UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
SOUTHEASTERN PAPER PRODUCTS EXPORT
Respondent.

OSHRC DOCKET
NO. 92-1769

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 March 24, 1993. The decision of the Judge will become a final order of the Commission on April 23, 1993 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 April 13, 1993 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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Review Commission
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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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: March 24, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-1769

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SECRETARY OF LABOR, Complainant, v. SOUTHEASTERN PAPER PRODUCTS EXPORT, INC., Respondent.	OSHRC Docket No. 92-1769

Appearances:

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Ft. Lauderdale, Florida
For Complainant

Jon K. Stage, Esq.
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For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Southeastern Paper Products Export, Inc. (Southeastern), contests alleged serious violations of 29 C.F.R. § 1910.212(a)(3)(ii), for failure to guard the point of operation of a paper cutting machine; of 29 C.F.R. §§ 1910.219(d)(1) and .219(e)(1)(i), for failure to guard belts and pulleys of a drill press; and of 29 C.F.R. §§ 1910.37(q)(5) and .37(q)(6), for failure to have directional and fully illuminated exit signs in its plant. Southeastern denies that the

conditions cited constitute violations of Occupational Safety and Health Administration (OSHA) standards.

Southeastern is a paper converter and exporter, converting paper from rolls to sheets and to other-sized rolls (Tr. 11). A family group owns and operates 21 companies (including Southeastern) in 17 countries (Tr. 169). In 1990 Southeastern began operating a newly designed and built facility in Miami, Florida (Tr. 150). On January 29, 1992, Mark Bruck, a compliance officer with OSHA, conducted an inspection of the Miami facility. A citation was issued on May 5, 1992, under the provisions of the Occupational Safety and Health Act of 1970 (Act). Jurisdiction and coverage are admitted (Answer, ¶¶ I, II).

Alleged Serious Citation
Item 1: 29 C.F.R. § 1910.212(a)(3)(ii)

The Secretary contends that, contrary to 29 C.F.R. § 1910.212(a)(3)(ii), three blades of an automated paper cutting machine were not guarded. The standard provides:

> (a) *Machine guarding* -- (3) *Point of operation guarding* . . . (ii) The point of operation of machines whose operation exposes an employee to injury, shall be guarded . . . or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

Southeastern utilizes a slitter machine (a Wills LSC cut-size rolling machine) to slit and cross cut rolls of paper into 8½ x 11 inch sheets (Tr. 17, 152). The slitter is a large piece of machinery, approximately 15 feet long and 6 feet wide (Tr. 33, 34). The slitter knives are located 40 to 45 inches above the ground (Tr. 36). An employee attempting to reach the first unguarded blade from the edge of the machine must extend his arm at least 33 inches (Tr. 183). The machine contains 6 "very sharp" circular rotating knives or "slitter rings" (Tr. 18). The first, second and sixth slitter rings have partial guards, which the Secretary of Labor (Secretary) considers to be adequate protection for those blades. The third, fourth, and fifth slitter rings have no guards and are the subject of the alleged violation (Exh. C-1, Tr. 76).

Was There a Hazard?

The language "whose operation exposes an employee to injury" in 29 C.F.R. § 1910.212(a)(3)(ii) requires a showing of hazard. Were Southeastern's employees "exposed to injury" within the meaning of the standard? This is one of the standards "promulgated by the Secretary which contains requirements or prohibitions that by their terms need only be observed when employees are exposed to a hazard described generally in the standard." *Austin Bridge Company*, 7 BNA OSHC 1761, 1765, 1979 CCH OSHD ¶ 23,935, p. 29,021 (No. 76-93, 1979). The burden of proving that a hazard exists at "the point of operation" rests with the Secretary.[1]

Bruck did not see the slitter in operation and based his conclusions about exposure on assumptions. Bruck photographed the machine within easy reach of the blades, where he understood the operator would stand (Tr. 72). The Secretary relies almost exclusively on the fact that the knives are "razor sharp" and on his assumption that employees worked in close proximity to the blades. The knives are sharp. With a running speed of 400 feet per minute, the blades could amputate or severely cut fingers caught under them. The Secretary assumes that a hazard of amputation exists for the slitter operator or for an employee who might trip or fall into the blades.

The distance an employee works from the blades is disputed. Even were this not the case, distance is not the only determinative factor. The standard contains no minimum distance that the operator's hands must remain from the point of operation of the machine. How the machine functions and how it is operated by the employees must also be considered. As the Review Commission noted in *Rockwell International Corp.*, 9 BNA OSHC 1092, 1097-1098, 1980 CCH OSHD ¶ 24,979 (No. 12470, 1980):

> The mere fact that it was not impossible for an employee to insert his hands under the ram of a machine does not itself prove that the point of operation exposes him to injury. Whether the point of operation exposes an employee to injury must be determined based on the manner in which the machine functions and how it is operated by the employees.

---

[1] Southeastern's assertion that the standard is properly read to define "point of operation" as the place from which the operator performs the work is contrary to the plain meaning of § 1910.212(a)(3) and is rejected.

The Secretary misunderstood the distance employees remained from the slitter knives. She did not properly consider the operation of the slitter in reaching a determination of hazard.

Bruck was unfamiliar with the function of the specific machine. He possessed a general knowledge, but did not see the machine in operation or interview employees concerning its use (Tr. 113). Contrary to Bruck's contention that operators stood within easy reach of the slitter knives, slitter operators stood at a control station at least 6 feet from the knives (Tr. 48, 152). Even when not at the controls and performing other normal duties, operators were not required to be nearer to the knives while the machine was running. For example, since the blades were permanently set for 8½ inch paper, employees did not adjust the knives while the machine was operating (Tr. 183). When the knives were changed out every month to six weeks or when the paper was loaded into the slitter, the machine was not running (Tr. 39, 42). Although Bruck suggested that an employee might reach into the knives to brush dirt off the paper, Southeastern's president, who had 35 years' experience in the industry, explained that the machine produces a stream of air which obviates a need to reach onto the paper (Tr. 185).

Two regular employees and one part-time employee operate the slitter. Each is experienced and well trained. Only one employee operates the machine at any one time. The operator is ordinarily the only employee in the immediate area (Tr. 40, 41, 54, 55). Southeastern has not had an injury from the unguarded slitter knives (Tr. 37, 178). In *Rockwell*, 9 BNA OSHC at 1098, the Commission stated:

> [W]hile the occurrence of injury is not a necessary predicate for establishing a violation, the absence of any injuries here buttresses Rockwell's contention of no exposure to injury.

The Commission's reasoning applies here as well.

The distance employees maintain from the slitter knives, the manner of operating the machine, and the function of the machine itself made inadvertent contact between the employees' hands and the knives extremely unlikely. Southeastern has established that employees were not required to expose themselves to the point of the operation of the slitter. The alleged violation and proposed penalty are vacated.

Item 2a: 29 C.F.R. § 1910.219(d)(1)

The Secretary asserts that there were exposed pulleys on a Bridgeport drill press which were not guarded as required by 29 C.F.R. § 1910.219(d)(1). The standard provides in pertinent part:

> (d) Pulleys, any parts of which are seven (7) feet or less from the floor or working platform, shall be guarded. . . .

Bruck inspected Southeastern's Bridgeport press and noted that belts and pulleys located at least 6 feet from the ground level on each side of the press were not guarded. Each opening was 2 or 3 inches wide and about 10 inches long (Tr. 21, 115). The belts and pulleys were left exposed to permit operators to change the speed of the machine. This would normally be accomplished by stopping the machine, going to the side of the machine where the openings are located, loosening the pulley, and moving it to the appropriate wheel before restarting the press (Tr. 84). The press was not running when the operator changed speeds, since the belts had to be loosened in order to be moved to a different pulley (Tr. 42, 43).

The crux of the issue is exposure. Were Southeastern's employees exposed to the hazard? The belt and pulley openings were not visible from the operator's position in front of the machine. Employees would be exposed only if they walked around the side of the press while it was still running (Tr. 115). Southeastern asserts that since employees never went to the side of the machine while it was running, none of its operators or other employees were exposed to the unguarded belts and pulleys.

The Secretary argues that exposure is established because Bruck was aware of a pattern of misuse of this drill press by employees in other establishments. Bruck asserted that other operators of Bridgeport drill presses often changed the machine's speeds by using a piece of wood or other tool. The wood would be inserted into the running belt and pulleys to flip the belt to the next wheel without taking the additional time to stop the machine and move the belt in the correct way (Tr. 83). The anticipated hazard was that the wood or tool would snag and draw the employee's fingers into the nip points, causing an amputation (Tr.

84). Bruck assumed that Southeastern's employees would misuse the speed changing apparatus and thus be exposed to these hazards. This position is not persuasive.

Although relying on general experience that misuse of a Bridgeport drill press had occurred at other establishments, Bruck did not present any positive evidence that the misuse occurred at Southeastern's plant. Bruck noted that in his experience operators often "have a piece of wood lying around," yet he did not see wood or any other such tool at the operator's station (Tr. 85). He did not observe the suggested misuse, or physical evidence that it had occurred, and he did not question employees about it. Speculation based on assumptions or general knowledge is insufficient to meet the Secretary's burden of proving exposure. He must establish facts, and none were established here. It is significant that Southeastern's superintendent and its consultant, each with many years' experience in the paper industry, had not seen employees improperly change speeds as suggested by the Secretary (Tr. 51, 157). Employees were not exposed to the zone of danger of the pulleys' nip points. The alleged violation and proposed penalty are vacated.

Item 2b: 29 C.F.R. § 1910.219(e)(1)(i)

The Secretary asserted that Southeastern failed to guard horizontal belts, in violation of 29 C.F.R. § 1910.219(e)(1)(i).[2] The standard applies to belt drives and provides at § 1910.219(e)(1)(i):

> Where both runs of horizontal belts are seven (7) feet or less from the floor level, the guard shall extend to at least fifteen (15) inches above the belt. . . .

Employees approached the belt and pulley openings only when the machine was in an off position. For the reasons previously discussed, the Secretary was not persuasive in his assertion that employees would be exposed to the hazard. There was simply no proof

[2] The standard applies to power-driven belts, except belts of specific dimensions which operate at 250 feet per minute or less. Southeastern incorrectly asserts that it is the Secretary's burden to establish that the Bridgeport press operated at more than 250 feet per minute. A party claiming the benefit on an exception bears the burden of proving that its case falls within the exception. *Griffin & Brand of McAllen, Inc.*, 4 BNA OSHC 1900, 1976-77 CCH OSHD ¶ 21,388 (No. 4415, 1976); *Dover Elevator Co.*, 15 BNA OSHC 1378, 1381, 1991 OSHD CCH ¶ 29,524, p. 39,849 (No. 88-2642, 1991). This it has not done.

of misuse leading to the exposure. It is unnecessary to determine whether the belts were properly characterized as "horizontal." The alleged violation and proposed penalty are vacated.

Items 3a and 3b: 29 C.F.R. §§ 1910.37(q)(5) and .37(q)(6)

The Secretary alleges that there were insufficient directional exit signs, in violation of 29 C.F.R. § 1910.37(q)(5), and improperly illuminated signs, in violation of 29 C.F.R. § 1910.37(q)(6). These standards provide:

> (5) A sign reading "Exit," or similar designation, with an arrow indicating the directions, shall be placed in every location where the direction of travel to reach the nearest exit is not immediately apparent.
>
> (6) Every exit sign shall be suitably illuminated by a reliable light source giving a value of not less than 5 foot-candles on the illuminated surface.

The plant is newly designed and constructed (Tr. 170). Bruck noted that the plant was one of the best warehouses he had seen in his 18 years as a compliance officer (Tr. 62, 124). Measuring approximately 300 feet by 400 feet, the plant had 6 exits (Exh. R-1, p. 17). Each exit was marked with an illuminated-type exit sign. The bulbs in 3 or 4 of the signs had burned out (Tr. 88). In addition to the regular plant lighting, Southeastern had an emergency lighting system and also had lights connected to an alarm system. When the alarm went off, horns sounded throughout the plant and strobe lights flashed every 50 to 60 feet (Tr. 46, 160).

Bruck, who has taken fire safety courses and served as a volunteer fireman for 10 years, walked through the plant during the walkaround with Plant Manager McNaulty. While in the center of the plant, Bruck noted that he could not see an exit or directional sign from that position. McNaulty agreed that he could not see an exit sign (Tr. 86). The standard requires that a directional exit sign be placed wherever the direction of travel to reach the nearest exit was not immediately apparent. Each aisle leads to an exit, although each aisle did not point directly at an exit (Tr. 52). It would certainly be possible for an employee to seek an exit which was further than the nearest exit in the panic of a fire. Since paper is stockpiled in the plant, a smokey fire is more likely.

Bruck also observed that 3 or 4 of the illuminated-type exit signs had their lights burned out. Bruck and McNaulty discussed using longer-lived industrial bulbs (Tr. 134). Southeastern argued that its emergency lighting system and the strobe lights of its alarm system provide adequate light in case of an emergency. It misses the point. As Bruck explained, the red lights are more visible through smoke (Tr. 88). The standard requires that an exit sign be lighted red or a designated color, even if the lights were not internally illuminated. Southeastern has violated both exit sign standards.

Southeastern argues that it had no knowledge of the violations because a State of Florida safety inspector did not apprise it of the problem. It is immaterial to a showing of knowledge whether prior inspections disclosed violations. *Columbia Art Works, Inc.*, 10 BNA OSHC 1132, 1133, 1981 CCH OSHD ¶ 27,456, p. 32,102 (No. 78-29, 1981) (failure to issue a citation following an inspection "does not grant an employer immunity from enforcement of applicable occupational safety and health standards"); *Simplex Time Recorder Co.*, 12 BNA OSHC 1591, 1596, 1984-85 CCH OSHD ¶ 27,456, p. 35,572 (No. 82-12, 1985)(compliance is required regardless of whether an employer has previously been informed that a violation exists). Knowledge is established, since Southeastern could have known of the violation through the exercise of reasonable diligence. The "exercise of reasonable diligence" requires an employer to inspect and perform tests to discover safety-related hazards. *Prestressed Systems, Inc.*, 9 BNA OSHC 1864, 1865, 1981 CCH OSHD ¶ 25,385 (No. 16147, 1981).

The facts that Southeastern's warehouse has well-defined aisles, that each aisle leads to an exit, and that there is both emergency and alarm lighting significantly lessens the severity of a potential injury. It has not been shown that an accident would likely result in death or serious injury. The exit sign violations are affirmed and properly classified as nonserious.

Southeastern has 40 to 48 employees and has no past history of violations. Compliance officer Bruck considered that it had an excellent safety program (Tr. 90). A penalty of $200 is considered appropriate for the grouped nonserious violations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based on the foregoing decision, it is ORDERED:

(1) That the violation of 29 C.F.R. § 1910.212(a)(3)(ii) and the proposed penalty are vacated.

(2) That the violation of 29 C.F.R. § 1910.219(d)(1) and the proposed penalty are vacated.

(3) That the violation of 29 C.F.R. § 1910.219(3)(1)(i) and the proposed penalty are vacated.

(4) That the grouped violations of 29 C.F.R. § 1910.37(q)(5) and § 1910.37(q)(6) are affirmed as nonserious violations and a total penalty of $200 is hereby assessed.

/s/ Nancy J. Spies
NANCY J. SPIES
Judge

Date: March 17, 1993