Secretary of Labor,	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. 97-2050
	:	
Auto Shred Recycling, L.L.C.,	:	**(EZ)**
Respondent.	:	

Appearances:

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

James D. Morgan, Esquire
Fisher & Phillips
New Orleans, Louisiana
For Respondent

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

DECISION AND ORDER

Auto Shred Recycling, L.L.C. (Respondent), is a corporation engaged in shredding and recycling metal scrap products and machinery in Pensacola, Florida. Following a fatality which occurred at respondent's facility on August 18, 1997, the Occupational Safety and Health Administration (OSHA) conducted an investigation from August 21, 1997, through August 27, 1997. As a result of this investigation, OSHA issued respondent a citation alleging a violation of 29 C.F.R. § 1910.212(a)(1) with a proposed penalty of $2,250. Respondent filed a timely notice contesting this citation and proposed penalty, and a hearing was held pursuant to the EZ trial procedures in Pensacola, Florida, on May 4, 1998.

Background

On August 18, 1997, respondent's operator of the oversize conveyor belt was found by other employees with his left arm caught in the tail pulley of the oversize conveyor belt line. This employee later died from his injuries. No one witnessed the incident or the operator's activity immediately preceding the incident. The operator was the only employee working in the area of the oversize conveyor. Other employees first realized there may be a problem when they noticed that the conveyor belt had stopped, but the drive belt was still turning, indicating a jam.

The citation issued to the respondent following OSHA's investigation alleges a serious

violation as follows:

> 29 CFR 1910.212(a)(1): Machine guarding was not provided to protect operator(s) and other employees from hazard(s) created by ingoing nip points:
>
> > On or about August 18, 1997, the employer had not provided adequate guarding of the incoming nip point on the tail pulley section of the oversize conveyor belt in the Eddy Current Line which exposed employees to the hazard of being caught in the conveyor nip point.

Stipulation of Facts

Prior to the hearing on May 4, 1998, the parties submitted a Stipulation of Facts as follows:

1. The parties stipulate that there was an inrunning nip point on the tail pulley section of the oversize conveyor belt in the Eddy Current Line at Respondent's workplace at 1000 Myrick Street, Pensacola, Florida 32505 during the period from August 1, 1997 to August 27, 1997, inclusive. The absence of a mechanical guard around the tail pulley of the oversize conveyor is the only condition which the Secretary alleges to be a violation of the Act relevant to this hearing.

2. The parties stipulate that there was a guardrail on the instrument side of the catwalk which ran parallel to the conveyor belt, including the area where the nip point was located on the oversize conveyor belt in the Eddy Current Line at Respondent's workplace at 1000 Myrick Street, Pensacola, Florida 32505 during the period from August 1, 1997 to August 27, 1997, inclusive.

3. The parties stipulate that there was a distance of 27 inches from the tail pulley to the catwalk on which the aforementioned guardrail was mounted and that there was no mechanical guard covering the tail pulley of the oversize conveyor belt in the Eddy Current Line.

4. The parties stipulate that there were recurring occasions when materials/debris would get caught or jammed in the tail pulley section of the oversize conveyor belt on the Eddy Current Line and that employees were required to lock out and tag out the machine before clearing this debris. The parties further stipulate that the action of clearing debris from the tail pulley area of the oversize conveyor is the only activity which the Secretary alleges to constitute a hazard in this matter.

5. The parties stipulate that the respondent was the employer of the following persons during the period from August 1, 1997 to August 18, 1997,

inclusive:

Adrian Lindsey
Don Drennen
Marc Jaffe
Hal Frazure
Bruce Johnson
James Heal
Samuel Payne

Discussion

The primary work area of the operator of the oversize conveyor was an elevated catwalk on the instrument panel side of the conveyor. The catwalk had a standard guardrail between the side of the catwalk and the tail pulley on the conveyor. The top rail was 45 inches above the catwalk grated floor. The midrail was 25.5 inches above the floor, and there was a toe kick barrier in place. During the hearing, the investigating compliance officer admitted there was no employee exposure to the tail pulley while employees were working on the catwalk during normal operations. The pulley was 24 inches wide, the width of the conveyor. The catwalk on the side of the conveyor opposite the instrument panel side abutted the area of the conveyor near the tail pulley. This area was not guarded mechanically or otherwise; however, it was used only by one employee when he was clearing debris jams. The employee never entered this area to clear jams until the conveyor was shut down, locked out, and tagged out in accordance with respondent's standard procedures.

Debris would jam the conveyors one to three times each day. All employees testifying at the hearing stated under oath that they were instructed by management to lock out and tag out the conveyors whenever they cleared jams or removed debris from the pulley area of the conveyor. These specific instructions were given to employees on several occasions prior to the August 18, 1997 incident. These employees appeared to fully understand that they were not allowed to clear any jams or debris from this area without first locking out and tagging out the system. I find their uncontroverted testimony credible. There is no evidence in the record that these employees on any occasion failed to follow the lockout/tagout procedure before clearing the jams or debris.

Section 1910.212 sets general guarding requirements for all machines. Respondent was charged with a violation of 29 C.F.R. § 1910.212(a)(1) which provides:

> (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 threshold issue to be decided is whether respondent provided a method of machine guarding to protect employees from the ingoing nip point hazards while working in the area of the tail pulley of the oversize conveyor. Complainant's compliance officer testified there was no exposure to the nip point hazard for employees standing on the catwalk during normal operations. The standard guardrail clearly protected employees working on the catwalk from ingoing nip point hazards in the tail pulley area. Furthermore, the tail pulley nip point was located below the floor level of the catwalk, and the tail pulley was 27 inches from the toe kick of the catwalk.

The only activity the Secretary alleges to be a hazard is the action of clearing debris from the tail pulley area of the oversize conveyor. The absence of a mechanical guard around the tail pulley is the only condition alleged to be a violation. Respondent's employees were specifically instructed not to clear jams or debris from the tail pulley area of the conveyor without first shutting it down and locking and tagging out the system. The testimony of management and hourly employees clearly demonstrated they understood and complied with respondent's lockout/tagout procedure before clearing jams and debris from this area.

The Secretary argues that respondent must use the lockout/tagout procedure and provide a mechanical guard that surrounds the nip point in order to fully comply with the cited standard and prevent employees from contacting the ingoing nip points during debris and jam clearing activity. She further argues that the guardrail does not prevent employees from climbing into the tail pulley area to perform maintenance or clear jams. Complainant suggests that to clear debris, the employee should lock out and tag out the system and then remove the guard to clear debris. This procedure provides no safeguard in addition to those currently provided by the respondent. When the system is shut down, locked out, and tagged out, there is no longer a hazard of ingoing nip points. The pulley, at that point, is not turning. Using the Secretary's recommended procedure, the employee would still be exposed to the uncovered nip point when the guard over the pulley is removed.

Machine guarding must protect employees from hazards of ingoing nip points. There is no requirement that this guarding prevent an employee from circumventing the guarding and, thereby, exposing himself to such hazards. Respondent provided this guarding by standard guardrails with toe kicks that protected employees from the ingoing nip point of the tail pulley. In addition, it located the catwalk so that the tail pulley was no closer than 27 inches from the nearest point on the catwalk floor. The nip point was also located below the floor level of the catwalk.

No part of an employee's job required him to be close to the pulley except when the conveyor system was shut down, locked out, and tagged out. For an employee to be exposed to an ingoing nip point while the tail pulley is turning, he must take two deliberate actions. He must climb or reach past the guardrail, and he must violate the respondent's lockout/tagout procedure. The Act and the cited standard require an employer to protect employees, but they do not require an employer to take extraordinary measures to prevent employees from circumventing guarding systems and violating protective procedures. *See National Realty and Construction Co. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973), and *Metal Shredders, Inc.*, 15 OSHC 1554, 1991-93 CCH OSHD ¶ 29,642 (No. 90-2273, 1992).

The Secretary has failed to prove that respondent's employees were exposed to the hazards of ingoing nip points on the tail pulley of the oversize conveyor. The alleged violation of 29 C.F.R. § 1910.212(a)(1) is vacated.

FINDINGS OF FACTS AND 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 ORDERED:

Item 1 of Citation No. 1, alleging a serious violation of 29 C.F.R. § 1910.212(a)(1), is hereby vacated and no penalty is assessed.

STEPHEN J. SIMKO, JR.
Judge

Date: May 22, 1998