UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
HARMONSON STARIS
Respondent.

OSHRC DOCKET
NO. 92-1681

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 May 23, 1995. The decision of the Judge will become a final order of the Commission on June 22, 1995 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 June 11, 1995 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
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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: May 23, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-1681

NOTICE IS GIVEN TO THE FOLLOWING:

Patricia Rodenhausen, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
201 Varick, Room 707
New York, NY 10014

Michael S. Berger. Esquire
Kevin Haverty, Esquire
402 Park Boulevard
Cherry Hill, NJ 08002

Richard DeBenedetto
Administrative Law Judge
Occupational Safety and Health
Review Commission
McCormack Post Offic and
Courthouse, Room 420
Boston, MA 02109 4501

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
JOHN W. McCORMACK POST OFFICE AND COURTHOUSE
ROOM 420
BOSTON, MASSACHUSETTS 02109-4501

PHONE:
COM (617) 223-9746
FTS (617) 223-9746

FAX:
COM (617) 223-4004
FTS (617) 223-4004

SECRETARY OF LABOR,
Complainant,

v.

CHERRY HILL STAIRS, t/a
HARMONSON STAIRS,
Respondent.

OSHRC
Docket No. 92-1681

Appearances:

Evan R. Barouh, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Michael S. Berger, Esq.
Kevin Haverty, Esq.
Cherry Hill, New Jersey
For Respondent

Before: Administrative Law Judge Richard DeBenedetto

DECISION AND ORDER

Cherry Hill Stairs, Inc., t/a Harmonson Stairs (Harmonson), was cited on April 16, 1992, for alleged willful violations of the woodworking machine guarding standards at 29 C.F.R. §§ 1910.213 (c)(1), (c)(2), and (c)(3), which relate to hand—fed circular ripsaws and require that they be guarded by: a hood enclosing the saw above the table and above the material being cut; a spreader to prevent material from squeezing the saw or being thrown back on the operator; nonkickback fingers or dogs to hold the material in place. The Secretary proposes that a penalty of $21,000 be assessed for the grouped violations.

Harmonson operates a custom stair-building facility in Mt. Laurel, New Jersey. The OSHA inspection which resulted in the instant citation was triggered by the New Jersey Department of Labor which notified the local OSHA area office sometime in 1991 that one of Harmonson's employees had been injured while operating a Powermatic table saw. Harmonson had been previously cited for violating the same three machine-guarding

standards in 1986 involving an Oliver brand table saw, and in 1989 for violating the hood-enclosure requirement of § 1910.213(c)(1) again involving an Oliver table saw.

The OSHA inspection which resulted in the present citation took place in February 1992. Upon his arrival at the shop, the compliance officer asked to see and was escorted to the table saw in question. When the compliance officer observed it, the saw was not in use, but an integrated three-in-one guard unit (consisting of a hood, spreader and nonkickback fingers) was on the floor nearby (Tr. 28). The compliance officer testified that he questioned three Harmonson employees regarding the use of the saw: foreman Walker, assistant foreman Weeks, and operator Kou Ton. It was disclosed that the saw had been used that day without guarding devices to perform rip cuts for stair treads. According to the compliance officer, Walker expressed the view, in substance, that the guards were for novices engaged in homecraft, and Weeks claimed that using the guards would obstruct his view of the wood being cut (Tr. 32, 36-37, 478). Although the integrated guarding device was installed on the saw before the compliance officer left the plant, Harmonson's president, P. Bart Withstandley, told the compliance officer that the employees "would probably take the guard off again" (Tr. 51-52).

In its answer to the complaint, Harmonson set out various affirmative defenses, including infeasibility of compliance. In its posthearing brief, Harmonson makes two principal arguments. First, it claims that the Secretary failed to prove "actual employee exposure to a hazard." Harmonson's brief at 10. Harmonson points to *Jefferson Smurfit Corp.*, 15 CCH OSHD at p. 39, 953 (No. 89-0553, 1991), where the Commission held that the machine guarding standard at § 1910.212(a)(1) requires the Secretary to prove that a hazard within the meaning of the standard exists in the employer's workplace. More specifically, the Secretary must establish that employees were exposed to a hazard as a result of the manner in which the machine functions and the way it was operated.

Harmonson's reliance on the *Smurfit* case is misplaced. As the Commission noted in *Papertronics, Div. of Hammermill Paper Co.*, 6 BNA OSHC 1818, 1819, 1978 CCH, OSHD at pp. 27,694-95 (No. 76-3517, 1978), the standard at § 1910.212 (a)(1) speaks explicitly in terms of "hazards" that must be guarded, therefore, "the Secretary must prove the existence

of a hazard to establish a prima facie case of violation of § 1910.212(a)(1)."[1] Unlike the general standard at .212(a)(1), the woodworking machinery guarding requirements under .213(c)(1), (c)(2), and (c)(3), are set forth in explicit detail, and leave little room for discretion in achieving compliance. Where, as here, a standard by its plain terms assumes the existence of a hazard, there is no requirement that a hazard be proven before noncompliance with its terms is established. *Lee Way Motor Freight, Inc.*, 1 BNA OSHC 1689, 1691, 1973-74 CCH OSHD ¶ 17,693 (No. 1105, 1974); Aff'd *Lee Way Motor Freight, Inc. v. Secretary of Labor, 511 F.2d 864, 869 (10th Cir. 1975).*

It merits observation that during the hearing Harmonson did not seriously challenge the existence of a hazard;[2] the debate ultimately focused directly on the question of feasibility. Harmonson's chief and only witness addressing the issue was its president, P. Bart Withstandley, who testified that shortly before the compliance officer's arrival at the shop, the employees were engaged in the process of cutting a large newel post some 6 feet in length and 10 inches in diameter, and because of the size and shape of the wood, and the type of rip cuts to be made, guarding devices could not be used (Tr. 310-25, 311-13).

To refute Withstandley's testimony the Secretary called Frazier Alburger as an expert witness. Alburger is a vocational instructor in cabinet-making and also operates his own woodworking shop. He had previously worked for Harmonson from 1967 to 1971 including a two-year assignment as shop foreman (Tr. 486-89). Alburger conceded that it was infeasible to cut the newel post on the table saw in question with the guarding devices in place; however, he stated that the operation could be done in a safer manner by using any

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[1]The standard reads as follows:

> **§1910.212 General requirements for all machines.**
>
> (a) *Machine guarding*—(1) *Types of guarding.* 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-hand tripping devices, electronic safety devices, etc.

[2]In fact, towards the end of the hearing, Harmonson's counsel "stipulated" that the employees were "exposed to hazards when the guard is off" (Tr. 543).

one of the four band saws which Harmonson had in its shop (Tr. 301, 507).[3] Alburger gave the reasons for believing the band saw would eliminate the hazards encountered when using a table saw. His testimony was neither successfully refuted nor shaken on cross-examination (Tr. 506-07, 541).[4]

Harmonson assigns little or no importance to the compliance officer's testimony regarding the information obtained during his interviews with Harmonson's employees Walker, Weeks and Kuo Ton. The statements of these employees as to the use of the unguarded table saw for cutting stair treads qualify as admissions under Rule 801(d)(2)(D) of the Federal Rules of Evidence because they related to a matter within the scope of their employment and were made while they were on the job. There is nothing in the record to undermine the compliance officer's testimony on this point which directly contradicts Harmonson's argument that its policy was to place guards on all saws "at all times unless it had to be removed to perform a specialty cut like the cutting of newel posts." Harmonson's brief at 6. It bears noting that although Harmonson's prehearing witness list included shop foreman Walker, assistant shop foreman Weeks and Ton (the first two were also designated as expert witnesses), none was called to testify in support of its case.

An employer who raises the affirmative defense of infeasibility must prove that (1) literal compliance with the requirements of the standard was infeasible under the circumstances and (2) either an alternative method of protection was used or no alternative means of protection was feasible. *Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1202, 1993 CCH OSHD ¶ 30, 052, p. 41, 302 (No. 90-2304). While it is undisputed that it was infeasible to use guards on the circular ripsaw in question for cutting the newel post, according to the uncontradicted testimony of the Secretary's expert the method employed

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[3]Withstandley testified to several other wood-cutting procedures which precluded the use of guarding devices. His testimony was countered by Alburger who described in detail alternative procedures for accomplishing the same cuts while significantly reducing exposure to the potential hazards (Tr. 507-20).

[4]Withstandley's testimony in rejoinder to Alburger's recommendations for using the band saw was vague and uncertain (Tr. 560-63).

by Harmonson to perform the cut exposed the employees to serious hazards (Tr. 501-05).[5] Under the circumstances, the procedure used by Harmonson cannot qualify as an acceptable alternative method of compliance. Harmonson has failed to establish an infeasibility defense to excuse its noncompliance with the guarding requirements of §§ 1910.213(c)(1), (c)(2), and (c)(3).

THE WILLFUL CHARACTERIZATION

The Secretary contends that the violation was willful, and points out that Harmonson had prior knowledge of the requirements of machine guarding standards, two previous inspections in 1986 and 1989 having resulted in citations for failure to guard table saws. Secretary's brief at 20. The Secretary also calls our attention to the fact that some two months following the 1986 OSHA inspection and issuance of citations, Harmonson issued a written notice to its employees concerning the recent OSHA inspection, Machine guarding, which was the second item to be dealt with in the bulletin, was addressed as follows (Exh. C-8):

> Guards on machinery was a big item with OSHA. Although it is not fully understood how to handle the "legal" issue in light of the practical and safe operation of the machines in question, we will attempt to meet the requirements of OSHA where possible. There is a clear disagreement on what is and what is not safe as it applies to the guarding of certain machines. Meanwhile, you are expected to use your usual good judgement and skill while operating ANY machinery. OSHA, has issued a citation with the instructions to post it for all to see. You are welcome to review this if you wish. (Emphasis in original.)

In marked contrast with the ambiguous and rather loose admonishment regarding the operation of machines, Harmonson invoked clear and stringent measures for improving housekeeping:

> BACK TO BASICS: Housekeeping, a major twist in OSHA's knickers, will be the FIRST ORDER OF PRIORITY. Maintained throughout the workday this shop can be easily kept orderly. OSHA cites that an excessive amount of scrap-wood

[5]Withstandley described the newel-post cutting procedure as requiring as many as 5 or 6 persons to feed the post and hold it down while performing a cut (Tr. 310).

> and saw dust was allowed to accumulate thus causing a tripping hazard. (And they are right.) Furthermore, the fire extinguishers and our access to them was obstructed by the same, a condition which we cannot allow to continue.
>
> > Effective NOW, all scrap wood will be maintained in designated areas only and done so in an orderly manner. On a regular basis, the scrap will be converted to usable inventory or disposed of.
> >
> > A routine "clean-up" time WILL be honored at the close of every workday - 15 minutes prior to the last buzzer, or sooner as required. Everyone, is expected to participate. (Emphasis in original.)

In June 1989, Harmonson was cited again for failing to provide a hood guard for a hand-fed circular ripsaw. As with the 1986 citation, Harmonson entered into a settlement agreement in July 1989 which resulted in a reduction of the penalty proposed for the saw violation (Exh. C-4). Harmonson's disagreement concerning the guarding of table saws, as previously reflected in its employee bulletin, erupted once more in November 1991 when Harmonson underwent an insurance survey for underwriting purposes. The insurance representative, Victor Smith, testified that during the survey, Harmonson's president informed him that OSHA had inspected his facility on two prior occasions, at which time "OSHA told him [Withstandley] that he needed a guard on the table saw, and he said OSHA didn't know what they were talking about" (Tr. 454).

Shortly after the loss control survey, Harmonson's insurance company made certain recommendations regarding the table saws. When the insurance representative telephoned Harmonson some months later to check on whether the recommendations were accepted and implemented, Withstandley told the representative that the recommendations were not valid (Tr. 459). This disagreement prompted the insurance company to refer the matter to the New Jersey Department of Labor, which then notified OSHA thereby resulting in the present citation (Tr. 228; Exhs. C-9, C-10).

A willful violation is a violation committed voluntarily with intentional disregard for the requirements of the Act, or plain indifference to employee safety. *United States Steel*

Corp., 12 BNA OSHC 1692, 1703, 1986 CCH OSHD ¶ 27,517 at p. 35,675 (No. 79-1998, 1986). "Willful" means action taken knowledgeably by one subject to the statutory provisions in disregard of the action's legality. No showing of malicious intent is necessary. A conscious, intentional, deliberate, voluntary decision properly is described as willful, regardless of venial motive. *Intercounty Construction Co. v. OSHRC*, 522 F.2d 777, 779-80 (4th Cir. 1975).

Prior to the issuance of the present citation, Harmonson had over five years in which to resolve its disagreement with OSHA as to the feasibility of operating its power saws with appropriate protective devices. During that time, it made no serious effort to deal with the problem in a manner that one could say was a good faith attempt to comply with the OSH Act. In fact, Harmonson's conduct can be fairly described as manifesting an obstinate refusal to comply.

Section 17(j) of the OSH Act provides that the Commission shall assess an appropriate penalty for each violation, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. 29 U.S.C. §666(j). Section 17(a), as amended, provides a maximum penalty of $70,000 and a minimum of $5,000 for each willful violation. The Secretary proposes a penalty of $21,000 for the three - item grouped violations. Pursuant to the statutory penalty criteria, a penalty of $12,000 is assessed.

Based upon the foregoing findings and conclusions, it is **ORDERED** that the citation is affirmed and a penalty of $12,000 is assessed.

RICHARD DeBENEDETTO
Judge, OSHRC

Dated: May 19, 1995
Boston, Massachusetts