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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 93-0239
VALDAK CORPORATION,	:	
Respondent.	:	

DECISION

BEFORE: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

At its car wash in Grand Forks, North Dakota, the Valdak Corporation used a machine called an industrial centrifuge extractor to dry towels. On November 7, 1992, a 15-year-old employee of Valdak had his arm pulled from his torso when he reached into the extractor while the internal drum was still spinning. As a result of an inspection conducted after the accident, the Secretary of Labor ("Secretary") issued three citations to Valdak. The one at issue before the Commission alleges that Valdak committed a willful violation of an OSHA machine guarding standard. The Secretary proposed a penalty of $28,000 for the violation. Administrative Law Judge Benjamin Loye affirmed the violation as willful and assessed a penalty of $14,000. For the reasons that follow, we find that Judge Loye properly affirmed the violation as willful, but we find that $28,000 is an appropriate penalty.

BACKGROUND

The industrial centrifuge extractor at the Grand Forks facility runs approximately forty loads a day. The machine, which is essential to the car wash operation, uses centrifugal force to dry towels by spinning the drum containing the towels at a rapid rate. When the towels are drying, water comes out of a drainage tube. When water stops coming out of the tube, the operator knows that the operation is complete. He then pulls the brake to stop the internal drum, opens the lid, and removes the towels. At the bottom of the lid of the extractor is the warning: "NEVER INSERT HANDS IN BASKET IF IT IS SPINNING EVEN SLIGHTLY."

The machine came equipped with an interlock system that kept the lid from being opened before the drum stopped spinning. However, the interlock system was usually inoperative. On November 7, 1992, Josh Zimmerman, a 15-year-old employee of the car wash stuck his arm in the extractor while it was operating. The machine pulled Zimmerman in up to his chest and pulled his arm from his torso about three inches below his shoulder. The arm was later reattached. At the time of the hearing, he was beginning to regain some movement in his fingers.

VIOLATION

The Secretary alleged and the judge found that Valdak's failure to have a working interlock is a violation of 29 C.F.R. § 1910.212(a)(4).[1] We agree. The evidence clearly establishes that Valdak violated the cited standard.[2] There is no dispute that section

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[1]**§ 1910.212 General requirements for all machines.**

(a) *Machine guarding*

. . . .

(4) *Barrels, containers, and drums.* Revolving drums, barrels, and containers shall be guarded by an enclosure which is interlocked with the drive mechanism, so that the barrel, drum, or container cannot revolve unless the guard enclosure is in place.

[2]*See Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578,

(continued...)

1910.212(a)(4) applies to the extractor and that the interlock on the extractor was not working. The record also shows Valdak's employees were exposed to the violative condition. They used the dryer to dry as many as forty loads of towels per day and, on occasion, operated it with the lid jammed open. Valdak's management knew that the interlock system was inoperative, yet it allowed the machine to be used by its employees.

The judge also correctly rejected Valdak's affirmative defense of unpreventable employee misconduct. To prove that a violative condition results from unpreventable employee misconduct, the employer must show that it had a workrule that effectively implemented the requirements of the cited standard and that these workrules were adequately communicated and effectively enforced. *Gary Concrete Prods.*, 15 BNA OSHC 1051, 1055, 1991-93 CCH OSHD ¶ 29,344, p. 39,452 (No. 86-1087, 1991). As the judge noted, section 1910.212(a)(4) requires that the employer guard revolving drums, barrels, and containers with an interlock connected to the drive mechanism. Valdak does not claim that it communicated or enforced a work rule requiring that the interlock be operated, or prohibiting use of the extractor without an operative interlock. Indeed, the evidence establishes that, despite the extreme youth of many of the employees, the overall level of supervision at the car wash was, at best, minimal. Several former employees testified that there usually was considerable horseplay at the carwash, generally consisting of tying towels in knots and playing football and wrestling. On the day of the accident, Zimmerman was heavily engaged in such horseplay. A hat was tossed into the spinning extractor. Zimmerman reached into the machine and pulled it out. Despite this act, which other employees thought was "crazy," Zimmerman was not warned of the danger. On that same day, another employee picked Zimmerman up and held him by the extractor. While the evidence does establish that Valdak's manager, Joseph Strang, would stop the horseplay

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[2](...continued)
pp. 31,899-900 (No. 78-6247, 1981)(In order to make out a prima facie case of a violation, Secretary must establish applicability of cited standard, existence of violative condition, employee exposure to condition, and employer knowledge of condition), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

when he encountered it, the high level of horseplay that nonetheless occurred is testament to the general failure of supervision at the car wash.

WILLFULNESS

A violation is willful if committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety. *L.E. Myers Co.*, 16 BNA OSHC 1037, 1046, 1993 CCH OSHD ¶ 30,016, p. 41,132 (No. 90-945, 1993); *Williams Enterp.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987); *Asbestos Textile Co.*, 12 BNA OSHC 1062, 1063, 1984-85 CCH OSHD ¶ 27,101, p. 34,948 (No. 79-3831, 1984). A willful violation is differentiated from a nonwillful violation by a heightened awareness, a conscious disregard or plain indifference to employee safety. *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHD ¶ 29,240, p. 39,168 (No. 82-630, 1991) (consolidated); *Williams*, 13 BNA OSHC at 1256-57, 1986-87 CCH OSHD at p. 36,509. A willful charge is not justified if an employer has made a good faith effort to comply with a standard or to eliminate a hazard even though the employer's efforts are not entirely effective or complete. *Keco Indus., Inc.*, 13 BNA OSHC 1161, 1169, 1986-87 CCH OSHD ¶ 27,860, p. 36,478 (No. 81-263, 1987).

The evidence overwhelmingly establishes that the violation here was willful. Valdak's management and supervisors knew that the interlock did not work and that the extractor was not supposed to be used without functioning interlocks, yet they allowed the machine to continue operating. The decision to continue operating was made at least partly for economic reasons. As Strang testified, at the time of the accident he was aware that the interlock was not working, but he did not have it repaired because it would have shut down the machine and the car wash for up to an hour and a half. Strang also testified that before the accident he had searched unsuccessfully for a new extractor for some time. However, Valdak was able to purchase a new extractor two days after the accident.

There were warnings by Strang and Anderson to employees who were required to use the extractor, including one by Strang pointing out that an employee who put his arm in the

spinning extractor could lose it, but these warnings were not followed up.[3] Virtually every employee who testified stated that he did not receive any written or oral safety training. Even Strang admitted that, contrary to Valdak's rules, a safety handbook was never handed out to employees. Thus, it was common for employees to put their hands in the spinning extractor, and Anderson taught at least one employee to slow the machine by holding a wet towel against the spinning drum when the brake was not working.

The steps Valdak took to repair the machine before the accident do not come close to negating a finding of willfulness. Indeed, they actually underscore the willful nature of the violation. George Bowman, a part time supervisor, repaired the brake drum on the extractor when it was not working properly, but he did not repair the interlock system. The work done by repairman Tim Bonlie was also without effect. When he first began work for Valdak five years before the accident, Bonlie had replaced the solenoid that controls the interlock, but there is no evidence that he worked on the extractor's safety system again until the day after the accident, despite the fact that the interlocks were generally inoperative.

We therefore conclude that Valdak permitted, for a long period of time, the almost continuous operation of a piece of equipment that it knew to be dangerous without the necessary safety device. It also exercised an abysmally low level of supervision over the employees who seem not to have appreciated the hazards present in the workplace. *See*

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[3]Valdak's claim that the judge erred in characterizing the testimony of a number of its witnesses as self serving does not affect our view of the evidence. Although the term self serving usually refers to a certain kind of out-of-court statement, it is clear that the judge was stating that he did not find Valdak's witnesses to be credible because their assertion that they did not realize that the machine was particularly dangerous was aimed at excusing their failure to prevent the extractor from being used without the interlocks. The Commission normally will not disturb a judge's credibility finding because it is the judge who has lived with the case, heard the witnesses, and observed their demeanor. *Archer-Western Contrac., Ltd.*, 15 BNA OSHC 1013, 1016, 1991-93 CCH OSHD ¶ 29,317, p. 39, 377 (No. 87-1067, 1991), *aff'd*, 978 F.2d 744 (D.C. Cir. 1992); *Kent Nowlin Constr. Co.*, 8 BNA OSHC 1286, 1980 CCH OSHD ¶ 24,459 (No. 76-191, 1980)(consolidated).

Little Beaver Creek Ranches, Inc., 10 BNA OSHC 1806, 1811, 1982 CCH OSHD ¶ 26,125, p. 32,879 (No. 77-2096, 1982).[4]

PENALTY

As a preliminary matter, we find no legal significance to Valdak's contention that the language of the direction for review, raised *sua sponte* and suggesting that the Commission might increase the penalty assessed by the judge, has a chilling effect on an employer's decision to seek review.[5] Once a citation is contested, the Commission has the sole

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[4]Valdak argues that, according to *St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840 (8th Cir. 1981), a willful violation cannot be found where the employer is shown only to have knowledge of the hazard. Rather, a willful violation can only be sustained where the Secretary establishes an actual intent to disregard the hazard. *St. Joe Minerals* does not require a different result. The evidence establishes not only that Valdak knew that the interlock system was inoperative, but also that it made a deliberate decision to operate the extractor without the required safety device.

[5]Commissioners Foulke and Montoya note that, in practice, the potential "chilling effect" on an employer's decision to file a petition for review is obvious. Accordingly, the Commission has traditionally balanced its authority for *de novo* review of penalty assessments by directing review of a judge's penalty assessment only when petitioned to do so by one of the parties or where it became necessary due to reversal of the judge's decision regarding the violation. Commissioner Montoya notes that the Commission has generally refrained from assessing a penalty in excess of that proposed by the Secretary, except in those instances where the proceedings disclose facts previously unknown to the Secretary that require the Commission to reevaluate the penalty factors set forth under section 17(j) of the Act, 29 U.S.C. § 666(j). *See R.G. Friday Masonry, Inc.*, 17 BNA OSHC 1070 (No. 91-1873, 1995) (consolidated). Furthermore, Commissioner Foulke notes that the Commission has generally refrained from assessing a penalty in excess of that proposed by the Secretary, except in those instances where the Commission determined that the penalty factors were so improperly applied that a failure to increase them beyond the level proposed by the Secretary would constitute an abuse of discretion.

Chairman Weisberg notes, as he did in *R.G. Friday Masonry, Inc.*, supra, at footnote 14, that there is no basis, statutory or otherwise for limiting the Commission's ability to assess a penalty that is higher than that proposed by the Secretary. Chairman Weisberg believes that the view espoused by his colleagues is at odds with *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1994 CCH OSHD ¶ 30,363 (No. 88-1962, 1994) and with the Commission's authority,

(continued...)

authority to assess penalties. *Hern Iron Works*, 16 BNA OSHC at 1621, 1994 CCH OSHD at p. 41,881. The Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits. *Compare* sections 17(a)-(g) and 17(j); 29 U.S.C. §§ 666(a)-(g) and 666(j). After an administrative law judge issues a decision, the Commission has discretionary authority to review the entire case, either by granting a petition for discretionary review filed by one of the parties or on the *sua sponte* order of any Commissioner, even where no petition has been filed. Commission Rules 91(a) and 92(a); 29 C.F.R. §§ 2200.91(a) and 92(a). As part of that review, the Commission may consider all penalties *de novo*. *California Stevedore and Ballast Co. v. OSHRC*, 517 F.2d 986, 988 (9th Cir. 1975); *Hern Iron Works*, 16 BNA OSHC at 1622, 1994 CCH OSHD at p. 41,881.

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that when assessing penalties, the Commission must give "due consideration" to four criteria: the size of the employer's business, gravity of the violation, good faith, and prior history of violations. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 1991-1993 CCH OSHD ¶ 29,964 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight. Generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus.*, 15 BNA OSHC 1481, 1483, 1991-93 CCH OSHD ¶ 29,582, p. 40,033 (No. 88-2691, 1992). The gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *J.A. Jones*, 15 BNA OSHC at 2214, 1991-93 CCH OSHD at p. 41,033.

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[5](...continued)
in cases where the penalty has been contested, to assess penalties *de novo*. Determination of an appropriate penalty *de novo* is a misnomer if it is subject to an artificial ceiling set by the Secretary's proposed penalty. In the Chairman's view, the Commission's discretion in assessing appropriate penalties is circumscribed by the facts of the case, application of the 17(j) factors, and certain statutory limits on the penalty structure, but is no more restricted when it comes to assessing a penalty that is higher than the Secretary's proposed penalty than when assessing one that is lower.

It is the Secretary's burden to introduce into the record evidence bearing on these section 17(j) factors. He should also explain how he arrived at the penalty he proposed. When determining what penalty is appropriate, the judge should articulate the weight he gives to each of the section 17(j) factors. *See J.A. Jones*. Of course, when the penalty amounts are not really disputed, we would expect the judge's analysis to reflect that fact.

Here, the Secretary determined that $35,000 was an appropriate amount based only on the gravity of the violation. He then allowed a 20 per cent deduction for the size of Valdak's operation and proposed a penalty of $28,000. The judge affirmed the violation as willful, but reduced the penalty to $14,000 based on Valdak's size. The judge did not explain why Valdak's size warranted such a substantial reduction. He merely stated that "[t]aking into consideration the size of Valdak's operation, however, the proposed penalty is considered excessive." This is not an adequate explanation for such a large reduction, and we cannot accept it. *J.A. Jones Constr. Co.,* 15 BNA OSHC at 2213-14, 1991-93 CCH OSHD at p. 41,032. We, therefore, make our own determination of an appropriate penalty *de novo*.

The gravity of this violation is high. As indicated by the accident, the cited condition exposed employees not only to the hazard of having a limb pulled off, but also to death. At least five employees at the Grand Forks car wash regularly used the extractor to dry up to forty loads a day. Other employees were also exposed to the violative condition. However, Valdak instituted few precautions. It had a work rule prohibiting employees from putting their hands in the extractor, but the evidence demonstrates that the rule was routinely violated. This lack of precaution is particularly troubling when we consider that some of Valdak's employees were 15 to 16-year-old boys.

Any employer that puts such employees to work in an environment that contains dangerous machinery undertakes a heightened duty to adequately supervise those employees and maintain in proper working order all safety devices. *Little Beaver Creek Ranches*; *see also Davey Tree Expert Co.*, 11 BNA OSHC 1898, 1900, 1983-84 CCH OSHD ¶ 26,852, p. 34,400 (No. 77-2350, 1984)(employer can rely on experience and judgment of employees to perform work in a safe and proper manner). Valdak failed on both counts. Its failure to provide adequate supervision resulted in a work environment rife with horseplay. Valdak,

itself, describes Zimmerman as a "loose cannon" who regularly engaged in hazardous behaviors, yet it did nothing to prevent him from working virtually unsupervised near dangerous machinery. Moreover, Anderson instructed employees to slow the spinning drum after the power had been turned off by holding a towel against the inside lip of the dryer. Certainly, these instructions substantially increased the likelihood that an accident would occur.[6]

Valdak's failure to adequately supervise its employees and to maintain the interlock system establish that Valdak lacked good faith with regard to employee safety and health. In fact, so cavalier was Valdak's attitude toward the safety of its employees that, in blatant disregard of the explicit warning on the machine and its own safety rules, one of its supervisors felt free to instruct employees to put their hands into the extractor to slow it down.

A penalty of up to $70,000 can be assessed for a willful violation of the Act. Considering the high gravity of the violation, Valdak's disregard for the safety of its employees and the potential maximum penalty for such a violation, we find the penalty assessed by the judge to be inadequate. Valdak's disregard for the safety of its employees entitles it to no credit for good faith. However, despite the gravity of the violation and Valdak's abrogation of its duty to provide a safe work environment for its employees, we note that, with 125 employees, Valdak is a relatively small company with no history of previous violations. Considering all relevant factors, we find a $28,000 penalty to be fully supported by the section 17(j) factors and appropriate to ensure prospective compliance with the Act[7].

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[6]Although in finding the violation to be of moderate gravity the judge considered the youth of the employees, he failed to adequately consider the impact of the unsupervised conditions in which they worked on the likelihood an accident would occur. Therefore, we find that the judge erred in finding the violation to be of only moderate gravity.

[7]Chairman Weisberg would find, based on his *de novo* review of the penalty issue, that the willful violation in this case warrants a penalty in excess of that proposed by the Secretary. In that regard, he notes that the maximum penalty allowable for a willful violation is $70,000. He further notes Valdak knowingly failed to provide, over an extended period of time, a (continued...)

ORDER

Accordingly, it is ordered that the citation for willful violation of 29 C.F.R. § 1910.212(a)(4) is affirmed and a penalty of $28,000 is assessed.

Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Commissioner

Dated: March 29, 1995

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[7](...continued)
functioning rudimentary safety device for the extractor. Valdak compounded the risk posed by the inoperative interlock system by failing to appropriately train its youthful workforce or provide other than minimal supervision. Indeed, Valdak's management effectively permitted a work atmosphere with abundant horseplay occurring near dangerous machinery. Its own supervisor, Anderson, actually encouraged the very kind of unsafe behavior which led to the accident precipitating the inspection in the instant case. The foregoing, combined with the high probability of dire consequences from such behavior, render this case, in the Chairman's view, a classic or textbook example of a willful violation.

The Chairman agrees with his colleagues that the record establishes that Valdak's blatant disregard for the safety of its employees entitles it to no credit for good faith in penalty assessment. Moreover, he notes that, while Valdak is not a large employer, with 125 employees it is, as his colleagues find, only "relatively" small. Accordingly, and given the extreme nature of the case, Valdak's size coupled with the fact that it has not been previously cited for safety violations are not, in the Chairman's view, nearly sufficient to reduce the maximum penalty to the great extent that the Secretary found appropriate.

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 93-0239
VALDAK CORPORATION,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on March 29, 1995. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

March 29, 1995
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 93-0239

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,
v.
VALDAK CORP.
Respondent.

OSHRC DOCKET
NO. 93-0239

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on February 25, 1994. The decision of the Judge will become a final order of the Commission on March 28, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before March 17, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: February 25, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-0239

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SECRETARY OF LABOR, Complainant, v. VALDAK CORPORATION, Respondent.	OSHRC Docket No. 93-0239

APPEARANCES:

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Kansas City, Missouri

John H. Moosbrugger, Esq., Moosbrugger, Ohlsen, Dvorak & Carter,
Grand Forks, North Dakota

Before: Administrative Law Judge Benjamin R. Loye

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 et seq.; hereafter called the "Act").

Respondent, Valdak Corporation (Valdak), at all times relevant to this action maintained a place of business at 1149 36th Avenue South, Grand Forks, North Dakota, where it was engaged in the operation of a car wash. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On November 9, 1992, following a reported accident, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Valdak's Grand Forks worksite (Tr. 49, 59). As a result of the inspection, Valdak was issued citations alleging a number of violations of the Act, together with proposed penalties. Valdak filed a timely notice contesting "willful" citation 2, and the penalties proposed under "serious" citation 1, bringing this proceeding before the Occupational Safety and Health Review Commission (Commission).

Prior to the hearing the parties stipulated to withdrawal of the alternative allegations contained in "willful" citation 2, charging violation of §1910.212(a)(3)(ii) of the Act (Tr. 8). Citation 2 remains at issue solely as a violation of §1910.212(a)(4). On November 4, 1993, a hearing was held in Grand Forks, North Dakota, on the contested issues. The parties have submitted briefs and this matter is ready for disposition.

Alleged Violation of §5(a)(1)

Serious citation 1, item 1 alleges:

1
Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees:

> (a) The employer did not have a safety and health program for all operations where employees could be exposed to potential safety and health hazards at the Valley Car Wash, 1149 36th Avenue South, in Grand Forks, North Dakota.
>
> Among other methods, one feasible and acceptable method of abatement to correct the hazard would be to develop a program similar to that outlined in the Safety and Health Program Management Guidelines as published in the Federal Register dated January 26, 1989, which would include as a minimum the following:
>
> 1. Management commitment and employee involvement.
> 2. Worksite analysis.
> 3. Hazard prevention and control.
> 4. Supervisory monitoring and enforcement.
> 5. Safety and health training.

Valdak contests only the penalty of $1,200.00 proposed by the Secretary.

Valdak has 125 employees, 30 to 50 of whom were employed at the cited location (Tr. 555). It is stipulated that Valdak never received a citation for violation of the Act prior to the issuance of the citations in this matter (Stipulation 6). Valdak demonstrated its good faith by cooperating fully in the investigation of this matter and immediately abating the violations (Tr. 81, 323-24, 537-39). CO Husebye testified that a safety program, properly implemented, would have controlled or eliminated the serious workplace hazards cited during the November 1992 investigation (Tr. 294-95).

Taking into consideration the relevant factors, the undersigned finds that the gravity of the violation is overstated. The gravity of the violation is moderate to low. The Secretary established no direct connection between the absence of a safety program and the cited violations. Moreover, the named serious hazards found at Valdak's workplace were also cited, and separate penalties proposed.

The proposed penalty is excessive. A penalty of $600.00 will be assessed.

Alleged Violation of §1910.219(d)(1), (e)(3)(i)

Serious citation 1, item 2 alleges:

2A
29 CFR 1910.219(d)(1): Pulleys with parts seven feet or less from the floor or work platform were not guarded in accordance with the requirements specified at 29 CFR 1910.219(m) & (o):

(a) The chemical pumps located in the loft area.

2B
29 CFR 1910.219(e)(3)(i): Vertical or inclined belts were not enclosed by guards conforming to the requirements specified at 29 CFR 1910.219(m) and (o):

(a) The chemical pumps located in the loft area.

Valdak contests only the combined penalty of $1,200.00 proposed by the Secretary.

The undersigned finds that the gravity of the violation is moderate to low. CO Husebye stated that employees could become entangled in the belts and pulleys and suffer broken bones, cuts and possibly amputation of fingers or hands (Tr. 298). Only

five supervisory and maintenance personnel were routinely exposed to the exposed belts and pulleys on the chemical pumps in the loft area, as they hooked the pumps up to new containers of concentrated chemicals (Tr. 296-298; Exh C-9, C-10).

Based on the statutory criteria, the proposed penalty is found to be excessive. A penalty of $900.00 will be assessed.

Alleged Violation of §1910.1200(e)(1), (h)

Serious citation 1, item 3 alleges:

3A
29 CFR 1910.1200(e)(1): The employer did not develop, implement, and/or maintain at the workplace a written hazard communication program which describes how the criteria specified in 29 CFR 1910.1200(f), (g), and (h) will be met:

> (a) Car wash, for employees exposed to hazardous chemicals such as rust inhibitor, de-icer, wax, and detergent.

3B
29 CFR 1910.1200(h): Employees were not provided information and training as specified in 29 CFR 1910.1200(h)(1) and (2) on hazardous chemicals in their work area at the time of their initial assignment and whenever a new hazard was introduced into their work area:

> (a) Car wash, for employees exposed to hazardous chemicals such as rust inhibitor, de-icer, wax, and detergent.

Valdak contests only the combined penalty of $1,200.00 proposed by the Secretary.

The gravity of the violation is low to moderate. The CO Husebye testified that the chemicals dispensed by the pumps ultimately end up on the floor of the car wash and on the vehicles. All employees are exposed to the dispersed chemicals daily (Tr. 302-04). Ingestion or inhalation of the cited chemicals could result in skin rashes, dermatitis, allergic reactions, burns or eye injuries (Tr. 303). There was no evidence that any injuries had ever been suffered as a result of the cited violations.

The proposed penalty is found excessive; $900.00 will be assessed.

Alleged Violation of §1910.212(a)(4)

Willful citation 2, item 1 alleges:

29 CFR 1910.212(a)(4): Revolving drums, barrels, or containers were not guarded by enclosures which were interlocked with the drive mechanism so that the barrels, drums, or containers could not revolve unless the enclosures were in place.

(a) Southeast corner of the Valley Car Wash located at 1149 36th Avenue South, Grand Forks, North Dakota, where the cover of the Bock centrifugal extractor could be opened during the operating cycle exposing employees to the hazard of contact with the rotating tub.

The cited standard provides:

Barrels, containers, and drums. Revolving drums, barrels, and containers shall be guarded by an enclosure which is interlocked with the drive mechanism, so that the barrel, drum, or container cannot revolve unless the guard enclosure is in place.

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991 CCH OSHD ¶29,239, p. 39,157 (No. 87-1359, 1991).

In this case, there is no question that Valdak violated the cited standard. Valdak admits that the centrifugal extractor, which is the subject of the citation, has a revolving container; §1910.212(a)(4) is, therefore, applicable (Tr. 8-9, Stipulation 7). Valdak further admits that the interlocking mechanism on the extractor was not "operating and/or functioning accurately" on November 7, 1992 (Tr. 9, 64; Stipulation 8). Testimony, as well as the accident itself, in which an employee lost an arm in the extractor, establishes employee access to the unguarded revolving part (Tr. 140, 145, 150, 152, 235, 255-56, 397). Finally, supervisory personnel were admittedly aware of the violative condition (Tr. 67, 280, 395, 403, 484, 563-64).

Valdak raises the affirmative defense of unpreventable employee misconduct. The citation in this case, however, involves a specifications standard which mandates a physical form of protection, thus limiting the availability of the employee misconduct defense.

The employee misconduct defense is only available to employers who have communicated and enforced work rules designed to eliminate the specific hazard for which the employer has been cited. *See, e.g. Archer-Western Contractors Ltd.,* 15 BNA OSHC 1013, 1991 CCH OSHD ¶29,317 (No. 87-1067, 1991). Here, the cited standard requires that the employer guard revolving drums, barrels, and containers with an interlock connected to the drive mechanism, so that the barrel, drum, or container cannot revolve unless the guard is in place. Valdak does not claim it communicated or enforced a work rule requiring that an interlock remain in operation on the extractor, or prohibiting use of the extractor without the interlock in place (Tr. 178-79). In the absence of a work rule designed to eliminate the cited violation, Valdak cannot prove an employee misconduct defense.[1] *Id.*

Valdak has failed to establish its affirmative defense.

The violation is classified as "willful." The Commission has held that:

> A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. It is differentiated from other types of violations by a "heightened awareness -- of the illegality of the conduct or conditions -- and by the state of mind -- conscious disregard or plain indifference.

Calang Corp., 14 BNA OSHC 1789, 1791, 1987-90 CCH OSHD ¶29,080, p. 38,870 (No. 85-319, 1990).

The undersigned finds that Valdak's failure to assure that a working interlock was installed on its extractor, contrary to the requirements of the Act, together with its failure to provide adequate training and supervision to operators, despite the obvious danger to

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[1] Testimony regarding the victim's conduct is relevant only if it concerns an attempt to defeat a functioning interlock device, or established rules prohibiting use of the unguarded extractor. The general deportment, or behavior of the victim is, in itself, insufficient to establish the defense, and will not be discussed here.

the young employees running that equipment, demonstrates plain indifference to those employees' safety and warrants a finding of willfulness.

The cited Brock 5197 centrifuge extractor extracts moisture from wet towels as its drum spins at a high rate of speed (Tr. 59, 60; Exh. C-3). The extractor presents a clear hazard; the bottom of the lid bears the warning: "Never insert hands in basket if it is spinning even slightly" (Tr. 157; Exh R-15 through R-17). Valdak's management was admittedly aware that the extractor was supposed to have an interlock device to keep the lid from being opened while the drum was spinning (Tr. 572).

Young employees, from 15 to 21 years of age (Tr. 92, 137-38, 175, 203, 252) operated the machine (Tr. 98, 99) without the benefit of any formal safety training (Tr. 93, 138, 176, 204, 238, 254, 393, 401, 434 558), and without close supervision (Tr. 206, 242, 244, 258, 269).

Valdak's management was aware that it was the practice of employee operators to press their hands against the inside lip of the extractor's drum to further slow the drum after applying the extractor's brake (Tr. 564-65; *See* testimony of Jeremy Larson, Tr. 236-37; Chad Preabt, Tr. 257-59). Employee Paul Gabriel testified that during an approximately six week period when the brake on the extractor was not working (Tr. 106-07), he had been specifically instructed by Joanne Anderson, an assistant manager, to slow the spinning drum after the power had been turned off by holding a towel against the inside lip of the drum (Tr. 103-04). Gabriel further stated that Joe Strang had seen him reach into the extractor while it was moving in order to remove a towel wrapped around the spindle, and then warned him that the extractor would "take [his] arm off" (Tr. 102, 111-12).

Anderson and Strang admitted that the extractor was the only one the car wash had, and so they had to continue using it, regardless of whether safety features, i.e. the solenoid, or hold down coil, were working, which they frequently were not (Tr. 369-70, 499, 558-59). Employees Chad Preabt, Jeremy Larson, Tim Castoreno and John Austin testified that the extractor lid could be opened while the extractor drum was spinning during the times they worked at Valdak (Tr. 140, 145, 150, 152, 235, 255-56). Gabriel

testified that there was no functioning interlock on the extractor at any time between November 1991 and May 1992, while he worked for Valdak (Tr. 91, 102).

Despite the presence of an obvious hazard in its workplace, and the availability of repair personnel (Tr. 417-18, 445), Valdak made no effort to assure that a working interlock was maintained on the extractor (Tr. 459, 470, 475-76).

The undersigned does not find credible the testimony of Valdak's management personnel, all of whom stated that they were unaware that the extractor was a dangerous piece of machinery (Tr. 375-76, 391, 398, 637). Such self-serving testimony is contradicted by the supervisors' own testimony that they warned the employees not to put their hands in the machine (Tr. 376-77, 399, 492), and Valdak's position that the hazard posed by the machine was obvious to employees, and that the safety legend on the lid of the extractor provided sufficient warning of the danger posed by the spinning drum. That management personnel did not foresee the extent of injury possible does not excuse its disregard for continuing safety hazards of which it had actual knowledge.

The gravity of the violation is moderate to high. At least five employees operated the extractor (Tr. 289), running approximately 40 loads a day (Tr. 562). An employee catching an appendage in the extractor could suffer injuries ranging from broken fingers, amputation or death (Tr. 292). Although the hazard was obvious, the youth of Valdak's employees increases the likelihood of an accident occurring.

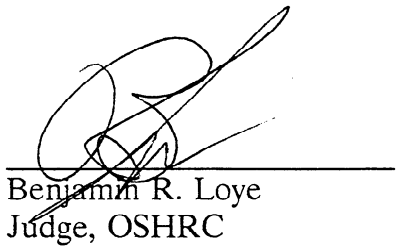
Taking into consideration the size of Valdak's operation, however, the proposed penalty is considered excessive. A penalty of $14,000.00 will be ASSESSED.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

1. Citation 1, item 1: A penalty of $600.00 will be ASSESSED.
2. Citation 1, items 2A and 2B: A penalty of $900.00 will be ASSESSED.
3. Citation 1, items 3A and 3B: A penalty of $900.00 will be ASSESSED.
4. "Willful" citation 2, item 1, is AFFIRMED and a penalty of $14,000.00 is ASSESSED.



Benjamin R. Loye
Judge, OSHRC

Dated: February 18, 1994