United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR, Complainant, v. S.K. WELLMAN FRICTION COMPANY, Respondent.	OSHRC DOCKET No. 98-0648

APPEARANCES:

For the Complainant:
Patrick L. DePace, Esquire, U.S. Department of Labor, Office of the Solicitor, Cleveland, Ohio

For the Respondent:
Kenneth B. Stark, Esquire, Duvin, Cahn & Hutton, Cleveland, Ohio

Before: Administrative Law Judge Ann Z. Cook

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). The trial of this matter was held in conjunction with that in Docket No. 98-1318 in Cleveland, Ohio on January 26 and 27, 1999, after which both parties filed post-hearing briefs.[1] The citations at issue in this proceeding allege nine serious and three repeat violations arising from an Occupational Safety and Health Administration ("OSHA") inspection in March, 1998 at the S.K. Wellman Friction Company ("Wellman") facility in Cleveland, Ohio. Wellman timely contested the citations. Wellman does not contest that it is an employer engaged in a business affecting interstate commerce and that it is subject to the requirements of the Act. (Answer ¶ 4; J-1).

[1]A separate decision is being issued for Docket No. 98-1318.

THE BURDEN OF PROOF

To establish a violation of a standard, the Secretary has the burden of proving, by a preponderance of the evidence:

> (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, © 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).

ALLEGED SERIOUS VIOLATION OF 29 CFR 1910.22(b)(2)

Citation 1, Item 1 alleges:

> Throughout the plant: There were no permanent aisles or passageways appropriately marked. Material and barrels or drums were throughout the plant and in aisle ways.

29 CFR 1910.22(b)(2) provides as follows:

> Permanent aisles and passageways shall be appropriately marked.

Danelle Jindra, the OSHA compliance officer ("CO") who inspected Wellman's facility, had been a CO for about two years in March of 1988. She testified that during one of her two visits to the site she took three photos of what she found to be three unmarked aisles. She further testified that materials stacked in the aisles obstructed employees' and tow motors' paths and that the hazard posed by the unmarked aisles was that in an emergency employees would not be able to evacuate the building safely or that tow motors would be operated in areas where there was insufficient clearance. (C. Brief p.18; Tr.156, 180-85; C-13, C-14, C-16).

Thomas Hite, Wellman's vice-president for human resources, testified that C-14 depicted not an aisle, but a work area within the molding department where no powered industrial trucks go. (Tr. 381). On cross-examination, Jindra acknowledged that an aisle within a department is not a permanent aisle for purposes of the cited standard and that she had not observed tow motors in the C-14 area, but was relying on an employee's statement. (Tr. 208-10). Hite further testified that C-13 and C-16 depicted not two different aisles, but two views of the same work area bordered on one side by a permanent aisle. (Tr. 381-84). Photographs C-13 and C-16 support Hite's position. Jindra

testified she did not photograph the aisle bordering the C-13, C-16 area because she found no problems with it . (Tr. 213). I found Hite's testimony more credible than Jindra's because it was detailed, unhesitating, and based on first-hand knowledge. I conclude that the Secretary has failed to establish that any permanent aisle was not properly marked. Item 1 of Citation 1 is vacated.

ALLEGED SERIOUS VIOLATION OF 29 CFR 1910.157(g)(2)

Citation 1, Item 2 alleges:

> Although portable fire extinguishers were available for employee use, neither initial, nor annual retraining was provided.

29 CFR 1910.157(g)(2) states as follows:

> The employer shall provide the education required in paragraph (g)(1) of this section upon initial employment and at least annually thereafter.

29 CFR 1910.157(g)(1) provides:

> Where the employer has provided portable fire extinguishers for employee use in the workplace, the employer shall also provide an educational program to familiarize employees with the general principles of fire extinguisher use and the hazards involved with incipient stage fire fighting.

CO Jindra testified that although the company's policy was to evacuate all employees in case of fire, employees told her they would use fire extinguishers to put out a fire. However, her recall of those employee interviews was very limited. On cross-examination, Jindra testified she questioned only three or four employees, of whom maybe two said they would use the extinguishers in case of a fire. She did not know if one of them was in maintenance or if Wellman's emergency action plan provided for training maintenance personnel in fire extinguisher use. She also could not say with certainty that she had reviewed the plan. CO Jindra placed substantial importance on Kent Yeager, Wellman's safety director, having said that new employees had been instructed to evacuate in case of fire, but older employees had not yet been so instructed. She stated this created a hazard in that in an emergency, untrained employees might attempt to use fire extinguishers. (Tr. 187-89; 218-19).

The CO's testimony, in my opinion, is insufficient to establish a violation of section 1910.157(g)(2). The standard requires annual training in fire extinguisher use if an employer "has provided portable fire extinguishers for employee use in the workplace." However, the Secretary presented no evidence to show that Wellman expected employees to use extinguishers or that

employees thought they were expected to use them. In addition, the evidence on training was sparse and inconclusive. Jindra testified that employees had not received annual training, but, when asked directly if the employees who said they would use extinguishers had told her that, she did not answer. (Tr. 189-90, 219-20). She was likewise unresponsive when asked if she had made any effort to determine which employees had been trained and which had not. (Tr. 218). The CO's concern was that employees had not been uniformly instructed against using the extinguishers, and, while this is clearly a safety problem, it is not one that violates the cited standard. Based on the record, I find that the Secretary has failed to establish the alleged violation. Item 2 of Citation 1 is therefore vacated.

ALLEGED SERIOUS VIOLATION OF 29 CFR 1910.212(a)(1)

Citation 1, Item 3 alleges:

> Button Line: On or before 3/12/98, employees were exposed to nip points while coining parts on the Toledo 250T press.

29 CFR 1910.212(a)(1) provides:

> One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from 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-handed tripping devices, electronic safety devices, etc.

On March 12, 1998, Wellman employee Marsha Freeman's fingertip was cut off when she was operating a Toledo 250T press and tried to remove a jammed part from the turntable with her hand. The turntable fed parts into the rear of the press where they were coined and then continued forward to an unguarded slot through which the parts fell into a chute. To work the press, the operator placed a part on the turntable, pressed down on the foot pedal to begin the process and stepped off the foot pedal to stop the turntable. Freeman had not operated the press previously. During the three to five minutes she operated the machine before the accident, it jammed several times, but when she removed her foot from the pedal, the jammed parts had fallen into the chute. She was injured when she instinctively used her hand to knock a part out, instead of one of the tools that were available for the purpose. As she dislodged the part, her finger became stuck and the turntable continued in motion. The testimony of employee Henry Foreman, who had operated the press the

day before and who was nearby when the accident occurred, supported Freeman's testimony. (Tr. 42-44, 54-55, 60, 444: C-4-5).

Wellman contends the normal manner of operating the press is to use a tool to dislodge parts caught in the turntable and that under normal operation there was no hazard of injury by the unguarded pinch point. Wellman argues that it had no knowledge that employees would not use tools to remove jammed parts. This argument is refuted by uncontradicted evidence that the button line presses jammed frequently and that supervisors were on the floor observing the machine operators work. (Tr. 52, 54-55, 61-62). The unguarded pinch point was in the open and obvious. It was also obvious that an employee might use a hand to free a jammed parts for a number of reasons, including the fact that it was faster than locating and using a tool. (Tr. 171).

The Secretary has established a serious violation of section 1910.212(a)(1). The standard applies to the Toledo 250T press and requires a nip point guard which admittedly was not present. Anyone who operated the press was exposed to the unguarded nip point and to serious injury such as that sustained by Freeman. Because the unguarded nip point was in clear view and supervisors were on the floor overseeing press operators' work, Wellman knew or with reasonable diligence could have known that the nip point on the Toledo 250T press lacked required guarding.

The Secretary has proposed a $1,500.00 penalty for this item. In determining appropriate penalties for violations, the Commission is to give due consideration to the gravity of the violation as well as the employer's size, history and good faith. The gravity of the violation is generally "the primary element in the penalty assessment." *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). I assess the probability of an injury occurring as moderate to high, given the frequency of jamming and the minimal training operators appear to have received; had more than one press been unguarded, employee exposure would have been greater. No reductions for size, history or good faith are appropriate, as Wellman has 350 employees and was cited for OSHA violations less than two years earlier. A penalty of $1,500.00 is appropriate and is therefore assessed.

ALLEGED SERIOUS VIOLATION OF 29 CFR 1910.217(b)(7)(x)

Citation 1, Item 4 alleges:

> Button Line: The Toledo 250T mechanical power press, operated by foot pedal, was not protected against falling objects or from unintended operation by accidentally

> stepping onto the foot control. The foot control shall be protected not only on top of the pedal, but the sides and ends also.

29 CFR 1910.217(b)(7)(x) states as follows:

> Foot operated tripping controls, if used, shall be protected so as to prevent operation from falling or moving objects, or from unintended operation by accidental stepping onto the foot control.

The Toledo 250T foot pedal was guarded on top only. CO Jindra testified that side guards were also needed to protect against unintended operation in case something fell on the pedal. (Tr. 174). However, the Secretary presented no explanation of how this might occur or how the operator might inadvertently step on the pedal from the side. Although the CO testified that she based her opinion on a machine guarding course she attended at the OSHA institute, she did not explain how what she learned applied to the pedal at issue. Moreover, she acknowledged on cross-examination that the cited standard did not specify side guards and that the corresponding American National Standards Institute standard found top guarding alone sufficient. (Tr. 221, 224-27).

On the basis of the evidence of record, the Secretary has failed to prove that the foot pedal was not adequately protected from unintended operation. This citation item is vacated.

ALLEGED SERIOUS VIOLATION OF 29 CFR 1910.217(c)(1)(I)

Citation 1, Item 5 alleges:

> Button Line: On or before 3/12/98, the Toledo 250T part-revolution power press did not have any point of operation guard.

29 CFR 1910.217(c)(1)(I) provides that:

> It shall be the responsibility of the employer to provide and insure the usage of "point of operation guards" or properly applied and adjusted point of operation devices on every operation performed on a mechanical power press.

To prove this allegation, the Secretary presented the testimony of CO Jindra and employees Foreman and Freeman. The Secretary also presented two photographs of the Toledo 250T press, one taken before (C-4) and one after (C-5) a plexiglass shield was installed in front of the point of operation. Foreman testified that he had operated the press may times, including the day before the accident, and that there were no guards or interlocks on the machine until he saw the shield installed on it the day after the accident. The CO testified she interviewed other employees, including

Freeman, who told her the press never had any guards until after the accident. However, Freeman's own testimony was that there was no guard at the nip point in the front of the machine, but that she did not know about the back part of the machine where parts were coined. (Tr. 44, 51, 54, 59-61, 162, 169).

Wellman presented the testimony of its safety director, Kent Yeager, and the testimony of two employees, that is, Brian Naylor, a setup man who set up the press several times a week, and Donald McCurry, a tool and die maker who installed the plexiglass shield after Freeman's accident. All three testified that from the time it arrived at the facility, the Toledo 250T press had an expanded metal point of operation guard that looked like screen or mesh. (Tr. 355, 424-27, 435-36, 439). Naylor and McCurry further testified that prior to the accident the guarding screen was painted a yellow color, and they and Foreman identified yellow paint on the guard frame and brackets pictured in C-4 and C-5. (Tr. 66-68, 423, 437-38). Naylor and McCurry noted that an interlock prevented operation of the press when the guard was raised, and McCurry stated that he had removed the mesh guard after the accident and installed a plexiglass shield on which he lettered "DANGER KEEP HANDS CLEAR." (Tr. 424, 427, 436-39, 444).

I found the testimony of Naylor and McCurry, which was candid and based on direct personal knowledge, to be very persuasive on the issue of the guarding on the Toledo 250T press. Foreman also testified credibly but his observations were limited, which led him to incorrect conclusions. CO Jindra's testimony was likewise of little probative value because she did not specify how many employees she interviewed, what questions she asked, and what answers they gave. The testimony of Naylor and McCurry is therefore credited over that of Foreman and Jindra, and I conclude that the Toledo 250T press at all relevant times had a point of operation guard. This citation item is consequently vacated.

ALLEGED SERIOUS VIOLATION OF 29 CFR 1910.217(e)(1)(I)

Citation 1, Item 6 alleges:

> A program of periodic and regular inspections of mechanical power press(es) was not established and followed to insure that all parts, auxiliary equipment and safeguards were in a safe operating condition and adjustment:
>
> The employer did not maintain a periodic and regular inspection record of their mechanical power presses.

29 CFR 1910.217(e)(1)(I) provides:

> It shall be the responsibility of the employer to establish and follow a program of periodic and regular inspections of his power presses to ensure that all their parts, auxiliary equipment, and safeguards are in safe operating condition and adjustment. The employer shall maintain a certification record of inspections which includes the date of inspection, the signature of the person who performed the inspection and the serial number, or other identifier, of the power press that was inspected.

CO Jindra testified she asked Yeager for press inspection records and that after checking with the maintenance department, he produced only a checklist for inspections done in February and March, 1997. The checklist did not include a place to record the results of inspecting safeguards, nor were the February entries signed by the person performing the inspections. Jindra concluded that no inspections had been done since March 1997. She explained that the hazard created was of machine parts falling and injuring employees working on the machines. (Tr. 200-02, 266, C-19).

Wellman argues that regular inspections were performed because setup men and supervisors inspected the machines almost daily while performing their jobs. (R. Brief p. 11). Naylor testified that each time a machine was set up the setup man checked to see that everything was intact. (Tr. 405, 427). While the Secretary has not shown these inspections to be inadequate, the standard requires "a program of regular and periodic inspections" with a written record to evidence when they were done and who performed them. The setup men's inspections were not documented, were not periodic, and were done incidental to other work. I find that section 1910.217(e)(1)(I) applies, that Wellman failed to comply with it, and that employees operating the machines were exposed to the hazard of being struck by falling machine parts that could have caused serious injuries. The existence of the 1997 inspection records demonstrates that Wellman was aware that regular and documented inspections were required to protect press operators from injury. This item is therefore affirmed.

The Secretary has proposed a penalty of $1,500.00 for this item. On the record before me, I judge the gravity of the violation to be very low, since the setup men's inspections were frequent and appear to have been sufficiently comprehensive to have taken care of problems which might have led to an employee injury. For this reason, and those set out in item 3, *supra*, I conclude that a penalty of $1,000 is appropriate. A penalty of $1,000.00 is accordingly assessed.

ALLEGED SERIOUS VIOLATION OF 29 CFR 1910.217(e)(3)

Citation 1, Item 7 alleges:

> Press department supervisors, foreman and setup personnel were not adequately trained in the safe operation of the presses. Supervisors must ensure that guards are in place.

29 CFR 1910.217(e)(3) states as follows:

> It shall be the responsibility of the employer to insure the original and continuing competence of personnel caring for, inspecting and maintaining power presses.

The Secretary argues the alleged violation is established by a December 11, 1997 memo from Wellman's plant manager to four top-level supervisors. (R. Brief pp. 29-30; C-21). The memo informed the supervisors that effective January 15, 1998, presses were not to be run without appropriate front, back and side guarding being installed; all setup men were to be instructed that guards were to be properly installed before turning the press over to an operator; and all operators were to be instructed that no press was to be run without guarding. The memo also states that most of the guards were available and only needed to be installed. The Secretary contends that the memo shows that machines were being operated without guards with the knowledge of management; that supervisors receiving the memo did not know that presses should not be operated without guards; and that management was willing to operate presses without guarding from December 11 to January 15. However, without corroborating evidence, I find these conclusions unreasonable.

CO Jindra testified she determined that supervisors lacked training based on her observation that line supervisors were up and down the aisles and saw unguarded presses being operated. However, aside from the Toledo 250T press, she saw no unguarded presses, and she did not interview supervisors or setup men about their training. (Tr. 191, 220-21, 241-42). Wellman, on the other hand, presented evidence of its 1994 training course and subsequent on-the-job training for setup men, and the Secretary has not challenged the adequacy of this training. (Tr. 256, 405, 419-22). The Secretary has also not rebutted Wellman's assertion that the objective of the January 15, 1998 memo was the replacement of worn and damaged safety guards and not the installation of new guards where none had been. (Tr. 406).

Based on the evidence of record, I conclude that the Secretary has not established noncompliance with the cited standard. Item 7 of Citation 1 is vacated.

ALLEGED SERIOUS VIOLATION OF 29 CFR 1910.217(f)(2)

Citation 1, Item 8 alleges:

> Mechanical power press operators were not adequately instructed in the safe operation of the presses. The employer must ensure operator compliance through adequate supervision. Training should include the hazards involved with operating a power press and procedures to be followed if parts get jammed.

29 CFR 1910.217(f)(2) provides that:

> The employer shall train and instruct the operator in the safe method of work before starting work on any operation covered by this section. The employer shall insure by adequate supervision that correct operating procedures are being followed.

Marsha Freeman testified that on the day she was injured, she received five to ten minutes of training from a coworker before she began operating the Toledo 250T press for the first time. It was her understanding generally that she should call a setup man if a part jammed at the back of the press (the point of operation), but if the jam was in the front part, she could unjam it. She knew there were tools available to remove jams. (Tr. 43- 55). Henry Foreman testified he received no training on operating the press or removing jammed parts, although he operated the press on many occasions. (Tr. 68-69). CO Jindra testified training was inadequate as employees were operating unguarded presses; she also testified she interviewed employees who told her there were no set procedures for removing jammed parts. (Tr. 190-92). However, no press was shown to be lacking a guard except at the nip point of the Toledo 250T press where Freeman was injured, and Jindra gave no details of her interviews with employees who said there were no set procedures for removing jammed parts.

Kenneth Frederick, a general supervisor and a former press department supervisor and setup man, testified about the training supervisors, setup men and press operators receive. Setup men were trained in a 1994 class and since then they have trained new setup men. Press operators are trained jointly by supervisors and setup men, and they are told not to operate a press if a guard is not in place and to call a setup man instead. (Tr. 402-07, R-6-8). The testimony of Brian Naylor, a setup man, was in accord with Frederick's testimony. (Tr. 418-22).

I find that employees were not adequately trained and instructed in the safe method of work before operating the Toledo 250T press. Foreman operated the press believing it had no point of operation guard, which indicates he was not trained to not operate an unguarded press. Freeman had operated a different type of press before her injury, and yet she received at most ten minutes of

training on the Toledo 250T press. Her training was not from a supervisor or setup man, but from a coworker about whose safety training there is no evidence. Jamming occurred on the Toledo 250T with sufficient frequency to require training on the proper procedure to remove jammed parts. However, Freeman was reluctant to call a setup man and believed that jams were hers to deal with unless they occurred in the point of operation. (Tr. 52-55). That the injury so closely followed instruction by her coworker also indicates that Freeman's training was inadequate. As Freeman's injury demonstrates, a lack of adequate safety instruction prior to operating a press can lead to serious injury. The Secretary has established a serious violation of the cited standard.

The proposed penalty for this item is $1,500.00. I assess the gravity of this violation as high because inadequately trained employees are more prone to injury due to ignorance or reflexive reactions such as the one that occurred in this case. Upon considering the gravity of the violation and the other factors set out *supra*, the proposed penalty is appropriate and is therefore assessed.

ALLEGED SERIOUS VIOLATION OF 29 CFR 1910.217(f)(3)

Citation 1, Item 9 alleges:

> Press Room: There is material and barrels of drums stacked everywhere around the presses, thereby, not giving the operators ample room.

29 CFR 1910.217(f)(3) states as follows:

> Work area. The employer shall provide clearance between machines so that movement of one operator will not interfere with the work of another. Ample room for cleaning machines, handling material, work pieces, and scrap shall also be provided. All surrounding floors shall be kept in good condition and free from obstructions, grease, oil and water.

The Secretary offered photos C-12 and C-15 in support of this item, as well as the testimony of CO Jindra that there was very limited room around the machines in the press department and that the condition created the danger of an employee tripping or falling into the press. (Tr. 178). The CO testified on cross-examination that the blue work box shown in the photos was where the press operator would stand. Thomas Hite, on the other hand, testified that the blue work box was a setup man's tool chest and that the photos showed a press being set up, thus accounting for any clutter. (Tr. 178, 243-45, 385-88). Hite was the more credible witness with respect to this item because he was

more knowledgeable and the CO could not defend her conclusions. The Secretary has failed to prove the alleged violation, and this item is consequently vacated.

ALLEGED REPEAT VIOLATION OF 29 CFR 1910.147(c)(4)(I)

Citation 2, Item 1 alleges, in pertinent part:

> Specific procedures were not developed for the equipment such as, but not limited to, mechanical power presses, grinders, sanders, etc.

29 CFR 1910.147(c)(4)(I) provides:

> 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.

Wellman acknowledges that it did not have machine-specific procedures for locking out each piece of equipment and that it was therefore in violation of the cited standard. (R. Brief p. 16). In mitigation of the violation, it points out that the CO's investigation disclosed no evidence that employees were not following or not trained in lockout/tagout procedures. (Tr. 204, 247-48). CO Jindra testified that without machine-specific procedures a hazard existed in that in the absence of maintenance personnel, other employees might lock out a machine without following all of the necessary steps and the machine might then energize unexpectedly. (Tr. 204-05).

The violation is repeated because, at the time it occurred, there was a final Commission order against Wellman for a substantially similar violation. *Potlatch Corp.*, 7 OSHC 1061 (No. 16183, 1979). Specifically, a settlement that became a final order required Wellman to abate an "other" violation of 1910.147(c)(4)(I) by May 26, 1997. (Tr. 15-17, 20; C-1 p. 11, C-2 p. 2). However, Wellman did not abate that violation. Wellman contends that its failure to have specific written procedures for each of its machines is not a serious violation and that the violation should be classified as "other" with no penalty. Wellman notes that pursuant to Chapter IV.C.2.1.(3) of OSHA's Field Inspection Reference Manual, when an "other" violation that initially would have no penalty is repeated once, a $200.00 penalty is appropriate. The Secretary presented no evidence or argument on the severity of the hazard or the propriety of her proposed penalty of $7,000.00.

I find the severity and probability of injury as to this item to be small, given that Wellman employees were trained and followed correct, though unwritten, procedures. However, I note Wellman's failure to abate the prior violation, despite its agreement to do so pursuant to the

settlement agreement. In view of this factor, as well as the company's size, history and good faith, I conclude that a penalty of $5,000.00 is appropriate. A penalty of $5,000.00 is therefore assessed.

ALLEGED REPEAT VIOLATION OF 29 CFR 1910.219(f)(3)

Citation 2, Item 2 alleges, in pertinent part:

> Button Line: On or before 3/12/98, the Toledo 250T mechanical power press had exposed chains approximately 18 ½" from floor level.
>
> 29 CFR 1910.219(f)(3) states, in pertinent part:
>
> (3) *Sprockets and chains.* All sprocket wheels and chains shall be enclosed unless they are more than seven (7) feet above the floor or platform.

CO Jindra noticed that the Toledo 250T press lacked a guard over an exposed chain when she first visited the plant. At the time, the press was locked out while a nip point guard was installed. A photograph that Jindra took of the unguarded chain shows it to be at most a foot above the floor. The guard was green and the top part is seen in place in the photo. (Tr. 172-73; C-10). At Jindra's request, an unidentified employee picked up the nearby lower part of the guard and tried to install it. He was unsuccessful, Jindra testified, because it was too small; however, Hite testified that it was because the wrong bolts were used and that with the correct bolts the guard was later installed. The CO testified that on her return visit, the chain was protected by a green guard, while Hite testified that the lower guard part was the same one that had not fit with the incorrect bolts. (Tr. 238-40, 380). Although the CO never saw the press in operation without the guard, she determined, based on employee interviews, that employees had operated the press with the chains exposed. On cross-examination, she conceded that the employees she interviewed were the same ones who had told her, mistakenly, that the point of operation on the Toledo 250T was unguarded. (Tr. 173, 239-40). CO Jindra's conclusions are unpersuasive, as they were based on interviews with three or four employees whose perceptions could well be faulty. The Secretary has not shown employees were exposed to a hazard created by the absence of the lower part of the chain guard. This citation item is vacated.

ALLEGED REPEAT VIOLATION OF 29 CFR 1910.1200(h)

Citation 2, Item 3 alleges, in pertinent part, as follows:

> 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:
>
> NOTE: Although new employees are trained on the hazardous chemicals in their work area, not all employees are trained as to hazardous chemicals in their work area when they are moved to a new department, or when a new hazard is introduced into their work area.
>
> 29 CFR 1910.1200(h) provides:
>
> (h) *Employee information and training.* (1) Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (*e.g.*, flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and material safety data sheets.
> (2) *Information.* Employees shall be informed of:
> (I) The requirements of this section;
> (ii) Any operations in their work area where hazardous chemicals are present; and,
> (iii) The location and availability of the written hazard communications program, including the required list(s) of hazardous chemicals, and material safety data sheets required by this section.

The Secretary's proof as to this item consists of CO Jindra's testimony that employees told her they had not been trained about new chemicals when they moved from one department to another and her further testimony that Kent Yeager had acknowledged that transferred employees received no training beyond their initial hazardous communication training. (R. Brief p. 37; Tr. 193-94). The Secretary presented no evidence that a new physical or health hazard had been created that was not included in the initial training, or that any employee had been exposed to a hazard about which he/she had no training. The Secretary found no fault with Wellman's initial training, labeling, or material safety data sheets. (Tr. 252-54). I conclude that the evidence does not establish a violation of the cited standard. This citation item is accordingly vacated.

FINDINGS OF FACT

The foregoing constitutes my findings of fact in accordance with Federal Rule of Civil Procedure 52(a). Any proposed findings of fact inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Wellman is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and the subject matter of the proceeding.

2. Wellman was in serious violation of section 5(a)(2) of the Act as alleged in Citation 1, Items 3, 6, and 8.

3. Wellman was not in violation of section 5(a)(2) of the Act as alleged in Citation 1, Items 1, 2, 4, 5, 7, and 9.

4. A total civil penalty of $4,000.00 is appropriate for the serious violations of the Act.

5. Wellman was in repeat violation of section 5(a)(2) of the Act as alleged in Citation 2, Item 1.

6. Wellman was not in violation of section 5(a)(2) of the Act as alleged in Citation 2, Items 2 and 3.

7. A civil penalty of $5,000.00 is appropriate for the repeat violation of the Act.

ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Items 3, 6, and 8 of Citation 1 are affirmed as serious violations, and a total penalty of $4,000.00 is assessed.

2. Items 1, 2, 4, 5, 7, and 9 of Citation 1 are vacated.

3. Item 1 of Citation 2 is affirmed as a repeated violation, and a penalty of $5,000 is assessed.

4. Items 2 and 3 of citation 2 are vacated.

Ann Z. Cook
Judge, OSHRC

Dated:

Washington, D.C.