

IN THE MATTER OF

*** BEFORE THE**

*** COMMISSIONER OF LABOR**

HOME DEPOT USA, INC.

*** AND INDUSTRY**

*** MOSH CASE NO. C9954-009-09**

OAH CASE NO. 41-09-20197

*** * * * ***

FINAL DECISION AND ORDER

This matter arose under the Maryland Occupational Safety and Health Act, Labor and Employment Article, Title 5, *Annotated Code of Maryland*. On June 1, 2009, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry (“MOSH”) issued two citations to Home Depot USA, Inc. (“Employer”) for violations of 29 C.F.R. §1910.212(a)(1), 29 C.F.R. §1910.1200(f)(5)(i) and 29 C.F.R. §1910.1200(f)(5)(ii) stemming from a planned inspection of a Home Depot store in Owings Mills, Maryland.

The Employer contested the citations and a hearing was held on September 23, 2009, at which the parties introduced evidence, presented witnesses, and made arguments. Presiding at the hearing was Sondra L. Spencer, Administrative Law Judge sitting as the Hearing Examiner (“HE”). The parties entered into a joint stipulation, which they submitted in writing to the HE, agreeing that Citation 2, Items 1-5 were properly cited and should be affirmed. At the hearing, the Employer also advised the HE that it was not contesting Citation 1, item 3. As such, the HE’s subsequent Proposed Decision affirmed Citation 1, item 3 and Citation 2, items 1-5 without discussion. The Proposed Decision focused on the remaining items in dispute: Citation 1, items 1, 2a and

2b and recommended that these all be affirmed. The Employer then notified the Commissioner of its timely appeal of the Proposed Decision as to Citation 1, items 1, 2(a) and 2(b).

On September 29, 2010, the Deputy Commissioner¹ held a review hearing and heard argument from the parties. Based upon a review of the entire record and consideration of the relevant law and the positions of the parties, for the reasons set forth below, the HE's recommendation as to Citation 1, item 1 is vacated and the citation is dismissed. The HE's recommendation as to Citation 1, items 2(a) and 2(b) is affirmed.

FINDINGS OF FACT

Christina Campbell, an industrial hygienist with MOSH, performed a comprehensive planned inspection of the Home Depot store on Reisterstown Road in Owings Mills, Maryland. FF 1.²

Facts Relevant to Citation 1, Item 1

The Employer uses a hydraulic bailer to compress cardboard boxes and materials used in the store. When activated, a single ram inside the bailer descends "at a very slow pace" to compact the cardboard. Tr. 156. Authorized store employees may place cardboard into the front feed opening of the bailer. FF 4. The on/off switch and other controls are located at the front of the baler. Tr. 50-51. The front of the baler has a gate that may be opened or closed. As long as the gate is open or up, the baler will not operate and the ram will not ascend or descend. Tr. 104-05.

¹ Review of this case was delegated by the Commissioner to the Deputy Commissioner. Pursuant to § 2-104, *Labor and Employment Article, Annotated Code of Maryland*, the Deputy Commissioner has the powers and duties of the Commissioner "to the extent delegated by the Commissioner" and "if for any reason the Commissioner is absent or unable to perform the duties of the office."

² Herein the Hearing Examiner's findings of fact are referred to as "FF." The Commissioner's additional findings of fact based on the transcript of the hearing held at the Office of Administrative Hearings are referred to as "Tr. ___".

The back of the baler is made of metal and sheet framing. FF 6, Tr. 24-25. It has vertical metal slats placed two inches apart. *Id.* The back of the baler is located approximately 3 feet from the wall behind it. Tr. 28.

The baler is located in the Receiving Department of the store. FF 4, Tr. 47. The area in which it is located is limited to authorized store employees. FF 4. There is a warning sign and a turn-off switch on the wall behind and to the left of the baler. FF 5. There is a door to the outside of the Receiving Department located behind and to the right of the baler. FF 4.

Personnel in the Receiving Department have all received training as to operation of the baler, the on/off switch, and the location of the “kill switch”. Tr. 145-46. All employees receive training directing them not to place hands or body parts inside the baler. Tr. 148.

Specifically designated employees in the receiving department use the baler to make bales of compacted cardboard. FF 3. To create a bale, an employee has to feed bale wire or cables through the bottom of the baler, go around to the back of the baler and feed the bale wire back through the slats, then go around to the front again to connect the bale wires through an eyelet and twist it closed around the bale. FF 3, Tr. 50. To make a bale, the front gate on the machine must be open, meaning that the baler cannot operate. FF 3, Tr. 96, 143.

Facts Relevant to Citation 1, Items 2a and 2b

The Home Depot store in this case has a Tool Rental Center which rents out power tools and equipment to customers. Tr.115-16. Employees in the rental center are

responsible for cleaning tools and equipment once returned. FF 9, Tr. 65, 115-16. At the time of inspection, six employees worked in the Tool Rental Center. Tr. 75.

Some of the cleaning materials used by the employees in the Tool Rental Center are hazardous chemicals. FF 9. Among the hazardous chemicals used to clean tools are Zep Mudslide Concrete Dissolving Cleaner (“Zepp”), an oxidizer, and MagiClean, a paint spray remover. FF 11. MagiClean can cause eye or skin irritation and is incompatible with strong oxidizers, including some of the other chemicals used in the Tool Rental Center, such as Zepp. Tr. 66, 71-72. Zepp can cause severe and permanent injury to the eyes and irritation to the skin. Tr. 69.

The Employer purchases large quantities of all cleaning materials used in the Tool Rental Center and then employees transfer the solutions to smaller spray bottles. FF 10. The Employer’s training materials state that when an employee transfers a material from the manufacturer’s bottle to another bottle, the second bottle must be labeled with the contents. Tr.172-73. The Employer put forth no evidence that an employee had ever been disciplined for failure to follow this policy regarding the labeling of secondary containers. Tr. 95-96.

On the date of the inspection, some of the bottles containing hazardous chemicals had labels that were unreadable and did not identify the contents of the bottle. FF 12. These same bottles were not labeled with hazard warnings. FF 12, Tr. 74. On the date of inspection, one employee interviewed could not identify the contents of a spray bottle. FF 14, Tr. 67.

DISCUSSION

I. Citation 1, Item 1

Citation 1, Item 1 alleges a violation of 29 C.F.R. §1910.212(a), which requires one or more methods of machine guarding “to protect the operator and other employees in the machine area from hazards such as those created by a point of operation, in-going nip points, rotating parts, flying chips and sparks.” Specifically, the citation asserts that “machine guarding was not provided to protect operators and other employees from hazards created by moving parts” of the cardboard baler machine.

To establish a violation of 29 C.F.R. §1910.212(a), MOSH must prove by a preponderance of the evidence that: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) an employee had access to the violative condition; and (4) the employer knew or could have known of the condition in the exercise of reasonable diligence. *See, e.g., Astra Pharmaceutical Products, Inc.*, 9 O.S.H. Cas. (BNA) 2126 (R.C. 1981), *aff'd in part*, 681 F. 2d 69 (1st Cir. 1982). The Employer does not dispute that the cited standard, pertaining to machine guarding, applies. Rather, the Employer focuses its argument on the third prong of the test, asserting that MOSH cannot prove employee exposure to the hazard.

Under long established Commission precedent, the Secretary, or in this case MOSH, has the burden of proving employee exposure by demonstrating that:

employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger.

Gilles and Cotting, Inc. 3 OSHC (BNA) 2002, 2003 (1976).

MOSH cannot meet its burden by showing that exposure is theoretically possible. *Fabricated Metal Products*, 18 OSHC (BNA) 1072, 1074 (1997)(citing *Rockwell Intl. Corp.*, 9 OSHC (BNA) 1092 (1980)). Rather, MOSH must demonstrate “that employees are in fact exposed to a hazard as a result of the manner in which the machine functions and is operated.” *South Dakota Beverly Enterprises, Inc.*, 21 OSHC (BNA) 1037, 1038 (2005)(quoting *ConAgra Flour Milling Co.*, 16 OSHC (BNA) 1137, 1147 (1993)). The fact that “it is not impossible for an employee to come into contact with the moving parts of a particular machine does not, by itself, prove that the employee is exposed to a hazard.” *Id.* (citing *Armour Food*, 14 OSHC (BNA) 1817, 1821 (1990)).

In this case, the machine in question, a cardboard baler, is located in the Receiving Department in the back corner of the Home Depot store. When activated, the machine compacts cardboard by means of a single ram. The front of the machine has a gate with an interlock mechanism so that an employee cannot open the baler and be exposed to a moving part when the gate is open. Tr. 45. Typically, the front gate is left open so that cardboard may be placed inside the machine for compacting at a later time. The back of the baler is where MOSH alleges that employees were exposed to a hazard: the back of the machine is made of metal and sheet framing which has vertical metal slats spaced two inches apart. FF 6; Tr. 45. The hazard identified by MOSH is that an employee could accidentally or deliberately place their hand through these slats while the machine was in operation and get crushed by the descending ram. Tr. 45.

The record shows that any store employee can enter the Receiving Department to place cardboard boxes in the front feed of the baler. FF 4. However, there is no operational reason for most store employees to access the back of the baler—it is located

three feet from the back wall and is not on a foot path. There is a door to the Receiving Department located to the back and right of the baler, but there is no testimony that this door is frequently used.

The record demonstrates that the only employees who routinely have an operational reason to go behind the baler are those employees in the Receiving Department who need to access the back of the baler in the bale-making process, and who also may be required to sweep or clean around the back of the baler area. Tr. 146.

However, these employees who feed the baler wire out and then back through the back slats of the machine are not exposed to a crushing hazard because this process can only be accomplished when the front gate is open and the machine is off. Tr. 50. Employees who sweep or clean around the baler area have no operational necessity to put their hands through or in the slats of the baler machine. Tr. 146. Moreover, the record shows that these employees are specifically instructed in use of the baler and told not to put their hands in the baler. Tr. 146-49, 169.

Thus, the facts in this case are distinct from those cases in which an employee's actual job tasks or operational necessity put them in the zone of danger. For example, in *S&G Packaging*, employees in a paper bag factory were routinely exposed to unguarded rotating rollers as "they were required by operational necessity to check" that the machines had properly applied paste to the bags. 19 OSHC (BNA) 1503, 1506 (2001). Performing this check necessarily placed the employees' upper bodies and heads within "1-2 feet or less" of the unguarded rollers. *Id.* Rather, the facts in this case are closer to those in cases like *Trinity Marine Products*, 21 OSHC (BNA) 1819, 1826 (2006), *Buffets, Inc. (d/b/a Old Country Buffet)*, 21 OSHC (BNA) 1065, 1066-67 (2005) and *Rockwell*

International Corporation, 9 OSHC (BNA) 1092, 1097-98 (1980), in which the Secretary of Labor was unable to prove employee exposure because, although employees could conceivably have come into contact with unguarded moving machine parts, as a matter of fact, they had no operational reason to do so.

Even if an employee placed their hand in the back of the baler while it was running, the evidence suggests that they could easily avoid the crushing hazard. It is undisputed that the ram lowers slowly, giving an employee the opportunity to remove his or her hand or for a trained employee to turn the machine off. Tr. 110-11. This factor has been cited in other cases as limiting employee exposure. *See Rockwell International Corporation*, 9 OSHC (BNA) 1092, 1098 (1980) (“the ram descended so slowly that an operator...would be able to withdraw it or reverse the descent of the ram before it contacted the hand”).

In summary, while it is certainly possible that an employee could inadvertently or deliberately put their fingers through the back slots of the baler while the baler is in operation, and then fail to remove their hand or turn the machine off before the ram descends, there is nothing in the record to suggest that an employee has ever actually been exposed to the descending ram or that such exposure is anything more than a theoretical possibility.³ And, as discussed above, a theoretical possibility is insufficient to establish employee exposure. Because MOSH cannot prove employee exposure to the hazard, there is no need to address the Employer’s knowledge, or the seriousness of the violation. The Commissioner dismisses Citation 1, Item 1.

³ The Commissioner does note, purely as an advisory, that the Employer could further limit the possibility of employee exposure by instructing Receiving Department employees to always perform a visual check behind the baler machine before operating the machine.

II. Citation 1, Item 2a and 2b

Citation 1, items 2a and 2b alleges that the Employer violated 29 C.F.R. §1910.1200(f)(5)(i) and (ii), which respectively require employers to ensure that hazardous chemicals used in the workplace are labeled, tagged or marked with the identity of the hazardous chemical contained within and with appropriate hazard warnings. The Employer does not dispute that the violations existed: on the date of the inspection, bottles in the Tool Rental Center containing hazardous chemicals were not labeled or marked with hazard warnings. However, the Employer argued unpreventable employee misconduct as an affirmative defense. To prove employee misconduct, the Employer must demonstrate that: (1) the Employer has established work rules designed to prevent the violation; (2) the Employer has adequately communicated those work rules to its employees; (3) the Employer had taken steps to discover violations; and (4) the Employer had effectively enforced the rules when violations occurred. *Secretary of Labor v. Jensen Constr. Co.*, 7 OSHC (BNA) 1477, 1478 (1979). The HE concluded that the Employer could not demonstrate the third and fourth prongs of this test.

The Commissioner agrees with the HE that the Employer could not prove the affirmative defense of employee misconduct. The Employer put forth evidence that it had a policy that required employees, when transferring the contents of a container from the manufacturers' container to a secondary bottle or container, to label that secondary container with the contents. However, the Employer did not demonstrate that it took any real steps to uncover violations or that it had ever disciplined employees for failure to follow this policy. Tr.195-96. Thus, the Employer put forth insufficient evidence to prove employee misconduct.

Aside of the employee misconduct defense, the Employer also argues that MOSH could not prove employee exposure to the violative condition or a substantial probability of death or injury. In essence, the Employer's argument is that because there were a limited number of employees in the Tool Rental Center and they used a limited number of chemicals, in practical effect the employees knew the contents of the bottles or could find the original manufacturer's bottles in close proximity. This is simply not the legal standard: 29 C.F.R. §1910.1200(f)(5) requires that secondary bottles are labeled and marked with the identity of the chemical contained within and marked with hazard warnings, regardless of whether employees may be able to obtain information regarding the contents of the bottle. Moreover, the fact remains that, in this case, at least one of the six employees of the Tool Rental Center could not identify the contents of the unlabeled bottle containing hazardous materials. Accordingly, the Commissioner adopts the HE's recommendation and affirms Citation 1, items 2a and 2b.

CONCLUSION AND ORDER

For the foregoing reasons, the Commissioner of Labor and Industry on this _____ day of September, 2011, hereby **ORDERS:**

1. Citation 1, item 1 for a serious violation of 29 C.F.R. §1910.212(a)(1) is **DISMISSED.**
2. Citation 1, items 2a and 2b for a serious violation of 29 C.F.R. §1910.1200(f)(5)(i) and 29 C.F.R. §1910.1200(f)(5)(ii) with an accompanying total penalty of \$4,500.00 is **AFFIRMED.**

This Order becomes final 15 days after it issues. Judicial review may be requested by filing a petition for review in the appropriate circuit court. Consult §5-215,

Labor and Employment Article, Annotated Code of Maryland, and the Maryland Rules,
Title 7, Chapter 200.

Craig D. Lowry
Deputy Commissioner of Labor and
Industry