SECRETARY OF LABOR, Complainant, v. NATIVE TEXTILES COMPANY, Respondent.	OSHRC DOCKET NO. 01-1636

APPEARANCES:

William G. Staton, Esquire U.S. Department of Labor New York, New York For the Complainant.	Thomas Benjamin Huggett, Esquire Morgan, Lewis & Bockius, LLP Philadelphia, Pennsylvania For the Respondent.

BEFORE: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On June 11, 2001, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of a facility of Respondent, Native Textiles Company ("Respondent" or "NTC"), located in Queensbury, New York. As a result of the inspection, OSHA issued to NTC a two-item serious citation and a one-item willful citation. NTC filed a timely notice of contest, a complaint and answer were filed, and the hearing in this matter was held in New York, New York on June 18 and 19, 2002. Both parties have filed post-hearing briefs.

The OSHA Inspection

Respondent NTC operates knitting mills in Queensbury, New York and Glens Falls, New York. In May of 2001, OSHA's Albany office received a complaint about the Queensbury mill. The complaint alleged, *inter alia*, that the mill's knitting machines had missing covers and guards that exposed employees to chains, sprockets, belts and pulleys. OSHA Compliance Officer ("CO") Richard Yurczyk received the complaint and was assigned to inspect the mill. After arriving at the site and holding an opening conference, CO Yurczyk toured the facility accompanied by NTC and

union representatives. During his tour, the CO observed an area that had 96 knitting machines, 80 of which were operating. The machines were 14 feet wide and over 6 feet tall, and they were set up in six rows of 16 machines each, with a 4-foot aisle separating each row. They were also set up so that every two rows faced each other, to facilitate monitoring the machines, and the ends of the machines were 24 to 30 inches apart. (Tr. 9-12; 34-38; 59; 64; 96; 189-90; 257; C-1-2).

The CO noted that each machine had a large spool at the top which guided threads over a bar and down into the machine and that the finished fabric came out onto a roller at the bottom front of the machine. He further noted that while the faster-moving parts of the machines were covered, the machines had slower-moving chains and sprockets, many of which were not covered.[1] Specifically, the right side of each machine had an upper and a lower take-up chain and sprocket set, one that went down to the take-up roller where the finished fabric was wound and one that went up to the top roller, or spool, and was connected to the drive motor; the left side of each machine had a chain and sprocket set that operated the selvage puller and another set that turned the top roller.[2] The CO measured the lower take-up chain and sprocket set shown in C-5 to be 7 inches above the floor and recessed 6 inches and the upper take-up chain and sprocket set in C-5 to be 37 inches above the floor and recessed 27 inches; the chains and sprockets on the left side were also about 37 inches above the floor. (Tr. 35-46; 53; 95-99; 115; 119-23; 140-44; 158-59; C-2; C-5-6).

CO Yurczyk observed that about 60 of the 80 knitting machines that were running were missing at least one guard or cover on the chains and sprockets, and some of the machines had no

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[1]The chains and sprockets evidently operated at about 1 foot per minute. (Tr. 123; 276).

[2]The CO referred to all of the cited gears as take-up chains and sprockets, and he indicated that both sides of the machines had the same gears. However, based on the testimony of Cheryl Eldridge, a "threader" at the mill, I conclude that the chains and sprockets were as set out above. I also conclude, based on her testimony and that of the CO, that C-5 shows the upper and lower take-up chains and sprockets on the right side, that C-2 and C-6 show the chain and sprocket set on the left side that turned the spool, and that the selvage puller chain and sprocket set, while not appearing in C-2 and C-6, was just above and to the right of the set shown in those photos. (Tr. 120-23; 140-44; 158-59). For the sake of simplicity, all of the cited gears will be referred to as take-up chains and sprockets, except for the selvage puller chains and sprockets.

guards at all on those parts.[3] He further observed six to seven employees working in the knitting machine area while the machines were running, *i.e.*, operators checking fabric, mechanics working on machines, and individuals operating forklifts to remove rolls of fabric. The CO determined that employees in the area could have gotten hair, fingers or clothing caught in the moving chains and sprockets, which could have caused serious injuries; an operator feeling the fabric, hitting a stop button, or retrieving a dropped item could inadvertently get into the equipment, or a mechanic working on one machine could accidentally contact the moving chains and sprockets of another machine. The CO also determined that the violation was willful, due to NTC's knowledge of the condition, in particular, its efforts to guard the equipment and a previous citation it had received for a similar condition. (Tr. 12; 35; 47-63; 97; 104-05; 113-14; 155-56; C-7).

In addition to the above, the CO noted that one or more of the "stop" buttons on most of the knitting machines had defects; the manufacturer's manual showed these buttons as having red mushroom-type caps over them, and many of the caps were black instead of red or were broken off, so that, to stop a machine, an employee would have to stick a finger in the hole the cap had covered. The CO learned the buttons worked but concluded the condition was a hazard; an employee caught in a machine might have trouble finding and depressing a button without the proper cap, but, with the proper cap in place, an employee could just hit it to stop the machine. The CO also noted that a portable thread rewinder machine he saw on the floor behind a knitting machine did not have a ground pin on its plug or strain relief on its cord. He noticed first the strain relief was broken off from where the cord entered the rewinder; he then used a tester and found power was going to the cord, and he noticed the ground pin was missing when the cord was unplugged. The CO concluded either condition could have caused a shock or a burn. (Tr. 14-19; 23-32; 69-83; 103-04; C-2-4).

Willful Citation 2 - Item 1

Item 1 of Willful Citation 2 alleges a violation of 29 C.F.R. 1910.219(f)(3), which provides, in relevant part, as follows:

> *Sprockets and chains.* All sprocket wheels and chains shall be enclosed unless they are more than seven (7) feet above the floor or platform.

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[3]The CO testified that the number of machines that lacked guards was an estimate that he and Don Williams, the plant manager, arrived at during the inspection. (Tr. 35, 47).

To prove a violation of a specific standard, the Secretary must show that (a) the standard applies, (b) the employer did not comply with the terms of the standard, (c) employees had access to the violative conditions, and (d) the employer knew, or in the exercise of reasonable diligence could have known, of the violative conditions. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994). The record clearly shows, and NTC does not dispute, that the cited standard applies and that knitting machines at the mill had unguarded or uncovered sprockets and chains.[4] (Tr. 34-35; 38-48; C-5-6; C-8). NTC does dispute, however, that employees were exposed to a hazard. NTC also disputes that it had the requisite knowledge of the cited condition.

CO Yurczyk's testimony about the employees he saw walking and working around the machines is set out above, as is his explanation of why he believed the unguarded chains and sprockets were a hazard. In addition to this general explanation, however, he testified about two specific instances he observed. He saw two mechanics working at the end of one machine that was turned off, but there was another machine right next to it that was running; he noted that the distance between the ends of the machines was 24 to 30 inches, and it was his opinion that the mechanics could have inadvertently gotten their hands into the operating chains and sprockets.[5] He also saw an operator standing in front of a machine, in front of the gears shown in C-6, who ran her hand from the left to about the center of the machine across the threads going into the machine; she had to reach her hand over the chain and sprocket in C-6 and C-2 to touch the threads up above, and he estimated that her hand was 8 to 12 inches from the gears when she did so. The CO said that although no duties actually required employees to place their hands within 12 inches of the chains and sprockets when they were operating, employees walking or working around the machines could still get hands, hair

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[4]As noted *supra*, the CO testified that he and Don Williams, the plant manager, agreed during the inspection that about 60 machines had missing guards. (Tr. 37-38). At the hearing, Mr. Williams testified that "maybe 40" machines had missing guards, and Cheryl Eldridge, a threader at the mill, testified that "quite a few" of the machines did not have guards. (Tr. 132; 275-76). Based on this evidence, the testimony of William Paculavich, NTC's president, estimating that 10 to 15 machines lacked one or more guards at the time of the inspection, is clearly inaccurate. (Tr. 204; 254-55).

[5]The CO described the chains and sprockets as being on the ends of the machines, and, while he agreed they were inside the machines' end frames, he said that someone walking in between two machines would be less than an arm's length from the chains and sprockets. (Tr. 50-51; 92; 100-05).

or clothing caught in the moving gears through inadvertence or accident and sustain serious injuries.[6] The CO also said that a manual for the machines that he reviewed at the mill showed all of the chains and sprockets as having covers or enclosures. (Tr. 35; 48-53; 92-107).

In defense of this item, NTC points to the testimony of Cheryl Eldridge, a threader, operator and union steward at the mill, Don Williams, the plant manager, and William Paculavich, NTC's president.[7] (Tr. 108-10; 140; 188; 272). These three individuals testified to the effect that the chains and sprockets were not a hazard, that there was no exposure to them when they were running, and that they had never caused any injuries. (Tr. 112; 116-18; 123; 140; 144-48; 155-57; 195; 202; 209; 212; 276-77; 280-81). Further, Ms. Eldridge testified about what threaders, operators and patrollers do and the fact that while their duties require them to walk and work around the machines, such duties do not bring them near the chains and sprockets when they are operating. (Tr. 109-18; 123; 144-48; 156-58). She admitted, however, that she herself had "cleaned collars," which involved cutting away yarn that had broken off from the spool and had built up on the ends of the spool; she said that most of this work was done with the machine off but that at the end it was necessary to run the machine for about 20 seconds to get the excess yarn off and that at that point her hands could be a foot from the chains and sprockets. (Tr. 116-18; 145; 156; 160). She also admitted an employee could probably contact the chains and sprockets inadvertently and that it would not necessarily take an intentional act.[8] (Tr. 148-49; 156). Finally, she discussed her involvement on NTC's Safety Guard Team ("SGT"), which was established to get additional guards or covers for both the take-up and selvage puller chains and sprockets, and she admitted the team had stated to management in 1999

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[6]The CO testified that the chain and sprocket systems were relatively taut in nature and were moving 14-foot rolls of material, and it was his opinion that an employee who got a hand, hair or clothing caught in one of these systems might not be able to get out before serious injury, such as broken bones or a crushing injury, occurred. (Tr. 53, 57).

[7]A former NTC employee also testified at the hearing. However, for the reasons set out in NTC's brief, which are supported by the record, the testimony of this former employee is not credited. (Tr. 165-66; 177-78; 181-84; R-4). *See also* NTC's brief at p. 18 n.5.

[8]In this regard, I note Ms. Eldridge's testimony that oil sometimes leaked out of machines and onto the floor; she also testified that basically any operator, threader or mechanic could walk along an aisle or cut across an aisle to reach another area. (Tr. 113-14; 132-33; 149-50).

that someone could possibly get hurt from an unguarded chain or sprocket.[9] (Tr. 119-20; 124-38). Based on the record, NTC's assertion that the unguarded chains and sprockets were not a hazard is rejected, and I find that the Secretary has shown that employees had access to the cited hazard.

In regard to knowledge, NTC contends it did not have fair notice that the cited condition was hazardous or in violation of the subject standard. In support of its contention, NTC notes that a 1985 inspection of another mill that was later sold resulted in no citations relating to unguarded chains and sprockets; Mr. Paculavich, NTC's president, testified he was involved in that inspection, that the knitting machines in that mill were subsequently moved to the Queensbury mill, and that the issue of guarding the chains and sprockets on the machines "didn't come up."(Tr. 192; 195-97; 255-56). However, Commission precedent is well settled that OSHA's failure to issue a citation after an inspection "does not grant an employer immunity from enforcement of applicable ... standards." *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1223 (No. 88-821, 1991). NTC's assertion with respect to the 1985 inspection is therefore rejected.

NTC also notes that a 1996 inspection of the Glens Falls mill resulted in a citation with numerous items and that OSHA withdrew the items relating to conditions similar to those in this case. In particular, Mr. Paculavich testified that Item 19 alleged that three machines were in violation of the same standard cited here, that Item 12(h) alleged that 65 knitting machines violated a similar standard, and that Items 19 and 12(h) were both withdrawn in the settlement that OSHA and NTC reached; Mr. Paculavich was involved in the informal conference that led to the settlement, and, on the basis of the settlement, he concluded that there was no requirement to cover the chains and sprockets on the knitting machines. (Tr. 196-202; R-3; R-5).

CO Yurczyk testified he had reviewed the OSHA file relating to the 1996 inspection and that Item 19 alleged violations of 29 C.F.R. 1910.219(f)(3) for failing to enclose chains and sprockets on three different machines, two of which were McCreary machines and one of which was a knitting machine similar to the ones in this case. He further testified that Item 19 was withdrawn after

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[9] *See* C-8, which contains a memo of the SGT meeting minutes from November 8, 1999. The memo is from Cheryl Eldridge to Don Williams and states the following in Item 5: "We need to stay focused on getting these guards on. Safety is a big concern. We need to take care of this now." The distribution list at the bottom of this memo includes Mr. Paculavich.

evidence was presented that one machine was guarded by location, one was guarded by material, and one was "people-driven" rather than power-driven. (Tr. 59-62; 87-92; R-3; R-5). Although the CO did not testify about Item 12(h), R-3 shows that the alleged violation there is pursuant to 29 C.F.R. 1910.212(a)(1), which requires machine guarding to protect employees from hazards such as points of operation, ingoing nip points and rotating parts. R-3 describes the unguarded equipment in Item 12(h) as the knitting machines' "pad and drive," which is clearly different from the chains and sprockets cited in Item 19. In addition, Mr. Paculavich agreed Item 19 was withdrawn because the chains and sprockets were guarded by material, location or otherwise. (Tr. 257-61). I find that Mr. Paculavich was mistaken in his conclusion that the knitting machines' chains and sprockets did not need to be guarded, and NTC's assertion as to the 1996 inspection is also rejected.

Turning to the other evidence in the record relating to knowledge, Ms. Eldridge, as noted above, discussed NTC's SGT, which was established to get additional guards or covers for the take-up and selvage puller chains and sprockets. She testified that the process started with the Dirt, Oil and Grease ("DOG") Team, which was formed to resolve the problem of dirt, oil and grease getting onto the knitted fabrics; the DOG Team learned that employees were leaning onto the take-up and selvage puller chains and then leaning against the fabric, and, as a result, the SGT was formed. She also testified that the SGT's purpose in obtaining guards was, one, to take care of the dirt, oil and grease issue, and two, safety. Ms. Eldridge discussed the efforts of the SGT to get additional guards during 1999. She herself spoke to Mark Cheney, the day shift supervisor, and Don Williams, the plant manager, and Mr. Williams told her that she could contact someone to make guards for the take-up and selvage puller chains. She did so, which resulted in NTC receiving 40 selvage puller guards in 1999.[10] While further guards were needed no more were ordered because, according to Mr. Williams, the guards were very expensive and NTC did not have the funds to buy any more, and while NTC itself made some guards during that period there were still machines that lacked guards. Ms. Eldridge said that the process to cover the chains and sprockets had continued since then,

[10]Ms. Eldridge said it was the SGT's decision to get selvage guards first, rather than take-up guards, because there was "no real emergency" as to which were put on first. She also said that all the guards that were made were put on, although she agreed that there was a period in which NTC had an employee shortage and putting the guards on had been a problem. (Tr.127-29; 137).

although not on a "steady basis," and that in early 2002 NTC had put more guards on the knitting machines. (Tr. 119-20; 124-39; 150-51; C-7).

In view of the foregoing, I find that NTC was aware of the cited condition. First, as set out above, Ms. Eldridge testified that she spoke to Mr. Williams about obtaining more guards in 1999 and that he told her to locate someone to make the guards. (Tr. 124-26). Mr. Williams did not deny this fact, and his signature is on C-7, the purchase orders for the selvage puller guards NTC bought in April and July of 1999.[11] Second, the memo of the SGT meeting minutes for November 8, 1999, noted in footnote 8, *supra*, was from Ms. Eldridge to Mr. Williams, and it expressed the concern of the SGT about getting guards put on the take-up and selvage puller chains and sprockets. In fact, C-8 contains 11 memos of the SGT's meeting minutes, from December 14, 1998, to November 8, 1999. These are all from Ms. Eldridge to Mr. Williams, and it is clear from her testimony and the memos that, while they include some other matters, they mainly address the need to obtain guards for the take-up and selvage puller chains and sprockets, to get the guards put on, and to check to ensure guards are replaced after they are removed. (Tr. 124-38). Again, Mr. Williams did not deny receiving the memos. Third, Mr. Paculavich testified that it had been his practice for several years to walk through the mill every day and to have any safety problems he saw corrected. He agreed that he was on the distribution list at the bottom of the SGT memos in C-8 and that he had received those memos and had read at least some of them; he also agreed that he was aware of what the SGT was doing generally, that he had talked to Mr. Williams from time to time about guards for the machines, including guards for the take-up and selvage puller chains and sprockets, and that he would have been consulted about the purchase of any guards. (Tr. 203-04; 217; 221; 225; 228; 234-43; 247-50).

As set out above, Mr. Paculavich and Mr. Williams both testified that they did not believe that the lack of guards on the cited equipment was a hazard. (Tr. 195; 202; 209; 212; 276-77; 281). However, to establish knowledge, the Secretary need only show that the employer was aware of the physical conditions constituting the violation, not that the employer understood or acknowledged that the conditions were actually hazardous. *See, e.g., Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079, and cases cited therein. The record demonstrates that both Mr. Williams and Mr. Paculavich were

[11]Neither counsel questioned Mr. Williams in this regard or about C-8, discussed *infra*.

aware of the physical condition constituting the violation in this case, and, as management officials, their knowledge is imputable to NTC. The Secretary has therefore established the knowledge element and has satisfied her burden of proving the alleged violation.

The Secretary has classified this violation as willful. To prove that a violation was willful, the Secretary must show that it was committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1256 (No. 85-355, 1987). Moreover, as *Williams* further explains:

> A willful violation is differentiated by a heightened awareness--of the illegality of the conduct or conditions--and by a state of mind--conscious disregard or plain indifference. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Without such evidence of familiarity with the standard's terms, there must be evidence of such reckless disregard for employee safety or the requirements of the law generally that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it. It is therefore not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation; nor is a willful charge justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts are not entirely effective or complete.

Id. at 1256-57.

As indicated *supra*, CO Yurczyk testified that the willful classification was based on the fact that the company had been previously cited under the same standard and on the fact that NTC had made efforts to obtain guards but had not gotten all of the guards needed for the knitting machines. (Tr. 54-56; 59-63). NTC, however, contends it was not in willful violation of the standard.

Mr. Paculavich testified he had been in the knitting mill industry for 25 years and that he had been at the subject mill since its inception in 1995.[12] He further testified that the subject mill had acquired its older knitting machines from an NTC facility that was sold and from another business as a debt settlement. Mr. Paculavich said the eight to ten newer machines the mill bought had come with guards on the take-up and selvage puller chains and sprockets but that the older equipment had

[12]Mr. Paculavich became the president and CEO of NTC in September 2001. Before then, he was NTC's vice-president of manufacturing for four years, and, before that, the plant manager of the cited mill. As the CEO, he was ultimately the "chief safety officer." (Tr. 188-89; 203).

arrived without such guards.[13] He also said he had never heard of an injury caused by the chains and sprockets in all the years he had been in the industry and that he did not consider them a hazard. Mr. Paculavich explained that the reason the SGT had begun putting guards on the take-up and selvage puller chains and sprockets was due to the dirt, oil and grease issue and that it was never a safety consideration to his knowledge. He further explained that while the real "push" to get guards occurred in 1999, because of the severe dirt, oil and grease problem at that time, the effort to guard the machines had been ongoing since then as needed. Mr. Paculavich basically reiterated the testimony of Ms. Eldridge about NTC's efforts to get guards, and he noted that the company bought guards as it could afford to do so and that it made some guards itself; he indicated, however, that guards not being put back on after they were taken off had been a problem. Mr. Paculavich stated that he had not noticed the lack of guards on the take-up and selvage puller chains and sprockets during his walks through the mill because his focus had been on serious hazards, such as guards on the pattern wheels and the "AB" gear boxes; he indicated that if he had actually believed the take-up and selvage puller chains and sprockets were hazards he would have made sure they were guarded. He agreed that he had received copies of the memos of the SGT's meeting minutes during 1999, but nothing in them identified employee exposure to the chains and sprockets as a safety concern and he disputed the language in the November 8, 1999 memo; he also agreed that he had gotten copies of the memos of the mill's safety committee meetings during 1998, in which guards being left off the machines was mentioned, but, again, they did not identify the take-up and selvage puller chains and sprockets as a safety hazard.[14] It was clear from the testimony of Mr. Paculavich that his belief that the take-up and selvage puller chains and sprockets did not require guarding was based in large part on the fact that the citation items resulting from the 1996 inspection that involved similar conditions were withdrawn. (Tr. 188-204; 209-64; 268-70).

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[13]All of the knitting machines at the mill were made by Mayer Textile Machine Company, and, while Mayer had made a number of design changes through the years, the machines all operated essentially in the same manner; however, the two newest machines that NTC had purchased were computerized and were apparently almost completely encased. (Tr. 191-94; 206).

[14]Mr. Paculavich did not speak to or meet with any of the SGT or safety committee members about the issue of the guards; rather, he spoke to Don Williams, who, along with Mark Cheney, was responsible for such matters. (Tr. 221-22; 225; 228; 231-34; 238; 242-43; 247; 250; 268).

I observed the demeanor of Mr. Paculavich as he testified, and I found him a sincere and credible witness. It was apparent from his testimony that he truly believed that the cited condition was not a hazard and that if he had thought it was he would have ensured that guards were in place on the chains and sprockets; this conclusion is supported by his testimony about guards being in place on the pattern wheels and the "AB" gear boxes, which he said were hazardous, and by the CO's testimony that the faster-moving gears on the machines were covered.[15] (Tr. 99; 222; 236). It was also apparent that Mr. Paculavich truly believed that the withdrawal of the 1996 citation items that were similar to the cited condition in this case meant that the mill was not required to have guards on the take-up and selvage puller chains and sprockets. In particular, although he agreed that Item 19 was withdrawn because the chains and sprockets there were guarded by material, location or otherwise, he interpreted this to mean that the cited mill's chains and sprockets did not require guarding as employees did not work near them when they were operating and there was no exposure to the alleged hazard. (Tr. 197-202; 209; 257-61). Mr. Paculavich was mistaken in this regard, as found *supra*. However, based on my review of his testimony on this subject and on my recall of his demeanor as he testified, I conclude that his belief, while in error, was nonetheless held in good faith.

With respect to the SGT and safety committee memos, Mr. Paculavich testified that he never viewed the guards for the take-up and selvage puller chains and sprockets as a safety issue because of the withdrawal of the 1996 citation items and that he therefore never inquired into any of the memos that mentioned guards for that equipment, although he did speak to Mr. Williams about the guards from time to time. (Tr. 197-202; 209; 221-54; 257-61). He further testified that none of the memos identified employee exposure to the chains and sprockets as a safety issue, and he disagreed with the statement in the SGT November 8, 1999 memo indicating the guards were a safety concern. (Tr. 240; 269). In addition, he testified that the SGT began putting guards on the chains and sprockets to address the dirt, oil and grease issue and not safety. (Tr. 194-95; 209-15). I have considered the testimony of Ms. Eldridge indicating that the SGT had two purposes in obtaining

[15]This conclusion is also supported by the testimony of Mr. Paculavich and Mr. Williams, and the agreement of the CO, that there had been no injuries relating to the chains and sprockets at the mill. (Tr. 97; 195; 202; 209; 212; 276-77; 281). Mr. Paculavich and Mr. Williams also testified that they had never heard of any such injuries in their 25 years and 47 years, respectively, in the industry. (Tr. 195; 281).

guards, that is, to resolve the dirt, oil and grease problem and safety; I have also considered her testimony that the SGT had stated to management that someone could possibly get hurt from an unguarded chain or sprocket. (Tr. 130-31; 137-38). However, her testimony indicates that the only time the SGT advised management that the chains and sprockets were possible hazards was in the SGT memo dated November 8, 1999. Moreover, no other witness testified that the purpose of the SGT was to address safety as well as the dirt, oil and grease issue. Regardless, in view of my findings above, I credit the testimony of Mr. Paculavich that the purpose of the SGT was to address the issue of dirt, oil and grease getting onto the fabrics.[16] I also credit his testimony that he never viewed the guards for the chains and sprockets as a safety issue, and I note his disagreement with the language set out in the SGT's November 8, 1999 memo. Finally, I note that although Mr. Paculavich had conversations with Mr. Williams from time to time about guards, including guards for the cited chains and sprockets, there is no evidence in the record that the conversations addressed the safety of the chains and sprockets. On the basis of the evidence of record and all of the circumstances in this case, I conclude that the Secretary has not shown the "heightened awareness," "conscious disregard" or "plain indifference" required to demonstrate a willful violation. The violation is accordingly affirmed as serious.

Having found the violation to be serious, I turn now to an appropriate penalty for this item. The record shows the CO determined the severity of the violation to be medium and the probability to be low. The record also shows the CO gave NTC a reduction of 40 percent for its size and that he gave no credit for good faith due to the willful classification. He likewise gave no credit for history, but he testified at the hearing that he should have, in view of NTC's lack of OSHA violations for the past three years. (Tr. 21-22; 57-58). Based on the CO's testimony, the Secretary moved to amend the proposed penalty to reflect a 10 percent reduction for history. (Tr. 58). In her brief, however, the Secretary notes the 40 percent reduction for size was due to the CO's being told that NTC had 100 employees; she also notes the testimony of Mr. Paculavich, NTC's president, that the company

[16]In so doing, I am aware that the very name of the SGT, or Safety Guard Team, would seem to suggest a safety purpose. However, this fact, without more, does not persuade me to credit the testimony of Ms. Eldridge over that of Mr. Paculavich.

actually had 220 employees.[17] (Tr. 21; 189-90; 298). The Secretary further notes the CO's testimony that a total of 220 employees would reduce the credit for size from 40 to 20 percent. (Tr. 298). She contends that the penalties for all of the citation items in this case should be raised by 20 percent, after giving the 10 percent reduction for history. (Sec. Brief at pp. 2-3 n.1).

In view of the CO's determination as to severity and probability, I conclude a base penalty of $2,000.00 for this item is appropriate. (Tr. 20-21; 57-58). I also conclude, based on the above, that reductions of 20 and 10 percent for size and history, respectively, are appropriate. Finally, as the violation has been found to be serious, and as the CO gave a 25 percent credit for good faith for the other serious items in this case, I conclude a like credit is appropriate for this item. (Tr. 21-22; 30). Applying these to the base penalty of $2,000.00, a penalty of $900.00 is assessed for this item.

Serious Citation 1 - Item 1

Item 1 of Citation 1 alleges a serious violation of 29 C.F.R. 1910.262(c)(5), which states that:

> *Inspection and maintenance.* All guards and other safety devices, including starting and stopping devices, shall be properly maintained.

During his inspection, CO Yurczyk observed that on the majority of the 80 knitting machines that were running, one or more of the "stop" buttons had defects; he saw a manufacturer's manual that showed the stop buttons as having red mushroom-type caps, and the defects he saw included the caps being black instead of red or broken off, so that an employee would have to stick a finger in the hole the cap had covered to stop the machine.[18] The CO was told the buttons all worked, but he concluded the condition was still a hazard; an employee entangled in a machine might have trouble finding a stop button if the cap was black or broken off, whereas, with the proper cap in place, the employee could just hit the cap to stop the machine. The CO noted that photo C-2 showed a machine with a proper red mushroom button on the left-hand side. He also noted that Mr. Williams agreed

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[17]The CO remembered asking how many employees worked at the Queensbury facility, but he was not sure if he had asked about the Glens Falls facility. (Tr. 298). Mr. Paculavich, on the other hand, made it clear that NTC had a total of 220 employees. (Tr. 189-90).

[18]The CO initially indicated the hazard was the caps that were broken; he later indicated the hazard also included the stop buttons that had black caps, and he noted that the safety committee had put red stickers on those stop buttons to designate their function. (Tr. 14-19; 69-76; 103-04).

the condition needed to be corrected but said it was difficult to get replacement parts for the older machines and that NTC was looking into a different system. (Tr. 14-19; 69-76; 103-04).

NTC disputes the applicability of the standard, asserting that the stop buttons on the knitting machines were not safety devices and that the standard did not require maintaining them as the CO described, particularly since the buttons were all functional. I disagree. The discussion as to Citation 2, Item 1, *supra*, establishes that the lack of guards or covers on the knitting machines' chains and sprockets exposed employees to the hazard of being caught and sustaining serious injuries. The lack of proper caps on the stop buttons would clearly exacerbate the hazard, because, as the CO testified, an employee caught in the equipment could have difficulty finding and depressing a button that had a broken cap or was not red in color. Under the facts of this case, I find the standard applies.

NTC further disputes the CO's testimony about the caps on the stop buttons, asserting that the Secretary failed to establish the alleged violation. The record shows that there was a three-button station on either end and in the middle of each of the older machines at the mill, that each such station had a "stop," "jog" and "run" button, although the buttons were not always in the same position, and that the original stop button caps on the older machines were red.[19] The record also shows that the two newest machines both had three similar button stations, as well as an "emergency stop" button on the front and the back, and that pushing one of the latter buttons required the machine to be reset by computer before it could be restarted; the regular stop buttons on the new machines were black, and the emergency stop buttons on the front and back were red. (Tr. 14-17; 70-72; 75; 152-53; 161-63; 204-08; 277-79; C-2).

As set out above, the CO's testimony was that nearly every machine in use had one or more defective stop buttons; the defects consisted of stop buttons that had black caps rather than red ones and buttons that were broken off, both of which would have made it more difficult for employees to stop the machines. Ms. Eldridge testified that none of the stop button caps were broken at the time of the inspection and that none of the machines were such that an employee had to insert a finger into a hole to stop the equipment. (Tr. 162-63). Mr. Williams, however, testified there were two stop buttons with broken caps at that time, (Tr. 278), and Mr. Paculavich offered no testimony in this

[19]That the stop buttons on the older machines were red is supported by the CO's testimony that the safety committee had put red stickers on them to designate their function. (Tr. 14, 71; 75).

regard.[20] Based on the CO's testimony, Mr. Williams' admission and my credibility findings set out above in Citation 2, Item 1, I conclude knitting machines at the mill had stop buttons with broken caps, that some of these required an employee to insert a finger into a hole to stop the equipment, and that there were stop buttons on the older machines that were black instead of red. I also conclude that these conditions would have made it more difficult to stop the machines and exacerbated the hazard of employees getting caught in the equipment; this conclusion is supported by the evidence that the stop buttons were not always in the same position on the button stations and that NTC's safety committee had put red stickers on stop buttons to indicate their function. (Tr. 14; 71; 75; 205). The Secretary has thus shown that the terms of the standard were violated and employee exposure to the cited hazard. She has also shown employer knowledge, in that the condition was open and obvious and should have been discovered by supervisory personnel; in this regard, I note the CO's testimony, *supra*, about what Mr. Williams said about the caps. (Tr. 14; 71). The Secretary has met her burden of proving the alleged violation, and this item is affirmed.

The Secretary has properly characterized this item as serious. The CO testified that an employee who was caught in a knitting machine's chains and sprockets could have sustained injuries such as broken bones, particularly if the employee was not able to turn the machine off quickly. (Tr. 18-20). With respect to an appropriate penalty, the CO accorded this item medium severity, due to the types of injuries that were possible, and low probability, in that the likelihood of an accident occurring was relatively low.[21] The CO arrived at a gravity-based penalty of $2,000.00, and, in view of my findings in the preceding penalty discussion, a total reduction of 55 percent is appropriate, resulting in a penalty of $900.00. A penalty of $900.00 is accordingly assessed.

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[20]Mr. Paculavich testified only that he was unaware of any stop buttons being broken, which is not relevant to the issue of how many stop button *caps* were broken. (Tr. 207).

[21]I agree the likelihood of an accident was low. The record shows employees were trained in the machines and the stop buttons and that there had been no injuries as to employees being caught in the machines. (Tr. 57-58; 83-84; 97; 140; 153; 207-08). In this regard, I note that the red stickers placed on the buttons, while not abating the hazard, may at least have mitigated it. (Tr. 14; 71; 75).

Serious Citation 1 - Items 2(a) and 2(b)

Items 2(a) and 2(b) of Citation 1 allege serious violations of 29 C.F.R. §§ 1910.304(f)(4) and 1910.305(g)(2)(iii), respectively. Those standards provide as follows:

> 1910.304(f)(4) *Grounding path*. The path to ground from circuits, equipment, and enclosures shall be permanent and continuous.
>
> 1910.305(g)(2)(iii) *Flexible cords and cables*. Flexible cords shall be connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminal screws.

During his inspection, CO Yurczyk saw a portable thread rewinder machine, on the floor behind a knitting machine, that did not have strain relief on its cord; specifically, the strain relief device, a small piece of metal that should have been in place where the cord entered the rewinder housing, had broken out of the housing and was laying on the cord, as depicted in photo C-3.[22] The CO used a continuity tester and found that power was going to the rewinder, after which someone unplugged it; at that point, the CO also saw that there was no grounding pin on the cord, as depicted in photo C-4. CO Yurczyk testified that the purpose of the strain relief device was to keep the wires inside the housing from pulling loose and energizing the housing. He further testified that the missing strain relief and grounding pin together constituted a serious hazard and that while either condition could have caused a shock or burn the two together increased the severity of the potential injury. The CO said the rewinder was not in use when he saw it but that someone picking it up to use or move it would have been exposed to the cited hazard. (Tr. 23-32; 76-83; 104; C-3-4).

The foregoing establishes that the cited standards applied, that the terms of the standards were violated, and that employees were exposed to the violative conditions. NTC contends that the Secretary failed to prove that it was aware that the rewinder was damaged. However, the Secretary's burden is to show that the employer either knew, or should have known in the exercise of reasonable diligence, of the violative conditions. *See Atlantic Battery Co.*, 16 BNA OSHC at 2138, *supra*. I conclude that the Secretary has met her burden here. Ms. Eldridge, Mr. Paculavich and Mr. Williams all testified that the plant had a rule prohibiting employees from using damaged electrical equipment; specifically, an employee discovering such equipment was not to use it, was to report it to his

[22]The rewinder was used to rewind broken threads back onto the knitting machines. (Tr. 24).

supervisor, and was subject to discipline for using the equipment that was damaged. (Tr. 151-52; 208; 279-80). Regardless, the rewinder was clearly plugged in and available for use on the day of the inspection. Moreover, that the rewinder had two defects persuades me that the plant's rule was inadequately communicated and/or enforced. Finally, when the CO asked him about the rewinder, Mr. Williams admitted that it probably had been used within the last month. (Tr. 78). Based on the record, NTC should have discovered the damaged condition of the rewinder with the exercise of reasonable diligence. NTC was therefore in violation of both of the cited standards, and Items 2a and 2b of Citation 1 are affirmed.

The record also supports a finding that the items were properly classified as serious. The CO testified that the two conditions together were a serious hazard and that while either could have caused a shock or burn the two together increased the severity of the potential injury. (Tr. 28-29; 32). As to a penalty for these items, the CO testified that although the violations were serious, he considered them to have low severity and probability, in view of the types of injuries that could have resulted and the fact that the rewinder was handled infrequently. (Tr. 28-33). In light of this testimony, and applying the reductions noted above for size, history and good faith to the gravity-based penalty of $1,500.00, I conclude that a total penalty of $675.00 for these two grouped items is appropriate. (Tr. 30-31). A penalty of $675.00 is accordingly assessed.

Conclusions of Law

1. Respondent, Native Textile Company, is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. §§ 1910.262(c)(5), 1910.304(f)(4), 1910.305(g)(2)(iii) and 1910.219(f)(3).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Item 1 of Serious Citation 1 is AFFIRMED, and a penalty of $900.00 is assessed.

2. Item 2 of Serious Citation 1 is AFFIRMED, and a penalty of $675.00 is assessed.

2. Item 1 of Willful Citation 2 is AFFIRMED as a serious violation, and a penalty of $900.00 is assessed.

/s/
Irving Sommer
Chief Judge

Dated: December 9, 2002
Washington, D.C.