SECRETARY OF LABOR, Complainant, v. AMERISIG SOUTHEAST, INC., Respondent.	:	OSHRC Docket No. 93-1429

DECISION

Before: WEISBERG, Chairman; MONTOYA and GUTTMAN, Commissioners.

BY THE COMMISSION:

AMERISIG Southeast, Inc. ("Amerisig") is a printing company based in Atlanta, Georgia, which prints and binds magazines and color catalogues. Over a period of eight months, three Amerisig employees suffered serious hand injuries. Each injury was investigated by a compliance officer of the Occupational Safety and Health Administration ("OSHA") of the Department of Labor. In each instance, the Secretary of Labor issued

Amerisig a citation alleging that the company had violated the standard at 29 C.F.R. § 1910.212(a)(1).[1] Only the third of these citations is before us here. At issue on review are whether the instant violation was a repeated violation, and, if so, what penalty is appropriate. To determine whether the violation here was repeated, we must examine the earlier citations.

The first citation, issued on August 5, 1992, was contested. The parties entered into a settlement agreement, which was approved by an administrative law judge on December 9, 1992, and became a final order of the Commission by operation of law under 29 U.S.C. § 661(j), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act").

The second citation, which was issued on March 23, 1993, was received by Amerisig on March 25, 1993. Under section 10(a) of the Act, 29 U.S.C. § 659(a), Amerisig had fifteen working days to contest the citation or it would become a final order. Amerisig did not contest that citation, and it became a final order on April 15, 1993.

On April 16, the injury occurred which led to the citation before us. OSHA investigated and issued the citation at issue, which alleged a repeated violation of section 1910.212(a)(1) and proposed a penalty of $25,000. Administrative Law Judge Nancy Spies found that Amerisig had committed a violation but that it was not a repeated violation because she determined that the citation received by Amerisig on March 25 had not become a final order when the April 16 violation occurred, and that the hazard presented by the

---

[1]That standard provides:

> **§ 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.

August 1992 violation -- unguarded nip points on a binder -- was not substantially similar to the hazard presented by the printing press at issue here. For the reasons below, we reverse the judge.

A violation is a repeated violation under section 17(a) of the Act, 29 U.S.C. § 666(a), if, when it is committed, there was a Commission final order against the employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979). Contrary to the judge, we find that the citation received by Amerisig on March 25 had become a final order before the April 16 violation occurred. The first day of the statutory fifteen-working-day contest period was Friday, March 26. The second was Monday, March 29. Counting the working days, we determine that the fifteenth day was Thursday, April 15. Under Commission precedent, the uncontested citation became a final order on that date. *See All Phase Elect. & Maint. Inc.*, 15 BNA OSHC 1301, 1303, 1991-93 CCH OSHD ¶ 29,482, p. 39,781 (No. 90-505, 1991). Since the accident that forms the basis for this citation occurred on April 16th, there **was** a prior final order in effect at the time of the violation in question.

The Secretary may establish a prima facie case of substantial similarity by showing that the final order alleged a failure to comply with the same standard. The burden then shifts to the employer to rebut that showing. *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594, 1993-95 CCH OSHD ¶ 30,338, p. 41,825 (No. 91-1807, 1994) (citing *Potlatch*). The violations covered by the second citation and the citation here were not only substantially similar; they were nearly identical. Both occurred during the procedure known as "webbing up" the printing presses, which involves threading a roll of paper through the rollers on the press. In each case, the employee whose hand was injured was the one who was on the outflow side of the rollers, attempting to pull through paper that was being fed into the other side of the rollers by a colleague. In both cases, the injury occurred because the machine unexpectedly operated in reverse briefly, pulling the employee's hand into the rollers. The only distinguishing fact is that the March accident was caused when the employee who was

injured accidentally pushed the reverse button instead of the forward button, while the April accident occurred when an employee working on another part of the printing press hit the reverse button.[2] That "distinction" is not enough to establish that the two violations were not substantially similar. Indeed, the principal factor in determining whether a violation is repeated is whether the two violations resulted in substantially similar hazards. *Stone Container Corp.*, 14 BNA OSHC 1757, 1762, 1987-90 CCH OSHD ¶ 29,064, p. 38,819 (No. 88-310, 1990). The March and April violations presented substantially the same hazard of an employee's hand being caught in unguarded rotating machinery. We thus find that the two violations cited in 1993 were substantially similar and that therefore the violation before us was repeated. Because we find that the violation was repeated on this basis, we need not determine whether the August 1992 violation was substantially similar.

Section 17(j) of the Act, 29 U.S.C. § 666(j), 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. Amerisig has 2,500 employees. As for its history, Amerisig had three violations in an eight-month period, all resulting in serious injuries. Although it demonstrated a degree of good faith by promptly eliminating the possibility that the March accident could recur the way it did, Amerisig did not completely eliminate the hazard. Nevertheless, as the judge noted, Amerisig was very cooperative during the inspection. The remaining factor is gravity, which the Commission has considered to be the principal factor. *E.g., Nacirema Operating Co.*, 1 BNA OSHC 1001, 1003, 1971-73 CCH OSHD ¶ 15,032, pp. 20,043-44 (No. 4, 1972). Certainly the severity of any resulting injury was shown by the

---

[2]We reject Amerisig's argument that the violation should not be found to be repeated because, following the March citation, it took the steps recommended by the OSHA compliance officer. Although the company separated the forward and reverse buttons and covered the reverse button so that it could not be activated accidentally, these steps did not completely abate the hazard, because another employee working on a different part of the machine could deliberately activate the machine in reverse without being aware that the employee involved in webbing up the machine had his hands in the zone of danger.

serious hand injuries suffered by the employees whose hands did get caught in the presses. Six employees were on the crew; two were actively involved in the webbing up process, which took five to six minutes. Given the frequency of the injuries to Amerisig's employees, three within eight months and two within six weeks, we conclude that the probability of injury was high despite the precautions taken after the March citation. Therefore, we find that the gravity was high. Upon consideration of all the factors above, we assess a penalty of $15,000.

Accordingly, we find that Amerisig committed a repeated violation of 29 C.F.R. § 1910.212(a)(1) and assess a penalty of $15,000.

/s/
Stuart E. Weisberg
Chairman

/s/
Daniel Guttman
Commissioner

Dated: July 2, 1996