



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
WATERBURY STYLE, INC.
Respondent.

OSHRC DOCKET
NO. 94-0685

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on January 5, 1995. The decision of the Judge will become a final order of the Commission on February 6, 1995 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before January 25, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. /SKA
Ray H. Darling, Jr.
Executive Secretary

Date: January 5, 1995

DOCKET NO. 94-0685

NOTICE IS GIVEN TO THE FOLLOWING:

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Richard DeBenedetto
Administrative Law Judge
Occupational Safety and Health
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SECRETARY OF LABOR,
Complainant,

v.

WATERBURY STYLE, INC.
Respondent.

OSHRC Docket No. 94-0685

Appearances:

Susan Salzberg, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Barrett Metzler, CSP
Northeast Safety Management, Inc.
West Hartford, CT
For Respondent

Before Administrative Law Judge Richard DeBenedetto

DECISION AND ORDER

Waterbury Style, Inc. (Waterbury), was cited on February 24, 1994, for serious violation of the machine guarding standard at 29 C.F.R. § 1910.212(a)(3)(ii), which requires that the point of operation of machines whose operation exposes an employee to injury shall be guarded. The Secretary proposes that a penalty of \$750 be assessed for the violation.

The subject of the citation involves a foot-operated "kick press" used at Waterbury's facility to assemble belt buckles. The press is operated from a sitting position and activated by a foot pedal. During the assembly operation of joining the "tongue" to the buckle frame, the operator must use both hands. Waterbury's supervisor, Ben Finnemore, testified that at a certain step in the process, the operator places the fingers of one hand in the point of operation and, at another stage, the operator's fingers are only a few inches from the point of operation (Tr. 100, 107).¹ The press operators' exposure to the hazard of having their

¹"Point of operation" is the area on a machine where work is actually performed upon the material being processed. 29 C.F.R. § 1910.212 (a)(3)(i).

fingers struck by or caught in a pinch point created by the moving parts of the press was vividly depicted by the Secretary's videotape of the press in operation as well as Waterbury's own presentation of a kick press at the hearing, the operation of which was explained by supervisor Finnemore.

The 212(a)(3)(ii) standard states simply and flatly, "[the guarding device] shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle." Guided by the foregoing language, one has considerable difficulty in understanding why Waterbury went to a great deal of trouble mounting a challenge such as that displayed during the hearing regarding the issue of point of operation exposure—a matter so plain that no room is left for doubt or dispute.

The Secretary's characterization of the violation as serious presents a very different situation. A violation may be considered serious "where, although the accident itself is merely possible (i.e., in statutory terms [29 U.S.C. § 666(k)] 'could result from a condition'), there is a substantial probability of serious injury if it does occur." *Shaw Const., Inc. v. OSHRC*, 534 F.2d 1183, 1185 (5th Cir. 1976). The record does not support a factual conclusion that the unguarded kick press presented a substantial probability of serious injury.

The Secretary called Manivone Pothitay who testified that she had worked at Waterbury's facility in September 1993 at which time she injured her finger while operating the kick press. Although she indicated that she thought she had "broken" her finger, her testimony was so fraught with vagueness, it failed to shed any light on the nature and extent of her injury (Tr. 83, 89). The Secretary also presented six reports of occupational injury for state worker's compensation purposes covering the period from September 1993 to April 1994 (Exh. C-2). The reported injuries, which were all related to the operation of the kick press, are variously described as follows: "hurt" index finger;² tip of index finger "cut"; "pinched" index finger; "scraped skin" of thumb and forefinger; "sprained" middle finger; middle finger "broke in 2 places." Of the six injuries reported, only the latter would clearly qualify as serious. However, because the nature of the injury is worded in the nonmedical

²This report concerned the witness Manivone Pothitay who sustained her injury on September 2, 1993 (Exh. C-2).

vernacular, some doubt is raised as to its accuracy. Waterbury steadfastly denied having knowledge of any injury involving a "broken" finger resulting from operating the press. But even if we accept the injury as a fracture of the finger, a single instance of such an injury does not meet the "substantial probability" requirement of a serious violation.

The parties saw fit to expend much time and effort debating the serious classification of the citation despite the fact that the issue really has no practical significance in this case. As it was made plain during the hearing, Waterbury would be required to abate the unguarded kick press whether the citation was labeled serious or nonserious, and the \$750 penalty proposed by the Secretary is so moderate that its assessment under the penalty criteria of 29 U.S.C. § 666(j) would be equally appropriate for a nonserious violation.

Based upon the foregoing findings and conclusions, it is **ORDERED** that the citation is affirmed as a nonserious violation and a penalty of \$750 is assessed.


RICHARD DeBENEDETTO
Judge, OSHRC

Dated: December 21, 1994
Boston, Massachusetts