UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant v. Loren Cook Company, Respondent, and USW, ALF-CIO CLC & Local Union #15485, District 11, Authorized Employee Representative.	OSHRC Docket No. **09-2119**

Appearances:

Oscar Hampton, Esquire, Office of the Solicitor, U. S. Department of Labor, Kansas City, Missouri
For Complainant

Douglas B. M. Ehlke, Esquire, Ehlke Law Offices, Federal Way, Washington
For Respondent

Gary Stewart, president, Local Union 15485, USW District 11, Springfield, Missouri
For Employees

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Loren Cook Company (Cook) manufactures air circulating equipment, such as fans and blowers, at its plant in Springfield, Missouri. On May 13, 2009, an employee operating one of Cook's small manual spinning lathes was killed when the lathe unexpectedly ejected the metal workpiece being formed by the lathe. The metal workpiece struck the employee in the head.

The Occupational Safety and Health Administration (OSHA) conducted an inspection of Cook's small manual spinning lathes. On November 10, 2009, the Secretary issued two citations

to Cook. Items 1, 2, and 3 of Citation No. 1 alleged serious violations of the personal protective equipment standards at 29 C.F.R. §§ 1910.132(a), 133(a)(1), and 138(b) respectively. On July 25, 2011, midway through the hearing in this case, the Secretary withdrew Items 1, 2, and 3 of Citation No. 1 (Tr. 2037).

Items 1 through 7 of Citation No. 2 allege willful violations of 29 C.F.R. § 1910.212(a)(1), the machine guarding standard. Each item cites a specific small manual spinning lathe. The Secretary proposed a penalty of $70,000.00 each for Items 1 through 7, for a total penalty of $490,000.00.

Cook timely contested the citations. The court held a hearing in this matter over the course of 20 days (starting in June and ending in September 2011) in Springfield, Missouri. The USW, AFL-CIO CLC and Local Union # 15485, District 11, was represented at the hearing by Local Union president Gary Stewart. Cook stipulates the Commission has jurisdiction over this proceeding under § 10(c) of the Occupational Safety and Health Act of 1970 (Act), and that it is a covered business under § 3(5) of the Act (Tr. 6). The parties have filed post-hearing briefs[1].

For the reasons discussed below, the court determines the Secretary failed to establish 29 C.F.R. § 1910.212(a)(1) applies to the cited conditions. Items 1 through 7 of Citation No. 2 are vacated and no penalties are assessed.[2]

The record of this proceeding contains thousands of pages of transcript and hundreds of exhibits. Some of the evidence went to issues that were hotly contested at the hearing, but which resolved themselves before the hearing closed (*e.g.*, the three items of Citation No.1 that the Secretary withdrew or Cook's unpreventable employee misconduct defense, which it abandoned). Other testimony was cumulative. Much of the transcript is taken up by arguments between the parties' counsel. Because the court has determined that the Secretary failed to establish the threshold element of standard applicability, it is not necessary to address several of the issues raised at the hearing, including the feasibility of abatement, fair notice, credibility of experts, willful classification, and collateral estoppel.

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[1] "Brief" is perhaps not the word for the parties' submissions; Cook's post-hearing brief ran to 330 pages, while the Secretary's was a relatively modest 68 pages.

[2] The parties made various motions prior to, during, and after the hearing. Any motions not previously ruled on in this proceeding are hereby DENIED.

Background

Operation of the Small Lathes

Cook uses four building in its manufacturing process, designated as Buildings #1, #2, #4, and #5 (the building once designated as Building #3 no longer exists). Building #1 houses the assembly and shipping operations; Building #2 houses the spinning and shearing operations, as well as the paint booth; and Building #4 houses the in-seam machine operations, the decoiler, and the brake press. Building #5 "is kind of an entity of its own. It builds a different line of product. . . [I]t's still air moving equipment, but it's very large stuff, and has everything in it" (Tr. 331).

At the time of the employee fatality, on May 13, 2009, the spinning department operated two shifts with 29 lathe operators working on 20 large, medium, and small lathes in Building #2.[3] Cook operated seven small manual spinning lathes, designated as lathes #14 through #20. The basic configurations and operations of the small lathes were similar regardless of the model (Exhs. C-74 and C-83).

The small lathes are industrial turning machines that have a motor with an attached horizontal spindle mounted on two base beams that support the machine components and attachments (Exh. C-35; Tr. 2019). Attached to the lower base support is the tool rest support. The tool rest is attached to the tool rest support. The tool rest is used to support the components the lathe operators use to form the industrial metal that Cook fabricates (Exh. C-4). The tool rests are rectangular steel parts that have holes uniformly spaced along one edge. The lower base support extends the full length of the machine (Exhs. C-9 and C-12).

The tailstock is mounted to the upper base support and is secured by two bolts that are located on either side of the tailstock metal casing. The tailstock has a crank shaft on its end, a live center, and a tailstock locking mechanism (Exh. C-12). The live center is a cylindrical housing at the end of a recessed shaft that releases when the tailstock crank is rotated (Exh. C-2). The lathe operator uses the crank shaft to advance the live center forward to secure the piece called the tailblock to the metal disk and chuck (Exh. C-35).

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[3] This court previously presided over a case involving the same parties, represented by the same counsel, in 2005. In that case, the court vacated a citation alleging a serious violation of § 1910.212(a)(1), issued to Cook for its failure to guard certain semi-automatic spinning machines at their points of operation when operators applied mutton during the lubrication process. Although the court found a hazard existed, it held that Cook established guarding the machines was infeasible. The court's decision was not reviewed by the Commission. It became a final order on July 21, 2006. *Loren Cook Company*, 21 BNA OSHC 1705 (No. 04-2179, 2006).

To operate a small lathe, the operator places a flat aluminum or steel disc (also referred to as a blank or workpiece) between the tailstock and the chuck. The chuck, which comes in various sizes, determines the shape into which the disc will be formed. The operator selects a tailblock to secure the disk to the chuck. The operator mounts the tailblock on the live center and rotates the tailstock crank to release the shaft that advances the tailblock toward the chuck and disk. With the tailstock near or up against the face of the disk and chuck, the operator may start the machine to "true up" the tailblock to the chuck and disk. If there is no discernible side-to-side wobbling, the tailstock bolts and live center locking mechanisms are tightened and the tailstock stop block is secured up against the tailstock and tightened down. The tailblock is now up against the chuck and disk (Exhs. C-2, C-4, C-18).

The operator then adjusts and positions the tool rest support and the tool rest itself so his tools are correctly positioned to form the workpiece. An operator may use a roller, egg tool, scissor bar, cutter bar, cornering tool, or stick of maple wood to form the workpiece. Except for the maple wood and the cutter bar, the tools are attached to the tool rest with a perpendicular pin. The scissor bar and roller tool are used together to form the workpiece (Exhs. C-12 and C-108).

To form the part, the operator applies a lubricant known as mutton to the face of the workpiece. As the workpiece rotates, the operator makes passes with the roller tool along the surface of the workpiece using leverage to form the disk in the shape of the chuck. The workpiece is then removed from the chuck and the process starts again. At the time of the accident, only the large spinning lathes were equipped with machine guards. The small lathes that the Secretary cited in the instant case were not guarded (Exhs. C-42 and C-51).

Approximately two weeks prior to the accident that gave rise to this proceeding, an operator was spinning on lathe #15. The lathe ejected the workpiece. No one was injured, but the workpiece narrowly missed an employee standing approximately 20 feet behind the operator. Cook discovered upon investigation of the incident that the pin had broken, causing the mechanism to wobble and ultimately eject the workpiece (Tr. 1305-1307).

Missing Guards

The large spinning lathes (not cited in this proceeding) have been equipped with "tool rest guards" since the early 1990s. Cook lathe operators fabricated the tool rest guards because they saw a need for protection from ejected workpieces. The tool rest guards (also referred to as pipe

structures, rest guards, pipe guards, and hay racks) generally have three or four metal horizontal ribs attached to two perimeter outer posts. The height and width of the guards are configured so they can be attached to the tool rest for each of the large spinning lathes. The guards provide protection from ejected workpieces to the operators and other employees in the area during forming operations (Exhs. C-47 and C-51; Tr. 1249, 1257-1258).

The tool rest guards were also used on the small spinning lathes that are the subject of this proceeding at various times in the late 1990s and early 2000s. The operators of the small spinning lathes also used a "question mark guard" until the early 2000s. The question mark guards were affixed to lathes #16 through #20. These guards were made of angle iron with metal ribs spaced horizontally along the body of the guard, which was shaped like a question mark. Wire mesh covered the area between the ribs of the guards. The guards were anchored to the backs of the lathes to provide protection against ejected workpieces (Exh. C-72; Tr. 1250-1255).

In 2002, Cook removed the question mark guards from the small spinning lathes when it moved the lathes near the east wall of Building #2 (Tr. 1255). Cook regarded the question mark guards as flawed in design, with the potential of causing injuries to employees. A spinning supervisor testified that some employees referred to the question mark guards as "maim and dismemberment cages" (Tr. 2202).

Following the removal of the question mark guards, lathe operators continued to use the tool rest guards. From 2000 to 2010, there were at least five tool rest guards used on the small lathes. Lathe operators used the tool rest guards at their own discretion (Tr. 1447).

One day in 2010 (after the fatality occurred that gave rise to this proceeding), lathe Operator #1 was operating a small lathe with an attached tool rest guard, when plant manager Dennis Blake stopped by. Blake said, "[W]here did you get that guard?" (Tr. 1453). Operator #1 told Blake it was one of the guards stored behind lathe #8, "just in case we wanted to use a guard" (Tr. 1453). When Operator #1 arrived at work the next day, the guards had been removed. When he asked management what had happened to the guards, he was told they were removed for "testing" (Tr. 1455).

Spinning shop supervisor Jim Pawlikoski had confiscated all of the guards being used by the small lathe operators. He testified he tested the guards to ensure they were safe to use on the lathes:

Q. What did you do with the guard [that was the subject of an employee grievance]?

Pawlikoski: I took it over to the test area in Building 5.

Q. Where is it at?

Pawlikoski: I don't know.

Q. No one instructed you to keep tabs on the guards, the prototype guard and that guard?

Pawlikoski: I put it on the pallet with the rest of the prototype guards. I know to keep evidence.

Q. What happened to the guards?

Pawlikoski: I don't know.

(Tr. 4191).[4]

May 13, 2009, Fatality

On May 13, 2009, the decedent, who had worked for Cook for 11 years, was operating lathe #16. His assignment was to spin 33 PLC shrouds, which are made of steel. The PLC shrouds were each 34.06 inches in diameter and weighed 12 pounds. The decedent set up the lathe to spin the disks after the lunch break. He was not using a tool rest guard or any other form of guarding on his lathe. The decedent formed the first workpiece, and then began to work on the second. He mounted the workpiece on the lathe, secured the tailblock against the chuck and workpiece, and started the machine. Standing between the scissor bar arm and the roller tool arm, he pushed the roller tool arm to his right, causing the roller to contact the face of the workpiece. The vibrations from the machine caused the tailblock to back off from the face of the workpiece and chuck (Tr. 1094-1095).

The lathe ejected the workpiece from the chuck. It first struck the tool rest and then struck the decedent in the head. The workpiece continued in its trajectory until it hit a rack located 20 feet behind the decedent. The decedent's coworkers heard the impact and immediately rushed to

[4] On May 31, 2011, the Secretary filed a motion for sanctions for Cook's spoliation of evidence. Following oral argument at the hearing, the court, while troubled by the disappearance of the guards, denied the Secretary's motion on August 1, 2011 (Tr. 3252-3253).

his aid. Police and emergency medical personnel arrived within minutes of the accident, but the decedent's head injury was severe. He died before he could be transported to a hospital (Tr. 89, 180-181).

The next day, OSHA compliance safety and health officer (CSHO) David Moehle arrived at Cook's facility to inspect the small lathe operation. He visited the plant on at least four other occasions (Tr. 457). On November 10, 2009, the Secretary issued the instant citations.

Citation No. 2

The Secretary has the burden of establishing the employer violated the cited standard.

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Items 1 through 7: Alleged Willful Violations of 29 C.F.R. § 1910.212(a)(1)

Items 1 through 7 of Citation No. 2 allege willful violations of § 1910.212(a)(1), 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.

Items 1 through 7 cite lathes #18, #16, #14, #15, #17, #19, and #20, respectively. The alleged violation description (AVD) for each item begins, "The employer is failing to protect employees from metal parts and debris being ejected from manual spinning lathes during operation."

Applicability

> The fundamental principle of statutory construction is that statutory language is to be construed according to its plain meaning. . . . Thus, the first step in statutory construction is the wording of the statute itself which, if unambiguous, obviates reliance on legislative history or other external sources. . . *Arcadian Corp.*, 17 BNA OSHC 1345, 1347 (No. 93-3270, 1995) ("'[i]n a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue[,] judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished'" (citations omitted)), *aff'd* 110 F.3d 1192 [17 BNA OSHC 1929] (5th Cir. 1997).

Jindal United Steel Corp., 21 BNA OSHC 1298, 1304 (No. 00-2231)

Subpart O addresses "Machinery and Machine Guarding." Section 1910.212(a)(1) addresses "General requirements for all machines." The Secretary contends § 1910.212(a)(1) applies to the cited lathes and that Cook violated the terms of the standard by not guarding against the ejection of workpieces.

Cook's primary defense is that § 1910.212(a)(1) does not apply to the cited lathes with respect to guarding against ejected parts. Cook cites *Carlyle Compressor v. OSHRC*, 683 F. 2d 673 (2d Cir. 1982), in support of its position. (*Carlyle* arose in the Second Circuit, while the instant case arose in the Eighth Circuit. The court is not bound by Second Circuit precedent.)

In *Carlyle*, OSHA cited the employer for a violation of § 1910.212(a)(1), and, in the alternative, a violation of § 5(a)(1), the general duty clause. The employer used a grinding machine to process shafts the company manufactured. In three years, the grinding machine had thrown five shafts, one of which had seriously injured an employee. The employer argued § 1910.212(a)(1) did not apply to the thrown workpieces. The ALJ affirmed the violation and his decision became a final order of the Commission, after the Commission declined review.[5]

The Second Circuit Court of Appeals disagreed with the ALJ on the applicability of § 1910.212(a)(1) to the thrown shafts:

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[5] "[I]t is well-settled that an unreviewed administrative law judge's decision has no precedential value. *See In re Cerro Copper Prods. Co.*, 752 F.2d 280, 284 (7th Cir. 1985) (holding that "[a]n unreviewed ALJ decision does not bind the OSHRC or the courts as precedent") (citations omitted)." *Elliot Construction Corp.*, 2012 WL 3875594 (No. 07-1578, August 28, 2012).

> We agree with Carlyle that § 1910.212(a)(1) is inapplicable. The language of that section does not cover the instant hazard; it requires protection, such as barrier guards, against "hazards such as those created by . . . rotating parts, flying chips and sparks." The ALJ apparently interpreted "flying chips and sparks" to included shafts thrown by the machine.
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> The Secretary argues that the phrase "such as" covers anything flying out of the machines. We hold that the language cannot be stretched to that extent. "Where specific words follow a general word, the specific words restrict application of the general term to things that are similar to those enumerated." *General Electric Co. v. OSHRC*, 583 F.2d 61, 65 (2d Cir. 1978). . . . Here, the standard is directed at the hazards attendant upon the wastage created by more normal projectiles such as flying chips and sparks, rather than abnormal projectiles, such as flying workpieces.

Id. at 675.

It is instructive, however, that the court went on to affirm "the final decision and order of the Commission on the ground that Carlyle violated the general duty clause." *Id. at 678.* The court found that the thrown shafts presented a recognized hazard that could cause death or serious physical injury, and that the employer was aware of it. The Secretary also established a feasible means of abatement of the hazard.[6]

The Secretary counters *Carlyle* with a case decided by the Court of Appeals for the Eighth Circuit, the circuit in which the instant case arises. In *Donovan v. Anheuser-Busch, Inc.*, 666 F.2d 315 (8th Cir. 1981), OSHA cited the employer for a violation of § 1910.23(c)(1), which requires the employer to install a standard railing on open-sided floors and platforms 4 feet or more above the adjacent floor or ground level. The employer argued that the tops of the cited 6-foot high pasteurizers used at its brewery were not floors or platforms, and so did not need to be guarded. The phrase "such as" does not appear in the cited standard, but is used in the standard's definition section for "platform." Section 1910.21(a)(4) defines "platform" as: "A working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment."

The ALJ vacated the item alleging a violation of § 1910.23(c)(1), reasoning that the tops of the pasteurizers were not platforms under the definition set out in § 1910.21(a)(4). The Court of

[6] In the instant proceeding, the Secretary declined (despite the similarity of the fact pattern in *Carlyle* to the present case) the court's offer to allow her to amend the citation to allege, in the alternative, a violation of § 5(a)(1).

Appeals reversed the ALJ's decision, finding that tops of the pasteurizers were platforms:

> The phrase "such as" is not a phrase of strict limitation, but is a phrase of general similitude indicating that there are includable other matters of the same kind which are not specifically enumerated in the standard. . . . An interpretation that the phrase "such as" is not a phrase of strict limitation is supported by several authoritative dictionaries which among other definitions have defined the phrase "such as" as meaning "for example" or "of the kind specified."
>
> . . .
>
> We conclude that the standard, 29 C.F.R. § 1910.21(a)(4) defines a "platform" as a "working space for persons elevated above the surrounding floor or ground" and then provides an example to this definition. If the definition was intended to be limited to the example the general phrase would not have been used.

Id. at 327.

The Secretary argues that because *Anheuser-Busch* was issued by the Court of Appeals for the Eight Circuit, its expansive interpretation of "such as" takes precedence over the Second Circuit's *Carlyle* decision, which adopts a more restrictive interpretation of the phrase. The court agrees that the Eighth Circuit Court's interpretation is precedential in the instant case, but disagrees that *Annheuser-Busch* supports the Secretary's position.

The Second Circuit's *Carlyle* decision, while not binding, is more applicable to the instant proceeding than the Eighth Circuit's *Anheuser-Busch* decision. The facts in this case are much closer to the facts in *Carlyle*; in both cases, OSHA alleges the company violated § 1910.212(a)(1) by failing to guard against a machine malfunction, which results in the machine ejecting a workpiece. The court finds that *Carlyle* is not precedential in the instant case, but its reasoning is persuasive.

In contrast, OSHA in the *Anheuser-Busch* case cited the employer for a violation of § 1910.23(c)(1), for failing to install a railing on a pasteurizer top, a fact situation greatly removed from the facts in the present case. The phrase "such as" does not appear in the cited standard—it is found in the definition subsection of the standard. The court in *Anheuser-Busch* emphasized the significance of the phrase "such as" appearing immediately after the definition of "platform": "If the definition was intended to be limited to the example the general phrase would not have been used." *Id.* The phrase "such as" does not follow a definition in § 1910.212(a)(1). Instead, it follows the word "hazard," which is not otherwise defined.

Even if this court followed the Eighth Circuit's reasoning in *Anheuser-Busch,* it would still

determine § 1910.212(a)(1) does not apply to the ejection of workpieces from the cited lathes. In *Anheuser-Busch*, the court states that the phrase "such as" "does not constitute words of limitation restricting the definition of 'platform,' but is an example or illustration to the nature and quality of structures included in the general definition of 'platform.'" *Id.* The hazards enumerated in § 1910.212(a)(1) share the nature and quality of being created by the routine operation of the machine. "Point of operation, ingoing nip points, rotating parts, and flying chips and sparks" are the normal, expected result when running the machine. An ejected workpiece is not of the same nature and quality of the listed hazards in § 1910.212(a)(1). It is the result of a machine malfunction. The "flying sparks and chips" listed in the standard are qualitatively different from the 12 pound, almost 3 feet in diameter, workpiece that the lathe ejected on May 13, 2009. Chips and sparks are the by-product of a routine process—they are not the product itself.

Section 1910.212(a)(1) lists point of operation, ingoing nip points, rotating parts, and flying chips and sparks as hazards that must be guarded against. The Secretary did not allege any of these hazards in the AVDs of Items 1 through 7. Instead, the items allege Cook failed to protect its employees from "metal parts and debris being ejected from the machine."

CSHO Moehle testified that OSHA did not cite Cook for a point of operation violation under § 1910.212(a)(1) (Tr. 717-718). He also acknowledged OSHA did not cite Cook for an ingoing nip point violation in any of the seven items (Tr. 729-730). The Secretary's expert Dennis Cloutier testified the lathes at issue did not present a hazard with respect to points of operation, ingoing nip points, or rotating parts (Tr. 2004-2005). There is no evidence in the record showing that the lathes created flying sparks or chips during their operation.

The court determines, based on the clear language of § 1910.212(a)(1), that the cited standard does not apply to ejected workpieces cited in this proceeding. Accordingly, Items 1 through 7 of Citation No. 2 are vacated.

Findings of Fact and Conclusions of Law

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1 of Citation No. 1, alleging a serious violation of § 1910.132(a), is withdrawn by the Secretary. Item 1 is vacated and no penalty is assessed;

2. Item 2 of Citation No. 1, alleging a serious violation of § 1910.133(a)(1), is withdrawn by the Secretary. Item 2 is vacated and no penalty is assessed;

3. Item 3 of Citation No. 1, alleging a serious violation of § 1910.138(b), is withdrawn by the Secretary. Item 3 is vacated, and no penalty is assessed; and

4. Items 1 through 7 of Citation No. 2, alleging willful violations of § 1910.212(a)(1), are vacated and no penalty is assessed.

SO ORDERED.

/s/

Date: October 22, 2012

KEN S. WELSCH
Administrative Law Judge