SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket No. 96-890
THE TIMKEN COMPANY, Respondent,	:	
and	:	
UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, and its LOCAL 1123, Authorized Employee Representative.	:	

Appearances:

Janice Thompson, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

William Cline, Esquire
Shannon Shinaberry, Esquire
Day, Ketterer, Raley, Wright & Rybolt, LTD.
Canton, Ohio
For Respondent

David A. Lewis
Art Maurer
For Authorized Employee Representative

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

On May 10, 1996, Occupational Safety and Health Administration (OSHA) compliance officer Leslie R. Cooper, Jr., inspected The Timken Company=s steel-making facility (the Gambrinus steel plant) in Canton, Ohio. As a result of Cooper=s inspection, the Secretary issued two citations to Timken on June 13, 1996. Timken contested the citations. Prior to the hearing in this matter, Timken withdrew its notice of contest to item 1 of citation No. 2, which alleged an other-than-serious violation of ' 1910.22(c) (Tr. 3).

The only item remaining at issue is item 1 of citation No. 1, which alleges a repeat violation of ' 1910.138(a), for failure to require employees to wear leather gloves while operating cutoff machines. Section 1910.138(a) provides:

> Employers shall select and require employees to use appropriate hand protection when employees= hands are exposed to absorption of harmful substances; severe cuts or lacerations; severe abrasions; punctures; chemical burns; thermal burns; and harmful temperature extremes.

The Secretary originally cited Timken for failing to provide employees with gloves while working on two cutoff machines in Plant B of the Gambrinus plant. On June 13, 1996, the Secretary amended the complaint to include two more cutoff machines in Plant A. The amended complaint states in pertinent part:

> Citation 1 Item 1 - Type of Violation REPEAT
>
> 29 CFR 1910.138(a): The employer did not select and require employees to use appropriate hand protection when employees= hands were exposed to hazards:
>
> Department 752, Plant B: Employees operating cutoff machines #8 and #9 were not provided nor required to wear leather gloves to protect their hands from lacerations or abrasions.
>
> Department 753, Plant A: Employees operating cutoff machines #1 and #10 were not provided nor required to wear leather gloves to protect their hands from lacerations or abrasions.

The terms of the citation detail hazards that may cause Alacerations or abrasions.@ At the hearing, the Secretary also adduced evidence of hazards of thermal burns caused by hot metal chips flying off the steel tubes during the cropping process. Although this evidence went beyond the scope of the citation, Timken failed to object to the introduction of this evidence. The issue was, therefore, tried by consent.

Timken points out that ' 1910.138(a) requires hand protection when employees= hands are exposed to Asevere cuts or lacerations@ and Asevere abrasions.@ Timken defends itself against the allegation that it violated the cited standard by asserting that any lacerations or abrasions to which its employees= hands were exposed were not Asevere@ within the meaning of ' 1910.138(a).

Background

Timken=s Gambrinus steel plant in Canton, Ohio, produces steel tubes (Tr. 10). The tubes, which are manufactured for use as bearings and for use in the automotive industry, range in length from 7 feet to 37 feet, and range in outside diameter from 2 inches to 13 inches (Tr. 10, 165).

The finishing department, which is the area at issue in this case, is the last department to which the tubes are sent prior to shipment. Operations in the finishing department include straightening, nondestructive testing (NDT), and cropping. Cropping consists of cutting the ends off the tubes. Cropping is performed on cutoff machines located in Plant A and Plant B. In Plant A, the operators of the machines are called cutoff operators. In Plant B, the operators of the machines are called finishers (Tr. 10-11).

Timken conducted a hazard assessment and concluded that operators of the #8 cutoff machine in Plant A should be required to wear leather gloves while operating that machine. Timken supplied the cutoff operators of the #8 cutoff machine in Plant A with leather gloves (Exh. C-2; Tr. 17-18).

Timken did not supply leather gloves to its employees who work on cutoff machines #8 and #9 in Plant B, and cutoff machines #1 and #10 in Plant A (Tr. 18, 23, 25-26). Generally, the employees who operate these machines wear leather gloves which they provide themselves. Gloves are available for purchase at the Gambrinus plant (Tr. 32-33). The parties stipulated that cost and availability are not factors in Timken=s policy of not providing its employees with leather gloves (Tr. 33, 74).

Alleged Violation of ' 1910.138(a)

> 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).

There is no dispute that ' 1910.138(a) applies to the cited machines. The Secretary contends that Timken violated the terms of ' 1910.138(a) by failing to provide its employees with leather gloves while they were operating four specific cutoff machines. Timken argues that it provides its employees with hooks and hoses to clean up the chips, streamers, and strands that result from the cropping process. The company contends that its operators have minimal contact with the chips, and that they do not need to handle the sharp ends of the cropped pieces of steel tubing. The testimony of the employees who operated the cutoff machines contradicts Timken=s assertions.

James Schweitzer had been a steelworker at Timken for 26 years at the time of the hearing. He had experience running all four of the cutoff machines at issue in this case. At the time of the inspection, Schweitzer was operating the #10 cutoff machine in Plant A, on which he cropped tubes and cut samples. Schweitzer testified that the metal chips and stringers that form during the cutting process are sharp and hot (Tr. 82-84).

Schweitzer wore leather gloves while operating the #10 cutoff machine, which he provided himself. He testified that he would not operate the machine without gloves. Even though Timken provided its cutoff machine operators with hooks and hoses to clean the chips and strands from their work areas, Schweitzer stated that it was not possible to perform his job without touching the chips and strands with his hands. Schweitzer had been injured while wearing leather gloves when a metal strand wrapped around his finger while he was using a hook to clear away the chips. He required stitches in his finger (Tr. 86). Schweitzer testified that, A[E]ven using a hook or whatever sometimes, when you pull on [a metal strand], when they fly loose, sometimes they hit your hands or arms or whatever@ (Tr. 89).

Schweitzer stated that he asks Timken to provide leather gloves at A[e]very one of our team meetings,@ which are attended by his supervisor Jerry Peterson (Tr. 89). Timken=s response to the requests for leather gloves was Athey looked into it and they said no@ (Tr. 90). Schweitzer had to replace his gloves every two to three weeks (Tr. 88).

Jonathan Spencer was operating the #1 cutoff machine at the time of the inspection (Tr. 97). He wore leather gloves which he provided himself. Spencer testified that Timken provides the cutoff operators with hooks to remove the chips and strands, but, ASome of them you have to reach in and pull them out by hand because you can=t get them with a hook@ (Tr. 99). Spencer removed the cropped ends of the tubes, which have sharp edges, with his hands. He testified that he had had Aminor cuts and nicks,@ as well as burns while wearing gloves and operating the #1 cutoff machine (Tr. 99).

Spencer needed to replace his gloves every two to three weeks. He stated that the sides of the glove=s fingers get torn out and the palms become worn (Tr. 108-109). Spencer testified that employees have requested leather gloves at team meetings, which were attended by shift supervisors and departmental supervisors. Timken refused to supply the gloves (Tr. 101-102).

Dennis Ardman, a steelworker at Timken for 24 years at the time of the hearing, operated

the #9 cutoff machine in Plant B (Tr. 118). The #9 cutoff machine is used to crop steel tubes and to cut out imperfections. When imperfections are cut out, both ends of the cropped piece are sharp. Ardman removes the cropped imperfections by hand (Tr. 120). The cropped pieces are hot enough to burn the operators= skin (Tr. 121).

Ardman wore leather gloves which he provided himself while operating the #9 cutoff machine (Tr. 122). Ardman testified that his gloves had been cut all the way through at times when he was operating a cutoff machine (Tr. 123-124).

Michael Linder had been employed as a steelworker at Timken for 23 years at the time of the hearing. He operated the #8 cutoff machine in Plant B (Tr. 130). Linder wore gloves which he supplied himself while operating the cutoff machine because, he stated, AThe type of work we do it is easy to get cut, easy to get burnt on the chips coming off the tools@ (Tr. 132). Linder required stitches in his fingers when a chip cut through his glove (Exh. C-23; Tr. 132). Linder was placed on light duty and did not operate the cutoff machine while he recovered from his injury. He believed that his injury would have been more severe had he not been wearing gloves at the time it occurred (Tr. 133).

Linder stated that the cutoff machine operators had asked to be provided with gloves A[n]umerous times@ at team meetings. Their supervisor, Peterson, attended these meetings. The cutoff operators were told that no gloves would be provided (Tr. 135).

Timken asserts that the OSHA 200 logs for its plant, which covered the period from 1990 through May 10, 1996, support its position that gloves were unnecessary for operators of the cutoff machines. In that time, among the cutoff operators and finishers there were two hand injuries that resulted in lost work time, and five hand injuries which resulted in the injured employees being placed on restricted duty (Exhs. C-3 to C-9). The cutoff machines operate 24 hours a day, with at least one operator at each of the four machines (Tr. 31). Timken calculates that in seven years, the four machines together processed about 750,000 pieces of tube per year and about 1,500,000 crops. The entire seven years resulted in the machines operating approximately 222,144 hours, and processing 5,250,00 pieces of tube with 10,500,000 crops. Timken asserts that only two hand injuries resulting in lost work time during that period is an insufficient basis for requiring the use of leather gloves.

Timken cites *Allied Egry Business Systems,* 13 BNA OSHC 1413 (No. 87-65, 1987), and

Donavan v. General Motors Corp., 764 F.2d 32 (1st Cir. 1985), in support of its argument. In *Allied Egry,* the administrative law judge found that the low incidence of foot injuries mitigated against a finding that the employer was required to provide steel-toed safety shoes to its employees. There had been only one foot injury per 880,673 parts handled, and one lost-time accident for every 151,893 hours worked in a five-year period. In *General Motors,* the court also found that the low incidence of foot injuries was insufficient to require the employer to provide safety shoes. At one plant, 168 employees handled from 6,000,000 to 16,000,000 parts per year. The injury rate was approximately one injury for every million parts handled.

Both of these cases are distinguishable from the present case. In *Allied Egry* and *General Motors*, the low incidence of foot injuries occurred despite the fact that the employees were not wearing steel-toed safety shoes. In *General Motors*, the First Circuit found it significant that the employees chose not to wear steel-toed safety shoes even though the company encouraged employees to do so and offered the shoes at a discount.

> The record shows that the practice of the majority of persons most familiar with the automotive parts warehousing industry, that is, the employees themselves, was not to wear steel-toed safety shoes. For example, a GM employee who had worked at the Chamblee facility for twenty-three years testified that, although he was concerned that falling automotive parts presented a potential danger, he chose to continue to wear leather shoes despite the payroll deduction and discount plan.

General Motors, 764 F.2d at 37.

This is in stark contrast to Timken=s employees, who would not operate the cutoff machines without wearing leather gloves, and who supply their own, even though they must replace them every two to three weeks. Timken=s reliance on its low incidence of injury is misplaced. The record shows that most of its cutoff operators and finishers wore leather gloves. The hand protection contemplated by ' 1910.138(a) was already in place at Timken=s facility, provided by the employees themselves.

The conditions of the gloves that the employees brought to the hearing demonstrated the harsh circumstances under which the employees worked. Schweitzer=s gloves, which were two or three weeks old, were dirty, with cuts in the fingers (Exh. C-20; Tr. 88). Ardman=s gloves were two weeks old. One had an inch long cut on his thumb and another one on its second finger, also about an inch long (Tr. 123).

The Secretary has established that Timken violated the terms of ' 1910.138(a). The hands

of the cutoff operators and finishers were exposed to thermal burns, severe cuts, lacerations, and abrasions from the metal chips and strands that result from the cropping process, and from handling the cropped pieces. Timken had actual knowledge that its employees= hands were exposed to thermal burns, severe cuts, lacerations and abrasions. Numerous employees asked supervisory personnel repeatedly and frequently to provide leather gloves for the operators of the cutoff machines.

Classification of the Violation

The Secretary alleged that Timken=s violation of ' 1910.138(a) was a repeat violation. Timken denies that it is a repeat violation. Under *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979), a violation is repeated if Aat the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation.@

Timken contends that there was no Commission final order against it. The Secretary issued a citation to Timken for violations of the Act on March 2, 1995. Item 3 of the citation alleged a violation of ' 1910.138(a) (Exh. C-28). The Secretary and Timken entered into a settlement agreement regarding the citation that was approved by Judge Welsch on Janurary 9, 1996 (Exh. C-27). Timken acknowldges that a settlement agreement that is incorporated into a final order can serve as the basis in a subsequent proceeding for a repeated violation. *DIC-Underhill, A Joint Venture,* 8 BNA OSHC 2223, 2227 (No. 10798, 1980). The settlement agreement states in its third paragraph that AItems 2c and 3 shall be grouped together with item 1, and affirmed as serious violations@ (Exh. C-29). From this, Timken concludes that the citation for ' 1910.138(a) (item 3) was merged Aout of existence by grouping it with the citation under ' 1910.132(a) [item 1]@ (Timken=s brief, p. 22). This argument is without merit. Item 3 was grouped with item 1, which was affirmed, for purposes of the penalty. In order for an item in a settlement agreement to become nonexistent for the purposes of a final order, the Secretary would have to agree to withdraw or vacate the item, as she did with items 2a, 2b, 6a, 6b, 7a, and 7b in the settlement agreement (Exh. C-29). A final order affirming a violation of ' 1910.138(a) against Timken existed.

Timken also argues that the Secretary failed to prove that the present violaton of ' 1910.138(a) is substantially similar to the previous violation of ' 1910.138(a). The Review Commission in *Caterpillar, Inc.*, 1997 WL 450093 (No. 93-3405, 1997), addresses the issue of

substantial similarity. In *Caterpillar*, the Commission stated:

> In order to establish a repeated violation:
>
> > [T]he Secretary has the burden of establishing that the violations were substantially similar. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1997 CCH OSHD & 23,294, p. 28,171 (No. 16183, 1979). Where the citations involve the same standard, the Secretary makes a prima facie showing of Asubstantial similarity@ by showing that the prior and present violations are for failure to comply with the same standard. The burden then shifts to the employer to rebut the showing. *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594, 1993-95 CCH OSHD & 30,338, P. 41,825 (No. 91-1807, 1994). . . .
>
> *GEM Industrial Inc.*, 17 BNA OSHC 1861, 1886, 1996 CCH OSHD & 31,196, p. 43,689 (No. 93-1122, 1996). Where the violations concern the same standard, but that standard is generally worded, the Secretary has the burden of showing that the prior and present violation are substantially similar in nature. *Edward Joy Co.*, 15 BNA OSHC 2091, 2092, 1991-93 CCH OSHD & 29,938, p. 40,904 (No. 91-1710, 1993)[.]

Section 1910.138(a) is a general standard in that it applies to Aany employment and place of employment in any industry@ as defined in ' 1910.5(c)(2). Therefore, the Secretary has the burden of showing substantial similarity between the prior and present violation. The principal factor to be considered in establishing substantial similarity is the similarity of the hazards. *Stone Container Corp.*, 14 BNA OSHC 1757, 1762 (No. 88-310, 1990).

The Secretary has failed to show that the hazards presented by the prior and present violations were similar. The 1995 citation states that Timken violated ' 1910.138(a) because AIn Department 753, employees running the straighteners were not required to use the appropriate hand protection such as hand pads@ (Exh. C-28). Item 1, with which item 3 was grouped, alleges a violation of ' 1910.132(a), and states, AIn Department 753, personal protective equipment (gloves), used on the straighteners, was not of a safe design in that the gloves used could be caught by the steel bars and cause the operator=s hand to be pulled around the bar@ (Exh. C-28). It appears from the description of the hazards in items 1 and 3 that the hazards with which the Secretary was concerned were not cuts, lacerations, and abrasions, but crushing injuries caused by the employees= hands being caught between the rotating bars. The proposed hand protection, hand pads, offers a different form of hand protection than do leather gloves. In fact, in the earlier citation, gloves presented the problem rather than the solution. Because the hazards presented in

the prior and present violations are not substantially similar, the present violation is not properly classified as repeat.

The Secretary states that the underlying violation is other-than-serious (Secretary=s brief, p. 11). This is consistent with Cooper=s testimony that he would have recommended an other-than-serious violation had he not believed the violation was repeat. Cooper stated he believed the violation would have been other-than-serious A[b]ecause they did were gloves@ (Tr. 154, 162-163). Timken argues that the violation should be classified as *de minimis.* This argument is rejected.

> AA de minimis violation is one in which there is technical noncompliance 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 order.@ *Keco Indus., Inc*., 11 BNA OSHC 1832, 1834, 1983-84 CCH OSHD 26,810, p. 34,297 (No. 81-1976, 1984); see also *Anoplate Corp*., 12 BNA OSHC 1678, 1688, 1986-87 CCH OSHD 27,519, p. 35,686 (No. 80-4109, 1986)(same explanation of law).

El Paso Crane & Rigging Co., Inc., 16 BNA OSHC 1419, 1427 (No. 90-1106, 1993).

In the present case, there was more than a negligible relationship between the violation and employee safety. The record establishes that most of the cutoff operators and finishers wore leather gloves, but there was no evidence that this use was universal among the operators of the cutoff machines. The violation is affirmed as other-than-serious.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under ' 17(j) of the Act, in determining the appropriate penalty the Commission is required to find and give Adue 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.

Timken employs 9,000 to 10,000 people in plants throughout the United States, and 5,000 to 6,000 people in the Canton, Ohio, area (Tr. 11). Timken previously had been cited for violations of the Act in 1995. No evidence of bad faith was adduced. The gravity of the violation was low. The majority of the cutoff operators and finishers wore the appropriate hand protection. It is determined that a penalty of $1,000.00 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 that:

Item 1 of citation no. 1, alleging a violation of ' 1910.138(a), is affirmed as other-than-serious, and a penalty of $1,000.00 is assessed.

NANCY J. SPIES
Judge

Date: September 25, 1997