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.
Stellar Management Group d/b/a QSI,
Respondent.

OSHRC Docket No. **11-0302**

Appearances:
Charna C. Hollingsworth-Malone, Esquire, Atlanta, GA
For Complainant

Gerald S. Koenig, Esquire, McLean, VA
Erin E. Slusser, Esquire, McLean, VA
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Stellar Management Group d/b/a QSI is engaged in sanitation cleaning. On October 20, 2010, the Occupational Safety and Health Review Administration (OSHA) conducted an inspection at the Respondent's jobsite in Buena Vista, Georgia. As a result of this inspection, OSHA issued a citation to respondent on December 17, 2010. Respondent timely filed a notice contesting the citation and proposed penalties. A hearing was held, pursuant to simplified proceedings in Atlanta, Georgia on June 3, 2011.

At the close of the hearing, the parties made oral arguments in lieu of filing post-hearing briefs. A bench decision was entered following the hearing. For the reasons that follow the alleged violation of 29 CFR § 1910.133(a)(1) is affirmed and a penalty of $2,000.00 is assessed.

Excerpts of relevant transcript pages and paragraphs, including the bench decision entered at the hearing, finding of facts and conclusions of law (Tr.182-191) are included in this decision as follows:

This case arose as a result of an inspection of the respondent's operation at Tyson Foods in Buena Vista, Georgia. The case involves Stellar Management Group d/b/a QSI. The inspection took place October 20, 2010 and as a result of that inspection, a citation was issued to the company on December 17, 2010. A hearing was held in Atlanta, Georgia, on June 3, 2011. Both sides were represented. We're in the NLRB hearing room in Atlanta, Georgia. The citation alleges a violation of 29 CFR 1910.133(a)(1).

The allegation is that respondent failed to require protective eye equipment where there was reasonable probability of injury that could be prevented by such equipment. Specifically, on or about October 20, 2010, in the Processing One Area eye protection was not worn by employees pressure washing equipment, exposing employees to struck-by hazards. A penalty of $5,000 was proposed by the Secretary for this alleged violation. The standard allegedly violated was 29 CFR §1910.133 involving eye and face protection. Specifically, section (a) general requirements, (1): "The employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation." Now, the Secretary has the burden of establishing that 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 the cited standard applies, that the employer failed to comply with the terms of the cited standard, that the employees had access to the violative conditions, and the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. That was established by the Commission in the case of *JPC Group, Inc*.**,** 22 BNA OSHC 1859 at 1861, Docket No. 05-1907, issued in the year 2009. This is a general industry standard which applies to all employers unless a more specific standard applies in the specific industry. This employer is engaged in sanitation cleaning at Tyson Food Company. It's involved in the general industry cleaning process. This standard does apply to the respondent. The issue that needs to be discussed in some great detail is whether the terms of the standard were violated and whether the company failed to comply with the terms of the cited standard, and we have to look at whether there was a hazard of flying particles specifically here.

Getting to that at a later time, I want to go to elements three and four, that of employee

exposure to the violative conditions; and that is, if there was a violative condition, the employees definitely had access to that condition. They work within three or four feet of equipment that was being sanitized and sprayed. They were not wearing protective eyewear. I will get into the question of whether there was a hazard of flying particles as we go on, but I do believe that employee exposure was proved here and is truly, I don't believe, at issue. If there was a hazard, they were in the zone of the hazard. Furthermore, I find the respondent had knowledge of the violative condition, if there was a violative condition. The supervisors of the company knew the employees worked in this area and condoned them working in this area and performing this work in proximity to the machinery without wearing eye protection. They also were aware that no eye protection was being worn during the pre-rinse process.

Now, what is the hazard here and was there a violation of the terms of the standard allegedly violated here? I think that has to be fleshed out in some detail; first of all, to see if there was a hazard. This is a general standard. Eye protection must be provided and worn by employees when they are exposed to a hazard of flying particles. Let's, first of all, look at the process as a whole. The sanitation cleaning process as a whole takes approximately four to four and a half hours. It begins with a dry pickup of all materials. This is being done while the production is down at the poultry processing plant. So there are dry materials like chicken bones and chickens and legs and breasts and whatever else on the floor that gets scattered as part of the process. This is picked up initially in the dry pickup process. Then we go to the pre-rinse process, the next or the first rinse process. This is done using high-pressure water and high-temperature water. The pressure is approximately 100 pounds per square inch or psi. The water temperature, as testimony was given, ranges between 110 to 120 degrees, possibly as high as 140 degrees. After the pre-rinse process is completed with water, then it goes to a chemical foam to clean the equipment. The foam comes out at about maybe 50 degrees or 60 degrees in, the temperature of tap water coming out of a tap. It's a different process that clings to the material. When that has been put on, it is washed off with a cold rinse process and that cold rinse process is also tap water temperature. After that, there's the sanitation process. So the entire process takes approximately four to four and half hours. The employees, during the entire time, wore hard hats. They wore netting for their hair. They wore like a rain jacket. They wore boots and other protective clothing. They had protective glasses, which were worn during the chemical process

and during the final rinse process but not during the pre-rinse process. The process at issue before me today is the pre-rinse process. That's when the water was sprayed after the dry pickup. The equipment, the floors, and some overhead conveyor belts were cleaned. The employees used, like I said, approximately 100 psi water coming out of the nozzle of a hose to clean racks, conveyor belts, tables, some of overhead conveyor belts, the floor, and some of the walls, which some parts of the walls were above the heads of the employees. The employees were within three or four feet of the equipment being sprayed. So they weren't spraying the floors where the spray is flowing away from the employees. They're spraying equipment where it can get bounced back or splashed back. They were also spraying overhead where the water could come back down or parts could come back down after being blown off the equipment.

There's testimony by Mr. Fulcher, who is an area director for OSHA and who has been deeply involved with the poultry industry in the last number of years, not only as a compliance officer but his work at the regional offices of OSHA, and he's describing this process and he is talking about, during the process, there was a spray-back of parts, bone, and skin and that this high-pressure hose actually blasted these parts off the equipment; it just didn't wash it down gently. Once again, these particles of bone, blood, and chicken parts splash onto the employees. The compliance officer testified that she got blood on her clothing and she was five to ten feet away from the employees and from where they were working. These particles of bone, blood, and chicken parts would constitute flying particles. Without protective eyewear, these employees could get particles of bone, blood, and chicken parts in their eyes.

Now, Mr. Wirtz testified for the respondent and is knowledgeable about the poultry industry and has spent approximately 25 years in that industry. He has testified that he also reviewed the respondent's record of injuries involving employees and he found no recorded eye injuries with this respondent in the last four years. I think it's worthy to note that respondent protects its employees while they're using the chemical spray and the cold water rinse at 60 psi, but at the higher 100 psi and higher temperatures of 110 to 120 degrees during the pre-rinse, there was no eye protection.

While the probability of eye injury may be low, the gravity of such an injury could be anywhere from low to severe. Employees getting a flying bone in their eye could lose the eyesight of that eye. Employees worked where there was a hazard. I'm finding that there was a hazard here. The

hazard is that of flying particles in the form of bone, blood, and chicken parts. Employees were exposed and worked in the zone of danger within three to four feet of equipment they were spraying. They weren't spraying the floors, as I said earlier, with the spray going away from them. They're going to get bounce-back, splash-back, and there are overhead parts that are also being sprayed. The respondent knew and had actual knowledge that these employees worked here without the eye protection. So I do find that the government has established a *prima facie* case of a serious violation of 29 CFR 1910.133(a)(1) and I find that that is a serious violation.

Now we move to the defense of a greater hazard. This is a very unique defense. It's a tricky defense. The essence of such a defense is that the hazard of compliance with this standard is greater than the hazards of noncompliance. Now it's not enough to show that compliance with the standard creates new or other hazards. This greater hazard defense has to be shown that the specific hazard involved with the standard would be increased by compliance as opposed to noncompliance. The hazard here is being struck in the eye by flying particles of bone, blood, chicken parts that could do injury to the eye. In this instance, I have to consider whether noncompliance with the standard is basically safer regarding flying parts than compliance with the standard. Now, there is another defense that applies which has not been pled and that would be infeasibility, the old defense of impossibility. If compliance with the standard makes it impossible to perform the job or infeasible to perform the job, there's a possibility that that defense could be applicable here. However, upon repeated questioning, respondent has asserted that the greater hazard defense is what it is relying on. Now, there is somewhat of an overlap to those two defenses, but I cannot find that the infeasibility defense or the old impossibility defense was, in fact, tried by consent. Here, respondent is not using other protective measures, protective measures other than what is specifically required by the standard; that is, specifically, personal protective equipment. I don't find that I need to get to the question of a variance, because with these two specific discrepancies, I have to find that the greater hazard defense has not been shown.

So I've considered a proposed penalty in this matter. Respondent has approximately 2,500 employees. The probability of an eye injury is fairly low, with no recorded injuries in the last four years for those 2,500 employees. It could just indicate that they weren't recorded or that they, in fact, didn't happen. I have to presume they didn't happen. The gravity and severity of the injury could be great but it could also be low. So I'm finding that a total penalty of $2,000 is appropriate in this matter.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

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

ORDER

Based on the foregoing decision, it is hereby ORDERED:

1. Citation No. 1, Item 1alleging a serious violation of 29 CFR § 1910.133 (a)(1) is affirmed and a penalty of $2,000.00 is assessed.

/s/ Stephen J. Simko, Jr.
STEPHEN J. SIMKO, JR.
Judge

Date: July 8, 2011