

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building - Room 2R90, 100 Alabama Street, SW  
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Garden Ridge, Store # 46,

Respondent.

OSHRC Docket No. **10-1082**

Appearances:

Clara H. Saafir, Esq., U. S. Department of Labor, Office of the Solicitor, Dallas, Texas  
For Complainant

Chris Reinhardt, Manager of Loss Prevention and Safety, Garden Ridge, Houston, Texas,  
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

**DECISION AND ORDER**

Garden Ridge, Store # 46 (Garden Ridge), is a home decor retail store located on Chenal Parkway in Little Rock, Arkansas. On February 17, 2010, Occupational Safety and Health Administration compliance officer David Bryan began an inspection of Garden Ridge after receiving an employee formal complaint. Based upon Bryan's inspection, the Secretary issued two citations to Garden Ridge on May 10, 2010.

Item 1 of Citation No. 1 alleges a serious violation of 29 C. F. R. § 1910.212(a)(1), for failing to adequately guard a garbage compactor. The Secretary proposed a penalty of \$2,250.00 for this item. Item 1 of Citation No. 2 alleges an "other" violation of 29 C. F. R. § 1904.40(b)(2), for failing to provide a copy of the employer's OSHA 300 logs to the compliance officer within four business hours. The Secretary proposed a penalty of \$900.00 for this item.

Garden Ridge timely contested the citations. The undersigned held a hearing in this matter on October 8, 2010, in Little Rock, Arkansas. The parties stipulated jurisdiction and coverage (Tr. 9). The parties have filed post-hearing briefs.

Under Citation No. 1, Garden Ridge contends § 1910.212(a)(1) does not apply to the cited conditions. The company asserts OSHA's Lockout/Tagout (LOTO) standard, at § 1910.147, is the applicable standard. Garden Ridge also argues the Secretary failed to establish its employees were exposed to a hazard while operating the garbage compactor. Under Citation No. 2, Garden Ridge concedes it violated § 1904.40(b)(2), but contests the proposed penalty.

For the reasons discussed more fully below, the undersigned vacates Item 1 of Citation No. 1. The undersigned affirms Item 1 of Citation No. 2, and assesses a penalty of \$100.00.

### **Background**

OSHA's area office in Little Rock, Arkansas, received an employee formal complaint regarding a number of alleged safety violations at a home decor store ("Store # 46") operated by Garden Ridge on Chenal Parkway in Little Rock, Arkansas. On February 17, 2010, compliance officer David Bryan arrived at the store shortly after it opened, at 10:00 a.m. Bryan held an opening conference with Michael McCullough, the store's general manager. Bryan explained the reason for the inspection, and asked McCullough for a copy of the store's OSHA 300 logs. Bryan then conducted a walk-around inspection of the facility (Tr. 26-27).

Bryan found most of the employee complaint items to be unfounded (Tr. 94), but he was concerned about an interlock device on the hatch door to the garbage compactor. The interlock device appeared to be missing one of the components needed to complete its circuit (Tr. 35)<sup>1</sup>.

To use the garbage compactor, an employee opens the hatch door at one end of the machine. The hatch door is approximately 40 inches above the ground and is approximately 4 feet high and 4 feet wide. The employee places the trash inside the compactor. The employee then shuts the hatch door and turns the key to activate the compactor. The trash slides down a 10 foot long chute, inclined at an angle of approximately 30 degrees, and ends up in a compaction chamber, where a hydraulic ram crushes it. It takes from 60 to 90 seconds for the compactor to complete a cycle. Occasionally the trash does not slide all the way down to the compaction chamber. Employees use a 2 x 4 board (referred to as a "pole" at the hearing), approximately 10 feet long, to push the trash

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<sup>1</sup> At the hearing, it emerged that the device Bryan identified as the interlock (on Exhibit C-3, the leftmost of the two rectangular wired devices located at the upper right corner of the hatch door) may have been an alarm contact (Tr. 67). Regardless of this apparent misidentification, Garden Ridge does not dispute the hatch door was equipped with an interlock, and the interlock was not functioning properly.

down the chute. On at least one occasion, a buildup of trash caused the compactor to jam. Garden Ridge employee Michael Graham entered the compactor through the hatch door and climbed into the compactor to clear the jam (Tr. 46, 49, 82, 147-148, 182, 185).

When Bryan asked McCullough about the missing interlock component, McCullough acknowledged that it did not work. McCullough removed the padlock to the hatch door, opened the hatch door, and activated the garbage compactor while the door was open (Tr. 36). Bryan took photographs of the garbage compactor (Exhs. C-1, C-2, C-3, R-1, and R-3) and continued with his walk-around inspection.

After conducting employee interviews, Bryan again requested copies of the company's OSHA 300 logs. McCullough told Bryan he was in the process of getting them from Garden Ridge's corporate office. Bryan left the store without the OSHA 300 logs. The next day, Bryan returned to the store at approximately 11:00 a. m. Bryan repeated his request for the copies of the OSHA 300 logs, once when he arrived, and again before he departed. He did not receive the copies of the OSHA 300 logs while at the store. Later that afternoon, Bryan received copies of the OSHA 300 logs via email (Tr. 55-57).

Based upon Bryan's inspection, the Secretary issued the instant citations to Garden Ridge on May 10, 2010.

### **Discussion**

The Secretary has the burden of proving the violation by a preponderance of the evidence.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

*Atlantic Battery Co.*, 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Employer knowledge is not at issue in this case. McCullough is the store's general manager and Kendrick Jones is a co-manager. McCullough and Jones are supervisors, whose knowledge is imputed to Garden Ridge. Both McCullough and Jones had actual knowledge the interlock on the hatch door was not working.

## Citation No. 1

### Item 1: Alleged Serious Violation of § 1910.212(a)(1)

The citation alleges:

On or about February 16, 2010<sup>2</sup>, and at times prior thereto with respect to the job site located at 11801 Chenal Parkway in Little Rock, Arkansas, where the employees were operating a Ramjet garbage compactor. The interlocking device on the gate was not working and did not fail in the safe mode, allowing employees to operate the hydraulic ram with the gate open. This practice created conditions which exposed the employees to crushing hazards in the event of an unexpected startup.

Section 1910.212(a)(1) 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.

#### *Applicability*

The Secretary must establish the cited standard applies to the cited conditions. Garden Ridge argues § 1910.212(a)(1) does not apply to its use of the garbage compactor. The company asserts, “OSHA cited us under an incorrect standard. The issue of lockout is being intertwined with the issue of guarding” (Garden Ridge’s brief, p. 1).

Section 1910.147(a)(1)(i) provides that the LOTO standard “covers the servicing and maintenance of machines and equipment in which the *unexpected* energization or start up of the machines or equipment, or release of stored energy could cause injury to employees” (emphasis in original).

Bryan testified he asked McCullough for a copy of Garden Ridge’s LOTO program for the garbage compactor. McCullough told him Garden Ridge did not have a LOTO program because its employees do not perform maintenance or repair work on the garbage compactor—that work is contracted out. Bryan explained at the hearing why, based on McCullough’s information, OSHA cited Garden Ridge under the machine guarding standard, rather than the LOTO standard:

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<sup>2</sup> The alleged violation descriptions for each citation states the alleged violations occurred “[o]n or about February 16, 2010.” Bryan first arrived at Garden Ridge’s store on February 17, 2010 (Exh. R-4; Tr. 86).

“Lockout/tagout applies to maintenance and repair activities. When you’re talking about production, then machine guarding standards are what applies to it. So his employees don’t do maintenance and repairs” (Tr. 34).

McCullough testified he did not recall telling Bryan that Garden Ridge did not have a LOTO program. McCullough stated, “I know that I posted the procedure there beside the [compactor] door, you know, two years before. So I know that the lockout/tagout procedure—and there is a poster nearby also that describes lockout/tagout” (Tr. 204). Bryan photographed the copy of the LOTO program posted on the wall next to the compactor, as well as a decal on the compactor itself warning employees to use LOTO procedures before entering the machine (Exhs. C-2 and C-3). Garden Ridge adduced a copy of the LOTO program for the compactor into evidence (Exh. R-2).

Garden Ridge is correct when it states the Secretary has “intertwined” the issues of LOTO and machine guarding. This intertwining began with the Secretary’s inartfully drafted alleged description violation for Item 1 of Citation No. 1. Generally, machine guarding violations create conditions that expose employees to injuries from points of contact during the machine’s normal production function. Here, the Secretary cites the machine guarding standard, § 1910.212(a)(1), for an alleged violation that creates “conditions which exposed the employee to crushing hazards in the event of an *unexpected start up*” (emphasis added).

An “unexpected start up” is the precise event for which the LOTO standard was promulgated. In *General Motors Corp.*, 17 BNA OSHC 1217, 1218, (Nos. 91-2973, 91-3116, and 91-3117, 1995), the Commission notes, “OSHA literally underscored the importance of the standard’s limitation to “unexpected” energization, etc., by italicizing that word in [ §§ 1910.147(a)(1)(i) and (b)]—a form of emphasis that OSHA rarely uses.” The Secretary’s use of “unexpected start up” in the alleged violation description for a machine guarding violation muddles the citation.

The record shows Item 1 actually addresses two separate hazards that occurred in separate instances. The first is the exposure to Michael Graham on (at least) one occasion when he entered the compactor to clear a jam caused by a buildup of trash. The second is the exposure to Garden Ridge co-manager Kendrick Jones and other employees who stand at the hatch door and put trash into the compactor. The instances will be analyzed separately.

*Applicability of § 1910.212(a)(1) to Michael Graham's Activity*

During his inspection, Bryan learned that Graham had, on at least one occasion, bodily entered the compactor (Tr. 45). Graham had worked for Garden Ridge for six years at the time of the hearing. He was a "tech," whose duties included mowing grass, buffing floors, and picking up trash (Tr. 179). To dispose of the trash, Graham would open the hatch door to the compactor, deposit the trash inside, close the hatch door, and then turn the activation key to the right until he heard the compactor start up. Sometimes the trash did not go down all the way. In that event, Graham stated:

I can open it back up and push that 2x4 on the side of the compactor and push it down there. And if that doesn't work, I have to go down there and unstop it . . . I have to probably go in there and unstop by hand and then push down a little bit and come back up, and somebody has to grab my hand and come up there through it. (Tr. 185-186).

Graham identified a worker named Antonio as the person who stood outside the compactor and who grabbed his hand to help him out of the chute (Tr. 186).

Graham was visibly nervous on the stand, resulting in testimony that was somewhat contradictory. The phrasing Graham used in the above-quoted passage gives the impression he entered the compactor on more than one occasion. When asked directly how many times Antonio had helped him out of the compactor, Graham responded, "Just one time," and said it occurred "[a]bout two weeks ago," *i.e.*, two weeks prior to the October 8, 2010, hearing (Tr. 186).

Despite his assertion he entered the compactor only once (after the date the Secretary issued the instant citations), Graham acknowledged he told Bryan the previous February that he had entered the chute to clear out a jam (Tr. 189). When asked again how many times he had been in the chute, Graham responded, "That one time," referring to the occasion when Antonio had helped him out (Tr. 190). Graham was asked again, "Michael, what's the total times you've been in that compactor chute?," to which he responded, "I'd say it's about one time" (Tr. 191).

Regardless of the number of times Graham entered the chute, his testimony is consistent that he did so only to clear out a jam so the compactor could work correctly. In doing so, Graham was performing work clearly defined in § 1910.147(b) as "servicing and/or maintenance," which is covered by the LOTO standard:

Workplace activities such as constructing, installing, setting up, adjusting, inspecting, modifying, and maintaining and/or servicing machines or equipment. These activities

include lubrication, cleaning or unjamming of machines or equipment and making adjustments or tool changes, where the employee may be exposed to the unexpected energization or startup of the equipment or release of hazardous energy.

The standard explicitly states that “unjamming” a machine, during which the employee may be exposed to the unexpected start up of the equipment, is servicing or maintenance. As such, the LOTO standard applies to the activity. Garden Ridge has established § 1910.147, and not § 1910.212(a), is the applicable standard with regard to Graham’s entry into the compactor. Graham’s entry or entries into the chute for the purpose of unjamming the compactor will not be further considered in determining whether Garden Ridge violated § 1910.212(a)(1).

*Applicability of § 1910.212(a)(1) to Kendrick Jones’s Activity*

Kendrick Jones is a co-manager of the Garden Ridge store. He had worked at the store for two years at the time of the hearing. He and Graham operated the garbage compactor most often. Occasionally another manager will operate the compactor (Tr. 146). Bryan identified Jones as the employee exposed to the compactor’s crushing hazard “by using the pole to push the refuse down” (Tr. 52). Bryan testified OSHA does not allow the use of tools, such as the 2 x 4, as the primary method of machine guarding (Tr. 44).

The record establishes Garden Ridge’s employees used the 2 x 4 to push trash down the compactor’s chute on a regular basis, as part of the normal production operation of the compactor. The undersigned determines § 1910.212(a)(1) applies to the instances of Jones and other employees standing at the open hatch door of the compactor, and pushing trash down the chute with the 2 x 4.

*Noncompliance with the Terms of the Standard*

It is undisputed the interlock on the hatch door of the garbage compactor was not functioning properly at the time of the OSHA inspection. McCullough demonstrated for Bryan that the compactor was operational while the hatch door was opened. Following the inspection, McCullough replaced the interlock, ensuring the compactor could not operate with the hatch door opened (Tr. 205-206).

At the hearing, McCullough attempted to argue Garden Ridge guarded the compactor by relying on “just the distance, and the use of the pole” (Tr.203). McCullough conceded he came to this conclusion during the hearing, while observing the proceedings (Tr. 204).

The Secretary has established Garden Ridge failed to comply with the terms of the standard. The company did not guard the point of operation of the compactor.

*Employee Exposure*

The Secretary contends Jones was exposed to crushing hazards from the hydraulic ram as he stood outside the hatch door and pushed trash down the chute with the 2 x 4. The hatch door is approximately 10 feet from the compaction chamber. It is more than 3 feet off the ground, and its opening is 4 feet by 4 feet. The Secretary argues Jones was in the zone of danger of the hydraulic ram as he pushed the trash down with the 10 foot long 2 x 4.

Bryan used an example to illustrate his theory of Jones's exposure:

I recently witnessed a video where an employee was working on a machine and using a curved stick to pull pieces out of a stamping machine, and she used a hook to pull the pieces out and across the table top to make sure she had all the pieces before it went in the package and her pole was not able to reach a load and she climbed up on the table and stuck her hand in there and lost four fingers.  
(Tr. 81).

Bryan's example is inapposite to the instant case for a number of reasons. The woman in the video was separated from the machine by a table top, not a chute inside a compactor. Bryan stated the woman's normal working distance from the machine was "her body length," which is presumably a little over half the distance between the hatch door and the compaction chamber (Tr. 81). The woman was pulling pieces toward her, rather than pushing them away from her, as Jones did with the trash. The circumstances of her work environment exposed her to the zone of danger of the stamping machine. The same cannot be said for Jones.

During normal production operation, employees pushing trash down the compactor chute using the 2 x 4 were not exposed to the zone of danger created by the hydraulic ram. Bryan envisioned a situation in which an employee would step up on the edge of the chute to push the trash down: "And that chute is a 30-degree angle and basically, if he lost his balance while he's perched on the edge, would actually act like a slide on a playground and would go down the chute into the machine" (Tr. 45).<sup>3</sup>

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<sup>3</sup> At the hearing, Bryan stated Graham told him that "on at least one or possibly more occasions, he also said that he climbed up on the edge of the chute to push the refuse down" (Tr. 45). Chris Reinhardt, Garden Ridge's safety manager who represented the company at the hearing, objected to this testimony, asking if Bryan had any evidence



The undersigned considers this scenario to be speculative. It is not representative of the experience of the two employees who operate the compactor most frequently, Jones and Graham. Neither employee testified he perched on the edge of the chute. Even if the Secretary established this was work practice, it still does not expose the employee to the hazard of being crushed by the hydraulic ram 10 feet away. Their testimony established the use of the 2 x 4 to push the trash down the chute did not bring them within the zone of danger of the hydraulic ram.

The Secretary has failed to prove Jones or any other employee operating the garbage compactor was exposed to crushing hazards created by the hydraulic ram. Item 1 of Citation No. 1 is vacated.

## **Citation No. 2**

### **Item 1: Alleged “Other” Violation of § 1904.40(b)(2)**

The citation alleges:

On or about February 16, 2010, with respect to the jobsite located at 11801 Chenal Parkway in Little Rock, Arkansas. The employer did not provide an OSHA representative with a copy of the OSHA 300 logs in the 4 hour window provided by the standard.

Part 1904 of Title 29 of the Code of Federal Regulations covers “Recording and Reporting Occupational Injuries and Illnesses.” Section 1904.0 states, “The purpose of this rule (Part 1904) is to require employers to record and report work-related fatalities, injuries, and illnesses.”

Section 1904.40(a) provides the basic rule for employers producing documents:

When an authorized government representative asks for the records you keep under Part 1904, you must provide copies of the records within four (4) business hours.

The cited standard, § 1904.40(b)(2), is written in a question and answer format:

**Do I have to produce the records within four (4) hours if my records are kept at a location in a different time zone?** OSHA will consider your response to be timely if you give the records to the government representative within four (4) business hours of the request. If you maintain the records at a location in a different time zone, you may use the business hours of the establishment at which the records are located when calculating the deadline.

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substantiating this claim. The undersigned overruled the objection. No employees testified they ever stood on the edge of the chute.

Bryan arrived at Garden Ridge at approximately 10:00 a. m. on February 17, 2010. He made his first request for copies of Garden Ridge's OSHA 300 logs shortly thereafter, during his opening conference with McCullough. He made another request that day, and two more the following day. Bryan received the OSHA 300 logs by email the afternoon of February 18, 2010, more than twenty-four hours after requesting them. The Secretary has established Garden Ridge violated § 1904.40(b)(2).

Garden Ridge did not contest this item at the hearing (Tr. 11). In its brief, the company states, "Garden Ridge does not challenge the validity of this citation," but asks the undersigned "to weigh the events of the entire inspection/citation process to rule that no fine is due" (Garden Ridge's brief, p. 9). The events Garden Ridge asks the undersigned to weigh are these: Before Bryan left on February 18, 2010, he told McCullough he would return the following Monday and hold a closing conference with the company. Bryan did not show up that Monday, and did not call to say he would not be there or to reschedule the closing conference. After ten weeks, Bryan showed up unannounced on May 3, 2010, and held a closing conference with Garden Ridge. Garden Ridge finds Bryan's conduct to be "inexcusable."

Bryan's delay in holding a closing conference has no bearing on whether Garden Ridge violated the cited standard. His perceived discourtesy towards Garden Ridge cannot be weighed as a factor when considering whether the Secretary met her burden of proof. Section 1904.40(b)(2) is written in clear and unambiguous language. Its requirements are easily understood. Garden Ridge failed to comply with those requirements, and it is found in violation of that standard. Item 1 is affirmed.

### **Penalty Determination**

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

Garden Ridge employed approximately 3,500 employees nationwide at the time of the inspection. The company had no history of violations in the three years prior to Bryan's inspection (Tr. 53). Garden Ridge demonstrated good faith in these proceedings. The gravity of Garden Ridge's violation of § 1904.40(b)(2) is slight. Garden Ridge provided the OSHA 300 logs the day after Bryan requested them. There is no evidence this minor delay hindered Bryan's inspection. Bryan did not hold a closing conference with Garden Ridge until May 3, 2010, more than ten weeks after the company provided OSHA with copies of its OSHA 300 logs. A penalty of \$100.00 is assessed.

### **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 29 C. F. R. § 1910.212(a)(1), is vacated, and no penalty is assessed; and
2. Item 1 of Citation No. 2, alleging an "other" violation of 29 C. F. R. § 1904.40(b)(2), is affirmed, and a penalty of \$100.00 is assessed.

/s/ \_\_\_\_\_  
SHARON D. CALHOUN  
Judge

Date: November 19, 2010  
Atlanta, Georgia