

BEFORE THE NORTH CAROLINA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
RALEIGH, NORTH CAROLINA

NC Occupational & Safety
Commission

COMMISSIONER OF LABOR OF THE
STATE OF NORTH CAROLINA

COMPLAINANT,

v.

PETTY MACHINE COMPANY, INC.
and its successors

RESPONDENT.

) DOCKET NO.: OSHANC 2018-6034
) INSPECTION NUMBER: 318111416
) CSHO ID: P8193
)
) DOCKET NO.: OSHANC 2019-6192
) INSPECTION NUMBER: 318173838
) CSHO ID: P8193

ORDER

Appearances:

Victoria L. Voight, Special Deputy Attorney General, North Carolina Department of
Justice, Raleigh, North Carolina

For Complainant

Larry K. Petty, Chief Executive Officer, Petty Machine Company, Inc. Gastonia, North
Carolina

For Respondent

Before: Carroll D. Tuttle –Hearing Examiner, North Carolina Occupational Safety and
Health Review Commission

DECISION AND ORDER

PRIOR PROCEEDINGS

1. During the period between July 10, 2017 and August 29, 2017, Beverly Stone, an Occupational Safety and Health Officer with the North Carolina Department of Labor and George Calvery, an Occupational Safety and Health Officer In Training, with the North Carolina Department of Labor conducted an inspection of Respondent's worksite located at 2403 Forbes Road, Gastonia, North Carolina (Inspection #318111416).

2. As a result of the inspection, on November 30, 2017, Complainant issued the following Citations:

CITATION NUMBER ONE (Serious)

<u>Item</u>	<u>Standard</u>	<u>Abatement Date</u>	<u>Penalty</u>
1	NCGS 95-129(1)	12/29/2017	\$2,800.00
2	29 CFR 1910.37(b)(1)	corrected	\$450.00
3a	29 CFR 1910.133(a)(1)	corrected	\$900.00
3b	29 CFR 1910.132(d)(1)	corrected	Grouped
4	29 CFR 1910.138(a)	corrected	\$450.00
5	29 CFR 1910.147(c)(1)	12/29/2017	2,800.00
6	29 CFR 1910.151(c)	corrected	\$900.00
7a	29 CFR 1910.184(d)	12/29/2017	\$1,500.00
7b	29 CFR 1910.184(c)(14)	corrected	Grouped
8	29 CFR 1910.212(a)(1)	corrected	\$2,800.00
9	29 CFR 1910.215(b)(9)	corrected	\$900.00
10	29 CFR 1910.219(e)(3)(i)	corrected	\$1,500.00
11	29 CFR 1910.303(g)(2)(i)	corrected	\$1,500.00
12a	29 CFR 1910.334(a)(3)(i)	corrected	\$1,500.00
12b	29 CFR 1910.334(a)(2)(ii)	corrected	Grouped
13a	29 CFR 1910.1026(d)(1)	corrected	\$1,500.00
13b	29 CFR 1910.1026(k)(1)(i)(A)	01/23/2018	Grouped
13c	29 CFR 1910.1026(l)(1)(iii)	01/23/2018	Grouped

CITATION NUMBER TWO (Nonserious)

<u>Item</u>	<u>Standard</u>	<u>Abatement Date</u>	<u>Penalty</u>
1	29 CFR 1910.305(g)(2)(ii)	corrected	\$450.00
2a	29 CFR 1910.1200(f)(6)	corrected	\$450.00
2b	29 CFR 1910.1200(g)(8)	01/23/2018	grouped
2c	29 CFR 1910.1200(h)(1)	corrected	grouped

3. The Respondent submitted a timely Notice of Contest, dated February 7, 2018.

4. During a Prehearing Conference on February 20, 2020 in Lenoir, North Carolina, the Parties reached an agreement to resolve all but one of the items (Citation 1, Item 8) listed above and requested approval of that agreement by the undersigned.

5. The agreement was memorialized in a Partial Consent Judgement dated June 23, 2020 and incorporated herein by reference.

6. During the period between July 23, 2019 and September 4, 2019, Officer Stone conducted a

second inspection of Respondent's worksite (Inspection #318173838).

7. As a result of the inspection, on October 21, 2019 Complainant issued the following Citations:

CITATION NUMBER ONE (Serious)

<u>Item</u>	<u>Standard</u>	<u>Abatement Date</u>	<u>Penalty</u>
1	NCGS 95-129(1)	immediate	\$1,500.00
2	29 CFR 252(b)(2)(iii))	immediate	\$900.00

CITATION NUMBER TWO (Nonserious)

<u>Item</u>	<u>Standard</u>	<u>Abatement Date</u>	<u>Penalty</u>
1	29 CFR 1910.134(c)(2)(i)	11/15/2019	\$450.00
1b	29 CFR 1910.134(c)(2)(ii)	11/15/2019	grouped

8. The Respondent submitted a timely Notice of Contest, dated November 12, 2019 in which he contested Citation 1, Item 2 but did not contest the remaining items.

9. By Order dated June 23, 2020, Respondent's challenge to OSHANC NO: 2018-6034, Inspection # 318111416, Citation 1, Item 8 was consolidated for hearing with Respondent's challenge to OSHANC 2019-6192, Inspection # 318173838 Citation 1, Item 2.

10. On November 12, 2020, a hearing via LIFESIZE and phone was conducted on the two remaining items. Present at the hearing via phone were Larry Petty, Respondent's CEO and Frank Hovis, Respondent's President. Present at the hearing via LIFESIZE were Officer Beverly Stone and Officer George Calvery.

11. Prior to the presentation of Complainant's case in chief, Mr. Petty presented proof that Citation 1, Item 2 of OSHANC NO: 2019-6192, Inspection # 318173838 had been abated and withdrew his contest with regard to this item.

12. The Parties proceeded to hearing with regard to Citation 1, Item 8 of OSHANC NO: 2018-6034, Inspection # 318111416.

13. During the hearing, Mr. Petty stated that he was not contesting Citation 1, Item 8 instance "a"

(grinder) of OSHANC NO: 2018-6034, Inspection # 318111416. His concerns related to the milling machines, which were discussed in instances “b, c and d” of that item. For this reason, the findings presented below relate to the milling machines.

ISSUES PRESENTED

1. Did Complainant meet its burden of proof that the conditions described in instances “b, c and d” of Citation 1, Item 8 of OSHANC NO: 2018-6034, Inspection # 318111416 constituted serious violations of 29 CFR 1910.212(a)(1)?
2. Did Respondent meet its burden of proof that abatement of the described conditions is infeasible?
3. Did Respondent meet its burden of proof that abatement of the described conditions creates a greater hazard?

STANDARDS AND/OR STATUTES AT ISSUE

1. 1910.212(a)(1) provides that “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.”

FINDINGS OF FACT

1. During the course of the inspection, Officer Calvery observed:
 - a. A Comet, Model # E3643 Milling Machine with was no point of operation guard to prevent the operator or other employees from contacting the milling head when the machine was operation (Complainant’s Exhibit #4);
 - b. Two Nova milling machines (model #s 43L558 and # 510025) with no point of operation guard to prevent the operator or other employees from contacting the milling head when the machine was in operation (Complainant’s Exhibit #s 5 and 6); and

c. A Bridgeport model #250102 milling machine with no point of operation guard to prevent the operator and other employees from contacting the milling head when the machine was in operation (Complainant's Exhibit #7).

2. Employees operating these machines were directly exposed at the point of operation when the parts being held by the employees contact the rotating bit which exposes the employees to contact with the moving parts of the machine. The employees are exposed to the rotating mill head, flying metal chips, cutting fluid, and possible sparks.

3. At the time of the inspection there were 10 employees that use these machines.

4. Use of the milling machines was based on the orders being produced on a given day and at a given time.

5. During the inspection, Respondent's Plant Manager, Jimmy Rogers, estimated that employees used the milling machines less than 2 hours per day.

6. During the hearing, Mr. Petty testified that employees used the machines approximately 15 hours a week.

7. Without guards in place an employee operating one of the milling machines would be exposed to direct contact with the rotating chuck and cutting tool at the point of operation and when making adjustments to the cooling line.

8. The most likely injury from contact with the rotating chuck or cutting tool, would be a severe cut, or amputation of a digit(s) resulting in lost time and partial or permanent disability.

9. Respondent's plant manager was aware that its employees used the machines without a guard in place.

10. Officer Calvery used the North Carolina OSHA Operations Manual (Manual) to determine a gravity-based penalty of \$7000.00.

11. Using the Manual, Officer Calvery awarded Respondent credit for size (50%) and history (%10) but did not award credit for good faith because he determined that the hazard was high/greater.
12. Based on his calculations, Officer Calvery Recommended that Complainant be issued a penalty of \$2800.00 for this item.
13. Officer Calvery sent Respondent examples of guards that could be installed to address the cited conditions. (Complainant's Exhibits 12-14).
14. Respondent chose to fabricate their own guards rather than purchase any of the guards suggested by Officer Calvery.
15. Officer Calvery received photos of guards that Respondent had fabricated and accepted them as abatements for the conditions cited. (Complainant's Exhibits 8-9)
16. The work being performed necessitated that the employees be able to adjust a fluid tube that provided coolant to the point of operation during the process.
17. During these adjustments, the employees were reaching around the guards that Respondent had fabricated to adjust the tubes.
18. Mr. Petty was concerned that reaching around the guards to adjust the tubes created a greater hazard of injury than performing the work with the guards off.
19. Mr. Petty informed Respondent's employees that they did not have to use the guards if they felt using them created a greater hazard.
20. During the hearing, Officer Calvery presented photos illustrating how the tubes could be adjusted without reaching around them using several types of adjustable guards specially designed for use on milling machines. (Complainant's Exhibit #21)
21. Officer Calvery also presented several more examples of adjustable guards which could be used to guard the point of operation on Respondent's milling machines. (Complainant's Exhibit #s 15-20)

22. While the guards suggested by Complainant were adjustable and the tube could be reached without having to reach around the guards, Mr. Petty felt that the guards would make it more difficult to see the point of operation or to hold parts in place during certain operations.

23. Mr. Petty had not actually tried any of the guards that Complainant suggested.

24. Mr. Petty stated that he would be willing to install one of the adjustable guards on one of his milling machines for test purposes.

DISCUSSION

To establish a violation of a specific OSHA standard, Complainant must establish: (1) the cited standard applies; (2) the terms of the standard were violated; (3) employees were exposed to the hazard covered by the standard; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. JPC Group, Inc. 2009 OSAHRC LEXIS 44, 22 OSHC (BNA) 1859, 2009 OSHD (CCH) P33, 027 (O.S.H.R.C. August 11, 2009). Matsu Ala., Inc., 2015 OSAHRC LEXIS 63, *102, 25 OSHC (BNA) 1952, 2016 OSHD (CCH) P33, 487 (O.S.H.R.C. September 29, 2015).

With regard to the present case, the courts have found that 29 CFR 1910.212(a)(1) applies to unguarded points of operation on milling machines. Matsu Ala., Inc., 2015 OSAHRC LEXIS 63, *102, 25 OSHC (BNA) 1952, 2016 OSHD (CCH) P33, 487 (O.S.H.R.C. September 29, 2015).

Complaint has established that the milling machines were not guarded. To establish exposure, Complainant need not show that an actual injury occurred while using the unguarded milling machine, only that it was "reasonably predictable" that the employees have been, are, or will enter into the zone of danger "by operational necessity" or as the result of "unsafe operating procedures, poor training, or employee inadvertence" and "carelessness." Id. Complainant has established Respondent's employees routinely used their hands to hold parts in placed during the milling process at which time they were directly exposed to the point of operation. Lastly, Complainant has established that Respondent's plant manager was aware that employees were routinely using their

hands to hold parts in place during the milling operation and there was no guard in place to prevent the employees from coming in contact with the point of operation.

A serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment. Prestressed Sys. 1979 OSAHRC LEXIS 197, *14 (O.S.H.R.C. September 19, 1979). The risk of an employee suffering a severe laceration of the hand or amputations of fingers, has been found to constitute a “serious hazard.” Dayton Tire, 1997 OSAHRC LEXIS 167, *83 (O.S.H.R.C. February 21, 1997). Complainant has established that most likely injury from contact to the chuck or cutting tool (severe cut, or amputation of a digit) would constitute a serious hazard.

Respondent has admitted that the conditions described in instance “a” of Citation 1, Item 8 constituted a serious violation of the cited standard. Based on the evidence presented at hearing and the facts set forth above, Complainant has established that instances “b, c and d” also constituted serious violations of the cited standard.

At the hearing, Respondent contended that there abatement of the conditions described in instances “b, c and d” was infeasible and that use of the guards for the type of work being performed created a greater hazard. Infeasibility of abatement and greater hazard are affirmative defenses for which Respondent bears the burden of proof. Manson Constr. Co., 2016 OSAHRC LEXIS 76 (O.S.H.R.C.A.L.J. December 12, 2016).

To establish infeasibility, Respondent must show that: (1) literal compliance with the terms of the cited standard was infeasible, and (2) an alternative protective measure was used or there was no feasible alternative measure. See e.g., Otis Elevator Co., 24 BNA OSHC 1081, 1087 (No. 09-1278, 2013). The greater hazard defense requires Respondent to prove: (1) compliance with the hazard is more hazardous than noncompliance; (2) alternative means of protection are unavailable; and (3)

either a variance has been sought and denied or a variance application would be inappropriate. Dole v. Williams Enters., 876 F.2d 186, 188, 278 U.S. App. D.C. 1 (D.C. Cir. 1989); True Drilling Co. v. Donovan, 703 F.2d 1087, 1090 (9th Cir. 1983).

Respondent has not established the necessary elements of either affirmative defense. With regard to the defense of “infeasibility,” Complainant established that adjustable guards were commercially available that were designed to work on the types of milling machines in use at Respondent’s worksite and would allow for the adjustment of the fluid tube during operation without bypassing the guards. Respondent admitted that it had not actually tried to use any of the guards that Complainant suggested as feasible abatements. With regard to the defense of “greater hazard,” while Respondent contended that the use of the guards it fabricated created a greater hazard because employees bypassed the guards to adjust the fluid tubes, it did not establish that there were no guards available that would allow the employees to adjust the fluids or perform other necessary tasks without having to bypass the guard. Respondent also did not establish that a variance requested had been submitted or that the submission of a variance request would not be appropriate.

CONCLUSIONS OF LAW

1. The foregoing findings of fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. Respondent is subject to the provisions of the Act.
3. At the hearing, Respondent withdrew his contest to OSHANC 2019-6192, Inspection # 318173838 Citation 1, Item 2 and presented proof of abatement.
4. At the hearing, Respondent admitted to a serious violation of 29 CFR 1910.212(a)(1) with regard to Citation 1, Item 8 instance “a” of OSHANC NO: 2018-6034, Inspection # 318111416.
5. Complainant proved by a preponderance of the evidence that Respondent committed a serious violation of 29 CFR 1910.212(a)(1) with regard to Citation 1, Item 8 instances “b, c, and d” of OSHANC NO: 2018-6034, Inspection # 318111416.

6. Respondent proved by a preponderance of the evidence that the penalty and the adjustment of the penalty was correctly calculated in accordance with the Complainant's Operations Manual.

Based on the foregoing Findings of Fact and Conclusions of Law and considering the Discussion, it is ORDERED as follows:

Citation 1, Item 8 of OSHANC NO: 2018-6034, Inspection # 318111416 is affirmed as a serious violation of 29 CFR 1910.212(a)(1). A penalty of \$2800.00 is appropriate and has already been paid. Respondent shall install guards on the milling machines no later than 30 days after the filing of this order.

Having withdrawn his notice of contest to Citation 1, Item 2 of OSHANC 2019-6192, Inspection # 318173838, the outstanding penalty of \$900.00 shall be paid within thirty (30) days of the filing of this Order.

This the 2ND day of December, 2020.


Carroll D. Tuttle
Hearing Examiner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this date served a copy of the foregoing ORDER upon:

JIMMY D ROGERS
PETTY MACHINE COMPANY, INC
2403 FORBES RD
GASTONIA NC 28052

by depositing same in the United States Mail, Certified Mail, Return Receipt Requested and by First Class Mail, postage prepaid at Raleigh, North Carolina, and upon:

VICTORIA VOIGHT
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH, NC 27602-0629

by depositing a copy of the same in the United States Mail, First Class, postage prepaid at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH, NC 27699-1101

By depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 30 DAY OF December 2020.



Karissa B. Sluss
Docket and Office Administrator
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