COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4266-05

COMMISSIONER, DEPARTMENT OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

AUTOLIV ASP, INC — RESPONDENT

* * * * * * * * * *

La Tasha Buckner for the commissioner. Richard K. Shimabukuro for Autoliv.

DECISION AND ORDER
OF THIS REVIEW COMMISSION

This case comes to us on Autoliv's petition for discretionary review. Section 48 (1), 803 KAR 50:010. After we granted review, the parties filed briefs. Autoliv asks us to dismiss the citation or reduce it to other than serious.[1]

KRS 336.015 (1) charges the commissioner of labor with the enforcement of the Kentucky occupational safety and health act, KRS chapter 338. When a compliance officer conducts an inspection of an employer and discovers violations, the executive director of the office of occupational safety and health compliance issues citations. KRS 338.141 (1). If the cited employer notifies the executive director of his intent to challenge a citation, the Kentucky occupational safety and health review commission "shall afford an opportunity for a hearing." KRS 338.141 (3).

The Kentucky General Assembly created the review commission and authorized it to "hear and rule on appeals from citations." KRS 338.071 (4). The first step in this

[1] Labor cited Autoliv for a violation of 29 CFR 1910.212 (a) (1), incorporated by reference in Kentucky by 803 KAR 2:314, section 5 (1) (a). We shall use the terms standard and regulation interchangeably.

process is a hearing on the merits. A party aggrieved by a hearing officer's recommended order may file a petition for discretionary review (PDR) with the review commission; the review commission may grant the PDR, deny the PDR or elect to call the case for review on its own motion. Section 47 (3), 803 KAR 50:010. When the commission takes a case on review, it may make its own findings of fact and conclusions of law. In Brennan, Secretary of Labor v OSHRC and Interstate Glass[2], 487 F2d 438, 441 (CA8 1973), CCH OSHD 16,799, page 21,538, the eighth circuit said when the commission hears a case it does so "de novo." See also Accu-Namics, Inc v OSHRC, 515 F2d 828, 832-833 (CA5 1975), CCH OSHD 19,802, page 23,611, BNA 3 OSHC 1299. After a hearing on the merits, this commission has the authority to sustain, modify or dismiss a citation or penalty. KRS 338.081 (3).

In the case before us the commissioner of labor conducted a general scheduled inspection of the Autoliv facility in Madisonville where the respondent makes automobile seats. Recommended order (RO) p 2. After the inspection the commissioner issued one serious citation charging the company with not guarding the unused portion of a band saw blade; the serious citation carried a proposed penalty of $1,300. The commissioner also issued two other than serious citations with no penalty. KRS 338.991 (2) and (3). Because Autoliv did not contest the other than serious citations at the hearing, our hearing officer in his recommended order sustained them as well as the serious citation and penalty. Autoliv in its petition for discretionary review did not make an issue of the other than serious citations. For reasons we shall explain, we affirm the hearing officer's

[2] In Kentucky Labor Cabinet v Graham, Ky, 43 SW3d 247, 253 (2000), the supreme court said because Kentucky's occupational safety and health law is patterned after the federal, it should be interpreted consistently with the federal act. The court said the review commission is the fact finder. At page 253.

recommended order sustaining all citations as written as well as the proposed penalty and adopt the recommended order to the extent it agrees with our decision.

For the commission to sustain a citation, the department of labor must prove the standard applies, the standard was violated, one or more employees were exposed to a hazard and the employer knew or could have known of the violation with reasonable diligence. Ormet Corporation, CCH OSHD 29,254, page 39,199, a federal review commission decision. We agree with our hearing officer's conclusion the department of labor met its burden of proof on all four issues. RO 6. Labor's compliance officer found the DoAll band saw in the maintenance shop within the production building. Transcript of the evidence (TE) 21 and photographic exhibit 2. Maintenance employees used the saw to cut pipe. TE 15. The unguarded portion of the band saw blade circled in exhibit 1 could easily be seen by employees using the band saw or by managers, proving employer knowledge of the hazard. See photographic exhibit 2. Compliance Officer Gray explained the hazard was rotating parts; he said the company violated the standard because it did not guard the band saw blade. TE 14 and 21 and exhibits 1, 2 and 4.

At issue is Autoliv's contention the department of labor failed to show the cited standard applies; because this is an element the complainant must prove, the issue need not be plead as an affirmative defense.

Complainant department of labor issued a serious citation to Autoliv for a machine guarding violation. Here is the citation:

> 29 CFR 1910.212 (a) (1): Machine guarding was not provided to protect operator(s) and other employees from hazard(s) created by rotating parts:
> a. The unused portion of the blade for the 'DoAll' vertical band saw in the Maintenance Shop of the Production Building, was not guarded. Exhibit 3

After compliance officer Randy Gray brought the unguarded portion of the blade to the company's attention, see photographic exhibit 1 with a circle drawn around the unguarded portion of the blade, management caused a guard to be cut from lexan and installed on the machine before the end of the inspection. TE 54-55.

Turning now to the matters before us, we must resolve a factual issue raised by Autoliv on review. In its brief to us Autoliv argues the trial record contains proof it used the DoAll band saw to cut wood. At the hearing on the merits, Autoliv called facilities manager Charles Phillips as its only witness. Mr. Phillips had the opportunity to say his employees used the saw to cut wood; this Mr. Phillips did not do.

Complainant's exhibit 2 is a photograph of the band saw. Next to the band saw is what appears to be a black fifty five gallon drum marked with the words "aluminum only." The three photographs of the band saw introduced into evidence, exhibits 1, 2 and 4, show a piece of metal on the saw table and metal chips surrounding the cut metal and the saw blade. We see no wood chips, uncut wood or wood pieces in any of the photographs. We find the photographic evidence does not support Autoliv's argument the company cut wood with the band saw.

Autoliv cites to portions of the record which, it says, proves the company used the saw to cut wood. We shall take each of Autoliv's assertions in turn. In its reply brief to the commission, Autoliv submits pages 15 and 16 of the transcript. A "lot of different things" says nothing about wood. TE 15. Similarly, "whatever...needs to be done" does not mention wood. TE 16. When the compliance officer testified on cross examination about "cutting materials with the lower flash point than metal," neither he nor the examiner talked about wood. TE 36.

On cross examination of the plant manager, labor's counsel asked about adjusting the "used portion of the blade down to where the wood stock or pipe stock would be. Is that correct about within a half inch?" Here the question was about how close the guard on the unused portion of the blade should be to the work to be cut, not about what the saw was used for. Mr. Phillips's answer "Yes, depending on what location..." was about the placement of the guard and said nothing about the composition of materials cut with the saw. TE 58.

Autoliv's counsel had the opportunity to ask whether the band saw was used to cut wood and chose, for whatever reason, not to do so. We find there is no proof Autoliv used the DoAll band saw to cut wood.

Autoliv's principal argument to us is the department of labor should have cited under the woodworking standard, 29 CFR 1910.213, rather than the general machine guarding standard. If it turned out labor used the wrong standard, then the review commission would dismiss the citation. C. F. McDonald Electric, Inc and IBEW, Local Union 716, CCH OSHD 32,736, page 51,952. Labor of course has the burden of proof. Section 43, 803 KAR 50:010.

In support of its argument Autoliv says 1910.212 refers to "hazards created by the 'point of operation[3].' Autoliv's brief to the commission, page 5. Autoliv's problem here is it was not cited for a point of operation violation. Labor cited Autoliv for a violation of 1910.212 (a) (1); that standard says:

> *Types of guarding.* One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying

[3] A point of operation on a machine is the area where the work is performed whether it be cutting, bending, pressing, grinding, etc.

chips and sparks. (emphasis added)

In its citation, the department of labor charged Autoliv with exposing its employees to the hazards "created by rotating parts." On that point the inspecting compliance officer said the blade runs continuously around two pulleys inside the machine. TE 19-20. He then said the hazard was "rotating parts being unguarded;" Mr. Gray was talking about the blade. TE 21. The federal review commission has consistently held employees must be protected from the hazards of rotating parts[4]. George C. Christopher and Son, Inc, CCH OSHD 25,956, page 32,532. Autoliv's arguments based on point of operation guarding concepts is irrelevant to a discussion of this band saw citation for a rotating parts violation.

Autoliv argues it should have been cited under 1910.213, a specific standard. In support of that argument Autoliv quotes from 29 CFR 1910.5 (c) (1)[5] which says:

> If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition...or process.
> (emphasis added)

While it is ordinarily true the specific controls the general, in this case the specific 1910.213 standard applies to woodworking machinery. There is no proof in this case Autoliv used the band saw to cut wood. Thus, the specific .213 standard does not apply.

In North Atlantic Fish Company, Inc, a federal administrative law judge decision, CCH OSHD 32,468, a fish processing company used a table saw to cut fish as well as wood. The ALJ's decision said when the saw is used to cut fish, the woodworking standard does not apply. Pages 50,195 and 50,196. Of course, if North Atlantic Fish

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[4] Here the saw blade.

[5] 29 CFR 1910.5 is incorporated by reference within 803 KAR 2:300, section 3.

used the band saw to cut wood, then the woodworking standard would apply. The North Atlantic Fish Company case says a band saw used to cut wood should be cited under the woodworking standard but not when it was used to cut fish. So if the proof in the case at bar showed the band saw was used to cut wood, or had most recently been used to cut wood, then a citation under the woodworking machinery would have been appropriate. Autoliv's assertions to the contrary, there is no proof in this case it used the band saw to cut wood.

In Burnetex Industries, Inc, CCH OSHD 28,326, a decision by a federal ALJ, a company was cited for violations of 29 CFR 1910.213. Burnetex is of no help to Autoliv because in that case the machines performed work on wood while in our case the saw was used to cut metal.

Complainant in its brief to the commission refers to an October 11, 1977 standards interpretation published by the US Department of Labor. In that interpretation[6] the US Department of Labor responded to an inquiry about band saws used to cut meat. The interpretation said the general machine guarding standard, 1910.212, applied to the meat industry since it did not have its own dedicated standards. Then the interpretation said band saws which are guarded in accordance with the 1910.213 woodworking standard will meet the 1910.212 guarding requirements. In other words, if a company uses a band saw to cut something other than wood, it may look to 1910.213 (i) **Bandsaws and band resaws** for guidance on how to guard its band saws. Ultimately, however, the band saw not used to cut wood is subject to the general machine guarding standard, 1910.212 (1) (a). Applying this standards interpretation to the case at bar, while Autoliv

[6] To find this interpretation go to osha.gov. Then click on "interpretations" which is found on the right hand side of the osha.gov page. On the interpretations page enter the word "biro" in the text section box and enter the date 10-11-1977.

may chose to guard its metal cutting band saw in accordance with 1910.213 (i), the metal cutting band saw is still subject to the general machine guarding standard. The citation in this case was therefore properly written under the authority of 1910.212 (a) (1).

The same is true of standard interpretation 01-07-1992 which can also be obtained through the osha.gov website. This interpretation says metal cutting band saws shall be guarded according to 29 CFR 1910.212 (a) (1).

Autoliv says the department of labor in its reply brief to us conceded the band saw was used to cut wood. Here is what the brief says: "In this case the 'DoAll' saw was clearly not solely used for woodcutting..." Labor's reply brief, page 2. Elsewhere in its reply brief labor said "There is no evidence in the record that would enable a reasonable person to conclude that this machine was being used to cut wood..." Page 1. Labor's reply brief reminds us of the photographic evidence which showed a metal piece and metal shavings on the band saw table and to another photograph showing a container marked that it was only for aluminum. Labor's reply makes the point the band saw was properly cited under general machine guarding standard, 29 CFR 1910.212 (a) (1), since the proof showed it had been cutting metal or at the very least had most recently been used to cut metal. To us that is a long way from a concession the saw was used to cut wood.

In any event, in North Atlantic Fish, supra, the administrative law judge said:

> the subject saw [in the Fish case a table saw] could be used by Respondent for different purposes - fish cutting or ripping [wood] or crosscutting wood, or all three...When and if used to cut fish, the woodworking machinery standard, 29 CFR 1910.213 would not apply. However, if Respondent used the 'multipurpose' saw to cut wood, it is reasonable to infer that two different [woodworking machinery] standards could apply... At pp. 50,195-50,196.

Because Autoliv had been using the band saw to cut metal, then the general machine guarding standard was appropriate.

Autoliv argues the serious citation was ambiguous or confusing; the company said the citation's reference to the "unused portion of the blade" could mean either the non-cutting portion of the blade or the band saw in the off position. Obviously, it would be futile for the department of labor to issue a citation which dealt with a machine either not in operable condition or taken out of service. An employer, however, cannot avoid a citation by turning off a machine when it is not in use and then place its faith in an inspecting officer not seeing the machine in operation. It is necessary for the department of labor to prove employee access to a hazard which it has done in this case (TE 15), not actual employee exposure. Giles and Cotting, Inc, CCH OSHD 20,448, page 24,425, a federal review commission decision.

When Autoliv says the citation was "ambiguous or confusing," we assume the company means it did not receive notice of the violation.[7] A citation in Kentucky "shall describe with particularly[8] [sic] the nature of the alleged violation..." 803 KAR 2:120, section 2.

Several events in this case demonstrate the company's awareness of what the term "unused portion of the blade" meant. During the compliance officer's testimony, for example, he was asked to mark exhibit 1 with a circle around the unused portion of the blade which the compliance officer did. TE 18 and exhibit 1. On cross examination,

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[7] Autoliv cites Carlisle Equipment Company v Secretary of Labor and OSHRC, 24 F3d 790 (CA6 1994), CCH OSHD 30,424. But Carlisle is of no help to respondent because in that case the company complained it was being charged with two separate violations while the citation contained only one. In the case at bar, on the other hand, Autoliv complains a phrase found in a single citation is ambiguous.

[8] 29 USC 658 (a), used as the model for the Kentucky regulation, says a citation "shall describe with particularity the nature of the violation."

Autoliv had ample opportunity to question the compliance officer about what was meant by the phrase but did not.

During the inspection the compliance officer told Mr. Phillips that same portion of the band saw blade, the unused portion, needed a guard and Mr. Phillips had one made and installed during the inspection. TE 52-54. Focused as the company was during the inspection on the DoAll band saw, there can be no doubt that when the company received the citation which named the saw and said it needed guarding, the company understood the department of labor wanted a guard for the DoAll saw blade as well as what the term "unused portion of the blade" meant; it was the blade directly above the area used for cutting. TE 38. The unused portion of the blade can be easily seen in photographic exhibit 1.

If what transpired during the inspection did not inform Autoliv about the meaning of "unused portion of the blade," and we find Autoliv was so informed at that time[9], then the company had the opportunity once it received the citation to seek discovery. Autoliv filed three requests for admission and at no time asked the department of labor to admit the unused portion of the blade was perhaps one thing or another. Neither did Autoliv seek to the take the deposition of the compliance officer. When a cited company believes a citation is vague or ambiguous, a discovery motion or a request for admission is the proper course. Cement Asbestos Products Company, CCH OSHD 24,343, page 29,667, a federal review commission decision.

[9] The administrative law judge in Henry J. Kaiser Company, CCH OSHD 26,621, said the company's managers understood the locations of the alleged violations because they had witnessed the entire inspection.

The question to ask when the respondent says it did not receive notice of the charges against it is whether the company was prejudiced by the department of labor's use of the phrase "unused portion of the blade" in its citation.

> ...it must be noted that, unless the employer demonstrates that the lack of formal notice was prejudicial, we will not order that charges be dismissed.
> Secretary of Labor v Dow Chemical USA, an Operating Unit of Dow Chemical Company and OSHRC, 801 F2d 926, 930 (CA7 1986), CCH OSHD 27,690, page 36,128.

Despite what Autoliv says in its petition for discretionary review, we see no indication the hearing officer was confused; this decision affirms the hearing officer's recommended order which, in our estimation, was correctly decided. In our experience adroit examiners will often feign ignorance when initiating a series of questions.

Complainant's citation said "machine guarding was not provided to protect...employees from hazard(s) created by rotating parts." Point of operation hazards were not alleged in the citation.

Band saws, as we have explained, which are not used to cut wood are not to be cited under the woodworking standard, 29 CFR 1910.213.

In neither its answer nor its amended answer did Autoliv make a notice argument. Autoliv did not seek discovery on a notice issue. We conclude Autoliv received fair notice of the charges against it during the inspection and in any event has not demonstrated prejudice.

Autoliv in its brief asks us in the alternative to reduce the citation to other than serious. KRS 338.991 (3). In its petition for discretionary review the company argues that because the compliance officer interviewed no band saw operators and did not observe the saw in operation, the violation could not have been serious. PDR at page 8.

In Giles and Cotting, Inc, supra, the federal review commission held a violation would be sustained if the secretary of labor proved employees had access to the hazard - proof of actual exposure was not required. At page 24,425. Randy Gray, the compliance officer, said "I don't have to see a machine running in order to know that there is a violation...that there is a hazard there." He said Autoliv employees had access to the band saw. TE 15.

Autoliv complains there is no proof the manufacturer of the band saw recommended a guard. For an occupational safety and health violation, it is necessary to prove the employer violated a standard. "Each employer...Shall comply with occupational safety and health standards promulgated under this chapter." KRS 338.031 (1) (b). It is not necessary to prove an employer ignored the recommendation of a manufacturer.

To sustain a serious violation, it is not necessary to prove an injury. In fact Kentucky's law is designed to prevent "any detriment to the safety and health of all employees..." "The keystone of the Act in short is preventability." Brennan v OSHRC and Underhill Construction Corporation, 513 F2d 1032, 1039 (CA2 1975), CCH OSHD 19,401, page 23,166.

Autoliv argues the hearing officer's finding of a serious hazard is not supported by substantial evidence, citing to Wells v Crawford Construction Company[10], Ky App, (1985). We disagree. Compliance Officer Gray testified he was told by employees and Mr. Phillips[11], the facilities manager, the band saw was infrequently used by maintenance employees. TE 16. Mr. Gray said the exposed blade was so near to the point where the

[10] While Crawford is an unpublished Kentucky decision, it is found in CCH OSHD 27, 290, in Westlaw at WL 70375 and in Lexis (see Autoliv's petition for discretionary review, page 9).

[11] Mr. Phillips statement to Compliance Officer Gray that the band saw was used by maintenance workers was "A statement by the party's agent..." and therefore admissible under KRE 801A (b) (4).

saw cut the work "that an employee could actually get their finger cut in that portion." TE 16. Mr. Gray said the lack of a guard was a serious violation because an employee could receive a "cut that would possibly require stitches, some medical treatment and lost time from work." TE 16-17. The saw was powerful enough to cut steel pipe. TE 15. Photographic exhibits 1 and 4 show the unguarded, unused portion of the blade. Those two photographs plus photographic exhibit 2 show that an operator standing at the saw could touch the unguarded area while using the saw to cut a pipe - see the thumb on exhibit 4. This is supported by Compliance Officer Gray who said the unused portion of the blade, the portion needing guarding, was close enough to an employee operating the band saw so "that an operator could accidentally make contact with that unused portion of the blade." TE 14.

KRS 338.991 (11) says a serious violation exists "if there is a substantial probability that death or serious physical harm could result..." Since Mr. Gray said he did not think death would result from an injury to the unguarded portion of the saw blade (TE 36), the issue is whether an injury to a finger requiring stitching and some days off of work would be a serious injury? In California Stevedore and Ballast Company v OSHRC, 517 F2d 986, 988 (CA9 1975), CCH OSHD 19,671, page 23,465, the ninth circuit said "When human life or limb is a stake, any violation of a regulation is 'serious.'" Based on the above testimony of the compliance officer, we find a potential finger injury caused by the unguarded, unused portion of the saw blade would be a serious violation as defined by the act.

In Crawford Construction, supra, cited by Autoliv, the Kentucky court of appeals said substantial evidence supported the citation and affirmed it; the court of appeals even

used the photographic evidence in that case to help them reach their conclusion as has this commission. See CCH OSHD, page 35,275.

Kentucky's supreme court in Uninsured Employers Fund v Garland, Ky, 805 SW2d 116, 117 (1991), said:

> A reviewing court must give great deference to the conclusions of the fact-finder on factual questions if supported by substantial evidence and the opposite result is not compelled.

In the case at bar, the saw could cut steel pipe. An operator could have reached into the unguarded, unused portion of the blade. Even without the testimony of Mr. Gray to the effect an injury to a finger would require surgery, which we do have, this commission concludes the citation in this case is properly characterized as serious.

As the compliance officer testified, the hazard was the unguarded, unused portion of the blade to which employees had access. See exhibit 1. The hazard was created by the rotating parts of the band saw which could inflict serious injuries on employees. Autoliv, before the end of the inspection, had installed a lexan guard over the unguarded part of the blade; we infer the guard was satisfactory to the compliance officer and to Autoliv because neither party objected to it during the hearing. 29 CFR 1910.212 (a) (1).

We conclude Autoliv's DoAll band saw was properly cited for a violation of the general machine guarding standard 1910.212 (a) (1) because a portion of the blade which was not doing the cutting, the unused portion, was not guarded. We affirm our hearing officer's recommended order upholding the serious citation and the penalty of $1,300[12] as well as the other than serious citations which were not contested at the hearing.

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[12] The compliance officer said he found the unguarded saw to be a medium serious violation (high and low being the other choices) and lesser probability (greater being the other option) because the company did not often use the saw. TE 22. Medium severity/lesser probability yields a gravity based penalty of $2,000. The gravity based penalty is derived from KRS 338.991 (11). Autoliv, a large company, received zero

It is so ordered.

May 1, 2007.

Kevin G. Sell
Chairman

Sandy Jones
Commissioner

William T. Adams, Jr.
Commissioner

credit for size (number of employees) but did get the maximum permitted of 25% for good faith (effective safety programs) and the maximum of 10% for history for not having any prior serious citations within 3 years. TE 23-24. The penalty adjustment credits are authorized by 803 KAR 2:115, section 1 (2).

Larger employers get no size credit. Smaller employers with 25 or fewer employees get 60 % credit which explains why penalties are higher for larger employers.

Certificate of Service

I certify a copy of the foregoing decision has been served on the following individuals in the manner indicated on May 1, 2007:

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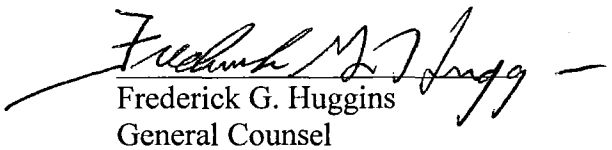

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