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. Duro-Last, Inc., Respondent.	OSHRC Docket No. **02-0285** **EZ**

Appearances:

Kathleen G. Henderson, Esq., Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama
For Complainant

Ellen E. Crane, Esq., Braun, Kendrick, Finkbeiner, P.L.C., Saginaw, Michigan
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Duro-Last, Inc. (Duro-Last), manufactures customized vinyl-like roofing sections at its plant in Jackson, Mississippi. Occupational Safety and Health Administration (OSHA) industrial hygienist (IH) Priscilla Jordan began an inspection of Duro-Last's Jackson facility on January 9, 2000, based on OSHA's Site Specific Targeting list, which targets employers with high injury and illness rates. On January 25, 2002, the Secretary issued a citation alleging three serious violations of the Occupational Safety and Health Act of 1970 (Act).

Item 1 of the citation alleges a serious violation of § 1910.151(c) for failure to have an eye wash for quick drenching or flushing within the work area for immediate emergency use. Item 2 alleges a serious violation of § 1910.219(c)(4)(i) for failing to guard two rotating shafts measuring 3¾ and 1½ inches on the parapet machine. Item 3 alleges a serious violation of § 1910.1030(d)(2)(ix) for allowing employees to eat and drink in a room where first aid was administered. The Secretary proposes penalties totaling $4,125.00.

The Review Commission designated this case as an E-Z proceeding pursuant to Commission Rule 200, *et seq.* A hearing was held in this matter on April 29 and 30, 2002, in Jackson,

Mississippi. The parties stipulated jurisdiction and coverage. They have filed post-hearing written statements of their positions.

Duro-Last denies that it violated the terms of the cited standards. For the reasons discussed below, it is determined that items 1 and 2 are vacated, and item 3 is affirmed.

Background

Duro-Last owns and operates eleven facilities in four states, with its corporate offices located in Saginaw, Michigan. Duro-Last employs approximately 750 employees corporate-wide. At the Jackson, Mississippi, facility that is at issue here, Duro-Last cuts, welds and folds the roofing material to its customers' specifications. Before cutting, the roofing material is stored on 500-pound rolls that are shipped from Saginaw, Michigan (Tr. 8, 14-15, 64).

IH Jordan conducted a one-day inspection of Duro-Last's facility on January 9, 2002. She initiated the inspection based on Duro-Last's high Lost Work Day Injury and Illness (LWDII) rate (Exh. C-12; Tr. 304-306). During the inspection, she inspected the eye wash machine, the parapet machine and the first aid station. As a result of IH Jordan's inspection, the Secretary issued the citation that gave rise to the present case.

The Jackson, Mississippi, facility has a battery charging station near the loading dock, where the company's four forklifts are left overnight to recharge their batteries (Tr. 309-310). A wall-mounted Pureflow 1000 eye wash machine is located approximately 50 feet from the battery charging station (Exh. C-6; Tr. 51).

Duro-Last has one parapet machine located in the welding area, which is used to hot-air weld smaller sheets of roofing material together. The operator of the parapet machine sits in a chair and uses her hands to move the material through the machine (Exhs. C-1 and R-3; Tr. 28).

Duro-Last maintains a medical supply cabinet on a wall in the office of the two production supervisors, both of whom eat lunch in the room (Exh. C-8; Tr. 70). A sign is posted above the office door with the words "FIRST AID" on it (Exh. C-8).

Citation No. 1

The Secretary has the burden of proving her case 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., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Item 1: Alleged Serious Violation of § 1910.151(c)

The Secretary alleges that Duro-Last committed a serious violation of § 1910.151(c), which provides:

> Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

The citation states that for Duro-Last's battery charging station, the "eye wash was located more than 25 feet away, [and] the unit did not contain enough water to provide for 15 minutes of continuous use."

The first element the Secretary must establish is that the cited standard applies to the cited conditions, *i.e*, that the battery charging area creates exposure "to injurious corrosive materials" such that "suitable facilities" would be required.

Duro-Last uses its four forklifts on a daily basis. After the facility shuts down for the evening, the employees connect the forklift batteries to the battery charger and charge them overnight (Tr. 42). Duro-Last employees are not otherwise required to work with the forklift batteries, although there is evidence that they may occasionally add water to the batteries (Tr. 104-105). Duro-Last has a contract with Briggs Equipment, who periodically comes to the facility to service the forklifts. Briggs Equipment's responsibilities include maintenance of the forklift batteries (Exh. R-1; Tr. 43-44). A Pureflow 1000 eye wash station is mounted on the wall in the corner of the plant next to the loading docks, approximately 50 feet from the battery charging area (Exhs. C-2, C-5, C-6, C-16, C-17; Tr. 51).

Section 1910.151(c) requires "suitable facilities" where "the eyes or body of any person may be exposed to injurious corrosive material." The Commission addressed this standard in *Atlantic Battery Co.*, 16 BNA OSHC at 2167-2168:

> Under Commission precedent, whether an employer has complied with its obligation to provide "suitable facilities" within the meaning of section 1910.151(c) depends on the "totality" of the relevant "circumstances," including the nature, strength, and amounts of the corrosive material or materials that its employees are exposed to; the configuration of the work area; and the distance between the area where the corrosive chemicals are used and the washing facilities.

The Commission also held in *ConAgra Flour Milling Co.*, 16 BNA OSHC 1137, 1142 (No. 88-1250, 1993), that the Secretary must prove that a hazard exists before § 1910.151(c) is applicable to the cited conditions: "[T]his standard by its plain terms requires the Secretary to prove the existence of a hazard requiring the use of the protective measures specified, here quick-drenching or flushing facilities."

The Commission in *ConAgra* reversed the ALJ's decision finding that a violation can be based solely on a potential hazard. In that case, employees added water to forklift batteries on a weekly basis. The Secretary cited the employer under § 1910.151(c) for failing to have an eye wash located within 25 feet of the battery charging area. The Commission vacated the cited item, stating:

> The purpose of section 1910.151(c) is to protect employees who are exposed to corrosive chemicals by giving them a means to wash such chemicals from their eyes or body before they suffer injury. . . . The standard applies generally to all situations in which corrosive materials are used and does not specifically address battery charging. Accordingly, the Secretary must demonstrate that the employer is on notice of a need for a washing or flushing facility in the circumstances in question. . . . [T]he mere possibility that battery electrolyte might splash onto an employee's body or into his eyes does not establish that a sufficient hazard existed to require a facility for washing or flushing the eyes or body.

There is even less of a potential hazard to employees in the present case. In *ConAgra*, employees added water to forklift batteries on a weekly basis as part of their duties. Here, there is no reason for Duro-Last's employees to have any contact with the batteries, other than connecting them to the battery charger, which does not expose them to corrosive materials. Production supervisor Freddie Roberts speculated that Duro-Last employees may add water to the batteries from time to time. Under the Secretary's own interpretation, this activity would not create the need for drenching facilities.

Industrial hygienist Jordan testified that one of the documents on which she relied in recommending the instant citation was an OSHA Standard Interpretation and Compliance Letter

addressing "Quick drenching or flushing facilities in battery charging areas," issued by the Secretary on August 16, 1976. Paragraph 1 of the letter states (Exh. C-14, emphasis added):

> Battery charging areas are not specifically mentioned in CFR 1910.151(c) but are considered to be covered *if the battery caps are removed and if electrolyte acid is added*, removed, or spilled. If the battery is simply undergoing charge, it is not necessary to have quick drenching or flushing facilities for the eyes or skin.

There was no evidence that anyone added electrolyte acid to the batteries. The Secretary's Standard Interpretation undercuts her case.

The Secretary attempted at the hearing to assert that the employees of Briggs Equipment were exposed to the corrosive materials in the batteries when they serviced the forklifts. This argument is rejected. The Secretary was not aware that the forklifts were maintained by a subcontractor until the hearing. The potential exposure to the employees of Briggs Equipment formed no part of the basis for issuing the citation. No evidence of the activities of the Briggs Equipment employees was adduced (Tr. 321-322).

The Secretary has failed to establish that any employees were "exposed to injurious corrosive material," and has thus failed to establish that the cited standard is applicable to the battery charging area. Item 1 is vacated.

Item 2: Alleged Serious Violation of § 1910.219(c)(4)(i)

Section 1910.219(c)(4)(i) provides:

> Projecting shaft ends shall present a smooth edge and end and shall not project more than one-half the diameter of the shaft unless guarded by nonrotating caps or safety sleeves.

The citation states that Duro-Last's parapet machine contained "two unguarded shafts measuring 3¾ inches and 1.5 inches in length."

It is undisputed that the shafts in question projected more than ½ inch the diameter of the shaft and that they were not guarded by nonrotating caps or safety sleeves. Duro-Last contends that the Secretary failed to prove that its employees had access to the exposed shafts.

When operating the parapet machine, the operator sits in a chair behind a table and moves the material through a hot air welder on a movable arm. The movable arm is attached to a stationary upright and a horizontal arm where the control panel is located. On the stationary upright near the

bottom above the table are two rotating shafts. The shaft closest to the operator is 3¾ inches long and ¾ inch in diameter. The other rotating shaft is 1½ inches long and ½ inch in diameter. The shafts rotate at 54 rpm. There are ½ inch grooves running the length of the shafts. The machine at one time was a drip welder, with wheels mounted on the shafts. When the drip welder was converted to a parapet machine, the wheels were removed, leaving the shafts exposed. The shafts are not guarded (Exhs. C-1, R-3; Tr. 249, 284-285).

Sandra White, a parapet machine operator, testified that her right hand is 2 to 3 feet from the rotating shafts when she holds the material as it moves through the welder. When pushing buttons on the control panel, her hands are approximately 18 inches from the shafts. When reaching under the horizontal arm and control panel, her hand is approximately 8 or 9 inches from the 3¾ inch shaft (Tr. 286-288).

Generally, the question of whether employees have access to a violative condition is determined by looking at the employees' exposure to the zone of danger.

> The Secretary may prove employee exposure to a hazard by showing that, during the course of their assigned working duties, their personal comfort activities on the job, or their normal ingress-egress to and from their assigned workplaces, employees have been in a zone of danger or that it is reasonably predictable that they will be in the zone of danger. . . . The zone of danger is determined by the hazard presented by the violative condition, and is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent.

RGM Construction Co., 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995) (citations omitted).

The starting point for an analysis of whether there was employee exposure in a machine guarding case is *Rockwell Intl. Corp.*, 9 BNA OSHC 1092 (No. 12470, 1980). In *Rockwell*, the Commission held :

> The mere fact that it was not impossible for an employee to insert his hands under the ram of a machine does not itself prove that the point of operation exposes him to injury. Whether the point of operation exposes an employee to injury must be determined based on the manner in which the machine functions and how it is operated by the employees.

Id. at 1097-1098.

The employer is not required to protect against every conceivable injury that could possibly occur during the use of a machine. The Commission has stated:

> [I]n order for the Secretary to establish employee exposure to a hazard she must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger. We emphasize that, as we stated in *Rockwell*, the inquiry is not simply whether exposure is theoretically possible. Rather, the question is whether employee entry into the zone of danger is reasonably predictable.

Fabricated Metal Products, Inc., 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (citations and footnotes omitted).

There is no operational necessity that would require the parapet machine operator to place her hands in the zone of danger of the unguarded shafts. The shafts are located on the opposite side of where the operator sits. White testified that the rollers and welders must be shut down before she can place her hands near the opposite side of the machine (Tr. 279-281).

The Secretary claims that an employee could inadvertently reach into the zone of danger while the machine was on. Industrial hygienist Jordan stated her reasons for believing that the unguarded shafts created a hazard for the parapet machine operators (Tr. 330-331):

> Any time that employees are working around unguarded shafts, sometimes they forget to turn the machine off or they don't even see the shaft after a while, especially if they have worked on the machine for a number of years, and that they can be distracted by other employees or by what they're doing or something that went on last night.
>
> And, if they get their sleeve caught or any part of their clothing caught in a rotating shaft, after it turns a couple of times, you're going to need somebody to turn the machine off because you cannot pull your clothing out.

Jordan's testimony regarding the hazard posed by the exposed shafts is highly speculative. White, who actually operates the machine, was adamant that she would never reach through the machine, placing her hands near the shafts, unless the machine was off and the shafts were not rotating. "Generally speaking, where employees testify from their own knowledge and experience on matters that pertain to their specific work activities, their testimony should be given greater weight than that of witnesses who do not have first-hand experience with the operation in question." *ConAgra*, 16 BNA at 1141.

The Secretary has failed to establish that employees were exposed to a hazard created by the unguarded shafts. Item 2 is vacated.

Item 3: Alleged Serious Violation of § 1910.1030(d)(2)(ix)

Section 1910.1030(d)(2)(ix) provides:

> Eating, drinking, smoking, applying cosmetics or lip balm, and handling contact lenses are prohibited in work areas where there is a reasonable likelihood of occupational exposure.

"Occupational exposure" is, according to § 1910.1030(b), "reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious material that may result from the performance of an employee's duties."

The citation states that in the "[f]irst aid room, employees eat and drink where first aid was administered."

Production supervisor Roberts testified that he and another production supervisor routinely ate lunch and drank beverages in the supervisors' office. The office is located next to the shipping area of the facility. There is only one entrance to the office, which also contains the company's medical supply cabinet. Roberts stated that employees occasionally came to the office for bandages when they had bleeding cuts or lacerations. A sign posted over the office door reads "FIRST AID," in letters bigger than those in the word "Supervisor" that appears on the office door (Exh. C-8; Tr. 67-71). If an employee sustained a more serious injury, he or she would be taken to Minor Med, a clinic located approximately 10 minutes from Duro-Last's facility, where Duro-Last's doctor works. Roberts recalled several occasions within the past year when employees came to the supervisor's office with bleeding cuts (Tr. 79-80).

Industrial hygienist Jordan explained the hazard created by performing first aid treatment in the same room where employees ate lunch (Tr. 339-340):

> [A]ny time you have a likelihood of transmitting a blood borne pathogen, such as hepatitis, which is easily transmitted and in small quantities, that you should not eat, drink or apply cosmetics or smoke in that area because you can transfer so easily from touching the doorknob. And, you can transmit the virus from the doorknob to your mouth which presents a route of entry for that particular virus or any other virus that would be in the blood.
>
> . . .
>
> You may not know a transmission has been made, but when you also eat or drink in that area or that office, then you have increased the likelihood of transmission. You can transmit whatever is on the doorknob to your bag of chips or to the french fries or whatever, or cup of coffee or whatever you're drinking.

The Secretary has established that two of Duro-Last's employees routinely ate and drank in a work area where there was a reasonable likelihood that they could come into contact with the blood of employees injured on the job. Item 3 is affirmed.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required 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.

Duro-Last employs approximately 750 employees corporate-wide, with approximately 50 employees at the Jackson, Mississippi, facility. There is no evidence that the Secretary had previously cited Duro-Last for any violations. Duro-Last is entitled to credit for good faith. It has a written safety program and a safety committee at its facility (Tr. 18-19).

The gravity of item 3 is moderate. Only two employees regularly ate their lunch in the office. If an employee had a bleeding cut that could be treated with a Band-Aid, he or she often went to the bathroom first to wash it off, minimizing the risk of bleeding in the office. Employees with serious bleeding cuts were taken to the clinic. A penalty of $1,000 is deemed appropriate.

FINDINGS OF FACT 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 upon the foregoing decision, it is hereby ORDERED that:

1. Item 1, alleging a serious violation of § 1910.151(c), is vacated and no penalty is assessed;

2. Item 2, alleging a serious violation of § 1910.219(c)(4)(i), is vacated and no penalty is assessed; and

3. Item 3, alleging a serious violation of § 1910.1030(d)(2)(ix), is affirmed and a penalty of $1,000 is assessed.

/s/
KEN S. WELSCH
Judge

Date: June 12, 2002