United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 Speer Boulevard, Room 250
Denver, Colorado 80204-3582

Secretary of Labor,
Complainant,

v. OSHRC Docket No. 00-1408

Idaho Trout Processors, Co.
Respondent

APPEARANCES:

For the Complainant:
William W. Kates, Office of the Solicitor, U.S. Department of Labor, Seattle, Washington

For the Respondent:
James G. Reid, Esq., Charles L. Honsinger, Esq., Chartered Lawyers, Boise, Idaho

Before: Administrative Law Judge: Stanley M. Schwartz

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, Idaho Trout Processors, Co. (Idaho), at all times relevant to this action maintained a place of business in Buhl, Idaho, where it was engaged in trout farming and processing. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On June 26, 2000 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Idaho's Buhl work site. As a result of that inspection, Idaho was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest, Idaho brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On October 24, 2000, an E-Z Trial hearing was held in Boise, Idaho. During the hearing the Secretary withdrew a citation alleging violation of §1910.132(a), which was pleaded, in the alternative, at citation 1, item 1 (Tr. 156, 159). The Secretary further withdrew items 3 and 4 of citation 1 in their entirety (Tr. 256-58). Item 2 was amended to limit its allegations to machine operators (Tr. 256-58). Respondent withdrew its contest to item 2, as amended, and agreed to a penalty of $1,250.00 (Tr. 256).

Items 1 and 5 remain at issue. No briefs are required in E-Z proceedings; this matter is, therefore, ready for disposition.

Alleged Violation of §1910.22(c)

Serious citation 1, item 1, as amended, alleges:

29 CFR 1910.22(c): Guardrail(s) were not provided to protect personnel from the hazards of falling into open fish runs.

(A) Guardrails were not provided at walkways over fish runs to prevent workers from falling into the runs.

Facts

OSHA's Compliance Officer (CO), Stephen Gossman, testified that while he was investigating a complaint about Idaho's processing equipment, he also observed Idaho's fish farming operation at Clear Lake Fish Hatchery (Tr. 39, 81). Gossman noted that the catwalks spanning the hatchery's fish runs were unguarded (Tr. 39). Gossman testified that the walkways were approximately 18 inches wide and ran approximately 300 feet across the runs, or "long ponds" (Tr. 40). Gossman believed that the water in the long ponds was approximately three feet deep, and that the catwalks were about two and a half to three feet above the water (Tr. 41). However, photographs of the long ponds, which Gossman agreed accurately depicted the ponds, show the catwalks just above an employee's waist level (Tr. 52; Exh. R-1). Gossman testified that he saw one employee on the catwalk, and one employee in chest waders working in one of the long ponds (Tr. 40). Gossman stated that an employee could fall from the catwalks, suffering broken bones or drowning (Tr. 42). Gossman admitted that the probability of an employee falling was remote (Tr. 44, 56).

Leo Ray, owner of four fish farms (Tr. 80-81), testified that he is familiar with approximately 150 licensed farms in Idaho, and that all of them have raceways similar to those at Idaho's Clear Lake facility (Tr. 82). Ray stated that in the 32 years he has been in the business, he has never seen guardrails on the walkways spanning the raceways (Tr. 82). Ray testified that guardrails would interfere with the movement of 150 pound, four foot square fish pumps (Tr. 83, 96), and with the use of dip nets, which may weigh up to 30 pounds when full, and screen-cleaning brushes (Tr. 84, 92-93). Leo Ray testified that there is no danger in falling from a catwalk into the raceway water less than a foot below (Tr. 99). However, his company *was* concerned about an employee falling, hitting his head on the concrete, knocking himself out and drowning (Tr. 87, 89, 99). Ray experimented with, though he eventually discarded, the idea of using flotation devices such as life jackets to eliminate the hazard (Tr. 86-87). Ray had never heard of any drowning accidents in the fish farming industry (Tr. 100).

Thorleif Rangen, a consultant with Rangen Incorporated testified that he has observed hatcheries all over the hemisphere (Tr. 138-40). Rangen Inc., operates a research hatchery similar to the facility at Clear Lake (Tr. 138-40). Rangen testified that he has never seen guard rails used on raceway catwalks at Rangen, or in any of the hatcheries he has observed (Tr. 141). Rangen agreed that guardrails would interfere with the feeding and harvesting of fish (Tr. 142-44). Based on his 37 years experience with fish hatcheries, Rangen opined that there was not a significant risk of falling into the raceways and drowning (Tr. 147). No fall protection is provided at his facility (Tr. 164).

Harold Johnson, Idaho's general manager (206), testified that in the 25 years he has been in the business, he has never seen a guardrail on a walkway across a raceway (Tr. 211). Johnson admitted that people occasionally fall off the walkways and end up in the ponds, however; he has never seen anyone fall into a raceway and strike his head (Tr. 212, 228). Johnson testified that he did not believe the unguarded walkways pose a significant hazard (Tr. 213).

Discussion

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, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

The cited standard provides:

> (c) *Covers and guardrails.* Covers and/or guardrails shall be provided to protect personnel from the hazards of open pits, tanks, vats, ditches, etc.

Applicability. This judge finds that the Secretary has failed to meet her burden of proof in regard to the first element.

Part 1928 specifically governs agricultural operations. Section1928.110. **Field sanitation** defines *Agricultural establishment* as a business operation that uses paid employees in the production of food, fiber, or other materials such as seedlings, plants, or parts of plants. Clear Lake Fish Hatchery is engaged solely in raising trout for food, and is, therefore, an agricultural establishment.

The purpose and scope section of Part 1928, §1928.21, specifically adopts a limited number of standards from the general industry standards at 29 CFR part 1910, making them applicable to agricultural operations. Section 1910.22 is *not* specifically enumerated. In a September 23, 1999

interpretive compliance letter concerning the applicability to §1910.178 to agricultural operations, OSHA suggests that the enumeration at §1928.21 is intended to be exhaustive:

> OSHA's agricultural standards are found in Part 1928. According to §1928.1, the standards in Part 1928 apply to "agricultural operations." Section 1928.21(a) expressly designates seven general industry standards (Part 1910) as applicable to "agricultural operations." It was not OSHA's intention to have §1910.178 apply to agricultural operations, and therefore, the final rule of §1910.178 **did not amend** §1928.21(a) to add §1910.178 to this list of applicable general industry standards. Thus, for those employments, which are "agricultural operations" under Part 1928, §1910.178 does not apply.

OSHA itself has clearly concluded that §1928.21 is intended to comprise an exclusive list of OSHA standards applicable to agricultural establishments.

Finally, agricultural operations are specifically exempted under §1910.22 **General Requirements,** which states: This section applies to all permanent places of employment, except where domestic, mining or agricultural work only is performed.

Clear Lake Hatchery is owned by Idaho and provides the raw material for Idaho's processing operation; the two work sites are located in close physical proximity. However, the Secretary failed to show that the two establishment's operations are so interrelated that Clear Lake did not function as a separate establishment. The Secretary introduced no evidence of any overlap in personnel, or in operations. This judge does not conclude, based on the evidence in the record, that the mere physical proximity of Idaho's processing plant to its Clear Lake hatchery is sufficient to transform the hatchery from an agricultural establishment into a business engaged in general industry, subject to the full gamut of regulations at §1910 *et seq.*

Citation 1, item 1 is, therefore, vacated.

Alleged Violation of §1910.212(a)(1)

Serious citation 1, item 5 alleges:

29 CFR 1910.212(a)(1): Machine guarding was not provided to protect operator(s) and other employees from hazard(s) created by moving parts and belts.

(A) The guard was raised on the Baader 234 when the machine was operating.

The cited standard provides:

> One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from the hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are–barrier guards, two-hand tripping devices, electronic safety devices, etc.

Facts

The Baader 234 is a fish processing machine that eviscerates, beheads and fillets trout (Tr. 15-16, 25, 173). CO Gossman testified that when he inspected Idaho's plant, the interlock guard on the Baader 234's in-feed had been disconnected and was in the raised position (Tr. 16, 27). John Barth, the plant manager, told Gossman that the guard was left up deliberately, to allow the operator to see when fish heads jammed up the machinery (Tr. 17-18, 168, 177).

Gossman testified that the operator is exposed to the nip point hazard posed by the conveyor belts that move the fish into the Baader 234's point of operation (Tr. 18, 29, 36). According to Gossman an operator could be pulled into the machine's idlers or pulleys if he places his hand inside the disabled interlock cover where the conveyor belts are located (Tr. 37). Gossman testified that should an employee catch his hand in the moving belts, he could suffer broken bones in his hands and/or fingers (Tr. 36-37).

On cross examination Gossman was asked under what circumstances the operator of the Baader 234 would have occasion to place his hand under the interlock cover. Gossman hypothesized that if the operator were to lose his balance and stick his hand out to catch himself, his hand could go into the belts (Tr. 121).

Discussion

It is well established that in order for the Secretary to prove a violation of §1910.212(a)(1), she must do more than show that it may be physically possible for an employee to come into contact with unguarded machinery. *Jefferson Smurfit Corp.*, (*Smurfit)* 15 BNA OSHC 1419, 1991 CCH OSHD ¶29,551(89-0553, 1991). The mere fact that it is not impossible for an employee to insert his hands into the machinery does not itself prove that the employee is exposed to injury. The existence of a hazard must be determined based on the manner in which the machine functions and how it is operated by the employees. *Id*. at 1421, *citing*, *Rockwell International Corp.*, 9 BNA OSHC 1092, 1980 CCH OSHD ¶24,979 (No. 12470, 1980).

In this case there is no evidence that the operation of the Baader 234 requires the operator to work near the nip points of the incoming conveyor belts. The only evidence in the record is that the operator might, in falling, accidentally place his hand into the zone of danger. In *Smurfit, supra.* the Commission specifically rejected a nearly identical scenario. In that case the CO believed that employees walking by the nip points of the employer's gluer "might trip or accidentally fall into the nip points." *Id.*, at 1421. The Commission rejected the CO's speculative testimony, and found that the

Secretary failed to establish employee exposure to a hazard where there was no reason for the operator to put his hands into the zone of danger while performing his normal work duties.

Based on Commission precedent, this judge must find that the Secretary failed to establish employee exposure to the nip point hazard created by the in-feed conveyors on the Baader 234. The citation is vacated.

ORDER

1. Citation 1, item 1, alleging violation of §1910.22(c) is VACATED.
2. Citation 1, item 2, alleging violation of §1910.147(c)(5)(i), is AFFIRMED, as amended, and a penalty of $1,250.00 is ASSESSED.
3. Citation 1, item 3, alleging violation of §1910.147(c)(6)(i)(A) is VACATED.
4. Citation 1, item 4, alleging violation of §1910.147(c)(7)(i) is VACATED.
5. Citation 1, item 5, alleging violation of §1910.212(a)(1) is VACATED.

/s/

Stanley M. Schwartz
Judge, OSHRC

Dated: December 8, 2000