, whether inadvertent or intentional. Respondent cannot rely on the skill or attentiveness of employees to avoid exposure to such obvious hazardous conditions.

It is clear from the testimony that only minimal training or instructions were given to employees regarding bypassing guards. Respondent acknowledged at the hearing that it, at most, only verbally told paunch room employees that, if a knife drops into the auger, leave it. This is insufficient protection of employees working in close proximity to this hazardous working condition. These instructions further demonstrate the reasonable predictability that employees might contact the rotating auger parts. They also show that respondent knew that the guarding would not protect employees' hands and arms from reaching through the openings in the grating. Knowing the grating would not protect these employees, IBP relied on verbal instructions and warnings.

The Commission has consistently held that 29 C.F.R. § 1910.212 "requires physical methods of guarding rather than methods of guarding that depend on human behavior." *Pass & Seymour, Inc.*, 7 BNA OSHC 1961, 1979 CCH OSHD ¶ 24,074, p. 29,238 (No. 76-4520, 1979) (and the cases cited therein). *See also George C. Christopher & Son, Inc.*, 10 BNA OSHC 1436, 1982 CCH OSHD ¶ 25,956, p. 32,532 (No. 76-647, 1982).

Respondent failed to provide a physical method of guarding that protected the paunch room

operator from endangering himself by reaching into the rotating auger. IBP relied on verbal training which depended on employee behavior, skill and attentiveness for compliance. That reliance is misplaced and does not comply with the requirements of the cited standard.

The Secretary has established that respondent violated 29 C.F.R. § 1910.212(a)(1) on August 25, 1997, and at the time of the inspection. The violation was serious in that there was a substantial probability that death or serious physical harm could result from this violative condition. If an employee were to contact the rotating auger flighting, death or serious bodily harm, including laceration and amputation, could occur. In this case, the paunch room operator's right arm was amputated when his hand passed through the grating and contacted the auger. As discussed above, respondent clearly knew of the existence of the violative condition.

#### Penalty

Under § 17(j) of the Act, in determining the appropriate penalty, the Commission must give due consideration to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations.

At the time of the inspection, IBP employed over 2,000 employees in its Emporia, Kansas, plant and two employees in the paunch operation. If workers contacted the rotating auger flighting, death or serious bodily harm could occur. Respondent knew of the violative conditions. Upon due consideration of these factors, it is determined that the penalty of \$2,125, as proposed by the Secretary, 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 hereby ORDERED:

Citation No. 1, item 1, is affirmed and a penalty of \$2,125 is assessed.

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STEPHEN J. SIMKO, JR.  
Judge

Date: November 9, 1998