COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 2831-95

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

TRUSS SUPPLY, INC. — RESPONDENT

* * * * * * * * * *

DECISION AND ORDER OF THIS REVIEW COMMISSION

We called this case for review on our own motion according to the authority contained in section 47 (3) of our rules of procedure (ROP).[1] We limited our review to items 1a and 1c of citation 1 and asked the parties to submit simultaneous briefs which they did.

Respondent Truss Supply, located in Bowling Green, makes wooden trusses using power equipment including radial arm saws. The secretary of labor, the enforcer of the Kentucky occupational safety and health act (KRS chapter 338), issued a willful citation to respondent for not guarding four radial arm saws (citation 1, item 1a) and for not installing the four saws in such a manner that the cutting heads would "gently" return to the starting point once released by the operator (item 1c).

Our hearing officer in her recommended order[2] sustained items

---

[1] Enacted as section 47 (3), 803 KAR 50:010.

[2] This commission may appoint hearing officers to try the cases and write recommended orders according to KRS 338.081 and ROP 3 (1). But this commission is ultimately responsible for deciding appeals from citations issued by the secretary. KRS 338.071 (4).

1a and 1c as willful violations with a combined penalty of $10,500. But the hearing officer dismissed citation 1, item 1b, because the secretary attempted to enlist 29 CFR (Code of Federal Regulations) 1910.213 (h) (3)[3] in a role for which it was not intended. Recommended order (RO), p.5, para. 19. We affirm the dismissal of citation 1, item 1b, and it is now a final order of this commission since it was not called for review. ROP 47 (3). The hearing officer dismissed item 1c (d) because the secretary presented no evidence on that saw, so that too is now a final order. RO p. 5, para. 22.

Although this issue was not called for review, we note our hearing officer found Truss Supply to be the successor corporation to Bowling Green Truss. RO p. 7. It was Bowling Green Truss that was originally cited in 1985 for not guarding the saws. Exhibit 1. We agree with our hearing officer's finding and adopt it as our own. To expand on the issue of a successor corporation, Dole v. H.M.S. Direct Mail Service, Inc., et al[4]., 752 F. Supp. 573, 581 (W.D. N.Y. 1990), CCH OSHD 29,274 at p. 39,262, makes the point that liability for a violation (discrimination in Direct Mail) follows to a successor where the new entity "...continues the business using the same premises, machinery, employees and supervisory personnel." Direct Mail cites to Terco, Inc. v. Federal Coal Mine Safety & Health Review Commission, 839 F.2d 236

---

[3] Adopted in Kentucky by 803 KAR 2:314.

[4] As a state agency we are not bound by federal occupational safety and health law, but we often find their cases persuasive as we do here.

(CA6 1987), CCH OSHD 28,103, for the proposition that notice is proven where the two corporations share corporate officers. In our case, Jack Brothers was the president of both corporations. Transcript of the evidence (TE) 194.

Citation 1, item 1a, a willful citation grouped with two other items for the calculation of a proposed penalty, charges the respondent with violating 1910.213 (h) (1). The standard reads in part

> The sides of the lower exposed portion of the blade shall be guarded to the full diameter of the blade by a device that will automatically adjust itself to the thickness of the stock and remain in contact with stock being cut to give maximum protection possible for the operation being performed.
>
> (emphasis added)

As photographic exhibits 10 through 17 show, the four saws had no guards. But prior to that time Truss, or its predecessor, had put two types of guards on the saws. First the company tried metal guards. But when an angle cut was attempted (that is when the saw was tilted), the guard rode over the wood and was pulled into the blade where it struck the welded carbide teeth, causing them to "...shoot off like bullets." TE 202 and 204. The metal guards cost the company $5,000. TE 202. Then the company tried plastic guards which cost it $700 (TE 209) but they got so dirty from sap, rosin and sawdust (TE 211) the operator could not see through them to ascertain when the saw would begin its cut. TE 165. That increased the likelihood the saw blade would "walk across" the wood, kicking it back into the operator. According to president Brothers and an operator of the saws, the dirty plastic guard made

the saw more dangerous with than without the guard. RO p. 3 and TE 163.

Because the saws had no guards when inspected October 2, 1995, we conclude the company violated the standard. We affirm our hearing officer's order to that extent. The question remains, however, whether the violations are willful; our hearing officer ruled they were. She based her conclusion on several points: Bowling Green Truss had been cited for a violation of the same standard in 1985 and the saws had guards which were later removed.

The sixth circuit court of appeals in Cincinnati set out in Empire-Detroit Steel Division, Detroit Steel Corp. v. OSHRC and F. Ray Marshall, Secretary of Labor, 579 F.2d 378, 384 (CA6 1978), CCH OSHD 22,813, a good definition of willful:

> Willful means action taken knowledgeably by one subject to the statutory provisions in disregard of the action's legality. No showing of malicious intent is necessary. A conscious, intentional, deliberate, voluntary decision is described as willful, regardless of venal motive. (emphasis added)

In short there must be some proof of intent or state of mind to establish a willful violation. Beta Construction Co., a federal commission decision, CCH OSHD 30,239. As the review commission put it in Beta, a history of "...prior violations...[is]...too limited to establish a state of mind that arises to the level of willfulness." (emphasis added) We agree.

Company president Brothers did try two types of guards. The metal guards hit the saw blades causing welded carbide tips to fly off the blade at high speed. His principal operator, Darrell Cowles, testified the plastic guards were dangerous because he

could not see what he was doing as the guards were always dirty from the wood debris. TE 165.

A witness for the secretary of labor testified that chain guards could be used. Mr. Brothers said while the chains would work on a 90 degree cut, they would "hang" into the saw blade when he attempted an angle cut. TE 212. Brothers said he was concerned about employees getting hurt with the guards in place. TE 250.

Brothers said he called other truss manufacturers. When asked how they coped, he said "...they buzz the saw people. The saw people run and put the guards on. OSHA goes out and inspects. As soon as OSHA clears the front walk, they're back off..." TE 214. This commission might not ordinarily place much faith in such testimony but for a line in a reported federal OSHA case, Atlantis Manufacturing Co., Inc., CCH OSHD 26,398, which said "The safety guards [for ripsaws] had been hastily put in place - loosely attached and not properly bolted - only after the inspector had appeared at the work site..."

We find Mr. Brothers did not have the intent to violate the standard. He tried two types of guards at considerable expense. Neither worked. In fact both guards caused problems of their own. He sought the advice of competitors who could not guard their saws. He worried about the safety of his workers with the guards in place. Because Mr. Brothers did what he could to guard the saws, we find he lacked the intent necessary to sustain a willful violation. This case was thoroughly tried. We see no proof that Mr. Brothers was indifferent to the safety of the sawmen.

Accordingly, we reduce citation 1, item 1a, to serious.

We take this action based solely on the facts of this particular case. In doing so, we wish to distinguish two cases. In Amatac Corporation, a federal ALJ decision, CCH OSHD 26,833, a willful violation for not guarding a power saw was affirmed because "...the employer's plant manager did not obtain the guard agreed to after an inspection..." But in the instant case, Mr. Brothers purchased two types of guards. Then in Donovan v. Capital City Excavating Company, Inc., and OSHRC, 712 F.2d 1008, 1010, (CA 6 1983), CCH OSHD 26,622, p. 34,035, an employer recognized his employees working in a trench needed a trench box (a steel frame used to protect employees working in the trench from cave ins). But the employer kept his employees working in the trench until the box arrived. The sixth circuit held that to be a willful violation despite the company's "...good faith belief that the workers could continue with the trenching without hazard."[5] There is no showing in Capital City that a trench box would not protect the workers. In the instant case, however, Mr. Brothers tried two types of guards which presented hazards to the sawman. As Truss observed in its brief to us, in Capital City "...there was no evidence of repeated efforts to comply with the applicable regulations..."

We are able to reduce the violation to serious because that

[5] We have our doubts that an excavation company could, in good faith, leave its employees working in a trench after concluding a trench box was necessary.

issue (the seriousness of citation 1) was tried, without objection[6], when the compliance officer testified he set the willful penalty after first fixing a serious penalty to which he then applied a multiplier. TE 127-132. KRS 338.991 (11) says there is a serious violation "...if there is a substantial probability that death or serious physical harm could result from a condition...," that is from a violation of the standards. Here the hazard was unguarded saw blades propelled by 5 horsepower motors. We find that to be serious. In any event, the compliance officer himself testified citation 1, the saw violations, were serious. TE 127-128.

The serious penalty in this case was determined by the compliance officer who first found the severity of any potential injury (amputation) to be high from a range of low, medium, high. TE 128. He then made a probability assessment of high from a range of greater and lesser. TE 129. Using a chart from his compliance manual, the compliance officer took high severity and greater probability and determined the gravity based penalty to be $5,000. TE 129. He then applied several adjustment factors. First he gave a 60 percent adjustment for size, meaning the number of employees, because Truss had fewer than 25 employees. TE 129-130. He gave 10 percent credit for history because the company had had no serious, repeated, failure to abate or willful violations within the last three years. TE 130-131. But the compliance officer would award

---

[6] In Toler Excavating Co., CCH OSHD 19,875, the federal commission held it could reduce a willful violation to serious where the seriousness issue was tried by consent.

no credit for good faith because the employer had just been cited for a high serious or willful violation. TE 130. The 70 percent credit resulted in an adjusted serious penalty of $1,500 for grouped citation 1 (items 1a, 1b and 1c). TE 131.

Under our authority found in KRS 338.991 (6), we set the penalty in this case at $1,500 for the serious violation.

Next, the secretary issued citation 1, item 1c (less the Speed Cut saw, item (d) which the hearing officer dismissed with our approval), which charges respondent with not installing saws "...in a manner so as to cause the cutting head to return gently to the starting position when released by the operator..." Our hearing officer sustained this item as willful. As we shall explain, we reduce this item to serious; since it was grouped by the secretary of labor with item 1a, the $1,500 serious penalty we set above includes item c.

Standard 1910.213 (h) (4) reads as follows:

> Installation shall be in such a manner that the front end of the unit will be slightly higher than the rear, so as to cause the cutting head to return gently to the starting position when released by the operator.

As our hearing officer found, compliance officer Gray established the three saws would not return to their original position. RO p. 5. But Jack Brothers testified he installed the saws to return. When asked how he did that, he replied "The thing is that the saw is on an incline. When you release the handle, it will come back. But they're on rollers. The problem then the reason that they don't sometimes is they don't, neglect to clean

the saw. And sawdust and rosin will build up." TE 219. He went on to say he instructed his employees to fix something when it was not working properly. TE 220.

Because the saws, on the date of the inspection, would not return to their starting point as designed, we conclude the secretary established a violation of the standard. But we reduce the willful to serious because Truss Supply designed their saws to return, just as the standard commanded. That Mr. Brothers designed the saw layout to produce the desired effect, proves he had no intent to ignore the standard.

Mr. Brothers was not charged with not cleaning his saws; instead the secretary charged the "...saws were not installed in a manner so as to cause the cutting head to return gently..." In fact, the saws were so installed but failed to function properly.

Because any safety infraction involving a power saw could result in a serious injury, we had no trouble denominating the violation as serious.

When Truss Supply argued the guarded saw blades were more dangerous than without the guards, it raised a greater hazard defense. But because the company had not 1) applied for a variance prior to the commencement of this litigation, 2) shown that a variance application would be inappropriate or 3) shown that alternative means of protecting employees are unavailable, the defense failed. General Electric v. Secretary of Labor and OSHRC, 576 F.2d 558 (CA3 1978), CCH OSHD 22,752.

Although too late for the instant citation, Truss Supply might

apply for a variance to 1910.213 (h) (1). KRS 338.153. General Electric leaves the door open to the possibility of obtaining a variance even after a citation has been upheld. Should , however, Truss Supply fail to obtain a variance, the saws must be guarded.

We affirm the recommended order to the extent it is consistent with this decision.

We affirm citation 1, items 1a and 1c, as serious violations with a combined penalty of $1,500.

If abatement has not already been accomplished by respondent, we order him to do so within 30 days.

It is so ordered.

Entered February 4, 1997.

George R. Wagoner
Chairman

Charles E. Yates
Member

Donald A. Butler
Member

Copy of the foregoing Order has been served upon the following by Messenger Mail:

HON GORDON R SLONE
COUNSEL
LABOR CABINET
OFFICE OF GENERAL COUNSEL
1047 U S 127 S STE 4
FRANKFORT KY 40601

and by Certified Mail, postage prepaid, upon:

HON DAVID D ANDERSON
HARNED MACHERT & DENTON
P O BOX 1270
BOWLING GREEN KY 42101-1270

This 5th day of February, 1997.

Sue Ramsey
Assistant Director
KOSH REVIEW COMMISSION
#4 Millcreek Park
Millville Rd.
Frankfort, KY 40601
PH: (502) 573-6892
FAX: (502) 573-4619