

IN THE MATTER OF

BETHLEHEM STEEL

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BEFORE THE COMMISSIONER

OF LABOR AND INDUSTRY

MOSH CASE. NO. H-2665-025-92

OAH CASE NO. 91-DLR-MOSH-41-2914

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FINAL DECISION AND ORDER

This matter arose under the Maryland Occupational and Safety Health Act, Labor and Employment Article, Title 5, *Annotated Code of Maryland*. This case is before the Commissioner of Labor and Industry pursuant to a remand from the Court of Appeals in *Bethlehem Steel Corp. v. Commissioner of Labor and Industry*, 339 Md. 323 (1995).¹ In its decision, the Court of Appeals ruled that Bethlehem Steel has the burden of proving the feasibility of compliance to abate an alleged violation of 29 C.F.R. § 1910.212(a)(1). Pursuant to

¹ The Occupational Safety and Health Unit of the Division of Labor and Industry conducted an inspection at Bethlehem Steel Corporation (“Bethlehem Steel or Employer”) as the result of an accident involving an employee fatality. MOSH issued a citation to the Employer alleging a violation of MOSH Standard 29 C.F.R. § 1910.212(a)(1). The Employer contested the citation which was upheld by a hearing examiner. The Commissioner adopted the hearing examiner’s determination and reaffirmed that the employer has the burden of proving the affirmative defense of impossibility. *See In the Matter of Bethlehem Steel*, Hearing Determination No. 93-1 (1992). The Employer appealed the burden of proof issue to the Circuit Court for Baltimore County. The Circuit Court for Baltimore County reversed and held that the burden of proof for the defense of impossibility rests with MOSH. The Commissioner appealed to the Court of Special Appeals which reversed the circuit court. *See Commissioner of Labor and Industry v. Bethlehem Steel Corp.*, No. 42, October 12, 1994 (Unreported Decision) The Employer then appealed to the Court of Appeals. The Court of Appeals issued a writ of certiorari to determine the allocation of the burden of proof between the parties concerning the feasibility of compliance to abate an alleged violation of 29 C.F.R. § 1910.212(a)(1).

the Court of Appeals' decision, the question before the Commissioner of Labor and Industry is whether "Bethlehem Steel satisfied its burden of proof of infeasibility."

An employer may defend against a citation that specifies a particular means of abatement by proving the affirmative defense of impossibility/infeasibility. *See Jukius Nasso Concrete Corp.*, 6 OSHC 1171 (1977). In the past, the Commission decisions addressing this defense spoke in terms of proving "impossibility." *See W.B. Meredith, II, Inc.*, 1 OSHC 1947 (1974). Over time, however, the Commission acknowledged that literal compliance with the standards was not possible, and while the case law continued to refer to the defense as impossibility, the analysis of the requirements for the defense evolved into an examination of the "feasibility" of the abatement. *See Cleveland Electric Illuminating Co.*, 13 OSHC 2209, 2213 (1989). The Commission acknowledged this evolution, and clarified that the defense of impossibility has shifted to a potentially less stringent test of "infeasibility." *See Seibel Modern Manufacturing & Welding Corp.*, 15 OSHC 1218 (1991); *Dun Par Engineered Form Co.*, 12 OSHC 1949, 1956 (1986). The Court of Special Appeals followed this evolution under Maryland law when it stated that the appropriate inquiry in evaluating this affirmative defense is the "infeasibility" of the abatement methods proscribed by the standards rather than the "impossibility" of the abatement methods. *See Commissioner of Labor and Industry v. Bethlehem Steel Corp.*, Slip Op. at 3, No. 42, October 12, 1994 (Unreported Decision). Hereafter, the Commissioner shall examine this affirmative defense in terms of the infeasibility of the abatement methods.

In establishing the affirmative defense of infeasibility, the employer must prove that (1) "the means of compliance prescribed by the applicable standard would have been infeasible in that (a) its implementation would have been technologically or economically infeasible or (b)

necessary work operations would have been technologically or economically infeasible after its implementation, and (2) there would have been no feasible alternative means of protection.”

V.I.P. Structures, Inc., 16 OSHC 1873, 1874 (1994). For an abatement measure to be feasible, it must be “useable” during an employee’s work activities for the “intended purpose of protecting employees.” See *Seibel Modern Manufacturing & Welding Corp.*, 15 OSHC at 1227. In evaluating whether the abatement is feasible, it is necessary to consider the “practical realities of the particular workplace.” *Dun-Par Engineered Form Co.*, 12 OSHC at 1959. For example, in *V.I.P. Structures, Inc.*, the employer was installing a roof on a pre-engineered metal building. Because of deep mud, the boomlifts used to advance the safety nets were immobilized and employees were working with no safety nets. The employer was cited for the failure to provide the required safety nets. The employer argued that it was infeasible to install the safety nets. The Commission held that because the employer had a policy that provided for the suspension of operations for weather-related reasons, and for the reassignment of employees to other worksites when necessary, there were feasible alternative means of protection. The employer, therefore, failed to meet its burden of proof.

Prior practice or custom are insufficient bases to argue infeasibility where an employer has not implemented alterations that are reasonably necessary to accommodate the abatement measure specified by the standards. See *Seibel Modern Manufacturing & Welding Corp.*, 15 OSHC at 1227. In proving infeasibility, an employer must consider all forms of protection, and demonstrate that protection is unavailable. *Monitor Constr. Co.*, 16 BNA 1589, 1596 (1994). In considering all forms of protection, an employer is obligated to modify a work practice in order to accommodate an abatement measure specified in a standard. See *Seibel Modern*

Manufacturing & Welding, 15 OSHC at 1227. Where literal compliance is not possible, an employer is expected to comply to the extent feasible. *RGM Construction Co.*, 17 OSHC 1227, 1229 (1995). Employers are directed to “exercise some creativity in seeking to achieve compliance.” *Secretary of Labor v. Gregory & Cook Inc.*, 17 OSHC 1189, 1191 (1995). The Commission has acknowledged, however, that “[i]f there is no way to use a measure for its intended purpose without unreasonably disrupting the work activities, the mere fact that the measure’s installation is physically possible does not in our view mean that we should compel the employer to install the measure specified in a standard.” *See Seibel Modern Manufacturing & Welding*, 15 OSHC at 1227. With these principles in mind, the Commissioner now turns to whether Bethlehem Steel has met its burden of proving the affirmative defense of infeasibility in this case.

This case arose out of a fatality sustained during the polishing of a lathe. The citation states that guarding was not provided to protect operators and employees from the hazards created by the rotating parts of the chuck jaws and shims. *See* MOSH Ex. 1. It is MOSH’s position that “the focus of the citation and the suggested abatement is guarding for the polishing operations.” *See* MOSH’s Memorandum in Support of Citation and Proposed Penalty, at 14; T. at 14, 180. The Commissioner’s decision, therefore, is limited to abatement during polishing, and not abatement for any other operations performed on the lathe.

There is no dispute that a chuck can be installed on a lathe, and that polishing on a lathe has been performed with a chuck guard in place. *See* Employer Exhibit 13; T. at 178. The installation of the chuck guard is not technologically or economically infeasible, and nor would the necessary work operations be technologically or economically infeasible after its installation.

See V.I.P. Structures, Inc., 16 OSHC at 1874. It is also undisputed that a guard cannot be installed between an employee's hands and the chuck jaws and shims while the lathe is being polished. (T. at 102, 120). This fact raises the issue of whether a guard installed on the chuck would be useable for the intended purpose of providing protection from contact with the chuck jaws and shims during polishing. *See Seibel Modern Manufacturing & Welding Corp.*, 15 OSHC at 1227.

Bethlehem Steel argues that while a guard,² which it terms a shield, can be installed on the chuck, there is no utility to its installation as an employee's hands will be under the guard to perform the polishing operation. Bethlehem Steel also asserts that the citation addresses the chuck jaws and shims, and that because of the physical location of the chuck guard in relation to the chuck jaws and shims, the guard would not provide any protection for the cited hazard. According to Bethlehem Steel, since there is no suitable guard or other form of physical protection for polishing, the only available protection is employee safety training which has been implemented.

It is MOSH's position that the chuck guard is "useable" to protect employees during the polishing procedure. MOSH asserts that a chuck guard will prevent "inadvertent contact with the lathe and prevent an employee's shoulder or head from falling against the chuck or jaws."T. at

²The Employer and MOSH disagree as to whether the abatement suggested by MOSH is a "guard" or a "shield." According to the Employer, shields are manufactured for installation on this type of lathe for the purpose of containing chips and/or coolant during operations other than polishing. A determination of whether the proposed abatement is a shield or a guard is unnecessary for the resolution of this case. However, as noted above, an employer must use some creativity in striving to comply with the standards which includes consideration of all possible forms of protection. *See Gregory & Cook Inc.*, 17 OSHC at 1191; *Monitor Constr. Co.*, 16 OSHC at 1596.

114. MOSH posits that if an employee's hands were above their shoulders, and the employee's hands inadvertently came down onto the chuck jaws, the guard would prevent the employee from coming in contact with the chuck jaws. T. at 288. In addition, MOSH describes the chuck guard as an "awareness type guard" to provide a barrier from the top of the chuck and the rotating jaws. T. at 58.

The Commissioner has examined the photographic evidence of an employee polishing the lathe on which the accident occurred, and a lathe located in the same facility with an installed chuck guard. *See* Employer Exhibits 3 & 13. The Commissioner finds this evidence particularly revealing as to the feasibility of the abatement for the limited operation of polishing. The exhibits show that the top of the chuck is at or above the height of an employee's shoulders and that the center of the chuck is at the height of an employee's chest. T. at 196-97. The cited hazard, the chuck jaws and shims, are between waist and armpit height. *See* Employee Exhibit 3. The cited protection, a chuck guard, would be located at or above the shoulders of an average height employee.

While there is utility to installing a chuck guard to protect against the hazards of the chuck, that issue is not before the Commissioner. MOSH has narrowed the issue in this case to guarding an employee from the chuck jaws and shims during polishing. With regard to preventing an employee from placing their head or shoulder against the chuck jaws, MOSH's factual scenario of an employee raising their hands above their head is theoretically possible. However, the Commissioner finds that the height of the chuck guard in relation to the employee's body does not support the conclusion that the chuck guard would provide a practical

level of protection during polishing.³ As to the guard as an awareness barrier, the chuck guard would be located at an employee's shoulder height during polishing while the employee is concentrating on polishing with the emery strip in the employee's hands which are at waist height. Under these facts, the hazard would be located at waist level while the protection would be located at shoulder height or higher. The value of the chuck guard as an awareness guard during polishing operations to heighten an employee's consciousness of the hazard is dubious. The Commissioner, therefore, concludes that a chuck guard installed on this lathe during polishing is not useable for the intended purpose of protecting employees. *See Seibel Modern Manufacturing & Welding Corp.*, 15 OSHC at 1227. Accordingly, the Commissioner finds that Bethlehem Steel has satisfied its burden of proof as to the infeasibility of abatement.

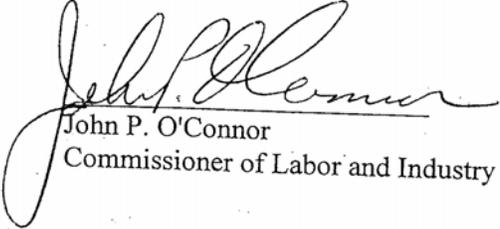
ORDER

The Commissioner of Labor and Industry hereby ORDERS, this 28th day of April 1999, that:

1. Citation 1, alleging a SERIOUS violation of MOSH Standard 29 C.F.R. 1910.212(a), is DISMISSED;
2. This Order becomes final 15 days after its issuance. Judicial review may be requested by filing a petition for judicial review in the appropriate circuit court. *See Labor and*

³ The Employer's witness testified that in order for an employee to come down on the chuck jaws, as MOSH suggested, the employee would have to be off the ground, for example, standing on a ladder. T. at 197.

Employment Article, § 5-215, Annotated Code of Maryland, and Maryland Rules, Title 7,
Chapter 200.



John P. O'Connor
Commissioner of Labor and Industry