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Secretary of Labor,
Complainant,

v.

Pilgrim's Pride Corporation,
Respondent,

United Food & Commercial Worker,
AFL-CIO-CLC, Local 540,
Authorized Employee
Respondent.

OSHRC Docket No. **98-1848**

EZ

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APPEARANCES

Ernest A. Burford, Esq.
Office of the Solicitor
U. S. Department of Labor
Dallas, Texas
For Complainant

Levi G. McCathern, II, Esq.
McCathern, Wadlington, Mooty, LLP
Dallas, Texas
For Respondent

Mr. Juan Gonzales
United Food & Commercial
Workers Union, AFL-CIO-CLC
Dallas, Texas
For Employess

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Pilgrim's Pride Corporation (PPC) processes chickens in a plant in Lufkin, Texas. On September 25, 1998, PPC received an "other" than serious citation after an inspection by the Occupational Safety and Health Administration (OSHA). The citation alleges that PPC violated § 1910.22(b)(1), or in the alternative § 1910.22(a)(3), because a hallway floor had numerous depressed areas caused by the cracking and flaking of the asphalt covering. The citation proposes a \$1,000 penalty. PPC timely contested the citation.

PPC requested and the case was designated for E-Z Trial proceedings pursuant to Commission Rules of Procedure at § 2200.200, *et. seq.* Party status was granted to the United Food & Commercial Workers, Local 540, as authorized employee representative. In a telephone

conference call on January 14, 1999, the parties stipulated coverage and identified the issues for hearing (E-Z Trial Prehearing Conference Order; Tr. 6).

The E-Z Trial hearing was held on January 21, 1999, in Houston, Texas. PPC argues that the cited standards did not apply; and, if applicable, there was no hazard. For the reasons stated, a violation of § 1910.22(b)(1) is affirmed and no penalty is assessed.

Background

PPC's chicken processing plant in Lufkin, Texas, has operated for more than 20 years (Tr. 116). The plant employs in excess of 1,000 employees and operates two shifts (Tr. 59). The employees are members of the United Commercial and Food Workers Union, Local 540 (Tr. 5). The plant's general manager is Cecil Jackson (Tr. 10).

In the portion of the plant known as the Weldatron/Labeling department, the processed chicken is packaged and labeled. Once packaged, the chickens are placed on trays in a steel-framed cart (Tr. 12, 25). The cart is approximately five feet high and three feet square. It weighs an estimated 200 pounds (Tr. 26). The cart sits on three-inch wheels at each corner and needs to be pushed by an employee (Tr. 75-76). It is not self-propelled. When the cart is filled with packaged chicken, an employee referred to as a blast tunnel feeder pushes the cart from the Weldatron/Labeling department into a closed hallway for storage in the freezer (Exh. C-2; Tr. 61).

The hallway is approximately six to seven feet wide, twenty to thirty feet long, with an eight to nine foot ceiling (Tr. 60). The freezer is on the right side of the hallway (Tr. 61). The floor in the hallway consists of a cement foundation covered with a one-quarter inch asphalt-like substance manufactured by Tuffco (Exhs. C-1, R-4; Tr. 62, 64-65). Because of the cold temperature in the freezer and the dampness from the Weldatron/Labeling department, the asphalt-like substance on the floor cracks and flakes off leaving shallow, depressed areas. PPC recognizes the cracks in the asphalt as an ongoing problem (Exh. R-4).

On July 9, 1998, OSHA's north Houston area office received a formal employee complaint alleging six unsafe conditions at the PPC plant. The complaint included an allegation that "in the Weldatron and Labeling Department there are pot holes on the floor. Employees push meat racks (carts) over the floor which weigh over 700 pounds"¹ (Exh R-1; Tr. 74).

After PPC refused to permit the inspection, OSHA sought and obtained an inspection

¹Although the complaint alleges the cart weighed 700 pounds, compliance officer Shelton estimated the weight based on his observation at 200 pounds (Tr. 26).

warrant (Tr. 12). With the inspection warrant, Safety and Health Compliance Officer James Shelton on September 3, 1998, conducted a limited, complaint-based inspection of the plant (Tr. 11). The inspection took approximately three hours and did not confirm any of the complaint items, except for the cracks in the hallway floor (Tr. 40, 59).

Shelton identified approximately fifteen to twenty shallow, depressed areas where the asphalt-like substance on the hallway floor had cracked and flaked off. The depressed areas ranged in size from two to three inches by six inches, to as large as twelve inches by a foot and a half (Tr. 65-66). The depressions were shallow, measuring one-quarter inch deep (Tr. 64). On the left side of the hallway, there was a three and half by six foot piece of one-eighth inch plastic covering a few, but not all of the depressed areas (Exh. C-1; Tr. 66-67). Shelton testified that he observed an employee pushing the cart through the depressed areas. He described the employee as “being very careful” (Tr. 68). He did not see the cart hung up or stopped by the depressions.

After the OSHA inspection, PPC repaired the floor by patching the depressed areas on September 5-6, 1998. On September 19, 1998, PPC also covered the entire hallway floor with a steel casing (Tr. 100). PPC states that it spent in excess of \$10,000 attempting to repair the hallway floor (Tr. 47).

Discussion

The Secretary has the burden of proving a 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).

The citation alleges that the condition of the hallway floor between the Weldatron/Labeling department and freezer violated § 1910.22(b)(1), or in the alternative § 1910.22(a)(3). Section 1910.22(b)(1) provides that:

Where mechanical handling equipment is used, sufficient safe clearances shall be allowed for aisles, at loading docks, through doorways and wherever turns or passage must be made. Aisles and passageways shall be kept clear and in good repairs, with no obstruction across or in aisles that could create a hazard.

In the alternative, Section 1910.22(a)(3) provides that:

To facilitate cleaning, every floor, working place, and passageway shall be kept free from protruding nails, splinters, holes, or loose boards.

Alleged Violation

The Application of § 1910.22(a)(3) or § 1910.22(b)(1)

PPC argues that neither standard is applicable to the condition of the hallway floor. The court agrees as to § 1910.22(a)(3) because there is no showing that the depressed areas in the floor caused a problem in cleaning the hallway. However, § 1910.22(b)(1) is found applicable.

Section 1910.22(b)(1) requires that floors be kept in good repair. The hallway floor between the Weldatron/Labeling department and the freezer had fifteen to twenty large depressed areas caused by the flaking and cracking of the asphalt-like covering. PPC does not dispute the condition of the floor. The floor was not in good repair. The metal cart used to transport the packaged chickens to the freezer needs to regularly cross this floor. The cart is a mechanical handling piece of equipment.

In applying a standard, the words must be interpreted in a reasonable manner consistent with a common sense understanding. The words are to be viewed in context, not in isolation, and judged in light of their application to the facts of the case. *Ormet Corp.*, 14 BNA OSHC 2134-2135 (No. 85-531, 1991).

Section 1910.22(b)(1) addresses “aisles and passageways,” such as the hallway at PPC, and requires that they be kept clear and in good repair. The cart is “mechanical handling equipment” because the metal cart is on wheels and is used to haul chickens to the freezer. The cart needs to be pushed by an employee. As noted by the Secretary, Webster’s Seventh New Collegiate Dictionary defines “mechanical” as (1) “of or relating to machinery or tools,” (2) “produced or operated by a machine or tool,” (3) “of or relating to manual operations.” Based on the broad definition of “mechanical,” the Review Commission has concluded that “mechanical handling equipment” is not

restricted to vehicles with motors but include hand trucks and barrel carts. *Pratt & Whitney Aircraft*, 9 BNA OSHC 1653, 1662 (No. 13401, 1981).

Terms of § 1910.22(b)(1) Were Violated

Upon establishing the application of § 1910.22(b)(1), the issue is whether it was violated. PPC does not dispute that the hallway floor was not free of numerous shallow depressed areas caused by the loosening and cracking of the asphalt-like substance covering the floor. The depressed areas were numerous and throughout the floor. According to Ronnie Harrison's affidavit, the floor is subject to temperatures between 42 degrees and minus 35 degrees (Exh. R-4). The temperature variation and dampness in the area causes the asphalt covering to crack and flake. The terms of § 1910.22(b)(1) were violated because the floor was uneven and not in good repair. The cart had to regularly travel across the cracks and depressions to access the freezer.

PPC Knew the Condition of the Floor

PPC does not dispute that it was aware of the depressed areas in the floor caused by the cracking and flaking of the asphalt covering. PPC acknowledges that the cracking is an ongoing problem. According to maintenance manager Ron Harrison's affidavit, the condition of the floor was abated by placing a steel casing over the entire floor after the OSHA inspection (Exh. R-4).

The record does not show when the Tuffco flooring was installed or if ever replaced prior to the OSHA inspection. Jackson told the compliance officer that PPC periodically patched the floor (Tr. 42). However, compliance officer Shelton did not observe any areas that appeared to be patched (Tr. 69). Other than considering that it was an ongoing problem, there is no evidence of how long the depressed areas in the floor existed. It is reasonable to assume that the cracks existed at least from July 9th when OSHA received the formal complaint to September 3rd when OSHA conducted the inspection.

Employee Exposure

Six employees, referred to as blast tunnel feeders, regularly pushed the carts over the depressed areas, the cracks and loosened asphalt. The compliance officer testified that the employees had to carefully push the cart through these areas in the floor. The cart was subject to

possible tipping from the wheels getting stuck or off-balance in the loosened asphalt and depressed areas. The issue is not whether an accident is likely to occur. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 87-1238, 1989).

Other-Than-Serious Classification

The condition of the hallway floor is cited as other-than-serious because the compliance officer did not believe that an employee pushing the cart was exposed to serious injury or possibly death. He testified that the employee was exposed to possible minor injury, such as lacerations and bruises, from the cart falling over (Tr. 30). There is no evidence that an employee was actually injured from a falling cart.

For an other-than-serious violation, there is a direct and immediate relationship between the violative condition and occupational safety. However, unlike a serious violation, the probability of death or serious physical injury does not exist. A *de minimis* violation, on the other hand, “is one in which there is technical non-compliance with a standard but the departure from the standard bears such a negligible relationship to employee safety and health as to render inappropriate the assessment of a penalty or the entry of an abatement or order.” *Keco Indus., Inc.*, 11 BNA OSHC 1832, 1834 (No. 81-1976, 1984). Also, *Otis Elevator Co.*, 17 BNA OSHC 1167, 1168 (No. 90-2046, 1995) (a *de minimis* violation is one where the deviation from the cited standard increases the risk of injury so slightly that the relationship of the violation to safety and health was not direct or immediate).

Based on the record, an other-than-serious classification is appropriate. The loose asphalt and depressed areas in the floor caused the employees pushing the cart to proceed cautiously through the hallway. If the cart tipped over because of the loose asphalt or depressed areas, the employee was exposed to a minor injury. The compliance officer observed an employee carefully maneuvering the cart over the cracks in the floor (Tr. 68). The cart is tall and appears awkward to push. To avoid tipping, it needs to be pushed easily and without obstruction.

Penalty Consideration for Violation of § 1910.22(b)(1)

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer’s business,

history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered. For an other-than-serious violation, section 17(c) Occupational Safety and Health Act provides that a penalty "may" be assessed. It is not mandatory.

PPC is a large employer with more than 1,000 employees (Tr. 59). There are only six employees, however, identified for the two shifts who regularly push the carts to the freezer (Tr. 22). Also, according to OSHA, PPC has received other citations in the past three years (Exh. R-1). There is no evidence whether PPC has the appropriate written safety programs (Tr. 31). Therefore, there is no showing that PPC is entitled to credit for size, history or good faith.

However, no penalty is shown as reasonable. In considering gravity, severity is not evaluated because the violation is classified as other-than-serious. The record also does not support the compliance officer's classification of greater probability (Tr. 30). The depressed areas were one-quarter inch deep. The compliance officer did not observe the cart hung up or stopped by the cracks or loosened asphalt (Tr. 68). He did not see it bounce an unusual amount (Tr. 48). There is no record of an employee injury caused by the cart or the floor. Also, the hallway floor was the only item found unsafe from the formal complaint (Tr. 40). PPC recognized the problem as ongoing and in the past attempted to patch the floor.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

- . Item 1, alleged violation of § 1910.22(b)(1), is affirmed and no penalty is assessed.

KEN S. WELSCH
Judge

Date: February 18, 1999