SECRETARY OF LABOR, Complainant, v. S&G PACKAGING COMPANY, L.L.C., Respondent, and UPIU, and its LOCAL #774, Authorized Employee Representative.	OSHRC Docket No. 98-1107

DECISION

Before: ROGERS, Chairman; EISENBREY, Commissioner.

BY THE COMMISSION:

After an employee of S&G Packaging Company, L.L.C. ("S&G" or "Respondent") was seriously injured in an accident involving the "drive rollers" of a bag-producing machine at its Yulee, Florida plant, Occupational Safety and Health Administration ("OSHA") compliance officer ("CO") Linda E. Campbell inspected the plant. On June 16, 1998, OSHA issued a citation to S&G alleging one serious violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78, for failing to comply with a machine-guarding standard, and proposed a penalty of $6300. S&G contested the citation and penalty, and after a hearing, Administrative Law Judge Nancy J. Spies affirmed the citation and assessed a penalty of $4000. At issue on review is whether the judge erred in affirming the citation and in rejecting S&G's defense of unpreventable employee misconduct. For the reasons stated below, we affirm the judge's decision.

I. Background

The subject of the citation is machine 37, one of approximately fifty bag-producing machines at the plant.[1] The machine was oblong, with components of various heights supported by metal framework. Paper was fed into it from a large roll at one end, and finished bags exited the machine at the other end. Near the mid-section of its "operations" side was the paste "knob" and "nozzle" area where paste was applied to the paper. The paste knob was located on the outside of the machine's frame, approximately 17 inches above the floor. The nozzle was located behind the knob, "a couple of inches" inside the machine and was also approximately 17 inches above the floor. Above and slightly to the right of the knob and nozzle area on the inner side of the frame were two rotating, horizontal "drive rollers" that stretched from the operations side to the rear side. The knob was 25 inches from the "drive shaft" roller and 20 inches from the "driven web roller."[2] The drive shaft roller was directly above the driven web roller, and the gap between them measured 1.25 inches.

Also above and slightly to the right of the knob and nozzle area was a yellow metal box that protruded 8 to 10 inches from the outside of the frame, covering gears on the ends of the drive rollers. Behind this box and several inches above the drive shaft roller was a narrow bar that stretched from the operations side of the machine to the rear side. Behind the box and to the left, there were several non-powered "web" rollers.[3] Behind the box and to the right, the drive rollers were completely unobstructed. They were clearly visible to anyone walking by the machine. Immediately to the right of the drive rollers, the machine's

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[1]At the time of the hearing, the machines were "for the most part, . . . 30-plus years and older," but CO Campbell testified that S&G's plant manager, Scott Garner, told her that the drive rollers at issue were "homemade"; it is unclear from the record when they were integrated into the machines.

[2]The drive shaft roller was part of the mechanics of the printing press and did not contact the paper. The driven web roller helped to pull the paper through the machine.

[3]The CO determined that the web rollers did not require guarding.

base was narrower and had a concave shape.[4]

Bag machine operators ("tenders") spent most of their time to the far right of the paste knob and nozzle area packaging finished bags, but were also required to adjust the knob and nozzle when needed. Three or four times per shift, when the "seam paste alarm" sounded, the tender walked by the drive rollers to the knob and nozzle area. Here, the tenders would come within 1 to 2 feet of the rotating drive rollers as they bent down, knelt, or squatted to reach the knob and nozzle. If the paste on the bags was misaligned with the seams of the bags, the tender turned the knob to move the nozzle. If the paste was "skipping," the tender reached into the machine to grab the nozzle and pick off any hardened paste or accumulated debris.[5] Only if there was no paste on the bags would the tender shut off the machine.

On April 14, 1998, bag machine tender Victoria Loveland was working on machine 37, as she frequently had done since joining S&G a little more than a year earlier. The seam paste alarm had sounded at least twenty times during her shift, but she had not been able to correct the problem or get anyone to help her. When the seam paste alarm sounded again around 5:40 a.m., Loveland, who was left-handed, walked to the operations side of the machine, took the knob with her left hand, and waved to a co-worker. She testified that "[i]n [the] blink of an eye" her hair became entangled in one or both of the drive rollers, and she found herself "sitting on the floor scalped." Loveland had to undergo several rounds of surgery to treat her physical injuries.

As a result of her investigation, CO Campbell concluded that either Loveland's hair or hair accessory could have gotten caught in the rollers and drawn into the machine. In determining that the drive rollers were a hazard, she considered that the "rollers [were]

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[4]According to the testimony, all of S&G's bag machines were made up of similar components, but differed slightly in size and configuration. Ray Bennett, S&G's maintenance supervisor, testified that approximately 10 of the machines at the Yulee plant had drive rollers configured like those on machine 37.

[5]According to the testimony, employees had to check the paste application process while the machine was running because the electric "paste pump" operated only while the machine was running.

rotating at approximately 450 rpm[], [that there was] static electricity buildup,"[6] that employees were required to perform operations in the roller area, and that an accident occurred there. She concluded that the drive rollers presented a "rotating caught-in" hazard for employees checking the paste application process: "There [are] two rollers [that] rotate. When you look at this machine and you see the job that has to be done from time to time, it is obvious that . . . . [s]ome part of your body can be caught in the rotating rollers which then pull you in." In the citation, the Secretary alleged that the machine "had [drive] rollers [that] were unguarded, exposing employees to being caught in the rotating parts" in violation of 29 C.F.R. § 1910.212(a)(1).[7]

In affirming the citation, Judge Spies held that "S&G does not dispute that [section] 1910.212(a)(1) applies to the Potdevin Bag Machine at issue in this case [or] that the drive shaft rollers in which Loveland's hair became entangled were not guarded." She also held that S&G's employees were exposed to the unguarded drive rollers and that because the unguarded rollers were in plain view, S&G had knowledge of the cited condition. Additionally, she rejected S&G's affirmative defenses of unpreventable employee

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[6]Loveland testified that near the paper roll area of the machine, an employee's shirt would get "lift[ed] . . . if it's a thin shirt," but that static electricity generally did not make her hair stand on edge because she wore it in a tight bun and did not "let that much hang out to do that." Shift supervisor John Freeman concluded in his post-accident report to the safety committee that "[t]he only reason the young lady got her hair caught . . . was once in a lifetime when static electricity pulled her hair into the belt."

[7]The standard provides in relevant part:

> **§ 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.

misconduct and greater hazard.[8]

II. Discussion

To establish a violation, the Secretary must prove by a preponderance of the evidence that (1) the cited standard applies; (2) its terms were not met; (3) employees had access to the violative condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *See Mosser Constr. Co.,* 15 BNA OSHC 1408, 1411, 1991-93 CCH OSHD ¶ 29,546, p. 39,902 (No. 89-1027, 1991).

Section 1910.212(a)(1) requires the Secretary to prove that a hazard within the meaning of the standard exists in the employer's workplace. *See Ladish Co.,* 10 BNA OSHC 1235, 1982 CCH OSHD ¶ 25,820 (No. 78-1384, 1981). Under the circumstances here, the injuries Loveland received by contacting the machine clearly establish the existence of a hazard. In addition, it is undisputed and clear from the record that the drive rollers were not guarded.

To establish access under Commission precedent, the Secretary must show either that Respondent's employees were actually exposed to the violative condition or that it is "reasonably predictable by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods.,* 18 BNA OSHC 1072, 1074, 1998 CCH OSHD ¶ 31,463, pp. 44,506-07 (No. 93-1853, 1997) (citing *Gilles & Cotting, Inc.,* 3 BNA OSHC 2002, 2003, 1975-76 CCH OSHD ¶ 20,448, p, 24,425 (No. 504, 1976)). Loveland's injuries establish actual exposure to the unguarded drive rollers. *Cf. Phoenix Roofing, Inc.,* 17 BNA OSHC 1076, 1079, 1993-95 CCH OSHD ¶ 30,699, p. 42,606 (No. 90-2148, 1995), *aff'd without published opinion,* 79 F.3d 1146 (5th Cir. 1996) (fact that an employee fell through a skylight unquestionably established actual exposure to a fall hazard). In addition to actual exposure, the record also shows that access to the violative condition was reasonably predictable. Although the tenders had no operational necessity to contact the rollers directly, they were required by operational necessity to check the paste application process, which put their upper bodies and heads

[8]The affirmative defense of greater hazard is not at issue on review.

within the zone of danger. *See RGM Constr. Co.,* 17 BNA OSHC 1229, 1234, 1993-95 CCH OSHD ¶ 30,754, p. 42,729 (No. 91-2107, 1995) (holding that the zone of danger is "that area surrounding the violative condition that presents the danger to employees [that] the standard is intended to prevent"). The record shows that their upper bodies and heads were 1 to 2 feet or less from the drive rollers when they stood directly in front of the paste knob and nozzle and bent down from the waist to reach the knob or nozzle.[9] Neither the framework nor the yellow metal box would prevent contact with the drive rollers when the tenders were in this position. If an employee stood to the right of the knob and nozzle, bending, kneeling, or squatting to reach the knob would put the tender's head and upper body even closer to the right side of the rollers, where they were completely unobstructed.[10] *See ConAgra Flour Milling Co.,* 16 BNA OSHC 1137, 1149-50, 1993-95 CCH OSHD ¶ 30,045, pp. 41,243-44 (No. 88-1250, 1993) (finding exposure where employees worked 1 to 1.5 feet away from unguarded belts and pulleys and neither the operation nor the configuration of the machine would prevent the employees from approaching the belts and pulleys), *rev'd in part on other grounds,* 25 F.3d 653 (8th Cir. 1994); *cf. Mosser,* 15 BNA OSHC at 1413, 1991-93 CCH OSHD at p. 39,904 (finding exposure where employees performed various tasks in close proximity to a crane's moving gears). Thus, we conclude that the tenders worked within the zone of danger of the drive rollers and were exposed to the hazard.[11]

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[9]This testimony was corroborated by employee Gary Scipio, who had operated a number of different machines, including machine 37, and who testified that he had reached "[r]ight in the same area" of the machine where the accident occurred to straighten folded paper, as he was trained to do.

[10]The judge's finding that a left-handed employee would get even closer to the drive rollers than a right-handed employee is supported by the record. Loveland testified that because she is left handed, she was "even closer" to the machine than the other employees. Scipio, who testified that he would bend down from the waist and would be "right up against" the frame of the machine, described Loveland's position as a result of her being left-handed as "backwards," which would place her head closer to the right and unobstructed side of the drive rollers.

[11]The judge did not err in finding that an employee could fall and come in contact

(continued...)

To establish employer knowledge, the Secretary must show that the employer was aware of the physical conditions constituting the violation. Here, it is clear that S&G had actual knowledge that the drive rollers were not guarded. Respondent concedes in its brief that "the rollers in this area are open and obvious: there is nothing to block the operator's view of the rollers as she is walking by the machine." CO Campbell and several employees testified that the rollers were in plain view and visible to anyone who walked by the machine, and the photographic exhibits fully support this point. Additionally, CO Campbell testified that Scott Garner, S&G's plant manager, and Paul Wedyck, S&G's safety manager, told her during the investigation that they did not consider the rollers a hazard but admitted that they were aware of the rollers' unguarded condition.[12] Contrary to S&G's contentions, the

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[11](...continued)
with the rollers. Loveland testified that when the paper broke and the tender had to rethread the machine, there were loose pieces of paper on the floor. CO Campbell described them as a tripping hazard. Moreover, Loveland and Bennett stated that "[s]ometimes" there was paste on the loose paper and/or spilled paste on the floor. Loveland testified that tenders were advised that when they had to rethread the machine, they should "get the machine running before you clean up your mess to save down time." Loveland also testified that on at least two occasions, she observed grease on the floor near the roller area of her machine. Moreover, relief leadman and mechanic Stanley King confirmed that an employee could contact the rollers if he or she "fell into something . . . or stumbled."

[12]Respondent suggests that OSHA's failure to cite the drive rollers during previous inspections is proof that there was "[n]o [a]pparent [n]eed" for guarding. It is well established, however, that the Secretary's failure to cite a condition does not amount to a determination that the condition does not constitute a violation. *See Seibel Modern Mfg. & Welding Corp.,* 15 BNA OSHC 1218, 1223-24, 1991-93 CCH OSHD ¶ 29,442, pp. 39,679-81 (No. 88-821, 1991) (and cases cited therein). Moreover, there is no evidence that OSHA made any representations that deprived Respondent of fair notice of the standard's requirements, and S&G does not contend otherwise. *Compare Miami Indus.,* 15 BNA OSHC 1258, 1264, 1991-93 CCH OSHD ¶ 29,465, p. 39,742 (No. 88-671, 1991) (OSHA's affirmative representations that it considered the employer in compliance deprived the employer of fair notice), *aff'd in relevant part and set aside in part without published opinion,* 983 F.2d 1067 (6th Cir. 1992).

Respondent's additional argument that "no one in the industry guards the [drive] rollers"
(continued...)

Secretary need not show that "S&G knew or should have known the rollers exposed employees to a hazard." *See Phoenix Roofing,* 17 BNA OSHC at 1079 & n.6, 1993-95 CCH OSHD at p. 42,606 & n.6; *Peterson Bros. Steel Erection Co.,* 16 BNA OSHC 1196, 1199, 1993-95 CCH OSHD ¶ 30,052, p. 41,299 (No. 90-2304, 1993), *aff'd,* 26 F.3d 573 (5th Cir. 1994). However, the record shows that S&G had knowledge that its employees worked in close proximity to the unguarded drive rollers.

We conclude, therefore, that the Secretary established a *prima facie* violation of section 1910.212(a)(1).

III. Unpreventable Employee Misconduct

S&G raised the defense of unpreventable employee misconduct. Under Commission precedent, to prevail on the affirmative defense of unpreventable employee misconduct, an employer must show that it has (1) established work rules designed to prevent the violation, (2) adequately communicated these rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations have been discovered. *See Propellex Corp.,* 18 BNA OSHC 1677, 1682, 1999 CCH OSHD ¶ 31,792, p. 46,589 (No. 96-0265, 1999).

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[12](...continued)
does not negate employer knowledge. As a threshold matter, industry practice is not relevant where a standard prescribes employer conduct in specific terms and is not vague. *See Cleveland Consol.,* 13 BNA OSHC 1114, 1117, 1986-87 CCH OSHD ¶ 27,829, pp. 36,428-29 (No. 84-696, 1987). Moreover, the evidence on this point does not support S&G's position. Wedyck testified that *to his knowledge* no one in the industry guards these rollers. However, Wedyck was not an expert on industry practice, and his experience appears limited to work at two other companies that manufactured bags, including a parent company of S&G. Although John Brabham, who worked at another bag plant before joining S&G as a machine adjustor, testified that his former employer had machines with similar unguarded drive rollers, he admitted on cross-examination that many of its machines were equipped with "interlocks" and "paper break switches" that would shut down the machines under certain circumstances. Additionally, King, a relief leadman and mechanic, testified that some machines, including a number of S&G's machines, have "LS-1" switches that shut off the machine if the paper breaks, edge guides that adjust automatically without paste nozzles, and paste knobs at waist level as opposed to the 17-inch level for the machine at issue here, factors that might bear on whether guarding would be required.

S&G had work rules addressing some of the hazards posed by the machinery. A March 12, 1998 memorandum provides in relevant part: "Employees having hair shoulder length or longer must keep it tied back so it does not swing around shoulders to the front or put it up under a hat. This must be done for your protection and to keep clothes, hands and hair from getting caught in any machinery." S&G's "Safety Rules and Procedures" booklet provides in relevant part: "Secure long hair when working around all moving equipment." Additionally, Respondent's "Job Safety for New Employees" booklet provides in relevant part: "Keep hands and feet away from moving machinery" and "Do not put your hands in any piece of moving machinery."[13] These rules, however, would not prevent the violation. Specifically, the rules as written did not prohibit the tenders from bending down, kneeling, or squatting to make adjustments to the knob and nozzle, which put their upper bodies and heads within 1 to 2 feet of the rotating drive rollers, *i.e.,* within the zone of danger. *See Mosser,* 15 BNA OSHC at 1415, 1991-93 CCH OSHD at p. 39,906 (rejecting the defense because the employer's rule prohibiting employees from "greasing" a crane's gears while the gears were engaged did not prohibit employees from performing other tasks near the gears while they were engaged).

The focus of S&G's defense relates to the implementation of its hair rule and the condition of Loveland's hair on the night of the accident. As noted above, we find that operation of the machines placed employees' upper bodies and heads within the zone of

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[13]The record shows that S&G made some efforts to communicate its rules to its employees. The safety memorandum stating the hair policy was "posted . . . on the cork board where the schedules [were] hung." S&G covered its "Safety Rules and Procedures" booklet "at least once a year and also at one of [its] monthly training sessions." New employees received copies of S&G's "Job Safety for New Employees" booklet, completed an orientation, and worked closely with trainers for several weeks before being required to operate the machinery on their own. S&G also made efforts to discover violations of its work rules; supervisors and safety committees regularly inspected the plant for problems. Additionally, S&G had a written disciplinary plan entitled "Safety Infractions and Recommended Disciplinary Action" which set out a system of progressive discipline: "First occurrence, documented verbal warning and counseling[.] Second occurrence, documented written warning and counseling. Third occurrence, documented three day suspension without pay and counseling. Fourth occurrence, termination of employment."

danger. Thus, even strict implementation and employee compliance with the employer's hairstyle rule would not have obviated the guarding requirement imposed by the standard.[14]

The command not to put hands in moving machinery was also not implemented as written, and in fact, employees were trained to perform tasks that violated it. When Duane Foreman, a tender, was asked whether he was trained to shut off the machine when the paste alarm sounded, he testified "[o]ur supervisor used to tell us if it was something small, keep it running. And, that's a small thing. If you can fix it right away, that's a small thing. You don't have to shut it off for that." When questioned about whether he *should* shut off the machine when performing the paste operation because it amounted to reaching into moving machinery in violation of S&G's rules, he responded, "[t]echnically, you do, but the way I was trained, you know, there is nothing back there that would hurt you, back where the seam paste nozzle is. And, the way I go in there, there is nothing there that would hurt you." When Foreman was asked what would happen if a supervisor saw him reaching into the

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[14]Commissioner Eisenbrey notes that, in any event, S & G did not meet its burden to establish that Loveland's hair failed to comply with company policy. The judge found that "[t]he evidence was convincing that having one's hair in a ponytail fully met the requirements of the work rule, at least as it was enforced by S&G." S&G argues that the judge's finding "ignores that part of the rule that clearly states that hair must be tied back in a manner that it does not swing in front of the shoulders." Yet, one of Respondent's own witnesses, Edna Parker, a "bag collator operator" who served on her shift's safety committee and trained new employees, testified explicitly that prior to the accident, long hair had to be pulled back from the sides of the face, but that wearing a ponytail or banana clip was permissible.

Loveland testified that she had her hair tied up in a bun on the night of the accident that "probably got messy," but "didn't fall down or anything." S&G relies on the testimony of machine adjustor Bruce Tubman who testified that he was familiar with the S&G hair policy and that on the night of the accident Loveland's hair did not comply with it. Tubman's description of Loveland's hair, however, reveals his apparent mistake. Thus, he described Loveland's hair as "a thing in the back of her head right up to her head and the hair was hanging down," like a ponytail. Most significantly, he stated that her hair went down "[t]o about her shoulders, maybe not quite that far." Even if some of Loveland's hair hung down from her bun like a ponytail, and even if Respondent's policy would prohibit a ponytail that could swing in front of the shoulders, Tubman's testimony does not establish that Loveland's hair hung down far enough to swing in front of her shoulders, or otherwise violated S&G's hair rule.

machine to adjust the seam paste nozzle, he responded that the supervisor would not say anything because "[e]verybody does it." Additionally, as noted, employee Gary Scipio testified that when dealing with problems involving folded paper, he would reach "[r]ight in the same area" where Loveland's accident occurred, rub his hand against the folded paper, and straighten it out while the machine was running, as he was trained to do.

The record shows that Loveland received reprimands after she injured her thumb while cleaning "built-up" ink from a moving impression roller and after she injured her hand in a "paper feed slide" while pulling paper out of a moving "bander." However, Loveland pointed out that the bander had a different configuration from the machine she usually operated and that she simply misjudged where in the machine she was placing her hand. She emphasized that the reprimand was not for reaching in while the machine was running, but for *reaching in the wrong way.* Indeed, when asked whether she was instructed to never reach into a machine while it was running, Loveland stated, "No, . . . Leo Cryder, [who] was my first trainer, actually showed me how to clean the print rollers while it was running with a putty knife. That's how I learned how to do that, and I did it. So, no, the trainers . . . are not [as safety] conscious as what [the safety booklet] says." We conclude that S&G's rules were inadequate to prevent the violation and, therefore, that its defense of unpreventable employee misconduct must fail. Accordingly, we agree with the judge and affirm the citation.

IV. Penalty[15]

In assessing penalties, the Commission must give due consideration to the employer's prior history and good faith, the size of the employer's business, and the gravity of the cited violations. 29 U.S.C. § 666(j); *see J.A. Jones Constr. Co.,* 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993). The Secretary proposed a penalty of $6300, and the judge assessed a penalty of $4000.

On review, we give S&G credit for its history because there was no evidence of other recent violations. In regard to good faith, we note that S&G had a written safety program

[15]The parties stipulated that the violation, if found, was serious.

that it distributed to all employees, trained its new employees extensively, conducted safety meetings, and had safety committees that met regularly and inspected the plant for problems. On balance, therefore, we give S&G credit for good faith. In regard to size, we note that during the time in question, S&G was a large employer, with 279 employees. Finally, the gravity of the violation in this case was high. While the likelihood of an accident was not great, the consequences in the event of an accident were severe. We therefore find the penalty of $4000 assessed by the judge to be appropriate.

V. Order

For the reasons set forth above, we affirm a serious violation of 29 C.F.R. § 1910.212(a)(1) and assess a penalty of $4000.

/s/
Thomasina V. Rogers
Chairman

/s/
Ross Eisenbrey
Commissioner

Date: August 2, 2001

Secretary of Labor,
Complainant,

v. OSHRC Docket No. **98-1107**

S & G Packaging Company, L.L.C.,
Respondent,

and

UPIU, and its Local No. 774,
Authorized Employee
Representative.

Appearances:

Leslie John Rodriquez, Esquire
U. S. Department of Labor
Office of the Solicitor
Atlanta, Georgia
For Complainant

John T. Groark, Esquire
Clausen & Miller
Chicago, Illinois
For Respondent

Ms. Victoria Loveland
Yulee, Florida
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

S & G Packaging Company, L. L. C., contests a citation issued to it by the Secretary on June 16, 1998. The Secretary issued the citation following an inspection of S & G's facility by Occupational Safety and Health Administration (OSHA) compliance officer Linda Campbell on April 16 to April 22, 1998. Campbell inspected the facility after OSHA received notice that S & G employee Victoria Loveland was scalped on April 15, 1998, when her hair became entangled in the drive shaft rollers of a paper bag machine. The Secretary cited S & G for a serious violation of §1926.212(a)(1) for failing to provide adequate machine guarding for the drive shaft rollers.

S & G admits jurisdiction and coverage. A hearing was held in this matter on January 20 and 21, 1999, in Jacksonville, Florida. The United Paperworkers International Union (UPIU) and its Local Number 774 elected party status as the authorized employee representative in this case. The Union was represented at the hearing by Victoria Loveland, the injured employee. The Secretary and S & G have filed post-hearing briefs. S & G contends that it was not reasonably foreseeable that an employee would bring his or her head within the zone of danger of the unguarded drive shaft rollers. S & G also asserts the affirmative defenses of unpreventable employee misconduct and greater hazard.

For the reasons set out below, the undersigned finds that S & G committed a serious violation of §1926.212(a)(1).

Background

S & G manufactures paper bags at its plant in Yulee, Florida.[16] S & G owns and operates several machines used to produce paper bags and grocery sacks for fast food chains and grocery stores (Tr. 268).

Victoria Loveland began working at S & G on March 17, 1997, almost 13 months before her accident. S & G assigned Loveland to be the bag machine tender for Potdevin Bag Machine #37 (Exh. R-15; Tr. 16).

The paper bag machine has a roll mounted in the rear from which paper is fed into the machine and then threaded through drive shaft rollers (also referred to as web rollers) in the center of the machine. The drive shaft rollers move the print unit that prints logos on each paper bag. From here, paper is fed to a former, where the bag is actually made and sent out to the front of the bag machine. The bag machine tender packs bags at the front of the machine and does not need to go to the side of the machine, unless the roll must be changed, the paper breaks, or the seam paste alarm goes off (Exhs. C-4, R-5, R-6, R-7, and R-8; Tr. 16-20, 66-69, 97, 103, 137, 161). The drive shaft rollers are 1¼ inches apart (Exh. C-2).

The seam paste sector of the machine consists of an applicator, a knob, a nozzle, and an electric pump. The paste flows from the pump and through the nozzle onto the paper. The nozzle,

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[16] S & G is a limited liability corporation formed between Stone Container Corporation and Gaylord Container Corporation. On November 18, 1998, Jefferson Smurfit Corporation and Stone Container Corporation merged, forming Smurfit-Stone Container Corporation.

which is located inside the knob, adjusts the paste alignment. The knob on the outside of the machine flips the nozzle to enable the machine tender to determine if the seam paste is flowing (Exh. C-4; Tr. 17, 24-26, 33, 35, 44, 91). The seam paste knob and nozzle are located 2 feet below the drive rollers and 17 inches above the floor level (Exh. R-12; Tr. 26-27, 73, 76-77). The seam paste knob is located on the right side of the machine, if one is standing at the back of the machine, facing forward.

The seam paste alarm or sensor alerts the machine tender when a bag is dry. S & G trains its bag machine tenders to check the seam paste application process for problems when the seam paste alarm goes off (Tr. 23, 61). The seam paste alarm normally goes off three or four times during an eight-hour shift (Tr. 22, 98, 121).

When the seam paste alarm goes off, either a bag has not gotten enough paste, the paste is too thick or skipping, or the seam paste needs adjustment. If there is no paste at all on the bag, the bag machine tender shuts off the machine, which stops the seam paste from flowing through the pump. Otherwise, the bag machine tender continues to run the machine to determine if the paste is too thick, if the paste is blocked, or if there is some other reason why the seam paste is not being applied properly. If this is the case, while the machine is running the bag machine tender must adjust the knob or the nozzle, or both; or the tender must clear hardened paste from the nozzle to keep the paste flowing (Tr. 17, 23, 25-26, 36, 44, 61-62, 81, 89, 91-92, 98-101, 104-105, 109-110, 121-122, 129-130, 137-138, 146-147).

To reach the seam paste knob and nozzle, the bag machine tender must either bend down, squat, or kneel beside the side frame of the bag machine (Tr. 37, 75-76, 100-101, 112, 122, 126, 131-132). The frame of the machine is between the bag machine tender and the drive shaft rollers. The rollers are not guarded (Tr. 72, 76; Exh. R-11).

On April 15, 1998, at approximately 5:40 a.m., Loveland, who is left-handed, responded to the seam paste alarm (Tr. 21, 415). The seam paste alarm had gone off approximately 20 times during her shift. Because of the unusual frequency of alarms, Loveland had asked adjustor Kevin Davis to check machine #37, but he did not do so. Loveland bent at the waist as she stooped to

adjust the knob with her left hand. Somehow her hair became entangled in the drive shaft rollers and her scalp was torn from her head. Loveland managed to jerk herself away from the rollers and turned off the machine. She required several major surgeries to treat her injuries. Due to the trauma of the accident, Loveland cannot recall specific details regarding how the accident happened (Tr. 416-417).

Alleged Serious Violation of §1926.212(a)(1)

The Secretary alleges that S & G committed a serious violation of §1926.212(a)(1), a general standard, which provides:

> 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.

The Secretary has the burden of proving her case 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., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

S & G does not dispute that §1910.212(a)(1) applies to the Potdevin Bag Machine at issue in this case, nor does it dispute that the drive shaft rollers in which Loveland's hair became entangled were not guarded. S & G argues that the Secretary failed to establish the there was foreseeable employee access to the drive shaft rollers. It also asserts that it had no knowledge that a violative condition existed.

Employee access

In *Rockwell Intl. Corp.*, 9 BNA OSHC 1092, 1097-1098 (No. 12470, 1980), the Commission held:

> 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.

The employer is not required to protect against every conceivable injury that could possibly occur during the use of a machine. The Commission has stated:

> [I]n order for the Secretary to establish employee exposure to a hazard she must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger. We emphasize that, as we stated in *Rockwell*, the inquiry is not simply whether exposure is theoretically possible. Rather, the question is whether employee entry into the zone of danger is reasonably predictable.

Fabricated Metal Products, Inc., 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (citations and footnotes omitted).

S & G argues that there is no operational necessity for a bag machine tender to come within the zone of danger of the drive shaft rollers. S & G cited the testimony of several of the employee witnesses in support of this argument, but their testimony is not unequivocal on this point.

Bruce Tubman is an adjustor for S & G (Tr. 134). S & G's counsel asked Tubman if there was any reason for Tubman to come into contact with the drive shaft rollers when responding to a seam paste alarm. Tubman said there was not. However, when S & G's counsel went on to ask, "Are you at all times usually at least two feet or more away from the driver rollers?" Tubman responded, "Not at all times, no, sir" (Tr. 148).

Edna Parker is a bag collator operator for S & G (Tr. 226). She was a bag machine operator for approximately 15 years and has trained many new employees in the use of the bag machines (Tr. 226-227). She testified that there was no operational reason for a machine tender to come into contact with the drive shaft rollers (Tr. 233), but she also stated that she considered the unguarded drive shaft rollers to be a safety concern (Tr. 231).

Stanley King is an S & G employee and president of UPIU Local 774 (Tr. 221). When asked if there was any operational reason for a machine tender to come into contact with the drive shaft rollers, he responded, "Not those two parts, unless they fell into something of that sort or stumbled" (Tr. 222). It is noted that some grease, ink, or paste may be present on the floor near the paper bag machine, presenting a potential slipping hazard (Tr. 313-314-413).

Counsel for S & G repeatedly framed the question as being whether there was any operational reason for the bag machine tender to come into contact with the rollers. This question

misrepresents the issue. The issue is not whether employees could be brought, by operational necessity, into contact with the rollers; the issue is whether operational necessity could bring employees into the *zone of danger* of the rollers, *i.e,* the area surrounding the rollers.

> The Secretary may prove employee exposure to a hazard by showing that, during the course of their assigned working duties, their personal comfort activities on the job, or their normal ingress-egress to and from their assigned workplaces, employees have been in a zone of danger or that it is reasonably predictable that they will be in the zone of danger . . . . The zone of danger is determined by the hazard presented by the violative condition, and is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent.

RGM Construction Co., 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995) (citations omitted).

The record establishes that it was reasonably predictable that operational necessity would require the machine bag tenders to be in the area surrounding the unguarded drive shaft rollers that presented a danger to the employees. The seam paste knob is located 17 inches above floor level, requiring anyone adjusting it to bend, stoop, squat, or kneel down. The knob is located 2 feet below the drive shaft rollers. The upper body of anyone reaching for the knob would necessarily be brought into the zone of danger of the rollers.

S & G cites several cases in support of its claim that it was not reasonably predictable that an employee would come within the zone of danger of the drive shaft rollers. In *Syntron, Inc.,* 11 BNA OSHC 1868 (No. 81-1491-S, 1984), the Commission affirmed an order vacating a citation where an employee stood approximately 1 foot from the unguarded blade of a bandsaw while setting it up and then turned on the saw, made the cut, and then shut off the machine. The judge determined that there was no reason for the operator's hands to come close enough to the blade to be exposed to a hazard.

In *Trinity Industries, Inc.,* 14 BNA OSHC 1594 (No. 88-1027, 1990), the administrative law judge found no violation of §1910.212(a)(1) for failure to guard the revolving chuck dogs on a metal lathe. The judge found that the operator stood approximately 4 feet away from the lathe's revolving parts, and that any contact with them would have to be a deliberate act by the operator.

In *Jefferson Smurfit,* 15 BNA OSHC 1419, 1422 (No. 89-0553,1991), the Commission reversed the administrative law judge, holding that a violation of §1910.212(a)(1) cannot be found in the absence of evidence that the operator would have any reason to put his hands close enough to the unguarded parts of the machinery to be exposed to a hazard.

These cases differ from the present case in that the machinery the employees were working

on did not require them to reach down to a point 17 inches above floor level. Those cases are concerned with employees' hands getting caught in rotating parts. They do not involve hazards where employees' heads are brought into the zone of danger of the rotating parts.

There was much speculation at the hearing as to how Loveland's hair became entangled in the rollers. S & G attacked her credibility by asserting that her testimony contradicted her prior statement to Campbell regarding her location and the position of her feet at the time of her accident. Loveland was quite forthright in stating that she could not recall the details of her accident (Tr. 79). Knowing the exact manner in which Loveland's accident occurred is not essential to the determination of whether S & G violated §1910.212(a)(1). "[I]t is the hazard, not the specific incident that resulted in injury . . . that is the relevant consideration in determining the existence of a recognized hazard." *Kelly Springfield Tire Co.,* 10 BNA OSHC 1970, 1973 (No. 78-4555, 1982), *aff'd* 729 F.2d 317 (5th cir. 1984).

What is relevant is how Loveland routinely operated the seam paste knob. A significant fact, which neither the Secretary nor S & G pursued, is that Loveland is left-handed (Tr. 415). The seam paste knob would be located to the right of an employee walking from the front of the machine to the seam paste knob. Loveland explained that when she approached the seam paste knob from the front of the bag machine, she squatted down and reached out with her left hand. Doing so brought her upper body leaning closer to the machine than it would if a person reached with his or her right hand.

It is foreseeable that a left-handed employee might operate the bag machine. Left-handed people necessarily operate machinery and equipment somewhat differently from right-handed people. It is reasonably predictable that reaching with the left hand for a knob that is to the employee's right as he or she approaches it would bring the employee's upper body farther into the zone of danger.

A case that is more apposite (and that neither party cited) is *Evergreen Technologies, Inc.,* 18 BNA OSHC 1528 (No. 98-0348, 1998), which was decided by the undersigned on facts similar to those in the present case. *Evergreen* concerned a company which used Instron machines to test the quality of the barricade fencing that it manufactures. The Instron machine consisted of two vertical supports with a 3-foot long cross head running between them. The two vertical supports housed internal drive screws. The drive screws were guarded with plastic accordion guards. One of the guards had become detached from its location, exposing the left drive screw.

While *Evergreen's* lab technician was operating the Instron machine, she dropped some

barricade samples behind the machine, a not uncommon occurrence during a lab technician's shift. Normally the lab technician would walk around the machine to pick up the dropped samples; but on that day, the lab technician asked another employee to pick up the dropped sample. The employee did not immediately see the sample. In order to point it out to the employee, the lab technician placed her knee on her chair and reached her upper body between the left vertical support and the upper clamp as the machine was operating. The lab technician's hair was caught in the unguarded drive screw. The lab technician's scalp and one ear were torn from her head. One of her thumbs was amputated as she tried to free her hair from the drive screw.

In *Evergreen*, the undersigned found that the company did not violate §1910.212(a)(1) because the Secretary failed to establish employee access to the zone of danger (18 BNA OSHC at 1529):

> There is no "operational necessity" that would require employees to be in the drive screw's zone of danger.
>
> * * *
>
> It is reasonable to assume that employees would retrieve the dropped samples, either by reaching through the machine or walking around it, only before or after a test was run. Evergreen could not reasonably anticipate that an employee would drop a sample, insert a sample into the clamps, turn away to start the machine at the keyboard, and then turn back to the machine and reach through the moving parts to retrieve the sample. Aside from the obvious hazard and inconvenience this would cause, the technicians knew that any contact with the moving parts of the Instron machine would invalidate the test results.

The present case is distinguishable from *Evergreen.* Here, Loveland's duties as a bag machine tender required her to bring her head within the zone of danger of the rollers. No one knows exactly how Loveland's accident occurred, but King, who was called as witness by S & G, testified that an employee could come in contact with the rollers if "they fell into something of that sort or stumbled" (Tr. 222). Such inadvertence is foreseeable, especially when an employee is required to shift his or her weight by reaching down to adjust a knob close to the unguarded rollers.

In *Evergreen*, the lab technician was injured while performing an act unrelated to her duties as a lab technician. Here, Loveland was injured while performing one of her duties as a bag machine tender. Operational necessity requires the bag machine tender to be within the zone of danger. Inadvertence can cause contact with the rollers. The Secretary has established that the bag machine tenders have access to the violative condition.

Employer knowledge

The unguarded drive shaft rollers were in plain view of everyone in S & G's facility. New S & G employees were specifically instructed not to reach into the drive rollers, which were "open and obvious" (Tr. 232). S & G was aware of the unguarded rollers.

Nevertheless, because the Secretary had never cited S & G for this during nine previous OSHA inspections, S & G argues that it did not understand that the condition constituted a violation (Exh. R-18; Tr. 189-190, 247-248). It is unknown, of course, whether OSHA previously observed employees using the paste knob. It is well-established that the employer "cannot rely on OSHA's earlier failure to issue a citation to later argue a lack of knowledge of the hazardous condition." *Columbian Art Works, Inc.,* 10 BNA OSHC 1132, 1133 (No. 78-29, 1981).

S & G also argues that it had no previous complaints from the employees, the Union, or the safety committee regarding the rollers. Machine guarding of exposed rotating parts should not be dependent upon employee complaints. It is the employer's responsibility to recognize safety hazards and protect against them. The fact that employees were instructed not to reach into the rollers while the machine is operating demonstrates that S & G recognizes that a hazard exists.

The Secretary has established that S & G committed a violation of §1910.212(a)(1). S & G stipulated that, if a violation were found, the violation was serious (Tr. 92). The burden now shifts to S & G to establish, if it can, an affirmative defense.

Unpreventable employee misconduct

S & G contends that any violation of §1910.212(a)(1) was the result of Loveland's unpreventable employee misconduct. To establish the affirmative defense of unpreventable employee misconduct, the employer must prove that (1) it established work rules to prevent the violation, (2) it adequately communicated the work rules to employees, (3) it took steps to discover violations, and (4) it effectively enforced the work rules when it discovered infractions. *Halmar Corp.,* 18 BNA OSHC 1014, 1017 (No. 94-2043, 1997).

S & G had a safety policy in effect at the time of Loveland's accident requiring employees to keep their hair back. Exhibit R-3 is a memorandum dated June 23, 1997, and posted to employees. It states in pertinent part:

> Employees having hair shoulder length or longer must keep it tied at the back of their head or put up under a hat. This must be done for your protection to keep it from getting caught in any machinery.

On March 12, 1998, approximately one month prior to Loveland's accident, S & G posted another memorandum, stating in pertinent part (Exh. R-4):

> Employees having hair shoulder length or longer must keep it tied back so it does not swing around the shoulders to the front or put it up under a hat.

Loveland testified that prior to the accident, she always wore her hair up in a bun on the top of her head while working (Tr. 30). Bruce Tubman testified that he saw Loveland several times over the course of her shift the night of her accident. He described her hair as "a thing in the back of her head right up to her head and the hair was hanging down" (Tr. 143). The hair that "was hanging down" Tubman subsequently identified as a ponytail (Tr. 143). The evidence was convincing that having ones hair in a ponytail fully met the requirements of the workrule, at least as it was enforced by S & G (Tr. 240-241).

S & G contends that Loveland violated its safety policy regarding hair, even though S & G adduced no actual proof that this was so. S & G simply argues that the accident could not have happened unless Loveland failed to tie her hair back.

S & G's position is highly speculative. The employee misconduct defense is not proven merely because the employer asserts that it is the most likely explanation as to how and accident occurred. Some other evidence must exist that points to the employee's safety infraction. None of the witnesses who testified stated that Loveland's hair was not pulled back the night of the accident. Indeed, the only witness who testified to seeing Loveland multiple times that night said that her hair was pulled back in a ponytail.

Furthermore, the affirmative defense of employee misconduct applies in situations in which the behavior of the employee, and not the existence of a violative condition, is at issue. An employer can rebut the Secretary's case by showing that it had a work rule designed to implement the requirements of the cited standard. *See Wheeling-Pittsburgh Steel Corp.*, 16 BNA OSHC 1780, 1784 (No. 91-2524, 1994).

In the present case, Loveland, as a bag machine tender, had no responsibility to guard the drive shaft rollers. Compliance with S & G's safety policy regarding hair would still leave the rollers unguarded. Section 1910.212(a)(1) requires "one or more methods of machine guarding"; its requirements are not met by implementing a work rule regarding hair. S & G's employee misconduct defense must fail.

Greater hazard

S & G argues that guarding the rollers will result in a greater hazard to its employees.

> To establish a greater hazard affirmative defense the employer must prove that the hazards caused by complying with the standard are greater than those encountered

> by not complying, that alternative means of protecting employees were used or were not available, and that application for a variance under section 6(d) of the Act would be inappropriate.

State Sheet Metal Co., 16 BNA OSHC 1155, 1159 (No. 90-1620, 1993).

S & G presented no evidence of either the application for a variance or the inappropriateness of applying for a variance. Its defense must fail.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

S & G employed 279 employees at the time of Campbell's inspection (Tr. 171-172). OSHA had not inspected S & G within three years of the April 1998 inspection that gave rise to this case. Campbell testified that she gave S & G no credit for good faith because she found deficiencies in the enforcement of S & G's safety policy (Tr. 173-174), but the undersigned saw no such evidence of a lack of good faith.

The gravity of the violation is moderately high. The probability of an accident is low, as evidenced by the fact that in over 21 years there had not been an accident like Loveland's (Tr. 246). The gravity is increased, however, by the grievous nature of the injuries likely to occur should an accident happen. It is determined that the appropriate penalty is $4,000.00.

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 upon the foregoing decision, it is hereby ORDERED that:

Item 1 of citation no. 1, alleging a serious violation of §1910.212(a)(1) is affirmed, and a penalty of $4,000.00 is assessed.

/s/
NANCY J. SPIES
Judge

Date: July 1, 1999