Secretary of Labor,
Complainant,
v.

C-Post,
Respondent.

OSHRC Docket No. **00-0061**

APPEARANCES

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

Mr. Clinton Brown
C-Post
Greenough, Montana
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

C-Post is a small employer engaged in manufacturing wooden fence posts and furniture legs from logs in Greenough, Montana. On May 10, 1999, a C-Post employee had his left hand severed in the doweler machine. In response to a complaint about this injury, Occupational Safety and Health Administration (OSHA) Compliance Officer (CO) Trina Mailloux inspected C-Post's facility on May 13 and 18, and June 10, 1999. As a result of this inspection, C-Post was issued serious, willful, repeat, and "other" than serious citations on October 22, 1999. C-Post timely contested the citations.

Citation 1 alleges serious violations of 29 C. F. R. §§ 1910.22(a) (Item 1, proposed penalty $2000); 1910.132(a) (Item 2, proposed penalty $1400); 1910.132(d)(1) and 1910.132(f)(1) (Items 3a and 3b, proposed grouped penalty $1400); 1910.133(a)(1) (Item 4, proposed penalty $1400); 1910.135(a)(1) (Item 5, proposed penalty $1400); 1910.138(a) (Item 6, proposed penalty $600); 1910.151(b) (Item 7, proposed penalty $2000); 1910.212(a)(1) (Item 8, proposed penalty $1000); 1910.212(a)(3)(ii) (Item 9, proposed penalty $2000); 1910.213(b)(1) (Item 10, proposed penalty $2000); 1910.213(b)(3) (Item 11, proposed penalty $1000); 1910.219(c)(2)(i) (Item 12, proposed penalty $2000); 1910.219(c)(4)(i) (Item 13, proposed penalty $600); 1910.303(f) (Item 14, proposed penalty $2000); 1910.303(g)(1)(ii) (Item 15,

proposed penalty $2000); 1910.303(g)(2)(i) (Item 16, proposed penalty $2000); 1910.305(b)(1) (Item 17, proposed penalty $2000); 1910.305(e)(1) (Item 18, proposed penalty $2000); 1910.305(j)(4)(ii)(B) (Item 19, proposed penalty $2000); and 1910.305(g)(1)(i) (Item 20, proposed penalty $2000).

Citation 2 alleges willful violations of 29 C. F. R. §§ 1910.147(c)(1), 1910.147(c)(4)(i), 1910.147(c)(4)(ii), 1910.147(c)(5)(ii)(D), 1910.147(c)(7)(i), 1910.147(c)(7)(iv), and 1910.147(f)(3)(ii)(D) (Items 1a, 1b, 1c, 1d, 1e, 1f, and 1g respectively, proposed grouped penalty $14,000); and 1910.213 (b)(7) (Item 2, proposed penalty $14,000).

Citation 3 alleges repeat violations of 29 C. F. R. §§ 1910.24(b) (Item 1, proposed penalty $100); 1910.219(d)(1) (Item 2, proposed penalty $4000); and 1910.19(f)(3) (Item 3, proposed penalty $4000).

Citation 4 alleges an other than serious violation of 29 C. F. R. § 1910.23(d)(1)(iii) and no penalty proposed.

A hearing was held October 18-19, 2000, in Billings, Montana. The parties stipulated jurisdiction and coverage (Tr. 18). Also, C-Post withdrew its contest as to the cited violations and classifications except the willful classification (Tr. 10, 16-17). The issues remaining for determination involve the willful classification and the reasonableness of the proposed penalties. C-Post is represented *pro se* by its owner, Clinton Brown.

For the following reasons, the willful classification is reclassified as serious and the total penalty assessed is $26,050.

Background

C-Post is owned and operated by Clinton Brown. It is a small manufacturing company employing 10 employees including 4 members of the Brown family. It began operation in November 1997 with two employees, Clinton Brown and Mike Jones, in Trout Circle, Montana. It moved to the Greenough facility in February, 1998. C-Post makes wooden fence posts and furniture legs at an outdoor facility. The manufacturing process involves de-limbing small logs with chain saws, removal of logs' bark on a peeler machine, shaping logs into posts in a doweler machine, sharpening fence posts to a point in the pointer machine, and finally, sizing the posts on the trim saw. On November 18, 1998, CO David Vaughn conducted an inspection of C-Post.

As a result of his inspection, C-Post was issued a serious citation for 6 violations on December 7, 1998. Four of these violations [violation
of §1910.147(c)(1), § 1910.24(b), § 1910.219(d)(1), and § 1910.219(f)(3)] are involved in the instant case. OSHA and C-Post entered into an informal settlement agreement and the citation became a final order on January 14, 1999 (Exh. C-3).

On May 10, 1999, Danny Lee, a general laborer for C-Post, was operating the doweler. He had finished oiling the doweler while it was still running, had turned away, and the accident occurred. His coat sleeve was caught in the doweler's feeder and his left hand was pulled into the blades. As a result, Lee lost his left hand.

OSHA received an accident complaint about C-Post. CO Trina Mailloux did an onsite investigation on May 13 and 18, 1999, and she returned on June 10, 1999, to determine whether C-Post had abated the alleged violations. Most of the guarding violations were abated at that time (Exh. C-1A).

As a result of her investigation, citations were issued to C-Post. In order to clarify the numerous citations, the violations are regrouped[1] into the following general categories:

winadequate housekeeping (1 item for a proposed penalty of $2,000);

wlack of personal protective equipment (6 items for a proposed penalty of $6,200);

wmedical care not readily available (1 item for a proposed penalty of $2,000);

wlack of guarding or casing on machinery (7 items for a proposed penalty of $27,600);

wlack of proper electrical protection (9 items for a proposed penalty of $17,000);

wlack of proper lockout tagout procedures (7 items for a proposed penalty of $14,000); and winadequate stairs (2 items for a proposed penalty of $100).

WILLFUL CITATION

The Secretary contends that seven violations of the lockout tagout standards at § 1910.147 and one violation of § 1910.213(b)(70) for failing to have feeder attachments

[1] The Review Commission has wide discretion in assessing penalties and has the authority to group distinct but overlapping violations for the purpose of penalty assessment. *H. H. Hall Construction Co.*, 10 BNA OSHC 1042, 1046 (No. 76-4765, 1981). *See also E. L. Davis Contracting Co.*, 16 BNA OSHC 2046 (No. 92-35, 1994) (Commission found that judge did not exceed his discretion in assessing a combined penalty).

covered or guarded are willful. The Secretary bases the willful violation of § 1910.147 on a December, 1998, citation issued to C-Post for violation of the same standard. The previous citation was settled informally and became a final order (Exh. C-3). The willful violation of § 1910.312(b)(7) is based on CO Mailloux's interview with an employee.

"It is well settled that a willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Continental Roof Systems, Inc.,* 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997). It is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation. "A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of conscious disregard or plain indifference when the employer committed the violation." *Hern Iron Works, Inc.,* 16 BNA OSHC 1206, 1214 (No. 89-433, 1993).

The Secretary failed to establish that C-Post had a "heightened awareness" of the violations. There is no showing that Brown intentionally disregarded the lockout tagout requirements. Brown testified that he had a lockout tagout program for each work station including written procedures and locks and a key for each lock (Tr. 402, 404). According to testimony of the employees and CO Mailloux, there were written lockout tagout procedures posted at the peeler, cutoff saw, yarder and in the control room (Exh. C-1A, Tr. 352, 387, 61). Brown believed that he was following the correct procedures provided by CO David Vaughn during the 1998 investigation of C-Post (Tr. 404, 410). "A willful charge is not justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard even though the employer's efforts are not entirely effective or complete." *Valdek Corp.,* 17 BNA OSHC 1135, 1136 (No. 93-0239, 1995), *aff'd* 73 F.3d 1466 (8th Cir. 1996). The test of good faith is an objective one, that is "whether the employer's belief concerning the factual matters in question was reasonable under all the circumstances." *Morrison-Knudson Co./Yonkers Contracting Co.,* 16 BNA OSHC 1105, 1124 (No. 88-572, 1993).

The record also does not establish that Brown had a "heightened awareness" of failure to cover or guard the feeder attachments on the two dowelers. In May, 1999, Danny Lee did not turn off the doweler to oil it. Oiling was required about 3 – 4 times a day. As a result of being near the feeders to do the oiling, he was injured. He stated that he had been told by Brown that

no one else had to shut off the doweler when oiling it, so he assumed he was not allowed to turn it off (Tr. 327). This does not prove a "heightened awareness," nor does the record show that Brown showed conscious disregard for employee safety. "The Secretary must show that the employer was actually aware, at the time of the violative act, that the act was unlawful or that it possessed a state of mind such that if it were informed of the standards, it would not care." *Propellex Corp.,* 18 BNA OSHC 1677, 1684 (No. 96-0265, 1999).

Therefore, the violations are not willful. Although the lockout tagout procedures were inadequate, the record indicates that C-Post did attempt to comply with the standard. In light of the serious injury, the violations are reclassified as serious.

PENALTY ASSESSMENT

Section 17 (j) of the Occupational Safety and Health Act requires that when assessing penalties, the Commission must give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the prior history of violations. 29 U. S. C. § 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.,* 16 BNA OSHC 1769, 1776 (No. 88-237, 1994).

C-Post is a very small company that employed 10 employees at the time of the inspection. It has been in business only since November, 1997. Based on a review of its income tax returns, C-Post has an extremely small income (Exh. R-1). Because of its small size, a reduction in the proposed penalties is appropriate.

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). Although only one or two employees were exposed at any time and they were not continuously exposed to the hazards, the number of violations is high and there was a serious accident. Therefore, the gravity of the violations is moderate.

C-Post demonstrated some good faith. It was cooperative throughout the inspection, had a good faith belief that it was complying with the lockout tagout standard, and attempted to abate

some of the violations (guarding of chains, sprockets, and rotating shafts) before the hearing. On the other hand, C-Post lacked good faith because it did not have any written safety programs or training for its employees. Accordingly, no credit will be given for good faith. *See Access Equipment Systems, Inc.,* 18 BNA OSHC 1718, 1728-29 (No. 95-1449, 1999) (no reduction for good faith where there was evidence for and against good faith).

C-Post was previously cited for the repeat violations and the lockout tagout standard. No credit is given for a good history.

Inadequate Housekeeping

Citation 1, Item 1, Serious violation of § 1910.22(a)(1) – penalty of $1,000 is assessed.

The standard requires a workplace to be free of debris. C-Post's manufacturing process generates substantial amounts of debris such as sawdust, wood chips, and pieces of wood. Brown stated that employees were responsible for cleaning around their own work area during down time (Tr. 65). Employee Dennis Lee stated that he cleaned up his operating area, the cutoff saw, about 4 to 5 times a day (Tr. 345). However, C-Post did not have any housekeeping schedule. Employees did say that the site was cleaned up every weekend but, a thorough cleaning was only done approximately once a month.

Lack of Personal Protective Equipment

Citation 1, Items 2, 3a, 3b, 4, 5 and 6, Serious violation of §§ 1910.132(a), 1910.132(d)(1), 1910.132(f)(1), 1910.133(a)(1), 1910.135(a)(1), and 1910.138(a), respectively – grouped penalty of $2,000 is assessed.

These items are grouped for purposes of a penalty because the violations are for failure to provide employees with personal protective equipment such as chaps (for leg protection while using chain saws), safety glasses (for eye protection from flying sawdust and wood chips), helmets (for head protection from logs that might fall off the log deck) and gloves (for hand protection when holding posts that were in the pointer). C-Post did not require its employees to use any personal protective equipment while operating the machines. Employees wore their own blue jeans, non-prescription sunglasses, baseball caps, and gloves.

Lack of Readily Available Medical Care

Citation 1, Item 7, Serious violation of § 1910.151(b) – penalty of $500 is assessed.

The standard requires an employee with first aid training to be on site since the nearest medical facility to C-Post's site was more than 10 miles away (it was 17 miles away). After the 911 call for Danny Lee's accident, a hospital helicopter arrived 15 – 20 minutes later. Fortuitously, EMTs, who were training in the area and heard the 911 call, arrived within 5 minutes of the call. Brown stated that his daughter, an employee, had first aid training and was on site the day of the accident. CO Mailloux admitted that she was not aware of this (Tr. 150). Nevertheless, no evidence of a first aid certificate was presented.

Lack of Guarding or Casing on Machinery

Citation 1, Items 8, 9, 12, and 13, Serious violation of §§ 1910.212(a)(1), 1910.212(a)(3)(ii), 1910.219.(c)(2)(i), and 1910.219(c)(4)(i), respectively;

Citation 2, Item 2, Reclassified Serious violation of § 1910.213(b)(7); and

Citation 3, Item 2 and 3, Repeat violation of §§ 1920.219(d)(1) and 1910.219(f)(3) – grouped penalty of $12,000 is assessed.

These items involve the lack of guarding on conveyor rollers, projecting shaft ends, feeders, and pulleys. There was inadequate guarding on the saw blades and peeler. There were no stationary casings enclosing the exposed shafts, chains, and sprockets. Six employees were exposed but not on a continuous basis.

Lack of Proper Electrical Protection

Citation 1, Items 10, 11, 14, 15, 16, 17, 18, 19 and 20, Serious violation of §§ 1910.213(b)(1), 1910.213(b)(3), 1910.303(f), 1910.303(g)(1)(ii), 1910.303(g)(2)(i), 1910.305(b)(1), 1910.305(e)(1), 1910.305(j)(4)(ii)(B), and 1910.305(g)(1)(i), respectively – grouped penalty of $6,000 is assessed.

These items are grouped for penalty purposes because the violations are for lack of proper electrical protection. The dowelers and pointers did not have cutoff controls near the point of operation preventing the machines from automatically restarting upon restoration of power. Disconnecting means of motors were not evident and legibly marked. The cutoff saw electric box was not enclosed in a cabinet and unused openings in the box were not closed. The electrical

disconnect box for the log deck, dowelers, and peeler was not weatherproofed. Electrical cables were not protected from the weather or equipment.

Lack of Proper Lockout Tagout Procedures

Citation 2, Items 1a, 1b, 1c, 1d, 1e, 1f and 1g, Reclassified Serious violation of §§ 1910.147(c)(1), 1910.147(c)(4(i), 1910.147(c)(4)(ii), 1910.147(c)(5)(ii)(D), 1910.147(c)(7)(i), 1910.147(c)(7)(iv), and 1910.147(f)(3)(ii)(D) – grouped penalty of $4500 is assessed.

These items are grouped for penalty purposes because the violations are for failure to have correct lockout tagout procedures for each machine. Brown did have what he thought were lockout tagout procedures but they did not meet the specific requirements of the standards.

Inadequate Stairs

Citation 3, Item 1, Repeat violation of § 1910.24(b); and

Citation 4, Item 1, Other than serious violation of § 1910.23(d)(1)(iii) – grouped penalty of $50 is assessed.

C-Post did not have fixed stairs and one set of stairs did not have a handrail. The repeat violation is based on the 1998 citation (Exh. C-3). The exposure was minimal, since employees infrequently used the stairs and the total height of the stairs was 5 feet.

Based on the foregoing factors, a total penalty of $26,050 is assessed. The primary objective of the assessed penalties is to assure a safe and healthful workplace and avoid imposition of destructive penalties. *See Colonial Craft Reproductions,* 1 BNA OSHC 1063 (No. 881, 1972), and *S. A. Healy Co.,* 17 BNA OSHC 1145, 1150 (No. 89-1508, 1995). The penalty of $26,050 is sufficient to impress upon C-Post the serious nature of its violations and to serve as a deterrent to any future violations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The preceding 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 preceding decision, it is ORDERED that:

1. Citation 1 is affirmed as serious.
2. Citation 2 is reclassified as serious and affirmed.
3. Citation 3 is affirmed as repeat.
4. Citation 4 is affirmed as other than serious and no penalty is assessed.
5. The total penalty assessed is $26,050.

/s/
KEN S. WELSCH
Judge

Date: April 2, 2001