COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4801-11

SECRETARY OF THE LABOR CABINET
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

OSRAM SYLVANIA, INC, — RESPONDENT

* * * * * * * * *

James R. Grider, Jr, Frankfort, for the Secretary. Thomas Benjamin Huggett, Philadelphia, and Susan C. Sears, Lexington, for Osram Sylvania.

DECISION AND ORDER OF THE REVIEW COMMISSION

This case comes to us on the Labor Cabinet's petition for discretionary review. We granted review and asked for briefs. Labor issued two repeat serious citations to Sylvania, item one alleging a lock out/tag out violation and item two a machine guarding violation. After a trial on the merits, our hearing officer issued a recommended order affirming item one as a serious citation and dismissing item two.

Sylvania at its plant in Versailles makes fluorescent light bulbs which start out as glass tubes. These tubes are coated on the inside; the coating is applied before the ends are installed. Valves in the coating machine apply the coating to the bulbs; the company calls them lamps. This coating is sticky and during a work shift the exterior of a valve may have to be cleaned with a brush. Ordinarily, employees use what appears to be a toilet brush. On the day of the accident an operator could not

find the brush which regularly hangs next to the coater. When he used a different, shorter brush, he had to put his hand closer to the point where the valve mates with the top of a lamp to clean a nozzle; operators regularly performed this work while the machine was in operation and not locked out or guarded. On the day of the accident, the operator, using the shorter brush, had the tip of a finger amputated above the fingernail.

The glass tubes which become lamps are suspended from trays. These trays, carrying 22 lamps in two rows of eleven each, are moved into the coater machine by a conveyor. Once a tray arrives in the coater, this process is automatic, valves come down and mate with the top of the lamps. Labor's compliance officer said the valve comes down and forms a seal with the lamp. Labor moved to admit the compliance officer's report. Once the valve and lamp form a seal, the valve sprays a liquid to the inside of the lamp. This liquid will dry and form a crust on the valve exterior, preventing a good seal with the lamp. Employees who act as inspectors begin to notice that a lamp, usually this happens to one valve at a time, has defects in the coating it receives. So the operator of the coating machine is informed that one valve needs cleaning. Transcript of the evidence, pages 20 – 21 and 129 (TE 20 – 21 and 129) and exhibit 1, the inspecting compliance officer's report, pages 7 and 8.

The toilet brush depicted in photographic exhibit 3J measures 20 inches. TE 25. The operator, to perform the cleaning, kneels on a rough metal bench, depicted in photographic exhibit 3A, and reaches into the coater with the brush.

On the day of the accident, an operator needed to clean a valve. Because he could not find the cleaning brush which usually hangs right next to the coater, exhibit 3A, he borrowed the shorter brush which company employees used to sweep up broken glass. This shorter brush is about 13 and one half inches long. TE 135 – 136 and photographic exhibit 3H. Not only is this sweeping brush shorter than the toilet brush regularly used, its bristles are softer and longer than the toilet brush bristles. TE 108 and 136.

While he cleaned a valve with the shorter brush, the employee caught his finger in the pinch point between the lip of the valve and the top of the lamp. This happened at some point at the end of a 20 second pause in the machine cycle when the lamps do not move. We infer the employee was still cleaning the exterior of the valve when the machine began to cycle with the valve coming down to contact the top of the lamp to form a seal. Neither party called the injured employee as a witness; no one else saw the accident.

KRS 336.015 (1) charges the Secretary 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 commissioner of the department of workplace standards issues citations. KRS 338.141 (1). If the cited employer notifies the commissioner 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 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*,[1] 487 F2d 438, 441 (CA8 1973), CCH OSHD 16,799 page 21,538, BNA 1 OSHC 1372, 1374, 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, 834 (CA5 1975), CCH OSHD 19,802, page 23,611, BNA 3 OSHC 1299, 1302, where the court said "the Commission is the fact-finder, and the judge is an arm of the Commission..."[2]

Our supreme court in *Secretary, Labor Cabinet v Boston Gear, Inc*, Ky, 25 SW3d 130, 133 (2000), CCH OSHD 32,182, page 48,639, said "The review commission is the ultimate decision-maker in occupational safety and health cases...the Commission is not bound by the decision of the hearing officer." In *Terminix International, Inc v Secretary of Labor*, Ky App, 92 SW3d 743, 750 (2002), the court of appeals said "The Commission, as the ultimate fact-finder involving disputes

[1] In *Kentucky Labor Cabinet v Graham*, Ky, 43 SW3d 247, 253 (2001), 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.

[2] See federal commission rule 92 (a), 29 CFR 2200.

such as this, may believe certain evidence and disbelieve other evidence and accord more weight to one piece of evidence than another."

The Standards and Citations

Compliance Officer Jesse Lewis limited his inspection to the unit 35 coater where the amputation took place. TE 16 and 20. After Mr. Lewis completed his investigation the Labor Cabinet's division of compliance issued two repeat serious citations.

repeat serious
item 1

Item one charged Sylvania with failing to lock out or tag out the coater during valve cleaning. Section 29 CFR 1910.147 (c) (4),[3] the cited standard, says:

> Energy control procedure. (i) Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered in this section.

This lock out/tag out standard applies when employees are servicing or maintaining equipment.[4] When an employee is servicing or maintaining equipment his employer must see to it that the machine cannot be turned on or be energized while the worker is so engaged. Sylvania argued its cleaning was part of its regular production activities, known in the lock out/tag out standards as "normal production operations." According to the lock out/tag out definitions section, however, cleaning is a servicing and maintaining activity covered by the standard. 1910.147 (b).

[3] Adopted in Kentucky by 803 KAR 2:309, section 2 (1).
[4] 1910.147 (a) (2) Application.

The first repeat serious citation, item 1, says:

> 1910.147 (c) (4) (i) Procedures shall be developed, documented, and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section:
>
> a. Prior to November 17, 2010, the employer had not utilized procedures for the control of hazardous energy where employees were required to 'clean coating heads, as necessary, to minimize buildup of dried solution on the valve'...a Solution Prep employee suffered an amputation...while performing this task without first utilizing procedures for the control of hazardous energy.
>
> (emphasis added)

This repeat serious citation, alleging a violation of 1910.147 (c) (4) (i), carried a proposed penalty of $25,000.[5] For reasons we shall discuss, our hearing officer affirmed item one as a serious violation with a penalty of $5,000.

In her recommended order Hearing Officer Durant said "It appears to the Hearing Officer that, as far as the valve cleaning procedure is concerned, Labor is citing in the alternative." Recommended order, page 6 (RO 6). While the Labor Cabinet retains the ability to cite in the alternative, it chose not to do so in this case even though abatement of one violation would serve as abatement of the other.

repeat serious
item 2

This is the cited machine guarding standard:

[5] Labor's compliance officer said the violation was high serious because of the amputation and other potential serious injuries; high, medium and low serious are the choices. Sylvania got no credit for size (number of employees) and no good faith because of the high – serious characterization. CO Lewis said he found the probability to be greater, and not lesser, because the coater employee had to put his hand inside the machine to clean the valves. This, he said, produced a gravity based penalty of $5,000. The compliance officer said his compliance manual, for a repeat, required a penalty five times the serious penalty. TE 51. The maximum penalty for a repeat violation is $70,000. KRS 338.991 (1).

29 CFR 1910.212 (a) (1)[6] **Machine guarding – (1)** *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 chips and sparks. Examples of guarding methods are – barrier guards, two-hand tripping devices, electronic safety devices, etc.

Then here is the citation for item 2:

1910.212 (a) (1) 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 chips and sparks. Examples of guarding methods are barrier guards, two-hand tripping devices, electronic safety devices, etc:

a. At the Unit 35 coater of the T12 Production Line employees are exposed to hazards of unguarded pinch points and rotating parts which are not guarded and may result in serious injury. On November 15...a Solution Prep employee suffered an amputation of the right index finger above the fingernail while performing this task without first utilizing procedures for the control of hazardous energy.

(emphasis added)

In this machine guarding item two citation, instance a, the Cabinet suggested Sylvania could abate by utilizing procedures according to lock out/tag provisions which are covered by item one. Labor's compliance officer confirmed this: "unless there is some form of guard in place that effectively protects them from the hazard of the moving equipment, they have to implement control of hazardous energy procedures," lock out in other words. TE 35. But section 1910.212 (a) (1), the cited standard, very specifically says "machine guarding shall be provided."

Discussion

[6] Adopted in Kentucky by 803 KAR 2:314, section 2 (1).

Should the two citations
have been grouped
because of their
similarity?

Sylvania received two repeat, serious citations for the unit 35 coater, one for a lock out/tag out violation and a second for machine guarding. For the machine guarding citation, the instance description suggested the company should have utilized "procedures for the control of hazardous energy," or lock out/tag out. Given the similarity of the two citations for the unit 35 coater, the same moving machinery hazard and abatement utilizing either lock out/tag out or machine guarding, should the Labor Cabinet should have grouped the two repeats for a single proposed penalty of $25,000?

In *H. H. Hall Construction Company*, CCH OSHD 25,712, pages 32,056 and 32,059, BNA 10 OSHC 1042, 1046, 1049 (1981), the US Department of Labor charged the company with not shoring a trench and permitting heavy equipment to operate near the same excavation; both alleged violations present the hazard of a cave-in. Because the two violations involved separate standards, an employer has the duty to comply with both. 29 USC 654 (a) (2) and KRS 338.031 (1) (b). But because the federal commission found the violations to be "potentially overlapping" according to the hazard presented by both, it assessed a single penalty for the two trenching citations.

Similarly, in *Burkes Mechanical, Inc*, CCH OSHD 32,922, page 53,564, BNA 21 OSHC 2136, 2142 (2007), the federal commission grouped two citations for the purpose of calculating the penalty because abatement of one violation was

abatement of the other. For the case at bar, Sylvania had two choices: to lock out/tag out the coating mechanism for the valve cleaning procedure or to place some type of guard on the machine. Either option protects the operator which is the intent of the Kentucky statute.

Because abatement for one citation would have abated the other and because the two citations share the same hazard, Labor should have grouped the two repeat, serious items for one $25,000 proposed penalty rather than the $50,000 proposed penalty.

According to our authority found in KRS 338.081 (3), we group the two items for the purpose of calculating a penalty. *H. H. Hall Construction* and *Burkes Mechanical, supra.*

Item one

Repeat, serious item one,
the lock out/tag out citation

In *Ormet Corporation*, CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135 (1991), the federal review commission said:

> In order to prove that an employer violated a standard, the Secretary must show that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew,[7] or with the exercise of reasonable diligence, could have known of the violative conditions.

[7] The comma should come after the word "or," not before it. Nevertheless this is how it is punctuated by OSHRC on line as well as CCH and BNA.

For item one our hearing officer found the standard applied and Sylvania violated the terms of the cited lock out/tag standard. Sylvania assigned an employee to clean coating valves, when necessary, during the cycling of the unit 35 coating machine without locking it out and we so find. TE 33. Hearing Officer Durant found "using an effective loto procedure while cleaning the coater-valves would prevent the hazard." RO 6. She found the injured employee used the thirteen inch brush, rather than the regularly used 20 inch brush, to clean a valve which had been identified by inspectors as the cause of imperfectly coated lamps. RO 3. An employee, she said, would clean a valve at least once per shift, proving employee exposure; our hearing officer found "ten solutions preparation employees were responsible for cleaning the coater valves at least once a day or more." RO 4. She said Sylvania had knowledge of the hazard because one of its job safety procedures discussed the valve cleaning process. RO 6. We would add, this is actual knowledge of the violation. *Ormet* and KRS 338.991 (11).

Because a Sylvania employee was injured by the unit 35 coater, the Labor Cabinet proved an actual injury. In *Phoenix Roofing, Inc*, CCH OSHD 30,699, BNA 17 OSHC 1076 (1995), an employee fell through a skylight. Phoenix argued there was no employee exposure because it would be difficult to fall through the opening even though an employee did, to his death. In its decision, the commission said the fall proved employee exposure. "Exposure to a violative condition may be established either by showing actual exposure *or* that access to the hazard was reasonably predictable." At CCH page 42,605, 17 OSHC 1079. Sylvania has not

argued the validity of item one, the lock out/tag out citation. Sylvania only contends item one was not a repeat.

Sylvania's production
defense

Sylvania, before the hearing officer, defended by alleging the cleaning operation was a part of the production process and thus exempt from the lock out/tag out standard. Labor, our hearing officer said, cited to an exception found in the lock out/tag out standard which said the employer, to qualify for the defense, must show it had an alternative measure which provided "effective protection."

> Minor tool changes and adjustments, and other minor servicing activities, which take place during normal production operations, are not covered by this standard if they are routine, repetitive, and integral to the use of the equipment for production, **provided that** the work is performed using alternative measures which provide effective protection...

an exception to 1910.147 (a) (2) (ii) (emphasis added)

Our hearing officer concluded Sylvania had not proven an alternative, effective protection procedure. She said five inches of the brush were within the point of operation during the cleaning process with only 20 seconds to clean the valve before the machine again begins to cycle. RO 6 – 7. We agree with her reasoning. We would add an employee received an injury while cleaning a valve, proving Sylvania's alternative measures did not provide effective protection; locking out the machine or providing machine guarding would have eliminated the hazard. We find a 20 inch brush is not equivalent to machine guarding; neither is it a replacement for locking out a moving machine.

We adopt our hearing officer's findings of fact to the extent they support our decision. Labor has proved all four elements for item one. *Ormet, supra.* We affirm our hearing officer's recommendation to sustain item one. In her recommended order our hearing officer reduced item one from a repeat serious citation to a serious citation with a $5,000 penalty. RO 10 and KRS 338.081 (3). Before us is the question whether Labor proved item one was a repeat violation.

Whether item one
was a repeat violation?

Sylvania, in its brief to the Commission, argues the item one lock out/tag out citation was not a repeat for two reasons: one, the hearing officer erred when she admitted exhibits 8, 9 and 10 over Sylvania's objection because their introduction violated the rule against hearsay. Two, Sylvania argues the prior violations, when compared with items one and two, are not substantially similar.

Sylvania's brief focuses on what Labor must prove to establish a violation as a repeat. Sylvania first cited to *P. Gioioso & Sons Inc v Occupational Safety and Health Review Commission,* 115 F3d 100, 103 note 2 (CA1 1997), BNA 17 OSHC 2091, where the court said "courts typically require proof that the respondent violated the same standard on an earlier occasion in a substantially similar fashion." Sylvania then draws our attention to *D & S Grading Co v Secretary of Labor*, 899 F2d 1145, 1147 (CA 11 1990), CCH OSHD 28,915, page 38,575, BNA 14 OSHC 1573, 1574. *P. Gioioso, supra*, cited to *D & S Grading* in footnote 2. In *D & S Grading*, the eleventh circuit stated the same rule for determining a repeat as did the first circuit in *P. Gioioso*:

> This Court has held that a violation is 'repeated' for the purposes of 29 USCA 666 (a)[8] if (1) the same standard has been violated more than once and (2) there is a 'substantial similarity of violative elements' between the current and prior violations....The burden of showing the requisite substantial similarity of violative elements rests with the Secretary...Once substantial similarity is shown, the burden shifts to the employer to disprove substantial similarity or prove any affirmative defense it may have. (emphasis added)
>
> *D & S Grading at* 899 F2d 1147, CCH pages 38,575 – 38,576, 14 OSHC 1574

Proof of substantially similar violations for the case before us is important because the LOTO standards encompass a wide range of working conditions. For example, in this case the 2007 violation was for an unguarded belt and pulley moving at a high rate of speed while the instant violation was for the lamp coating machine where its automatic cycle would stop for 20 seconds, permitting an employee to clean a valve. While both citations were for violations of the LOTO standard, the violations may not have been substantially similar.

Evidence of the 2007 violation, the basis for the repeat for item one, was submitted via a Kentucky rule of evidence which says a public document may be introduced if it is accompanied by an affidavit from the agency's custodian of the records who attests the document offered into evidence is a true copy of the public record. Exhibits 8, 9 and 10 and KRE 902 (4). For our courts of appeals, the issue is trustworthiness; if the process produces a trustworthy document, then it should be admitted.

[8] KRS 338.991 (1).

Sylvania objected to the introduction of exhibit 10, containing the 2007 citation and the compliance officer's 2007 report, arguing they were hearsay and thus could not be admitted. Our hearing officer admitted exhibit 10, the 2007 citation and the CO's report, which were accompanied by the affidavit of Labor's custodian of the records. Exhibit 10 and TE 52. In its brief to the Commission, Sylvania reasserts it was error for the hearing officer to admit it because of hearsay.

Because exhibit 10, the basis for the repeat characterization of item 1, is composed of several documents, we must be careful to define the parameters of the Kentucky Rules of Evidence as they pertain to our case. Labor has regularly introduced copies of prior citations which are accompanied by an affidavit of the custodian of the records who attests the citation is a true copy of the original. These prior citations are admissible because of Kentucky Rule of Evidence 902 which says:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following... (4) Official records. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by an official having the legal custody of the record...

As we shall demonstrate, our hearing officer, over Sylvania's objection, correctly admitted so much of exhibit 10 that contained the citation but erred when she admitted the compliance officer's report which was also a part of exhibit 10. In her ruling, the hearing officer did not distinguish between the citation and the report; but we shall.

Kentucky's Rules of Evidence contains an exception to the rule against hearsay which is found in KRE 803 (8) (A) and (B). Here is that portion of KRE 803 which applies to the issue before us:

> **KRE 803 Hearsay exceptions: availability of declarant immaterial**
> The following are not excluded by the hearsay rules, even though the declarant is available as a witness:
> (8) Public records and reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or other data complications in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule:
> (A) Investigative reports by police and other law enforcement personnel.
> (B) Investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party...
>
> (emphasis added)

KRE 803 (8) says public records are admissible and may be admitted when they are attested to by the custodian of the records. KRE 902 (4). This exception found in KRE 803 (8) applies to citations which are issued by the program manager for compliance in the Labor Cabinet. But the compliance officer's report is typed and put into the file. We know from our own experience in these matters, when a citation is issued to a respondent, it is not accompanied by the compliance officer's report; they are two different documents.

A compliance officer's report is certainly an "Investigative report prepared by...an agency." KRE 803 8 (B). It is also very likely an investigative report

prepared by "other law enforcement personnel." KRE 803 8 (A). Exceptions (A) and (B) state those reports are hearsay and cannot be admitted. Of course, Labor could have called the 2007 compliance officer as a witness to testify about his 2007 inspection; but Labor did not do that and as a practical matter never does but perhaps should if it wants to introduce a prior inspection report.

For Exhibit 10, as well as exhibits 8 and 9 to which the same objection applies, we hold our hearing officer correctly admitted that portion of the exhibits containing the prior citations as an exception to the rule against hearsay but erred when she admitted the compliance officers' reports which are excluded from the KRE 803 (8) exception.[9] We have ruled the 2007 citation was properly admitted and so we can examine it to see what we can learn:

> 29 CFR 1910.147 (c) (4)...Located on a roof, an employee failed to lock out pulleys resulting in the amputation of three fingers on his right hand, as fingers were puled [sic] between the belts and fan pulleys.

Jerry Soper, a Sylvania production line manager who had personal knowledge of the 2007 violation, testified, without objection, the 2007 belt and pulley citation involved a fan on the roof of the factory building. He said Sylvania's policy was to lock out the fan on the roof but not the coating valve machine because the cleaning of the valves, in his view, was a production matter. He said the two processes were not similar. He said the work on the fan was maintenance while the coater valve cleaning was a minor cleaning activity. TE 155 – 156.

[9] We strike from the record the compliance officers' reports for exhibits 8, 9 and 10.

Sylvania's tube manufacturing process takes place in the factory building; the valve cleaning is done during the time the valves, which are a part of complex machinery, are not moving for twenty seconds giving the operator time to clean the valve with a brush to remove crusted, sticky fluid.

But the 2007 citation involved a belt and pulley on the roof of a building at the same factory in Versailles. Belts and pulleys have their own safety standards which require them to be guarded. 1910.219 (d) for pulleys and 1910.219 (e) for belts. We do not know, for the 2007 citation, why the lock out/tag out standard was cited rather than the belt and pulley standards which are characteristically cited together because belts run around pulleys, creating pinch point hazards.

In *D & S Grading, supra,* the same hazards and conditions were involved: unshored trenches and their potential collapse. Labor's compliance officer in our Sylvania case said the hazard was amputation, but that is an injury not a hazard. For a trenching violation, the hazard is the collapse of the trench; the injury can be death by asphyxiation. For Sylvania the hazard for the instant violation was a pinch point formed by the valve and the top of a tube; the condition was production, the machine which moved the tubes into position to be coated. For the 2007 belt and pulley violation the hazard was the pinch point formed where a belt was drawn around the pulley. But Labor's Compliance Officer Lewis did not as a part of his testimony discuss the hazards associated with belts and pulleys. So far as the conditions of the 2007 belt and pulley are concerned, it was maintenance work, not on the factory floor but on the roof.

Our hearing officer did not believe this 2007 citation put Sylvania on notice to be more careful about lock out/tag out violations and so be liable for a repeat LOTO citation; that is one reason she reduced item one to serious. Labor wasn't so sure it was a lock out/tag out issue either. We infer that is why it issued two citations for the same violation: LOTO and machine guarding but with one abatement, LOTO or guarding.

In *Monitor Construction Co*, CCH OSHD 30,338, page 41,826, BNA 16 OSHC 1589, 1594 (1994), the company received two citations, one a repeat for violating 1926.500 (b) (1) and a prior citation for violating 1926.500 (f) (5) (ii); both violations concerned floor openings. Although in *Monitor*, the two citations were for different but related standards, floor openings, the commission's analysis is instructive for our purposes. One hole was small and hidden; the second was long but thin enough to step over. The commission said:

> We find that the two openings at issue, the hazards they pose, and the means of abatement they require are distinct – the covering of one opening so common a safety precaution on a construction site as to be elementary, the covering of the other not routine at all, but technically required by the standard... Accordingly, we find that the Secretary failed to establish that this violation was repeated...

For *Monitor Construction* the two violations were concerned with unguarded floor openings and yet the federal commission concluded the US Department of Labor had not proved the second violation to be a repeat; in its decision the federal commission said the two violations were distinct, meaning dissimilar. For Sylvania, the instant violation was a failure to lock out the coating machine during valve

cleaning while the 2007 violation was for an unguarded, or not locked out, belt and pulley.

From Sylvania's point of view, the two processes are different: production of lamps on the factory floor versus maintenance of a ventilation fan on a roof. Belts and pulleys are so specific in terms of their function, appearance and potential hazard, they have their own guarding standard. The coating machine does not have its own standard; Labor instead has relied on the lock out/tag out standard and a general machine guarding standard. Labor cited both. Not only did Labor cite both, but for the machine guarding citation, Labor said a possible solution was lock out/tag out even though the machine guarding standard requires guarding of some type.

We agree with our hearing officer who reduced item one to serious. We conclude the Labor Cabinet has failed to prove the hazards presented by Sylvania's coating machine and the 2007 belt and pulley were substantially similar. For this decision, we have relied upon the 2007 citation but not the compliance officer's 2007 report which we have held was hearsay and should not have been admitted. We affirm our hearing officer's recommendation to reduce item one to a serious violation with a $5,000 penalty. *P. Gioioso, D & S Grading and Monitor Construction, supra.*

Item Two

Should our hearing officer
have dismissed item two and
was it a repeat
violation?

Our hearing officer dismissed item two; she said Labor did not prove employee exposure. RO 7. As we have explained, however, an employee sustained an actual injury while cleaning a valve on the unit 35 coater, proving employee exposure. *Phoenix Roofing, supra.* Labor properly cited to the machine guarding standard because a cleaning employee was exposed to moving machinery hazards. *Ormet, supra.*

The guarding standard says "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..." Compliance Officer Lewis said "unless there is some form of guard in place that effectively protects them from the hazard of the moving equipment, they have to implement control of hazardous energy procedures." From this testimony, we infer Mr. Lewis determined the coating machine was not guarded, a violation of the cited standard which requires moving parts to be guarded. TE 35. Sylvania had argued guarding was unnecessary because its employees used a 20 inch brush for the cleaning. *Ormet, supra.*

Sylvania knew its employees regularly used a brush to clean valves during the lamp coating process. Inspecting employees looked for lamps which had not been properly coated. Typically, one valve at a time would begin to malfunction and the inspector then informed the operator that cleaning the valve was required. Employees cleaned the valve with a company supplied 20 inch brush; Sylvania argued the use of a brush obviated the need for a guard. Sylvania had actual

knowledge of the violation; it expected its employees to reach into the unit 35 coater with a 20 inch brush to clean the valves which, according to the cycling of the machine, would remain stationary for 20 seconds. TE 110 and RO 3. *Ormet, supra.*

We conclude the Cabinet proved the machine guarding standard applied and Sylvania violated the terms of the standard. An actual injury was a consequence of the failure to guard, proving employee exposure. Finally, Sylvania expected its employees to perform the cleaning of the valves on a machine that was unguarded and presented a moving parts hazard to the cleaning employee. Labor proved Sylvania had actual knowledge of the hazard. *Ormet, supra.* Because of the actual injury, Sylvania's argument that it was not reasonably predictable an employee would be in the zone of danger is of no assistance. Sylvania did not plead employee misconduct and so the injured employee's use of the shorter, 13 inch at the time of the accident brush is immaterial. An employer may prove it had rules, communicated those rules to its employees, had a system to detect violations of its rules and disciplined employees for violating its rules. Sylvania did not attempt to prove the affirmative defense of employee misconduct. *Jensen Construction Co,* CCH OSHD 23,664, page 28,695, BNA 7 OSHC 1477, 1479 (1979).

We reverse our hearing officer and sustain item two. *Ormet, supra.* What remains for us to decide is whether item two was a repeat violation and the penalty to be set. KRS 338.081 (3).

Did Labor prove item two
was a repeat violation?

Labor bases its repeat characterization for item two on prior citations citing to the same machine guarding standard and "substantially similar conditions" found in previous inspections. And yet, Labor's brief does not attempt to persuade us the instant and prior violations are substantially similar except to say a repeat may be based on a citation written for another work site. Labor's brief at pages 4 and 5. These two prior citations supporting item two as a repeat violation were admitted into evidence as exhibits 8 and 9. While we have held our hearing officer properly admitted the citations found in exhibits 8 and 9, we ruled she erred when she admitted the compliance officer's reports for those two prior inspections; thus, we have struck from the transcript the compliance officer's information about the two inspections he obtained from the inspection reports. We held the compliance officers' reports for exhibits 8 and 9 were hearsay and could not be admitted. KRE 803 (8) (A) and (B).

Citation item 1, dated May 14, 2008, says "paint mixer shafts, which rotate at or around 1725 RPM...are not guarded." Exhibit 9. Compliance Officer Lewis said the 2008 citation became a final order in 2009; Mr. Lewis said this information was available on osha.gov. TE 50 and 51. According to the citation, an employee lost the "tips of his middle and ring fingers while working around the paint mixer." From what we have learned about the functioning of the unit 35 coating machine, the instant violation, it moves quite slowly and even pauses for 20 seconds at which time an employee can clean a valve with a brush. Without more, we see no relationship between the hazards presented by a paint mixer which rotates at 1725

revolutions per minute and a coating machine which moves slowly and pauses for 20 seconds before each row of lamps mate with the valves. We infer the paint mixer is not a part of the lamp manufacturing process. We find for exhibit 9 the Cabinet has not proved the hazard presented by the paint mixer, rotating at a high rate of speed, is substantially similar to the hazard presented by the unit 35 coater.

Exhibit 8, a March 14, 2009 citation, is a machine guarding violation at Sylvania's plant in Winchester, Kentucky. Labor's Compliance Officer Jesse Lewis said he was not the CO for the 2009 inspection and so he could not testify about the details of the inspection. TE 43, 44. But he did say, without contradiction, the 2009 citation was a final order of the Commission and could be used to support a repeat.[10] TE 48. For the 2009 exhibit 8 inspection, we have two machine guarding citations. One is for the "Bonding Line/Finish Line" at the Winchester plant. From the citation, instance a, we learn "the points of operation of the crimping and staking mechanisms" were not guarded. Instance a conveys no information about the nature of the bonding, finishing line such as the speed of the machine, the operator's position relative to it or the time an operator must spend at the machine. Then for instance b, the citation says:

> Located in the Flame Seal 2 line, perimeter guards were not fastened with fasteners requiring a tool to open them. The guards along the aisle side and the conveyor side of the machine had sliding doors which could be opened without unbolting them, allowing employees access to moving components of the machine...

Here again, instance b does not tell us about the type of machine cited except to describe it as the flame seal 2 line. We do not know how close to the machine the

[10] This he could learn from osha.gov.

operator must be to perform his work. We do not know how frequently an operator must have access to the machine's moving components or at what distance from the machine he must be.

We have considerable information, however, about the unit 35 coater. We know the machine moves slowly and pauses for 20 seconds during which time the operator uses his brush to clean a valve. We know the cleaning employee kneels on a small shelf to do his work, but because the unit operates automatically, no employee need be constantly present. Cleaning a valve may take less than one minute and usually need not be performed more than once a shift.

As we have stated, we agree with the rule set down by the first circuit where in *P. Gioioso & Sons, supra*, the court said "courts typically require proof that the respondent violated the same standard on an earlier occasion in a substantially similar fashion." We see no substantial similarity for the 2009 exhibit 8 hazards and the instant, unit 35 coating machine hazard. We do not know, for example, about the characteristics of a crimping and staking mechanism or the details of employee exposure; and for instance b of the 2009 citation, we do not know what type of machine is involved or the potential exposure.

We find Labor did not prove the hazards presented by the 2009 violations and the unit 35 coater violation are substantially similar. *P. Gioioso & Sons and Monitor Construction, supra.*

For the reasons stated, we reduce item two from a repeat serious to a serious violation. We have ruled Labor should have grouped items one and two. *H. H. Hall Construction Company* and *Burkes Mechanical, supra.*

We affirm item one as a serious violation; we affirm item two as a serious violation. Because we have already set the penalty for item one to be $5,000, we group items one and two with a combined penalty of $5,000. KRS 338.081 (3).

It is so ordered.

January 8, 2014.

Faye S. Liebermann
Chair

Paul Cecil Green
Commissioner

Joe F. Childers
Commissioner

Certificate of Service

I certify this decision of the Review Commission was served on this January 8, 2014 on the following in the manner indicated:

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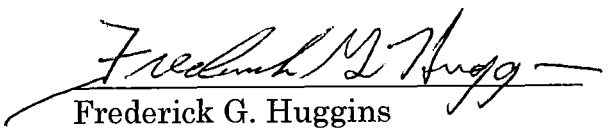

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