

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,

Complainant

v.

The News Press,

Respondent.

OSHRC Docket No. **06-0992**

Appearances:

Mary L. Bradley, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta,
Georgia

For Complainant

William B. DeMeza, Jr., Esquire, Holland & Knight, LLP, Tampa, Florida

For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

The News Press (News Press), a subsidiary of Gannett Company, prints newspapers including the “USA Today” and several weekly newspapers at a plant in Fort Myers, Florida. On December 6, 2005, the Occupational Safety and Health Administration (OSHA) initiated an inspection of News Press’ procedure for loading large rolls of paper used for newsprint onto trolleys¹ in the reel room. As a result of the inspection, News Press received a serious citation on May 30, 2006. News Press timely contested the citation.

The serious citation alleges News Press violated § 5(a)(1) of the Occupational Safety and Health Act (Act) (Item 1) for failing to protect employees from struck-by injuries when catching and guiding paper rolls onto trolley carriages and 29 C.F.R. § 1910.22(a)(2) (Item 2) for failing to

¹During the hearing, a trolley was also referred to as a “dolly” or “cart.”

maintain the floors in the “B” press area of the reel room in a dry condition. The citation proposes penalties of \$1,875.00 and \$1,500.00 respectively.

On June 20, 2006, the parties resolved Item 2 by reclassifying the violation to “other” than serious and reducing the penalty to \$1,000.00. The parties’ settlement of Item 2 is approved by the court (Tr. 5).

The hearing on Item 1, alleged violation of § 5(a)(1), was held on December 15, 2006 in Fort Myers, Florida. Jurisdiction and coverage are stipulated (Tr. 4). The parties filed post hearing briefs on March 23, 2007.

News Press denies the §5(a)(1) violation and asserts that its procedure for loading 2,000 pound paper rolls onto trolleys is not hazardous to employees. News Press points to its years of experience without injury. Also, News Press claims OSHA’s recommended abatement methods (barrier guards² or the use of a PVC pole through the center of the paper roll) are not feasible. News Press asserts unpreventable employee misconduct as to the employee involved in the three instances when a paper roll fell off the trolley during loading.

For the reasons discussed, the violation of §5(a)(1) of the Act is affirmed and a penalty of \$1,500.00 is assessed.

The Inspection

News Press is a subsidiary of Gannett Company. At its Fort Myers, Florida plant, News Press prints newspapers including the “USA Today” and several weekly newspapers. The plant operates three shifts and employs more than 700 employees (Tr. 54, 164, 167).

On November 10, 2005, OSHA notified News Press of a non-formal employee complaint regarding the loading of paper rolls used for newsprint onto trolleys in the reel room (Tr. 13-14). In response to the complaint, News Press, in a letter to OSHA, sent a videotape which demonstrated how two employees roll and load a paper roll onto a trolley. One employee is shown pushing the paper roll onto the trolley while the other employee standing in front of the paper roll uses his arms and body to keep it on the trolley carriage. Also, the letter described an incident when an employee in the reel room failed to catch and stop a paper roll from falling off the trolley carriage. The

²During the hearing, a barrier guard was also referred to as a “bumper guard.”

employee was disciplined although the reason for her failure to catch the paper roll was “unknown” (Exhs. C-4, C-5).

Based on this information, OSHA compliance officer Lawrence Anderson initiated an inspection of the reel room on December 6, 2005 (Tr. 14, 16-17, 20). However, Anderson was not able to observe the actual trolley loading procedure because it had been completed for the day (Tr. 21). Instead, News Press arranged a demonstration of the procedure (Tr. 69, 85). Anderson was also shown a barrier guard in one location. He was informed by the vice-president for human resources that the barrier guard was generally used in loading trolleys unless the guard could not be used because of the tight location (Tr. 27-28).

After Anderson’s visit to the reel room and based on his understanding of the use of the barrier guard, OSHA issued a §5(a)(1) recommendation letter. The letter notified News Press that although it was not issuing a citation, OSHA had observed a hazard and recommended abatement (Tr. 29). A copy of the letter was sent to the employee complainant.

When the employee notified OSHA that the barrier guard was never used, Anderson returned to the plant on May 18, 2006, to further investigate (Tr. 29-30). Although the trolley loading operation was already completed, night shift supervisor Anthony Rybarczyk told Anderson the barrier guard was never used during the evening shift (Tr. 35-36). Except for the material handlers who use the barrier guard during the morning staging of the paper rolls, there is no dispute the barrier guard is not used by the press operators to load trolleys in the reel room.

The reel room is a large room underneath the press room where paper rolls are loaded onto rotating reels for printing by the two printing presses on the second floor (Tr. 21, 173). Two press operators work in the reel room moving the paper rolls and loading them onto the stands of the printing presses’ rotating reels (Tr. 168, 196).³ For each printing press, there are eight reel stands and each stand holds three rolls of paper (Tr. 173). Paper rolls are loaded every shift. News Press uses approximately 70 rolls of paper a day (Tr. 183). Each roll lasts approximately 25 minutes (Tr. 183). According to the assistant director of operations, paper rolls are changed roughly every five minutes (Tr. 184).

³Two other press operators work at the printing presses upstairs (Tr. 168).

A paper roll weighs approximately 2,000 pounds and is 45 inches in diameter (Tr. 24, 234). The paper rolls are rolled on their sides. A full roll is 46 inches wide. News Press also uses three-quarter rolls (36 inches wide) and half rolls (24 inches wide) (Tr. 185).

The paper rolls are stored in a warehouse, adjoined to the reel room and are brought into the reel room on forklifts by employees identified as material handlers (Tr. 80). The material handlers who stage the paper rolls work from approximately 6:00 a.m. to 2:00 p.m. Once the paper rolls are brought from the warehouse, the material handlers roll the paper rolls onto trolleys at a single location. A trolley holds one paper roll. Loading by material handlers is a one person operation. While the material handler rolls the paper roll onto the trolley, a re-moveable barrier guard on the other side of the trolley keeps the paper roll from falling off the trolley. The barrier guard is approximately six feet long and weighs more than 100 pounds. After loading, the trolley is pushed along a track to one of the 30 locations in the reel room where the paper rolls are staged until needed by the press operators who are responsible for loading the presses' rotating reel stands (Tr. 71, 182, 184, 197-198, 200, 232).

From these staging areas, two press operators on each shift are responsible for loading the trolleys and pushing them to the reel stands as needed. To load a trolley, one press operator, the "pusher," stands behind the paper roll and rolls it on a level concrete floor onto the trolley, which is the approximate height of the floor. The other press operator, the "catcher," stands in front of the paper roll and on the other side of the trolley. According to News Press, the catcher ensures the trolley is centered underneath the paper roll and is, also, responsible for keeping the paper roll on the trolley carriage. The catcher uses his arms, chest and legs to prevent the paper roll from falling off the trolley carriage (Exhs. C-5, R-1; Tr. 24, 177, 187-188, 215). The trolley loading procedure utilized by the press operators particularly the catcher employee is the subject of OSHA's alleged §5(a)(1) violation.

The tracks upon which the trolley runs are approximately 8 inches below the dock floor where the paper rolls are staged. Each trolley weighs 136 pounds and is 24 inches long, 16 inches wide, and approximately 8 inches high (Exhs. C-6, C-10; Tr. 189). This allows the trolley's carriage to be the same height as the dock floor (Tr. 24-25). The trolley carriage is concave with a slight rise on the sides and lower in the center (Exh. C-6, photo 1 and 2; Tr. 189). Once a paper roll is loaded

onto a trolley, the trolley is manually pushed along the track which circles the area to the reel stands (Tr. 72). The record does not identify the number of trolleys in use.

During a review of News Press' OSHA 300 logs, Anderson noted that one press operator was injured on May 14, 2003, when she fell back trying to stop a paper roll from falling off the trolley. The operator lost 43 work days (Exh. C-9; Tr. 48-49, 203). Although no other injuries were recorded, Anderson found two other incidents of paper rolls falling off trolley during loading (October 26, 2005 and January 2004) involving the same press operator (Tr. 202, 219-221).

As a result of News Press' trolley loading procedure utilized by the press operators, OSHA issued the serious citation for violation of §5(a)(1) of the Act. To abate the alleged hazard to the catcher employee, OSHA recommends the use of a pole (PVC pipe) placed through the center core of the paper roll so that both employees could stand on each side of the paper roll instead of one employee in front of the paper roll as it is loaded onto the trolley. Also, OSHA recommends additional barrier guards in suitable locations (Exh. C-7; Tr. 32, 58).

Discussion

Alleged Violation of §5(a)(1) of the Act

The citation alleges that in the reel room at the A & B press trolley carriage track area, employees catching and guiding paper rolls onto trolley carriages were not protected from struck by injuries. Section 5(a)(1) of the Act provides:

Each employer -

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

A citation alleging a violation of §5(a)(1), referred to as the general duty clause, is appropriate when a specific standard does not apply to the facts. In this case, there is no dispute that there is no applicable safety standard (Tr. 47, 116).

To establish a §5(a)(1) violation, the Secretary must show (1) there was an activity or condition in the employer's workplace that constituted a hazard to employees; (2) either the cited employer or its industry recognized that the condition or activity was hazardous; (3) the hazard was causing or likely to cause death or serious physical harm; and, (4) there were feasible means to

eliminate the hazard or materially reduce it. *Waldon Healthcare Ctr.*, 16 BNA OSHC 1052, 1058 (No. 89-2804, 1993).

The Secretary must show that New Press' procedure for loading paper rolls onto trolleys was a recognized hazard likely to cause serious injury or death and there exists a feasible means of abating the hazard.

1. The Struck-By Hazard

The Commission defines a "hazard" in terms of the conditions or practices deemed unsafe over which an employer can reasonably be expected to exercise control. *Morrisson-Knudson Co./Yonkers Contracting Co., A Joint Venture*, 16 BNA OSHC 1105, 1121-1122 (No. 88-572, 1993). A hazard exists if the hazardous incident can occur under other than a freakish or utterly implausible concurrence of circumstances. An accident may demonstrate that an activity presents a hazard to employees. See *Coleco Industries, Inc.*, 14 BNA OSHC 1961, 1964 (No. 84-546, 1991).

The Secretary alleges a struck-by hazard exists if the paper roll falls off the trolley and strikes the catcher employee who is standing in front of the paper roll during News Press' trolley loading procedure. The paper roll weighs 2,000 pounds. If the paper roll fails to stop on the trolley carriage or the catcher fails to keep it on the trolley because he loses his balance or is inattentive, the paper roll could strike the catcher and cause serious injury. The record indicates that at least three times paper rolls have fallen off the trolley during loading. In the 2003 incident, the catcher moved to the side and reached with her arm to stop it. She injured her shoulder and lost 43 work days (Exhs. C-9, C-14; Tr. 49, 202-203, 207, 218-219). Although the catcher was not technically struck-by the paper roll, the incident demonstrates what could happen when a paper roll falls off the trolley. Clearly, if the catcher had remained in front of the paper roll, her injuries may have been worse.⁴

News Press claims there is no hazard to the catcher employee based on its years of loading trolleys without injury or accident. It claims the paper rolls are rolled slowly and are easily

⁴News Press' assertion of the unpreventable employee misconduct defense is rejected (News Press Brief, p. 10-11). The defense is not applicable because the purpose for identifying the accident was to show the potential hazard if a paper roll fell off the trolley during loading even if News Press' procedures were fully complied. The issue is not the conduct of the employee who was injured but News Press' paper loading procedure. Also, it is noted the employee was disciplined for failing to follow procedure which was not described by News Press. It appears the employee only failed to stay in front of the paper roll when it fell off the trolley.

controlled because of the employees' training and experience. With the concaved carriage of the trolley, the catcher is in no danger.

The hazard is being struck by the paper roll if it falls off the trolley during loading. The lack of struck-by injuries recorded by News Press is immaterial to the finding of a hazard. The Commission does not require there be a significant risk of the hazard coming to fruition, "only that if the hazardous event occurs, it would create a 'significant risk' to employees." *Waldon Healthcare Center*, 16 BNA OSHC at 1060. Also, the belief of employees that the current loading procedure is safe is not credited because there is no showing the employees have attempted to utilize other procedures except for a one week experiment (Tr. 194). Further, the belief is not shared by all employees. It is noted the employee who filed the non-formal complaint regarding the procedure did not consider it safe. According to News Press, the reason the paper roll fell off the trolley in one incident was because she was "afraid" (Tr. 207).

In this case, the hazard to the catcher employee is shown in the loading procedure (Exh. C-5). The speed and force of the paper roll onto the trolley are controlled by the pusher employee. Such speed and force could vary depending upon the strength of the pusher and distance to the trolley. The catcher who stands in front of the paper roll is responsible for maintaining it on the trolley. The catcher uses his arms, chest, and legs. The catcher must react to the speed and force set by the pusher. Other than his instincts, the catcher can not rely upon any protective devices if the paper roll travels too fast or the catcher slips, loses his balance, or is inattentive (Tr. 195, 237).

Each paper roll weighs approximately 2,000 pounds and is 45 inches in diameter (Tr. 19, 186). The trolley is only 18 inches wide. If the paper roll rolls off the trolley, it would gain additional momentum by falling 8 inches to the floor where the catcher is standing. The slight concave of the trolley's carriage has not prevented at least three incidents of paper rolls falling from a trolley during loading. Although the number of incidents appear small compared to the total number of times paper rolls are loaded onto trolleys, the purpose of the Act is to prevent the first serious injury because of a hazardous activity. The loading procedure utilized by News Press relies upon the training, skill and attentiveness of the press operators. By providing a barrier guard or other means preventing the catcher from standing in front of the paper roll, the danger from a paper roll falling off the trolley is eliminated and reliance upon the press operator's skill or attentiveness to

prevent injury is replaced. See *American Luggage Works, Inc.*, 10 BNA OSHC 1678, 1682 (No. 77-893, 1982).

A struck-by hazard to catcher employees is established.

2. The Struck-by Hazard was Recognized

A hazard is deemed “recognized” when the potential danger of a condition or activity is either actually known to the particular employer or generally known in the industry *Pepperidge Farm Inc.*, 17 BNA OSHC 1993 (No. 89-0265, 1997). The condition or activity must be a preventable consequence of a work operation over which the employer controls. *Morrisson-Knudson Co./Yonkers Contracting Co., a Joint Venture* 16 BNA OSHC 1105, 1121-22 (No. 88-572, 1993).

In this case, the struck-by hazard created by the trolley loading operation is recognized by News Press. There are at least three incidents in five years where a paper roll has fallen off a trolley during loading. In one incident, the employee sustained injury when she tried to stop the paper roll with her arm. The incident was recorded on News Press’ OSHA 300 log of injuries for the year 2003 (Exh. C-9). News Press was aware of the other two incidents although the employee was not injured (Exhs. C-4, C-14). Also, it is noted these incidents involve one of the twelve press operators. Additionally, News Press currently uses a removable barrier guard in one location during the morning staging (Tr. 197, 199). Such barrier guard does not require a catcher employee to be in front of the paper roll. News Press’ vice-president of human resources acknowledged during the OSHA inspection that the purpose of the barrier guard was “to protect machinery and people” (Tr. 51). The use of a barrier guard is recognition by News Press that the trolley loading procedure could be done by one employee without having another employee stand in front of the moving paper roll.

The paper industry also recognizes the struck-by hazard presented by handling paper rolls. In an article entitled “Handling and Storage of Paper Rolls,” the National Safety Council describes the problems in handling paper rolls because of the size, shape and weight of the rolls which make them hard to move, stop and control. Because of the possibility of being struck by a roll, the article states “the roll should be pushed or moved from the side” (Exh. C-12, para. 25; Tr. 120-121). The paper rolls used by News Press are 45 inches in diameter, weight 2,000 pounds and are rolled onto the trolleys by hand. Also, OSHA’s website contains an article developed in association with the printing industry which describes the hazards associated with rolling large rolls during transfer from

storage to presses. The photographs in the article show employees standing on the sides of the paper rolls and not in front (Exh. C-13, figures 12 and 13; Tr. 123, 124-125).

News Press' vice president of operations testified that he had observed similar trolley loading procedures in the 1980s at the Des Moines Register and a Gannett location in Rochester, New York (Tr. 231). However, neither facility continues to use the procedure; the Des Moines Register fully automated the press room in 2000 and Gannett built a new facility in 1997 (Tr. 231, 236). Thus, his testimony is not material as to industry's current recognition of a hazard.

The struck-by hazard to catcher employees in loading the trolleys is recognized by News Press and its industry.

3. The Struck-by Hazard Is Likely to Cause Injury

As another element in establishing a § 5(a)(1) violation, the Secretary must show the recognized hazard is likely to cause serious injury or death.

_ In this case, there is no dispute an employee could receive a serious injury if struck-by a 2,000 pound paper roll which fell off a trolley during loading. In 2003, one employee was injured while trying to stop a paper roll. She lost 43 days of work (Exh. C-9).

4. The Struck-by Hazard Can Be Eliminated or Materially Reduced

As the final element in establishing a § 5(a)(1) violation, the Secretary must show the proposed abatement method(s) can "eliminate or materially reduce the hazard." *Flour Constructors International Inc.*, 17 BNA OSHC 1947 (No. 92-2342, 1997). However "[i]f a proposed abatement method creates additional hazards rather than reducing or eliminating the alleged hazards, the citation must be vacated for failure to prove feasibility." *KoKosing Construction Co., Inc.*, 17 BNA OSHC 1869, 1875, fn. 19, (No. 92-2569, 1996).

_ In this case, the Secretary proposes that the struck-by hazard caused by loading paper rolls can be abated by placing a pole (PVC pipe) through the center core of the paper roll. The pole would allow both employees to stand on either side of the paper roll during loading onto the trolley instead of one employee standing in front of the paper roll (Exh C-7; Tr. 32, 58, 135-136). In some locations, the Secretary recommends the use of additional barrier guards which might eliminate the need for the catcher employee or if necessary, the guard would be in front of the catcher to protect

him from being struck by the paper roll (Tr. 57, 136-137). The barrier guard is already used by material handlers in one location during the morning staging operation (Exh. C-6; Tr. 197, 199).⁵

News Press argues the two abatement methods proposed by the Secretary are not feasible. With regard to the pole through the center core of the paper roll, News Press notes that because the paper roll is 45 inches in diameter, the pole would be approximately 23 inches above ground level; requiring employees to bend at the waist to hold the pole. News Press argues the employees would be subject to back strains trying to roll the paper roll. Also, News Press claims the pole would make it difficult centering the roll on the trolley (Tr. 193-194). For one week, two employees attempted to load trolleys from the side. According to News Press, the employees did not like it and found it difficult to center the trolley under the paper roll. However, there is no record of paper rolls falling off trolleys during loading or employees experiencing back strains (Tr. 194, 209).

With regard to installing additional barrier guards, News Press asserts there are 30 staging locations where paper rolls are loaded onto trolleys. A barrier guard is approximately 6 feet long and weighs more than 100 pounds (Tr. 71, 176). In many locations, a barrier guard would interfere with movement of the trolleys on the track unless repeatedly removed (Tr. 191). The Secretary concedes a barrier guard is not feasible in those locations (Tr. 44, 64-65, 130-131, 146).

Despite News Press' objections which for the most part are speculative and refuted by the record, the Secretary has established feasible means of abatement which would "eliminate or materially reduce" the struck-by hazard. Both methods should be considered depending on the location, if News Press in fact needs 30 staging locations for access to the presses' rotating reels. It is noted the material handlers who load the paper rolls during the morning use one location where the barrier guard is in place (Tr. 198-199). This location only requires one employee and it does not apparently interfere with the track. The use of the barrier guard by the material handlers is also not considered inefficient. The record is unclear why the same method could not be used by the press operators during the other shifts at this location or similar locations. In at least the location where re-moveable barrier guard is used by material handlers, the feasibility of same method is also shown for the press operators.

⁵There was also some discussion about automating the process. However, automation was not pursued by the Secretary because of the unknown costs (Tr. 75, 153-154).

When the pole is placed through the center core of the paper roll, the record shows that such method is feasible in those locations where the barrier guard could not be used because of the tightness of the space or the disruption to the use of the track in moving the rolls to the reel stands. The experience of the material handlers refutes News Press' argument that the catcher is needed to keep the trolley centered on the paper roll. The morning loading operation is done by a single material handler pushing the paper roll onto the trolley. There is no evidence the material handlers have problems centering the trolley under the paper rolls.

Also, News Press' concern for back strains from bending at the waist to reach the pole while pushing the paper roll is not established. The Secretary's proposal envisions the paper roll will be pushed as it is currently rolled to the trolley. The pole will be used at the trolley when loading the paper roll onto the trolley (Tr. 149-150). The pole will not be used to lift or push the paper roll. It will be used to assist in keeping the paper roll on the trolley carriage. When loading the paper roll onto the trolley, the press operators will stand at the track floor level which is 8 inches below the dock floor where the paper rolls are staged. Thus, the PVC pole will be in excess of 31 inches above the floor, at approximate waist level. By standing to the side, neither employee will be in front of the roll or the PVC pipe in a zone of danger if the paper roll should fall off the trolley. Any concern by employees regarding safety will be eliminated through proper employee safety training and regular usage. News Press' one week experiment of loading the paper rolls from the sides did not cause any injuries or run away rolls (Tr. 209).

The record establishes a violation of § 5(a)(1) of the Act.

Serious Classification

The Secretary classified News Press' violation of § 5(a)(1) as serious. A violation is serious under § 17(k) of the Act, if it creates a substantial probability of death or serious physical harm and the employer knew or should have known of the violative condition.

News Press' post hearing brief does not dispute the violation's serious classification. Also, in establishing a § 5(a)(1) violation, a serious violation by definition is established based on finding a recognized hazard that is likely cause serious injury or death. See *Plum Creek Lumber Company*, 8 BNA OSHC 2185 (No. 78-1485, 1980). News Press, through its supervisors, knew the catcher employees stood in front of the paper roll during its trolley loading procedure without any protective devices. In 2003, an employee lost 43 work days when she injured her shoulder trying to stop a paper roll (Exh. C-9).

Penalty Consideration

The Review Commission is the final arbiter of penalties in contested cases. In determining an appropriate penalty, the Commission is required, pursuant to § 17(j) of the Act, to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

News Press is not entitled to credit for size because it is a large employer with in excess of 700 employees. News Press is entitled, however, to credit for history because it has not received an OSHA citation within the proceeding three years. Also, News Press is entitled to good faith credit based on its safety program (Tr. 54, 167).

Based on giving such credit and considering the gravity, a penalty of \$1,500 is assessed for News Press' violation of § 5(a)(1) of the Act. Paper rolls are loaded during every shift (Tr. 183). There is one employee on each shift exposed to the struck-by hazard created by the trolley loading procedure (Tr. 196). Paper rolls are changed on the reel stands approximately every five minutes (Tr. 184). Each paper roll weighs approximately 2,000 pounds (Tr. 19). One employee missed 43 days of work as a result of trying to stop a paper roll which had fallen off a trolley (Exh. C-9).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

1. Citation no. 1, item 1, alleged serious violation of § 5(a)(1) of the Act, is affirmed and a penalty of \$1,500.00, is assessed; and
2. Citation no. 1, item 2, alleged violation of § 1910.22(a)(2), pursuant to the parties' settlement, is affirmed as "other" than serious and a penalty of \$1,000.00, is assessed.

/s/
KEN S. WELSCH
Judge

Date: **April 25, 2007**