UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET NW
4TH FLOOR
WASHINGTON, DC 20006-1246

FAX
COM (202) 634-4008
FTS (202) 634-4008

SECRETARY OF LABOR
Complainant,
v.
WASTE PROCESSING EQUIPMENT, INC.
Respondent.

OSHRC DOCKET
NO. 91-3106

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 February 4, 1993. The decision of the Judge will become a final order of the Commission on March 8, 1993 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 February 24, 1993 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
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: February 4, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-3106

NOTICE IS GIVEN TO THE FOLLOWING:

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

George Palmer, Esq.
Assoc. Regional Solicitor
Office of the Solicitor, U.S. DOL
Suite 201
2015 - 2nd Avenue, North
Birmingham, AL 35203

Mr. Bill Traylor, President
Waste Processing Equipment, inc.
160 Dilbeck Road
P.O. Box 1047
Rainsville, AL 35986

Edwin G. Salyers
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309 3119

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

PHONE:
COM (404) 347-4197
FTS (404) 347-4197

FAX:
COM (404) 347-0113
FTS (404) 347-0113

SECRETARY OF LABOR,
Complainant,

v.

WASTE PROCESSING EQUIPMENT,
Respondent.

OSHRC Docket No.: 91-3106

Appearances:

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

Mr. Bill Traylor, President
Waste Processing Equipment, Inc.
Rainsville, Alabama
For Respondent

Before: Administrative Law Judge Edwin G. Salyers

DECISION AND ORDER

Respondent operates a manufacturing plant in Rainsville, Alabama, where it employs approximately 28 employees in the production of paper balers and other types of waste handling equipment. Respondent's products are shipped in interstate commerce and it is, therefore, engaged in a business affecting commerce and subject to the Occupational Safety and Health Act (29 U.S.C. 651, *et. seq.*).

On September 16, 1991, respondent's operations were inspected by compliance officer, Virginia Simmons, to determine respondent's compliance with the Act and the standards promulgated for its enforcement. As a result of this inspection respondent was issued a serious citation consisting of twelve items and proposing a total penalty of $12,500.00. Respondent also received an "other" citation consisting of sixteen items but

proposing no penalties. By letter dated October 28, 1991, respondent filed a notice of contest indicating its intent to contest the penalties proposed in the citation.

On January 24, 1992, the Secretary filed her complaint with the Review Commission. When respondent failed to file an answer to the complaint, an order to show cause was issued to respondent requiring it to file a responsive pleading on or before March 16, 1992. Respondent complied with the order by letter dated March 10, 1992, reiterating respondent's contention "that the penalties accessed against this company are unreasonable and excessive" and requesting the Commission "to dismiss the penalties in their entirety." While this letter addressed each of the twelve items contained in the serious citation it did not clearly reflect a denial of the factual allegations upon which the Secretary predicated the charges. The letter further indicated respondent did not intend to further contest the "citations that have no penalty."

At the hearing respondent was represented by its owner[1] and president, Bill Traylor, acting *pro se*. By mutual consent, the case was conducted in accordance with Commission Rule 2200.200 which provides for simplified procedures (Tr. 5). At the outset of the hearing Mr. Traylor reiterated the Company's main concern was the amount of penalties proposed by the Secretary and that respondent was not disputing "most of the items" charged by the Secretary but "there are some things (in the serious citation) that we feel we were penalized unduly for" (Tr. 6, 7). Traylor conceded he was no longer contesting "other" citation No. 2 and this citation will be affirmed with no penalty (Tr. 8).

In view of the court's uncertainty concerning respondent's intentions as to each of the items charged in serious citation No. 1, the court conducted an informal discussion with the parties to resolve each item. The parties were afforded the opportunity to discuss the individual items and to give sworn testimony where such testimony was deemed appropriate.

As a result of the foregoing, the following conclusions are reached with respect to serious citation No. 1.

Item No. 1 charges respondent with a violation of 29 C.F.R. § 1910.23(c)(1) for its failure to provide guardrails around an overhead storage area where employees were exposed to potential falls while placing or removing materials. The area was approximately

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[1] Respondent is a corporation whose stock is wholly owned by the Traylor family (Tr. 4).

10 feet above ground level (Tr. 23). The Secretary offered into evidence a photograph (Exh. C-1) which clearly reflects the absence of guardrails around this storage area and this circumstance is not in dispute. Respondent argues that this area was seldom, if ever, used by employees (Tr. 15). However, respondent's plant manager admitted employees would go upon the platform for short periods of time on a fairly regular basis (Tr. 23). It is concluded, therefore, that the Secretary has established the necessary exposure of employees to a fall hazard even though this exposure was infrequent and of short duration. *Walker Towing Corp.,* 14 BNA OSHC 2072, 91 CCH OSHD 29,239 (No. 87-1359, 1991). This item will be affirmed.

Item 2 relates to conditions existing in respondent's paint spray room which created a potential for fire or explosions. Respondent conceded that the wiring in this room did not conform to the specifications set forth in 29 C.F.R. § 1910.107(c)(5) and that electric fans were inside the spray room in contravention of § 1910.107(d)(5) (Tr.24-29). Respondent also conceded that at the time of the inspection, paint was not stored in a closed container in violation of § 1910.106(e)(2)(ii) and that the quantity of flammable or combustible liquids kept in the vicinity of spraying operations exceeded the minimum required for operations in violation of § 1910.107(e)(2) [Tr. 29-32]. This item will be affirmed in its entirety.

Item 3 charges respondent with a violation of § 1910.151(c) for its failure to provide employees using corrosive material with quick drench facilities to flush the eyes or body in the event of an emergency. Even though the Secretary withdrew the penalty proposed for this item during the hearing (Tr. 32) respondent refused to concede a violation occurred since it maintains the drum in the truck shop which contained the alleged corrosive material was never opened or used (Tr. 33). The Secretary based this charge upon statements allegedly made by Traylor to compliance officer Simmons that the material contained in the drum was "used once weekly" to wash trucks, which statement was denied by Traylor at the hearing (Tr. 34). Traylor testified that the drum in question had never been opened or used in respondent's operations (Tr. 33) and was removed from the premises as a result of the Secretary's inspection (Tr. 36, 37). No additional evidence was offered by the Secretary to

confirm that any corrosive material[2] was ever used in respondent's operations and it must be concluded that the Secretary has failed to establish exposure, an essential element of her case. This item will be vacated.

Item 4(a) charges violations of § 1910.184(e)(2)(ii)[3] with respect to a certain alloy steel chain used in respondent's shop for lifting a certain piece of material used in respondent's manufacturing operations. Sub-item (a) refers to a chain which was connected together by means of a seven-sixteenth inch bolt (See Exh. R-8). The Secretary maintains that the use of a bolt in this fashion is a violation of the cited standard unless the chain with the bolt inserted is sent back to the manufacturer of the chain for testing and certification (Tr. 42) or unless the chain with the bolt inserted is load tested by respondent before use (Tr. 45). Respondent concedes it took neither of the foregoing measures. It argues as a matter of common sense that the strength of the bolt far exceeds the capacity of the chain[4] and would present no safety hazard since this chain is used solely to lift a plate weighing 191 pounds and the chain has a 1,300 pound capacity (Tr. 44). On balance, it appears to the court that the Secretary has established a violation of the standard in a technical sense but that the potential for an accident with resulting injuries would be minimal. This circumstance will be considered in the court's penalty determination.

Sub-item 4(b) charges a violation of § 1910.184(e)(7)(ii)[5] for respondent's use of "mechanical coupling links or low carbon steel repair links to repair broken lengths of a chain sling" (See Exh. C-3, R-9). Respondent did not deny the basic elements of the charge but again asserts that the chain in question, given the circumstances under which it was used,

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[2] An additional problem with the Secretary's case arises from the fact that no evidence was presented to verify that the material contained in the drum was actually corrosive and it appears that no corrosive materials were ever used at respondent's shop (Tr. 37).

[3] 29 C.F.R. § 1910.184(e)(2)(ii) provides: Makeshift links or fasteners formed from bolts or rods, or other such attachments, shall not be used.

[4] Traylor conceded, however, that he could not "document" this statement (Tr. 42) but would "guarantee" that the "chain would break before the bolt" (Tr. 43).

[5] 29 C.F.R. § 1910.184(e)(7)(ii) provides: Mechanical coupling links or low carbon steel repair links shall not be used to repair broken lengths of chain.

presented no hazard to employees.[6] Traylor testified that particular chain was "used strictly to lift a frame out of the jig" which frame weighs approximately 900 pounds (Tr. 54, 55). The chain has a working load capacity of 5,400 pounds and is used in conjunction with another chain which has a capacity of 14,600 pounds (Tr. 58). According to Traylor, even if one chain failed in operation the other would serve to prevent the 900 pound load from dropping and causing injury to employees. The evidence is clear, however, that respondent did not load test the chain in question after it was repaired and this circumstance is sufficient to constitute a technical violation of the cited standard.

Item 5 charges respondent with a violation of § 1910.212(a)(1) for its failure to guard the exposed areas of blades in use on two horizontal bandsaws (See Exh. C-4, C-5). Respondent admits that the saws were not guarded, but argues that there is little, if any, exposure of employees to the blades while the saws are running since the saws are automatically fed and the operators stand away from the saws while they are in operation (Tr. 66). Simmons did not dispute respondent's contention concerning exposure while the saw was in operation but maintained employees were at some risk during the start-up procedures and at other times (Tr. 68). Traylor conceded there would be some exposure to employees while using the bandsaws and the only way to eliminate it "a hundred percent" would be to "set it outside and not use it" (Tr. 69). It is concluded that the Secretary established a violation of this item.

Item 6 charges respondent with a violation of § 1910.212(a)(3)(ii) for its failure to guard the point of operation on the shearing mechanism of its Webb steelworker machine (See Exh. C-6). Traylor testified this machine was purchased from the Navy in 1967 and did not have a guard at the time of the Secretary's inspection. He conceded there would be some exposure to an employee using the "nibbler" mechanism but no one had ever been injured while using the machine (Tr. 72). Following the Secretary's inspection, respondent installed a guard around the point of operation which, on the surface, at least, appears to

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[6] The cited standard is "specific" and when its terms are violated a hazard is presumed. *Clifford B. Hannay & Son, Inc.*, 6 BNA OSHC 1336, 1978 CCH OSHD ¶ 22,525 (No. 15983, 1978).

satisfy the requirements of the standard[7] (Tr. 73, 73; Exh. R-11). In any event, the Secretary has established a violation and this item will be affirmed.

Item 7 charges respondent with a violation of § 1910.212(a)(5) for its failure to guard two large box fans to prevent employee exposure to the rotating blades (See Exh. C-7, C-8). This item is not contested by respondent (Tr. 82, 83) and will be affirmed. Respondent corrected this condition by enclosing the fans with wire mesh (Tr. 85).

Item 8, sub-items a, b & c, charges respondent with violations of § 1910.219 for its failure to guard pulleys, V-belts and drive belts on a compressor and floor fans in use at its facility. Respondent does not contest these charges and has corrected these conditions by installing appropriate guarding devices (Tr. 84-88).

Item 9 charges a violation of § 1910.219(f)(i) for respondent's failure to guard the rotating gears located on the side of the Webb steelworker machine. This item is not contested and the condition has been corrected (Tr. 90-91).

Item 10, which charges a violation of § 1910.243(c)(1) for respondent's failure to guard a portable grinder, is not contested (Tr. 91-93) and has been abated.

Item 11, sub-items a & b, dealing with respondent's failure to have a grounding prong on an electrical extension cord [§ 1910.304(f)(4)] and its use of a damaged extension cord [§ 1910.334(a)(2)(ii)] are not contested and have been abated (Tr. 94, 95).

Item 12 charges a violation of § 1910.333 for respondent's failure to develop and implement a lock-out, tag-out program. Traylor testified he was unaware of this requirement and has now taken steps to comply with the standard (Tr. 99-102). This item will be affirmed.

As previously indicated, the primary issue for resolution in this case is the amount of penalties to be imposed for the infractions. The Secretary initially proposed a total penalty of $12,500.00 for the violations contained in serious citation No. 1, Items 1 through 12. This court has concluded that item 3 with a proposed penalty of $1,000.00 should be vacated leaving a remaining balance of $11,500.00 in the Secretary's proposal.

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[7] Traylor testified the installed guard could not remain in place while the "nibbler" was in operation and this raises a question of whether this condition has actually been abated (Tr. 76-81). This circumstance indicates a need for further action by the parties to resolve the abatement question.

While the Secretary initially proposes penalties in citations, the final determination of penalties in contested cases is made by the Commission. *Secretary v. OSAHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act, the Commission is required to find and give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the assessment of an appropriate penalty.

In this case the Secretary allowed a forty percent reduction in penalties as a result of respondent's small size (28 employees) (Tr. 106). An additional ten percent was allowed for history since respondent had not been previously inspected (Tr. 107). However, no reduction was allowed for good faith since "the company did not have a written safety program." (*id*).

The court notes in the testimony of compliance officer Simmons that respondent operated a "clean" shop and gave good safety instructions to its employees (Tr. 108). Respondent's plant manager was "fully cooperative" during the Secretary's inspection, had a good attitude towards safety and either immediately corrected or agreed to correct all hazardous conditions which were directed to his attention during the course of the Secretary's inspection (Tr. 109).

It further appears in the record that the parties engaged in extensive discussions prior to the hearing wherein the Secretary indicated a willingness to accept a substantial reduction of penalties if abatement was assured and a settlement could be reached. While settlement discussions are not admissible as evidence over the objection of either party and this circumstance was explained at the hearing (Tr. 110), in this case the parties agreed that the substance of these discussions might serve as an aid to the court in arriving at an appropriate penalty (Tr. 111). The record discloses that the Secretary, after considering all aspects of the case, was willing to accept a sixty percent reduction of penalties in the interest of compromise and settlement (Tr. 114). This courts' analysis of the relevant factors leads to a conviction that the Secretary's settlement proposal was reasonable and generous under the circumstances presented in the case. This proposal will be adopted and a total penalty of $4,600.00 will be assessed.

The foregoing will constitute the findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.

It is hereby ORDERED:

1. That item 3 of serious citation No. 1 is vacated.

2. That items 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, and 12 of serious citation No. 1 are affirmed and a penalty of $4,600.00 is assessed; and

3. That "other" citation No. 2 is affirmed in its entirety with no penalty assessed.

/s/ Edwin G. Salyers
EDWIN G. SALYERS
Judge

Date: January 28, 1993