

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.
Aerospace Testing Alliance,
Respondent.

OSHRC Docket No. **08-1035**

Appearances:

Joseph B. Luckett, Esquire, Nashville, TN
For Complainant

Darren S. Harrington, Esquire, Dallas, TX
For Respondent

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

DECISION AND ORDER

Aerospace Testing Alliance (ATA) provides operations, maintenance and support services at Arnold Engineering Development Center Air Force Base in Tullahoma, Tennessee. On May 12, 2008, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Respondent's workplace. As a result of this inspection, Respondent was issued a citation and notification of penalty. A hearing was held pursuant to Simplified Proceedings in Nashville, Tennessee on November 14, 2008. For the reasons that follow, the alleged violation of 29 CFR § 1910.212(a)(1) is affirmed as an other-than-serious violation and penalty of \$1,400.00 is assessed.

BACKGROUND

During the inspection on May 12, 2008, Complainant's compliance officer, Michelle Sotak observed two lathes in Respondent's machine shop, a Lodge and Shipley lathe and a Harrison AA lathe. The lathes are used in the manual mode for polishing parts and drilling washers. Both lathes had unguarded rotating chucks. The periphery of both lathes was irregular, and both had horizontally protruding jaws to hold the work. In the manual mode, the lathe chuck rotates at approximately 625 revolutions per minute (RPM).

Employees use these lathes to perform exact work close to the piece as it is rotating. These lathes are not operated automatically for production purposes. Both lathes are continuously available for use. Scott Pogue, Respondent's machinist, told Inspector Sotak that he used the Harrison AA lathe five to ten minutes, once each week, and had used the Lodge and Shipley lathe once since he began working for the Respondent in January 2008. At the hearing, Mr. Pogue testified he used the Harrison lathe once a month for about 10 minutes. He further testified that the Lodge and Shipley lathe was used once or twice a year. Two other employees also use these lathes.

DISCUSSION

Alleged Serious Violation of 29 CFR § 1910.212(a)(1)

Respondent was issued a citation on May 19, 2008, pursuant to Complainant's inspection of ATA's workplace on May 12, 2008.

In Citation No. 1, Item 1, Complainant alleges a serious violation of 29 CFR § 1910.212(a)(1) as follows:

Machine guarding was not provided to protect operator(s) and other employees from hazard(s) created by rotating parts.

- (a) Bldg 676 - On or about May 12, 2008, lathes were not properly guarded to protect employees during operation.

The standard at 29 CFR § 1910.212(a)(1) provides:

§ 1910.212 General requirements for all machines.

(a) *Machine guarding - (1) Types of guarding.* 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.

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).

The standard is applicable to both the Harrison AA lathe and the Lodge and Shipley lathe. Since there is no specific standard for lathe chucks, the general machine guarding standard at 29 CFR § 1910.212(a)(1) applies.

It is undisputed that both lathe chucks were unguarded. The periphery of the chucks, work holding devices, was irregular on both lathes. Frank Kelly, ATA's safety professional, testified that in the periphery of the chucks there are recesses for the chuck keys and where the jaws move in and out of the chucks.

Respondent's employees were exposed to the unguarded chucks. At least three employees used the two lathes. The Harrison AA lathe was used by Scott Pogue at least once a month according to his testimony or once a week, as he told the compliance office during the inspection. He admitted using the Lodge and Shipley lathe once since he began work for ATA in January, 2008. Pogue stated that two other employees used these lathes. Both machines were continuously available for use and were used as needed. Work was done in close proximity to the unguarded chucks. The jaws holding the work to be polished or drilled extend two inches from the chuck and the hands of the employee performing the work would be approximately two inches from the work. Frank Kelly conceded during cross-examination that it is possible for an employee's hand to come in contact with the face of the chuck while performing this work. Employees work within inches of the periphery of the chucks.

It is clear from the evidence that Respondent had actual knowledge of the violative conditions. It knew through Greg Otwell, its craft supervisor, that both lathes were unguarded at the time of the inspection and had been unguarded for many years. It also knew through Otwell that at least three employees used those lathes in the unguarded condition.

During the pre-hearing conference, respondent raised the affirmative defense of infeasibility. At the hearing, however, Frank Kelly, its safety professional, testified guarding that covered the periphery of the chuck could be achieved so that the guard would not get in the way of the work.

William Cochran, the OSHA Area Director in Nashville, Tennessee, accompanied the compliance officer during this inspection, and observed the unguarded lathes. He testified generally as to the availability of lathe chuck guards. He also testified that a guard could be modified, engineered and positioned to cover the periphery and jaws of the chuck that would not interfere with

the work. There was some testimony suggesting a lack of feasibility of the guards as installed by the respondent in preparation for trial. Mr. Kelly and Mr. Cochran, however, testified that a guard could be fashioned to at least protect against contact with the chuck periphery so as not to interfere with the work being performed on the lathes.

Respondent did not raise the defense of “greater hazard” during the pre-hearing conference. That defense, however, appears to have been tried by consent of the Secretary, since both parties addressed the issue in post hearing briefs. There is overlap here between Respondent’s claim of infeasibility and that of creation of a greater hazard by use of the guards. ATA’s assertion of “greater hazard” is based primarily on its pre-trial experiment with three or four guards. Kelly testified that a guard covering the periphery of the chuck that does not come over the point of operation would not create any kind of additional hazard. Cochran testified that a guard previously attached to the lathe by Respondent could be modified to cover the periphery and the irregular shaped jaws. He testified that a properly positioned guard would not create a greater hazard of bumping or trapping of an employee’s hand.

Respondent’s defenses of infeasibility and greater hazard are rejected.

It is unnecessary to address respondent’s argument relating to the 1979 OSHA Interpretive Letter (Exh. R-1), having determined that the periphery of the chucks on both lathes was irregular, including recesses for chuck keys and where the jaws move in and out of the chucks. These irregularities are graphically depicted in Exhibits C-1 through C-4.

The Secretary has proven a violation of 29 CFR § 1910.212(a)(1).

The Secretary alleges that the violation is a serious violation. A violation is serious within the meaning of Section 17(k) of the Act where there is a substantial probability that death or serious physical harm could result from an incident.

William Cochran, the Secretary’s Area Director testified that the lathe chucks spin at 625 rpms. The periphery of each chuck has key openings and irregular shaped jaws. This was confirmed by Frank Kelly, Respondent’s Safety Professional. Mr. Cochran testified that cuts, contusions or potentially broken fingers might result from contact with the unguarded rotating chucks. Mr. Kelly

testified he would expect an abrasion, cut or slight laceration. Michelle Sotak, the compliance officer testified only conclusively that the hazards of the unguarded lathe were amputations, contusions and lacerations. No factual evidence was presented to support her conclusions. The Secretary did not present sufficient evidence to prove that the violation was Serious within the meaning of Section 17(k) of the Act. The violation is therefore found to be other-than-serious.

PENALTY ASSESSMENT

Section 17(j) of the Act requires that when assessing penalties, the Commission must give “due consideration” to (1) the size of the employer’s business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. 19 U.S.C. § 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.*, 16 BNA OSHC 1769, 1776 (No. 88-237, 1994).

The Respondent is an employer with approximately 2300 employees. It has no history of violations which were affirmed in the last three years.

Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation “depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result.” *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

Here, three employees used both lathes. At most, the Harrison AA lathe was used once a week for 10 minutes each time. The Lodge and Shipley lathe was used once or twice a year. Employees had some training on safe work practices when using the lathes. The probability that any injury would result was estimated as low by the Secretary. The extent of those injuries would be cuts and abrasions. Based on these factors, a penalty of \$1,400.00 is assessed for the violation of 29 CFR § 1910.212(a)(1).

FINDING 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 on the foregoing decision, it is hereby ORDERED:

Citation No. 1 Item 1, alleging a serious violation of 29 CFR § 1910.212(a)(1) is hereby modified, reclassified and affirmed as an other-than-serious violation, and a penalty of \$1,400.00 is assessed.

/s/
STEPHEN J. SIMKO, JR.
Judge

Date: February 22, 2009