UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., Respondent.	)	OSAHRC DOCKET NOS. 6499 & 7207

DECISION

Before: BARNAKO, Chairman; MORAN and CLEARY, Commissioners.

MORAN, Commissioner: An order of Review Commission Judge John J. Larkin, dated October 8, 1974, is before this Commission for review pursuant to 29 U.S.C. § 661(i). At issue is whether the occupational safety standard codified at 29 C.F.R. § 1910.132(a) requires meat-cutters in retail stores to wear protective aprons when cutting meat. For reasons that follow, we answer that question in the negative and affirm the Judge's vacation of the citations.

The above-cited standard provides:

> "Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact."

No question exists that this wording is very broad and indefinite. See Cape and Vineyard Division of New Bedford Gas and Edison Light Company, 512 F.2d 1148, 1152 (1st Cir. 1975); Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230, 233 (5th Cir. 1974); Secretary v. Grand Union Company, 20 OSAHRC 663 (1975); Secretary v. Modern Automotive Services, Inc., 6 OSAHRC 738, 739-740 (1974).[1/]

In remedial type legislation, however, vagueness of a cited regulation on its face is not a sufficient basis in and of itself for dismissing a citation. United States v. National Dairy Products Corp., 372 U.S. 29, 83 S. Ct. 594, 600 (1963). Rather, standards promulgated thereunder must also be judged "in light of the conduct to which it is applied." Brennan v. OSAHRC and Santa Fe Trail Transport Company, 505 F.2d 869, 872 (10th Cir. 1974).

The court in Ryder Truck Lines, Inc. v. Brennan, supra, noted that so long as the standard affords a reasonable warning of the proscribed conduct, it will pass constitutional muster. This conduct is judged in light of whether "a reasonably prudent person familiar with the circumstances of the industry would have protected against the hazard" in the manner charged. Cape and Vineyard Division of New Bedford Gas and Edison Light Company v. OSAHRC, supra.

1/ Complainant also recognized this standard's broad wording at trial by stating:

> "The Government is relying on the general standard that is cited and there are publications within the meat industry which helped to clarify the standard by stating the type of personal protective equipment that is recommended to be furnished people in the meat cutting department."

Therefore, the question to be answered here is whether a reasonably prudent person familiar with the industry would have foreseen that the standard required that retail meatcutters be protected by protective aprons. This critical question was clearly litigated during the hearing in these cases.

Testimony by three of complainant's witnesses established that, in their combined experience of some 75 years in the industry, they had personal knowledge of a total of only four accidents which could have been prevented by the use of protective aprons. One of these witnesses, Saverio Gerardi, who had 26 years of experience as a meat cutter, testified as follows:

"Q. During your 26 years . . . have you ever worked with an employee who used one of these aprons?,

A. I relieved in a store one year and they had a colored butcher there and he had an apron. That is the only one I have seen.

Q. Have you ever worn one before?

A. No, sir."

* * * * * *

"Q. [H]ave you ever participated in any safety program . . . ?

A. Yes, sir."

* * * * * *

"Q. What did the safety program consist of?

A. Conditions in the store. Conditions in the meat department, cutting procedures."

* * * * * *

"Q. Were any of the butchers in these films wearing protective aprons?

A. No, sir.

Q. Was there any mention of protective aprons in these films?

A. Not that I recall."

Another of complainant's witnesses, one James Keifer, also testified that he was familiar with only one man in the industry who had ever worn an apron.

We conclude from this testimony that the answer to the previously mentioned critical question is negative and that the evidence clearly establishes that protective aprons are not recognized in the retail meat cutting industry as personal protective equipment "necessary by reason of hazards of processes." (Emphasis added.) Moreover, evidence of four accidents over the extended period of time shown herein does not demonstrate the existence of an obvious hazard such that a reasonably prudent person familiar with the circumstances would take steps to abate the hazard. We therefore find that 29 C.F.R. § 1910.132(a) does not adequately warn employers that their employees must be protected by protective aprons. Thus, there is no violation of the Act for the respondent's failure to do so in the instant cases.

Accordingly, the Judge's order is affirmed.

BY THE COMMISSION

William S. McLaughlin

William S. McLaughlin
Executive Secretary

DATED: MAR 23 1976

CLEARY, Commissioner, DISSENTING:

The majority inquires whether a reasonably prudent person familiar with the industry would have foreseen that the standard required that retail meatcutters be protected from knife wounds by protective mesh aprons while boning meat with a sharp knife having a six-inch blade. On the basis of evidence of few accidents in respondent's facilities which could have been prevented by the use of aprons, and in reliance on testimony by two employees to the effect that they were familiar with very limited use of aprons, the majority answers its question in the negative. The majority also concludes that evidence of four accidents does not establish an obvious hazard.

I dissent from the majority opinion because the Secretary has established that respondent's butchers encounter the hazard of knife wounds while boning meat and that protective aprons or similar protective devices are necessary to lessen or eliminate the hazard. Thus, the Secretary has established a prima facie case under 29 CFR §1910.132(a).2/

2/ It is important to note that respondent never introduced evidence in this case. At the beginning of the hearing respondent raised the defense that §1910.132(a) is unconstitutionally vague. At the close of the Secretary's evidence respondent moved for dismissal of the complaint, asserting (1) the vagueness of the standard and (2) that the Secretary failed to prove a hazard associated with its meatcutting operations. The Judge granted respondent's motion on both grounds. Respondent presented no evidence of its own. Briefs were later submitted by the parties. The Judge's decision in this case was styled as an "Order Granting Respondent's Motion for Directed Judgment." The Judge noted that, between the date of hearing and issuance of his order, the U.S. Courts of Appeals for the Fourth and Fifth Circuits in McLean Trucking Co. v. O.S.H.R.C., 503 F.2d 8 (4th Cir. 1974) and Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230 (5th Cir. 1974) specifically held that §1910.132(a) is not unconstitutionally vague, and is valid and enforce-

(contd.)

I.

There can be no doubt that respondent understood the meaning of the terms "hazards" and "processes" as they are applied to its meat-cutting operations. It is obvious that respondent, an employer engaged in retail meatcutting, knew that its butchers use sharp knives and knew that they are used in a manner to expose meatcutters to abdominal injuries. It is equally clear, and there is no claim to the contrary, that respondent was apprised before issuance of this citation of the existence and availability of a form of personal protective equipment known as protective aprons.3/ Evidence of record establishes that protective aprons have been used in respondent's retail facilities on a limited individual basis for many years. The understanding by the person subject to a particular regulation is a relevant criterion in determining whether notice of required or proscribed conduct is adequate. See National Ass'n of Ind. Tel. Pro. & Dist. v. F.C.C., 516 F.2d 526, 539 (2d Cir. 1975).

Moreover, the majority's reading of the standard requiring it to meet a "reasonable man" standard of care is unwarranted. The use of a

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2/contd.
able. Consequently, the Judge reversed his earlier conclusion that the standard was invalid and based his order on the Secretary's failure to prove a hazard. The Judge characterized his order as a "directed judgment." Perhaps it more accurately should be considered as a motion for involuntary dismissal under Fed. R. Civ. P. 41(b). Inasmuch as such a motion may be made only by the defendant and may be renewed at the end of the defendant's case, see Walden Corp. v. Schwey, 482 F.2d 550, 552 (5th Cir. 1973), it should not be granted unless the inadequacy of the plaintiff's case is clear.

3/Application of the standard to retail meatcutting is not such a novel application as to approach that degree of surprise violative of due process. It is in no respect fundamentally unfair. See Colten v. Kentucky, 407 U.S. 104, 110 (1972).

"reasonable man" test as a standard of care detracts from the Act's purpose and the Congressional objective of raising the level of safety consciousness above that existing before passage of the Act. Coughlan Constr. Co., CCH 1975-76 OSHD para. 20,106, 3 BNA OSHC 1636 (Nos. 5303 & 5304, 1975) (concurring opinion). To use a test so dependent on the behavior or customs of the persons or industry regulated blunts the purpose of the Act and the standards promulgated pursuant to it, and also tends to make the Commission little more than a "specialized jury," a role disapproved by the U.S. Court of Appeals for the Fourth Circuit in Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1262 (4th Cir. 1974).

II.

The Secretary has sufficiently established a "hazard" of "process" within the meaning of the standard. The majority's reliance on evidence of "only" four accidents is misplaced.

In a case involving a citation for violation of §1910.132(a) for failure to provide wire mesh gloves to employees engaged in cutting sausage in a meatcutting facility, the U. S. Court of Appeals for the Ninth Circuit was not persuaded that an absence of injuries established that the hazard was not such as to necessitate the use of protective equipment. In Brennan v. Smoke-Craft, Inc. & O.S.H.R.C., No. 74-2359 (9th Cir., Feb. 13, 1976), the Court stated:

> Respondent's accident free safety record, standing alone, cannot support the Commission's order.
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> While the fact that respondent's employees have never reported an injury resulting from the cutting process may be some evidence as

> to whether a reasonably prudent man would protect against such a hazard, it is not conclusive [footnote omitted]. 'One purpose of the Act is to prevent the first accident.' Lee Way Motor Freight, Inc. v. Secretary of Labor, 511 F.2d 864, 870 (10th Cir. 1975). The goal would not be achieved if the Secretary were required to await an accident before issuing a citation. Petitioner need not show the occurrence of actual injury before citing an employer for violation of the Act. Lee Way Motor Freight, supra at 870; Ryder Truck Lines, supra at 233.

Smoke-Craft, Inc., supra (slip op. at 5).

The Act is intended to prevent future injuries. Ryder Truck Lines, supra at 233. Accord, Brennan v. O.S.H.R.C. & Underhill Constr. Corp., 513 F.2d 1032, 1039 (2d Cir. 1975); Brennan v. O.S.H.R.C. & Vy Lactcs Laboratories, Inc., 494 F.2d 460, 463 (8th Cir. 1975). The majority's discussion does not reveal how many injuries of a particular level of gravity must occur before they would find a violation of the standard. I would find a violation based on the evidence of a hazard of process regardless of whether that hazard has yet resulted in injury.

The evidence in this case plainly demonstrates that the hazard associated with boning meat while unprotected by an apron is stab wounds rather than the less severe cuts associated with other meatcutting procedures. In respondent's reply brief before the Commission it admits what is clear from the evidence of record - that some of its employees bone meat by pulling the knife toward themselves, although the process may be accomplished by cutting away from one's body. On page 2, the reply brief reads, in part, as follows:

> It is therefore respondent's position that it should not be required to provide aprons at great expense to protect employees who for a maximum of one and a half hours per week (Tr. 36, 58-59) elect not to follow proper procedures and, instead, choose to carelessly pull the knife toward themselves in order to complete their work more quickly. In short, no "hazards of processes" exist if boning is done properly.

Respondent's argument runs to the cost of the aprons and not to the existence of a hazard. Respondent has certainly not established that the conduct of its employees in boning meat by pulling the knife toward themselves was unpreventable.[4/] One of respondent's meatcutters testified that he "very seldom" saw anyone bone meat by cutting away from himself and that "the majority of the people that I know of . . . bone toward themselves."

Respondent plainly acknowledges the regular and known exposure of its employees to the hazard of knife wounds while boning meat, a hazard of process within the meaning of the standard. The standard involved requires protection against this hazard by means other than a work rule requiring the movement of the knife away from the body. The standard implicitly recognizes that human characteristics such as skill and intelligence as well as carelessness and fatigue, along with many other qualities, play a part in an individual's job performance, and it avoids dependence on human conduct to increase safety. See A & M Sheet Metal, Inc., CCH 1975-76 OSHD para. 20,099, ____ BNA OSHC ____ (No. 4435, 1975] (dissenting opinion), citing,

4/ See e.g., National Realty & Constr. Co., Inc. v. O.S.H.R.C., 489 F.2d 1257, 1265-67 (D.C. Cir. 1973).

Hartford Accident & Indemnity Co. v. Cardillo, 112 F.2d 11 (D.C. Cir. 1940), cert. denied, 310 U.S. 649 (1940). Complainant's witness Keifer, a meatcutter, made the following remark in this regard:

> Anytime that you have an accident, it is carelessness, or you wouldn't do it. It is because you are in a hurry in trying to get something done and you just get careless.

In addition, the record discloses sufficient evidence to both establish the existence of a hazard of process and to satisfy the majority's unwarranted insistence that the hazard be such as to put respondent's industry on notice of the existence of the hazard of knife cuts.

James Keifer, a meatcutter employed by respondent with 25 years experience, testified as follows:

> Q Have you ever stabbed yourself?
>
> A Yes, sir, twice.
>
> Q In your opinion, could either one of these stabbings [have] been prevented if you had been wearing an apron?
>
> A Definitely.
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> * * *
>
> Q Now, would you describe the apron we have talked about that you feel would have prevented the stabbings when you stabbed yourself?
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> A Well, the mesh apron would be worn around your waist down to the groin or to cover the groin. At any time if you would accidentally have the knife slip from the bone that you are boning the meat away from, it would prevent a stomach wound.

Elmer Perkins, a union officfal with 24 years experience as a meatcutter, testifted as follows concernfng a stabbfng fnjury he observed in 1954:

> Q Now, would you describe the accident and how it occurred?
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> A He was loosening up the bones on the back-side of it, and when he was coming back around this way here, the knife hit a piece of cartilage, and when it did, it busted right through on him, the knife.
>
> Q Was this man using the process that has been described earlier where he is to pull the knife, standing beside and pulling the knife to his side?
>
> A At that time the bone was in between him and the meat, so he was perfectly safe over there until he hit that piece and it slipped right on through. His knife was going in that direction, then it went through that joint, hit that joint right here and it just shot it off this way.
>
> Q And what was the result of him stabbing himself?
>
> A He very nearly died.

Exposure by respondent's meatcutters to the hazard of stab wounds while boning meat has been established by this record. The record also reveals sufficient use of protective aprons in respondent's own stores to apprise respondent of an appropriate item of personal protective equipment to lessen the hazard.