United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. G. A. West & Co., Inc., Respondent.	OSHRC Docket No. **08-0400**

Appearances:

Angela Donaldson, Esq., U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For Complainant

William E. Hester, III, Esq., and Cecily L. Kaffer, Esq., The Kullman Firm, New Orleans, Louisiana
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

G. A. West & Co., Inc., is a resident contractor at a pulp mill owned by Alabama River Pulp (ARP) in Perdue Hill, Alabama. On October 6, 2007, G. A. West employee Joel Andrus sustained serious injuries while under the pulp machine at ARP's mill. He was taken by ambulance to a hospital, where he subsequently died from his injuries. Occupational Safety and Health Administration (OSHA) compliance officers Dimitrios (Jim) Critopoulos and Brian Smith arrived at ARP's mill on October 24, 2007, to inspect the accident site. Critopoulos returned to the site several more times. Upon his recommendation, the Secretary issued a citation to G. A. West on February 21, 2008, alleging a serious violation of 29 C. F. R. § 1910.261(b)(1), for failing to lock out machinery before allowing employees to work in close contact with the machinery. The Secretary proposed a penalty of $ 6,300.00 for the violation. G. A. West timely contested the citation.

The court held a hearing in the matter on July 29 and 30, 2008, in Mobile, Alabama. At the hearing, G. A. West stipulated to jurisdiction and coverage (Tr. 4-5). The parties' cross motions for summary judgment and the Secretary's motion to amend the citation to indicate a time period for

the alleged violation were held in abeyance, to be ruled on in this decision (Tr. 15). The parties have filed post-hearing briefs.

G. A. West concedes it did not lock out the pulp machine. It also concedes its employees were following company instructions at the time of the alleged violative conduct, so G. A. West was aware of their activities. G. A. West's affirmative defense of employee misconduct was not pursued because the Secretary determined the violative conduct concerned the work performed by Dale Lett and Michael Medley between October 1 and 6, 2007, and not the conduct of Joel Andrus on October 6, 2007. (Tr. 14-16).

Four issues emerged from the hearing:

(1) Did the Secretary fail to give G. A. West its statutorily mandated walk-around rights when Critopoulos returned to the site after his initial visit?

(2) Is the citation faulty and not actionable because it did not indicate when the alleged violation took place?

(3) Does § 1910.261(b)(1) apply to the cited conditions?

(4) If § 1910.261(b)(1) does apply, were employees exposed to the violative condition?

For the reasons discussed, the parties' cross motions for summary judgment are denied. The Secretary did not violate G. A. West's walk-around rights. The Secretary's motion to amend the citation is granted to allege the violative conduct occurred at the mill between October 1 and 6, 2007. Also, § 1910.261(b)(1) does apply to the cited conditions, but the Secretary failed to establish G. A. West's employees were exposed to "close contact" with the cited machinery. Item 1 of the citation is vacated.

Facts

ARP owns and operates a pulp mill in Perdue Hill, Alabama. G. A. West performs work for ARP at the mill under two contracts: a maintenance contract and a capital improvements contract. The capital improvements contract covers expansions to and modifications of equipment (Tr. 109-111).

ARPs's pulp machine processes sheets of pulp and deposits those sheets onto a "layboy table" (or "cutter layboy table") that begins in a raised position and lowers as the machine deposits more pulp on the table. The layboy is weight-driven and drops gradually as the machine deposits more pulp, until a maximum weight is reached and the table drops to within 8 to 10 inches of the

floor. After the layboy table drops to the floor, the pulp is transferred to the "transfer table" at the north end of the pulp machine. The transfer table rotates and carries the pulp away to be compressed and packaged for shipping. After the layboy table drops to the floor, it remains there for approximately 20 seconds as the pulp is transferred to the transfer table. The layboy table then rises to its starting point and the machine deposits more pulp on it. Under normal operation, the machine loads the layboy table with pulp in less than 2 minutes. The pulp machine operates 24 hours a day, 7 days a week (Exh. C-1; Tr. 29-32, 119-120, 242-243, 260-261).

If the machine malfunctions, it stops processing pulp and an alarm sounds. The conveyor belts beneath the machine begin rolling to take away the "broken" pulp. In the event of a malfunction, the layboy table automatically stops and the conveyor belts automatically start. The layboy table will not move during a malfunction (Tr. 40-41, 50-51, 123, 172-173, 261).

In Fall 2007, ARP installed a new motor and variable speed drive on its pulp machine. The new motor and drive allows the pulp machine operator to control the speed at which the machine bundles the pulp. G. A. West did not install the motor and drive, but did install approximately 30 feet of conduit and the wires that run through the conduit from the motor control center (MCC) to the new motor and drive. The conduit installation was done under G. A. West's capital improvements contract with ARP (Tr. 112-116).

G. A. West electrical superintendent Jerold Medley supervised five G. A. West employees for the conduit installation project, including his nephew Michael Medley and Dale Lett. Sometime between October 1 and 6, Medley and Lett installed conduit (three 10-foot sections), working for approximately an hour in the "maintenance tunnel" underneath the pulp machine. ARP continued operating the pulp machine while Medley and Lett installed the conduit (Tr. 36-37, 110-113, 140-141, 270).

To access the area under the pulp machine on the south side, Lett and Medley entered an opening approximately 62½ inches high and 38 inches wide. On the north side, the opening was 58 inches high and 24 inches wide. Other pipes and structural pieces underneath the machine were lower than the north and south entrances. Lett is 5 feet, 8 inches, tall. Medley is 6 feet tall (Tr. 37-38, 171, 290).

A 10-inch high concrete dike surrounds three conveyor belts underneath the pulp machine. The concrete dike angles away from the center of the area under the pulp machine, where the middle

conveyor belt is located. Lett and Medley stood beside one another, each by the angle of the dike on either side of the center, as they handled the conduit. This was the lowest conduit, installed at the bottom of the conduit rack under the pulp machine. The employees attached the conduit with clamps to "straps," "flat plates," and "flat bars" to secure the conduit. The installation required Lett and Medley to stand underneath the pulp machine, between the concrete dike and the moving layboy table, as the machine operated. The conduit rack which held several conduits was between the employees and the moving layboy table. The employees secured the conduit to four clamps spaced across the length of the conduit, using a socket wrench to manually tighten the nuts and bolts. The nuts and bolts faced towards the rising and falling layboy table, and away from where Lett and Medley were standing (Tr. 39-40, 47-50, 108, 153-155, 280, 284-288).

On October 6, 2007, G. A. West employee Joel Andrus was discovered lying on the floor near the pulp machine with serious injuries. Although no one witnessed the accident, Andrus, who was conscious immediately following the accident, told employees who came to his aid he had been injured under the layboy table. There was no reason given for Andrus to be at the pulp machine or under the layboy table. Paramedics transported Andrus by ambulance to a hospital, where he died from his injuries on October 23. That day, G. A. West notified OSHA of Andrus's death. The next day, compliance officers Critopoulos and Smith arrived at ARP's mill.

OSHA's Inspection

On October 24, 2007, Critopoulos and Smith met with several representatives for G. A. West and ARP, as well as the attorneys for the two companies, at the mill. Critopoulos interviewed employees and videotaped the pulp machine in operation. On October 30, 2007, Critopoulos returned to the mill and took additional photographs of the pulp machine. He did not notify G. A. West of his return, and no G. A. West representative accompanied him. Critopoulos returned two more times, on July 23 and 29, 2008 (the visit on the 29th occurred the night of the first day of the hearing), taking more photographs and measurements. Critopoulos did not notify G. A. West either of these times.

G. A. West claims it was prejudiced by Critopoulos's failure to notify it of his visits to ARP's mill after his initial inspection because it was denied its walkaround rights.

Section 8(e) of the Act provides:

> Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

G. A. West contends evidence gathered by Critopoulos during his October 30, 2007, and July 23, 2008, visits is "fruit of the poisonous tree" and should be excluded from the record. G. A. West cites no case supporting its contention. The Commission has dismissed cases where OSHA failed to give the employer any opportunity to accompany the compliance officer during the inspection, but only when the employer was able to show its defense was prejudiced by OSHA's failure. *Western Waterproofing Co.,* 560 F.2d 947 (8th Cir. 1977), *Pullman Pwr. Prods.,* 8 BNA OSHC 1930 (No. 78-4989, 1980) *aff'd* 655 F.2d 41 (4th Cir. 1981).

In the present case, a number of G. A. West's representatives, including its attorney, accompanied Critopoulos on his initial visit. G. A. West knew OSHA was focusing on the company's installation of conduit for the pulp machine. The pulp machine is owned by ARP and located at ARP's mill, where G. A. West has no expectation of privacy.

G. A. West argues it was prejudiced by Critopoulos's later visits since he and compliance officer Smith (G. A. West's brief, p. 7):

> did not learn of Lett's and M. Medley's activities during their October 24 inspection, they must have found out about those activities during one of Compliance Officer Critopoulos's other inspections or during his interviews when his inquiries exceeded the scope of OSHA's inspection which OSHA announced when G. A. West agreed to the October 23 inspection.

Employers are afforded walkaround rights "for the purpose of aiding such [physical] inspection." Walkaround rights do not include the right to accompany compliance officers during employee interviews. Section 8(a)(2) of the Occupational Safety and Health Act (Act), 29 U.S.C. §657(a)(2), allows the Secretary "upon presenting appropriate credentials to the owner," to enter any establishment where work is performed "and to question privately any . . . employee." G. A. West does not allege Critopoulos entered ARP's mill without ARP's permission. Critopoulos initially afforded G. A. West walkaround rights, during which it became clear the inspection related to work

on the pulp machine. Critopoulos's later visits, in continuation of his inspection, did not prejudice G. A. West's defense. G. A. West's request to exclude evidence from those later visits is denied.

Timeliness of the Citation

G. A. West contends the citation is not actionable because it does not identify the date when the alleged violation occurred. Section 9(c) of the Act provides:

> No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

The Secretary's original citation issued on February 21, 2008, alleged:

> Product Unit: The employer did not ensure that equipment such as, but not limited to, conveyors and the cutter Layboy were locked out before employees were allowed to work under the machine. The employees were exposed to struck by and crushing hazards.

After G. A. West made timeliness of the citation an issue in its motion for summary judgment, the Secretary moved to amend the citation on July 18, 2008, to allege:

> Product Unit: Between October 1 and 6, 2007, the employer did not ensure that equipment such as, but not limited to, conveyors and the cutter Layboy were locked out before employees were allowed to work under the machine. The employees were exposed to struck by and crushing hazards.

Under Federal Rule of Civil Procedure 15, amendments are freely given where the amendment adds further specificity to the charges but does not alter the conduct or occurrences at issue. The amendment must not prejudice the employer. *Dole v. Arco Chemical Co.,* 921 F. 2d 484 (3d Cir. 1998). The primary issue is whether G. A. West had adequate notice of the factual basis underlying the citation.

G. A. West is neither surprised nor prejudiced by the amendment which was filed ten days prior to the hearing. The company was aware the focus of the inspection was the time during which it was installing the conduit for the pulp machine. G. A. West's argument is rejected.

The Citation

The Secretary has the burden of proving the violation by a preponderance of the evidence.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) 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., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

G. A. West conceded at the hearing that it did not lock out the pulp machine and layboy table, and that it had instructed Lett and Medley to perform the activities the Secretary alleges is violative (Tr. 15-16). The remaining issues are whether § 1910.261(b)(1) applies to the cited conditions and whether Lett and Medley were exposed to the alleged violative condition.

Item 1: Alleged Serious Violation of § 1910.261(b)(1)

Section 1910.261(b)(1) provides in pertinent part:

> Before any maintenance, inspection, cleaning, adjusting, or servicing of equipment (electrical, mechanical, or other) that requires entrance into or close contact with the machinery or equipment, the main power disconnect switch or valve, or both, controlling its source of power or flow or material, shall be locked out or blocked off with padlock, blank flange, or similar device.

Does § 1910.261(b)(1) Apply to the Cited Conditions?

Section 1910.261(b)(1) applies when an employee's entrance into or close contact with machinery results from "maintenance, inspection, cleaning, adjusting, or servicing" of the machinery. The Secretary contends Lett and Medley were servicing the machinery.

Section 1910.261 does not define "servicing," but the general lockout/tagout standard at § 1910.147(b) defines "servicing and/or maintenance" as (emphasis added):

> Workplace activities such as constructing, **installing**, setting up, adjusting, inspecting, **modifying**, and maintaining and/or servicing machines or equipment.[1]

[1]Section 1910.147(a)(3)(ii) provides: "When other standards in this part [1910] require the use of lockout or tagout, they shall be used and supplemented by the procedural and training requirements of this section." The definitions found in § 1910.147 apply to § 1910.261(b)(1).

The moving layboy and conveyor belts are interconnected with and permanently attached to the pulp machine. All are part of a single system. Lett and Medley were installing conduit for the variable speed drive upgrade. This installation modified the existing pulp machine and layboy table. Prior to the modification, the pulp machine and layboy table operated at a constant speed. The modification allowed the operator to vary the speed at which the pulp machine operates (Tr. 22, 110-112). Modifying a machine is one of the workplace activities the standard defines as "servicing."

Lett and Medley were modifying the pulp machine system between October 1 and 6, 2007. Their modification of the machine constituted "servicing" of the machine. Section 1910.261(b)(1) applies to Lett and Medley's activities.

Were Lett and Medley Exposed to a Hazardous Condition?

G. A. West did not lockout the pulp machine while Lett and Medley modified it (Tr. 270). In order to be exposed to any hazardous condition created by G. A. West's failure to lockout the pulp machine, Lett and Medley's work must have required them to enter the machine or come within "close contact" with the machine. The Secretary contends the employees' work activities brought them into close contact with the moving layboy table and the conveyors under the pulp machine. The standard nowhere defines "close contact." The preamble to the lockout/ tagout standard provides some guidance (54 Fed. Reg. 36647):

> Performance of maintenance or servicing activities on a machine or equipment that is in operation has the potential of exposing employees not only to contact with moving machinery components at the point of operation, but also to contact with other moving components, such as power transmission apparatus, and also increases the risk of injury due to the position the employee must assume and the need to remove, bypass or disable guards and other safety devices. In many cases, these activities expose the employee to the hazard of being pulled into the operating equipment when parts of the employee's body, clothing or the material or tools used for cleaning or servicing become entrapped or entangled in the machine or equipment mechanism. The use of extension tools or devices to permit the operator to stay outside these danger areas, while of some benefit in reducing direct employee exposure to the hazards of entanglement or entrapment, can in itself, result in injuries to employees. This can occur, for example, when an employee is struck by the tools or devices that inadvertently come in contact with moving machine components, and are pulled from the employee's grasp.

The preamble indicates machine servicing that brings an employee into "close contact" with the machinery is any required activity causing an employee to be so near to a machine that his or her body, clothing, or equipment or tools could be entrapped or entangled in the machine. Accurate measurements of the distances between the moving parts of the system and the employees is crucial to analyzing the situation.

Critopoulos took various measurements when he first inspected the pulp machine area in October 2007. He documented these measurements in a diagram (Exh. C-4). At some point before the hearing, Dale Lett obtained a copy of the diagram. Lett took it upon himself to go to ARP's mill the day before the hearing and take his own measurements. Although still employed by G. A. West at the time of the hearing, Lett no longer worked at the ARP mill (Tr. 162-163, 177-178). Lett's measurements differed from Critopoulos's measurements, significantly in some cases (Tr. 157-158). After listening to Lett's testimony the first day of the hearing, Critopoulos returned to ARP's mill that night and re-measured the disputed distances. His measurements differed from his October 2007 measurements. The pulp machine was not operating that night, unlike when Critopoulos initially took the measurements. He explained the discrepancy between his measurements taken in October 2007 and those taken in July 2008 (Tr. 302): "Better measurements, machine not operating, not being concerned with my personal safety, since the table and everything was shut down. It was easier to get closer to it."

The biggest discrepancy is the distance from the floor to the conduit installed by Lett and Medley. Critopoulos initially measured this distance as 18 inches (Tr. 118). Lett estimated the distance to be 6 to 12 inches (Tr. 155-156, 160). Jerold Medley estimated the distance from the floor to the conduit to be 14 to 18 inches (Tr. 254). The second day of the hearing, Critopoulos changed his measurement to 36 inches. He explained the pulp mill operator accompanying him the night of July 29 informed him Lett and Medley had installed the conduit above where Critopoulos had originally measured. The operator "shined his flashlight and traced the conduit installed by G. A. West as it looped and came out of the machine to the south side end. . . . And, after he shined his flashlight, I realized he was correct. So, I measured from that distance to the floor, and it was 36 inches" (Tr. 304). This distance is significant because the Secretary alleges a gap of 3 feet could allow an employee bending over or crouching down to fall under the conduit and into the area where

the layboy table descended. G. A. West contends that if the gap is at most a foot and a half, an employee could not inadvertently fall under the conduit.

Neither Critopoulos nor Lett took photographs of the measurements as he made them, or had another person present during the measuring corroborate the measurements. The court expressed surprise at the hearing that an issue as crucial as the distances between the employees and the moving parts of the pulp machine system would receive such careless treatment by both parties. No attempt was made by the parties to coordinate a visit to the mill so that representatives of each party could together measure the distances at issue. At the end of the hearing, the court suggested this course of action. On August 6, 2008, the court received a letter from G. A. West's counsel, declining to make additional measurements.

Where the measurements of Critopoulos conflict with those of Lett, Lett's measurements will be accepted as accurate. Critopoulos was a credible witness, but he was hampered by the circumstances of this case. When he first measured the distances around the pulp machine system, the system was operating so he could not get close enough to the machine to make accurate measurements. He never observed Lett and Medley actually installing the conduit; he only heard about it after the installation was completed. While Lett knew exactly where he and Medley had stood when installing the conduit, Critopoulos had to guess. Critopoulos speculated as to how he thought the employees performed the installation, and took measurements based on that speculation. In one instance, Critopoulos failed to measure the distance from where the employees were working on the conduit to the layboy table, which Lett measured as 24 inches (Tr. 157-158). He mistakenly measured from a point on the conduit where the employees did not work to the end point of the layboy, where a piece protruded so the distance was only 10 inches (Tr. 313). With regard to the height of the conduit from the floor, Critopoulos's measurement of 36 inches is rejected. Jerold Medley, who supervised the installation of the conduit, and Lett, who actually installed it, both stated the conduit was no higher than 18 inches. They are credited with knowing better the location of a conduit they worked on than an unnamed ARP employee accompanying Critopoulos nine months after the installation.

Michael Medley testified the closest he came to moving machinery while installing the conduit was "close to 3 feet, probably" (Tr. 278). He estimated the closest conveyor belt was

approximately 4 feet from where he was standing (Tr. 293). Lett stated he never came closer than 24 inches to any moving part of the pulp machine system (Tr. 152). When asked if he or Medley could have fallen under the layboy, Lett responded there was no way possible to do that because, "either way you fell, you're going to fall up against the conduit rack and there's no way you could have because the height of that conduit come off the floor approximately about 6 to 12 inches" (Tr. 155). A falling employee could not come into contact with a conveyor belt because, "you've got a guard over here that protected that conveyor" (Tr. 156).

The Secretary has the burden of proving the employees were in "close contact" with the moving machinery. Such proof requires reliable measurements, taken where the employees actually worked. No weight is given to speculation and guesswork. There is no credible evidence either employee ever came closer than 2 feet to the machinery. Given the presence of the dike, the height of the conduit rack, and the configuration of the moving parts of the system, the Secretary has not established installation of the conduit required Lett and Medley to come into close contact with moving machinery. Item 1 is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

Item 1 of the citation, alleging a serious violation of § 1910.261(b)(1), is vacated and no penalty is assessed.

/s/
KEN S. WELSCH
Judge

Date: March 31, 2009