

SECRETARY OF LABOR,  
Complainant,

v.

OMNI SOURCE CORP.,  
Respondent.

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OSHRC Docket Nos.

**96-1439** and **96-1441**

(Consolidated)

Appearances:

Heather A. Joys, Esquire  
Office of the Solicitor  
U. S. Department of Labor  
Cleveland, Ohio  
For Complainant

John T. Landwehr, Esquire  
Eastman & Smith, Ltd.  
Toledo, Ohio  
For Respondent

Before: Administrative Law Judge Nancy J. Spies

***DECISION AND ORDER***

The Occupational Safety and Health Administration (OSHA) conducted two inspections of Omni Source Corporation's facility in Toledo, Ohio. OSHA compliance officer Thomas Buchele conducted the first inspection on March 20, 1996, following a fatal accident at Omni's facility that occurred on March 19, 1996. Buchele's inspection resulted in the Secretary's issuing of two citations under Docket No. 96-1439. Compliance officer Robert Koedam conducted the second inspection on June 28, 1996, in response to an employee complaint. The Secretary issued one citation under Docket No. 96-1441 as a result of Koedam's inspection.

The two cases were consolidated. Prior to the hearing held on April 23, 1997, the Secretary and Omni settled all but two of the items contained in the three citations. The items remaining at issue are item 2 of Citation No. 1 of Docket No. 96-1439, which alleges a serious violation of the ' 1910.147(c)(4)(i) (the lockout/tagout standard); and item 2 of Citation No. 1 of Docket No. 96-1441 which alleges a serious violation of ' 1910.133(a)(1) (the eye and fall protection standard).

## Background

Omni maintains a scrap facility in Toledo, Ohio, where it performs metals reclamation. Omni employs approximately 900 employees nationwide, with approximately 150 employees working at the Toledo facility. Of those 150 employees, approximately 90 work in the facility's yard; the other employees at that facility are in administrative positions (Tr. 16, 77, 180).

Omni operates a large hammermill machine at its facility that is known commercially as a Texas Shredder. The Texas Shredder shreds automobiles and large metal pieces into scrap metal (Exh. J-1; Tr. 40, 55). It contains a number of different pieces of equipment with separate drive mechanisms. The Texas Shredder systems contain an in-feed conveyor, feed rollers, a safety cage, and the hammermill (Tr. 96-97, 226-227).

During the production operation, the automobiles or the metal is sent down the conveyor into two hydraulically powered feed rollers, which spin at 500 to 600 RPM. This results in the shredding of the automobile or large piece of metal (Tr. 168-169, 184-185).

The safety cage prevents material from flying out of the mill or in-feed rollers when the mill is running. The lower section of the safety cage is retractable to allow maintenance on the double-feed rollers and to clear material jammed under the double-feed roller system. It is retracted only when employees need to work on the in-feed rollers (Tr. 50,226-227). The safety cage is made of tubular steel and wire mesh (Tr. 252). The movable component of the safety cage weighs at least 5,600 pounds (Tr. 60, 235).

The movable component of the safety cage is fitted with six-inch wheels that rest on rails made of angle iron which sit at a 40° angle. When the mill is in operation, the movable section rests on stops. The back of the movable section is held to the angle iron by hook rollers. These hook rollers were added to the safety cage after installation of the mill to prevent tipping of the movable component (Tr. 82-83, 88, 228-230).

During certain maintenance operations, the movable component of the safety cage is retracted by means of an electric winch that is attached to the safety cage by safety cables. The winch was not working at the time of the accident because the winch had pulled out of its mounting bolts several weeks earlier and had been sent out for repair and additional parts (Tr. 65).

On March 19, 1996, Omni was performing routine maintenance on the hammermill, which involved removing and replacing a banana liner using an overhead chain hoist. The banana liners

are generally removed and replaced several times a month. James Coutcher, the owner of T. J. Welding, was engaged in replacing the liner along with several other workers. As the liner was being lifted out, the movable component of the safety cage came off the rails on which it sat and fell into the mill, striking and injuring Doug Smith of Omni, and fatally crushing Coutcher (Tr. 31, 35-36, 57, 63).

**Docket No. 96-1439**

**Item 2 of Citation No. 1:**  
**Alleged Serious Violation of ' 1910.147(c)(4)(i)**

The Secretary charges Omni with a serious violation of ' 1910.147(c)(4)(i), which provides in pertinent part:

Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section.

The Secretary has the burden of proving this 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 (No. 90-1747, 1994).

Section 1910.147(a)(2)(i) makes the section applicable to ~~A~~the control of energy during servicing and/or maintenance of machines and equipment.<sup>@</sup> Omni does not dispute the applicability of ' 1910.147(c)(4)(i) to the cited conditions. The Secretary concedes that Omni had an adequate written lockout/tagout program (Exh. C-3; Tr. 95). The written program specifically mentions gravity as a potentially hazardous energy under the heading ~~A~~isolation steps for stored energy,<sup>@</sup>where it states (Exh. C-3, p. 14):

- \$ Block or brace any part that could fall because of gravity.
- \$\$ Presses
- \$\$ Shears
- \$\$ Other Elevated Equipment

The Secretary also acknowledges that the hammermill itself had been properly locked out (Tr. 97).

The Secretary contends that Omni violated ' 1910.147(c)(4)(i) because it failed to develop, document, and utilize procedures to control the force of gravity on the movable component of the safety cage during maintenance operations. Compliance officer Buchele testified that Omni failed to address the potentially hazardous energy created by the situation of the safety cage sitting on a 40° incline on wheels . . . . [I]f anything happened, the gravity would bring the cage down to the ground (Tr. 88).

The crux of Omni's defense is that it had no knowledge, either actual or constructive, that the safety cage created the risk of potentially hazardous energy in the form of gravity.

Omni had implemented some safety devices to prevent the cage from falling. Omni welded hook rollers to the safety cage to keep it from tipping off its rails. The hook rollers hooked underneath the AT near the rail on which the wheels of the cage were riding to keep the cage from rotating. Omni also welded 4-inch high metal stops onto the end of the rails upon which the wheels of the cage rolled to prevent the safety cage from traveling off the end of the track (Tr. 230-231).

The Secretary argues that Omni had previously used an additional safety precaution to prevent the safety cage from falling, which it failed to use the night of the accident. The winch and safety cables that Omni had used to retract the movable part of the safety cage were not in use that night. However, as compliance officer Buchele conceded, the cables were not used to keep the cage from falling, but to retract the cage (Tr. 112, 183, 250).

The manufacturer of the Texas Shredder had provided Omni with a safety checklist for the hammermill, which Omni followed (Exh. R-2; Tr. 166-167). Buchele testified that he reviewed the checklist and found no deficiencies (Tr. 107). Buchele also testified that the accident which resulted in Couter's death was not predictable. He had never heard of a similar accident occurring (Tr. 109-110, 112). Marvin Himmelein, a mechanical engineer who worked with Omni on the specification process for the installation of the Texas Shredder, testified that there was no reason to expect that cage to ever move from its position resting against the stops, when the cage was at a minimum energy state (Tr. 240). Richard Hayes, president of Hayes Environmental and a former OSHA compliance officer, testified for Omni that the accident was not foreseeable and that Omni could not have known that further precautions should have been taken (Tr. 253-254, 261-262).

The Secretary has failed to prove that Omni knew, or with the exercise of reasonable diligence could have known, that the safety cage presented a risk of falling due to gravity. This item is vacated.

**Docket No. 96-1441**

**Item 2 of Citation No. 1:**  
**Alleged Serious Violation of ' 1910.133(a)(1)**

The Secretary charges Omni with a serious violation of ' 1910.133(a)(1), which provides:

The employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation.

Compliance officer Robert Koedam conducted a complaint inspection of Omni on June 28, 1996 (Tr. 12-13). During the inspection, Koedam observed Omni employee Tom McCullough using a high pressure power washer to clean a locomotive crane in the yard. McCullough was not wearing any eye or face protection and there was a significant amount of oil, grease, and other materials on his face and around his eyes (Exh. C-2; Tr. 18-19). Omni does not dispute that McCullough's actions constituted a serious violation of ' 1910.133(a)(1).

Omni asserts the affirmative defense of unpreventable employee misconduct. In order to prove this defense, the employer must show that it had established a work rule designed to prevent this violation, adequately communicated these work rules, and effectively enforced these work rules when they were violated. @ *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1816 (No. 87-692, 1992).

Omni issued a booklet of employee guidelines to each of its employees during orientation (Exh. R-3). Tom McCullough received one (Exh. R-4). The work rule that addresses safety glasses states, in pertinent part (Exh. R-3, 9th page):

1. All employees will be issued a hard hat and safety glasses . . . . Also, there are certain jobs that will require wearing of goggles or face masks, you will be advised of these areas.

Omni provides each employee with safety glasses (Tr. 214). Daniel Atkinson, Omni's maintenance director, testified that the booklet contains Omni's eye protection safety glasses program that employees must wear [safety glasses] at all times while in the yard (Tr. 171). While the booklet does not specify where the safety glasses must be worn, Atkinson testified that the safety glasses

policy is communicated to employees in their orientation and, also, once they are on the job with their supervisors they also convey that (Tr. 173).

McCullough's supervisor, Terry Ward, stated that he had instructed McCullough prior to June 28, 1996, that safety glasses were required to be worn in the yard (Tr. 209-210). Ward, who accompanied Koedam on his inspection, ordered McCullough to put on his safety glasses and gave him a verbal reprimand (Tr. 210-211). Omni implements a disciplinary program, which includes verbal and written warnings, and suspensions (Exh. R-5; Tr. 175).

The Secretary contends that Omni's written work rule regarding safety glasses is too vague to provide adequate direction to its employees. A written work rule is not, however, required to establish the defense, and Omni provided unrefuted evidence that employees were informed verbally that safety glasses must be worn in the yard. The Secretary also argues that because Ward did not himself give McCullough his orientation, his testimony did not establish that McCullough ever received specific instructions regarding wearing safety glasses in the yard (Tr. 213). Wade testified without contradiction, however, that he had instructed McCullough prior to Koedam's inspection to wear safety glasses in the yard (Tr. 210). Koedam, who questioned McCullough at the time of the incident, did not testify that McCullough was unaware of Omni's safety policy (Tr. 22).

Omni has established the affirmative defense of unpreventable employee misconduct. Omni proved that it had a work rule requiring employees to wear safety glasses while in the yard, that it communicated this rule to its employees, and that it enforced this rule through a disciplinary program. This item is vacated.

#### 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:

1. Item 2 of Citation No. 1 of Docket No. 96-1435 is vacated and no penalty is assessed; and
2. Item 2 of Citation No. 1 of Docket No. 96-1441 is vacated, and no penalty is assessed.

This order also incorporates the partial stipulation and settlement agreements filed by the parties on April 23, 1996. The agreements disposed of the items not litigated as follows:

Docket No. 96-1439

1. Citation No. 1, item 1 is vacated;
2. Citation No. 1, item 3 is amended and affirmed as an other-than-serious citation with no penalty;
3. Citation No. 2 is affirmed as issued with no penalty;
4. Omni withdraws its notice of contest with respect to the citations and proposed penalty modified by the terms of this agreement; and
5. Omni represents that the conditions described in the items 1 and 3 of Citation No. 1 and Citation No. 2 have been abated.

Docket No. 96-1441

1. Citation No. 1, item 1 is vacated;
2. Omni withdraws its notice of contest with respect to Citation No. 1, item 1; and
3. Omni represents that the conditions described in the Citation No. 1, item 1 have been abated.