BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

PRESTIGE FARMS, INC.,

RESPONDENT.

DOCKET NO. OSHANC 93-2619
OSHA INSPECTION NO. 18497792
CSHO ID NO. L0307

ORDER

DECISION OF THE REVIEW BOARD

This appeal was heard at 11:00 A.M. on the 13th day of September, 1994 in the Conference Room in the office of the Safety and Health Review Board of North Carolina at 217 West Jones Street, Raleigh, North Carolina by Robin E. Hudson, Chair, Kenneth K. Kiser, and Hugh M. Wilson, Members of the North Carolina Safety and Health Review Board.

APPEARANCES

John C. Sullivan, Associate Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

William M. Claytor, of Baucom, Claytor, Benton, Morgan, Wood & White, P.A. Charlotte, North Carolina for Respondent.

ISSUES PRESENTED

1. Did the Hearing Examiner err by dismissing Citation No. 1, Item 1a, which alleged a serious violation of 29 CFR 1910.132(a), the Personal Protective Equipment Standard, for failure to require its employees to wear steel mesh gloves on both hands while operating electrical cutting machines?

2. Did the Complainant fail to prove by the greater weight of the evidence that the use of the electric circular saws to saw chickens without hand protection on both hands created a hazard that the wearing of wire mesh gloves would alleviate?

3. Did the Hearing Examiner err by affirming Citation No. 1, Item 2 as a nonserious violation of 29 CFR 1910.305(d) with no penalty rather than affirming the citation as a serious violation with a penalty of $1,250.00?

4. Did the Complainant fail to prove by the greater weight of the evidence that the condition of the panel cover of the battery charger was a serious violation , a serious violation being defined by N.C.G.S. 95-127(18) as existing "if there is a substantial probability that death or serious physical harm could result from a condition which exists ..."?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

1. 29 CFR 1910.132(a), which requires that appropriate personal protective equipment be worn by employees who are exposed to hazards in a manner capable of causing injury.

2. 29 CFR 1910.305(d) which permits the use of panelboards other than the dead front externally-operable type where accessible only to qualified persons.

3. N.C. Gen. Stat § 95-127(18) which defines a serious violation as existing "if there is a substantial probability that death or serious physical harm could result from a condition which exists ..."?

Having reviewed and considered the record and the briefs and the arguments of the parties, the Safety and Health Review board of North Carolina hereby makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. This case was initiated by a notice of contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.

2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).

3. The employer (Respondent) Prestige Farms, Inc. is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128). The Respondent is a family owned corporation located in Charlotte, North Carolina which is in the business of processing poultry products and which employs 90 persons.

4. The Complainant inspected the Respondent on December 15, 1992 through December 16, 1992 and issued two citations on February 9, 1993. Citation No. 1 contained six items alleged to be serious violations of the cited standards and Citation No. 2 containing nine items alleged to be nonserious violations of the cited standards. Total penalties in the amount of $3,250.00 were assessed. The abatement date for Citation No. 2, Item 2 was March 15, 1993 and the abatement date for the rest of the items was February 16, 1993.

5. The Respondent timely exercised its right to contest the violations and penalties (N.C. Gen. Stat §§95-129, 95-137). The notice of contest was timely filed with the Safety and health Review Board of North Carolina on March 10, 1993.

6. The Safety and Health Review Board of North Carolina (Review Board) assumed jurisdiction over the issues in contest. (N.C. Gen. Stat § 95-135).

7. The Respondent's Statement of Employer's/Respondent's Position was filed on March 25, 1993 contesting the proposed penalties for Item 1a, 2a and 3a of Citation No. 1.

8. A hearing was scheduled and held on August 10, 1993 before the Honorable Richard M. Koch. At the hearing the Respondent made a motion for a continuance and a motion to amend its statement of position to contest the alleged violations in Citation No. 1 and was granted both motions.

9. A second hearing was scheduled and held on September 29, 1993 again before the Honorable Richard M. Koch. Judge Koch's order, filed with the Review Board on February 9, 1994, dismissed Item 1a of Citation No. 1, affirmed Item 2 of Citation No. 1 as a nonserious violation of 29 CFR 1910.305(d) with no penalty, affirmed the rest of the items of Citation No. 1 as serious violations and affirmed all of the items of Citation No. 2 as nonserious violations with no penalty. Total penalties of $2,000.00 were affirmed and immediate abatement was ordered of all violations not previously abated.

10. The Complainant timely filed an appeal with the Review Board on March 14, 1994. The appeal was limited to review of the dismissal of Item 1a of Citation No. 1 and the affirming of Item 2 of Citation No. 1 as a nonserious rather than a serious violation of 29 CFR 1910.305(d) with no penalty and to certain enumerated findings of fact and conclusions of law.

11. The Complainant filed a brief with the Review Board on July 27, 1994 and the Respondent filed its brief with the Review Board on August 17, 1994.

12. On September 13, 1994 , the issues on appeal were heard by the full Review Board.

13. The hazard in the operation (cutting of chicken carcasses with electric circular saw) was that an employee could be cut by an electric cutting machine. An employee, Phil Honeycutt was observed cutting chicken carcasses with an electric circular saw while wearing a wire mesh glove on his left hand but not his right hand (T-15, L.15 et seq.).

14. Another employee was observed wearing wire mesh gloves on both hands while cutting chickens with a similar circular saw (T-16, L.6 et seq.).

15. The hazard in the cutting of the chickens with an electric cutting machine created the possibility of an accident (T-16, LL. 20-25).

16. The hazard in the operation of cutting chickens with an electric cutting machine also included" the fact that there was an employee using a saw that was designed to cut flesh and bone; that he was engaged in a relatively monotonous, repetitive task; that he could very possibly not pay attention during his work; and that the proximity of his hand to that cutting blade required every possible protection." (T-58, L. 17-23)

17. Officer Long had very little experience with wire mesh gloves prior to the inspection (T-58, L.1). He testified that he had been told that it was possible that the wire mesh gloves could be caught in the blade or parts close to the blade (T-67, L. 15 et seq.)

18. The warranty card that came with the wire mesh gloves contained a disclaimer which stated as follows: " Note: The stainless steel glove has been designed to provide you with limited protection against knife cuts. Warning: (1) The stainless steel in this glove will not withstand the force exerted by power blades on power saws or power driven tools and should not be used where the danger of a power driven tool is in evidence; (2) Stainless steel gloves can be caught in moving machinery and should not be used where a contact with any moving part is possible . . . . (T-62, LL.10-20)."

19. The cutting of the chickens with the power saw was a messy operation in that there was fat and flesh from the chickens scattered around the saw and on the floor (T-60, L. 6 et seq.).

20. Employee Honeycutt's left hand came within two inches of the moving circular blade while he was sawing chickens (T-64, L. 17).

21. The employees who operate the power saws to cut chickens are given the option to wear the wire mesh gloves and that when they wear the gloves they wear three sets of gloves, a cloth glove to keep their hands warm, a rubber glove over the cloth glove to keep the hands free of bacteria and to keep the wire mesh glove from rubbing the hands and over the rubber glove they wear the wire mesh glove. (T-146-147.)

22. Employee Randy Baker's hands came within three inches of the blade (T-150, L. 6) and part of the glove dangled and could easily slide into the blade and pull an operator's hand into the blade (T-149, L. 21 et seq.; T-152, LL. 7-20).

23. Wearing the wire mesh gloves made it difficult to pick things up with the hands and fingers and made it difficult to squeeze and made the hands stiff (T-151, L. 7 et seq.). The wire mesh gloves become so slick from the chicken fat and grease that an operator can't even grip the chicken and that the grease gets caught in the grooves and band of the gloves (T-152, LL. 23-25; T-153, L. 1 et seq.).

24. An employee lost the tip of his finger in the saw while wearing the wire mesh gloves (T-160, L.3-7).

25. The respondent's Vice-President's personal opinion which was based on his observations over many years in the family business and on conversations with long time employees, was that wearing the wire mesh gloves while using the electric saw increased the risk of injury to the employees (T-pp160-161.).

26. Ms. Sandra Thompson George, the Manager of the processing area for the respondent had her wire mesh glove get caught in the saw while using the wire mesh gloves on a similar saw at another job and the tips of the

glove were cut off (T-p. 177).

27. An employee of the respondent's cut off the tip of his finger and sliced his finger down the side while wearing the wire mesh gloves (T. p. 177.).

28. Employees had nicked their fingers on the saw while not wearing the wire mesh gloves (T. pp. 159-160).

29. The Respondent's written company policy requires the wearing of metal mesh gloves while cutting chickens with a knife and does not refer to sawing chickens with a circular saw (T. p. 193).

30. Employees were observed sawing chickens with the saw and were exposed to the electric saw for eight hours out of the day.

31. Officer Long gave his opinion that the substantial probable result of an accident while cutting chickens with the power saw would be severe lacerations and amputation of fingers (T-16, L-23-25).

32. Officer Long observed a battery charger in respondent's facility with a cover that was not secured. Behind this cover were energized terminals and fuse holders, which could be accessed by anyone pushing a finger on the lower lip of the cover.

33. Respondent's employees advised Officer Long that the battery charger was used on a daily basis by the pallet jack operators in the plant and was in an area of general accessibility to all employees.

34. The floor surrounding the battery charger was concrete and was sometimes wet.

35. The employees in the plant all wore rubber boots, which are recognized as a good electrical insulator.

36. Officer Long testified that all the electrical standard violations he observed created the possibility of an accident, the substantially probable result of which would be severe electrical shock, which could cause death or serious injury. The respondent offered the testimony of Phillip Briggs, program director for CPCC's electrical installation and maintenance curriculum. Mr. Briggs testified that the substantially probable result of contact by an employee with an energized contact in any of the circumstances cited as electrical violations by Officer Long would be a minor shock.

37. Contact with the battery charger with the panel cover closed would not result in any accident (T-p. 123).

38. Contact with the battery charger with the panel cover open given the conditions that were observed during the inspection would result in a minimal shock. (T pp. 123-124).

39. The panel cover on the battery charger was closed when Officer Long made the inspection (T-82, L. 22-24).

40. The battery charger was maintained by an outside contractor (T-82, L. 15-16).

41. No evidence was presented that any employees of the Respondent ever opened the panel cover door of the battery charger (T-83, L. 20-23).

CONCLUSIONS OF LAW

1. The foregoing findings of fact are incorporated as conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. The Commissioner has proved by the greater weight of the evidence that the sawing of the chickens on the electric circular saw with the hands coming within two to three inches of the moving blade created a hazard that the fingers or hands could be drawn into the blade and injured.

3. The Commissioner has proved by the greater weight of the evidence that the employees were exposed to the hazard for 8 hours of the day.

4. The Commissioner has failed to prove by the greater weight of the evidence that the wearing of steel mesh gloves eliminated the hazard created by sawing chickens on an electric circular saw.

5. The Hearing Examiner did not err when he dismissed Citation No. 1, Item 1a for failure of the Complainant to meet its burden of proof.

6. The Hearing Examiner's findings of fact # 15-17 and 24-25 with respect to the battery charger are supported by substantial evidence when viewed in the light of the whole record.

7. The Complainant has failed to prove by the greater weight of the evidence that the condition of the panel cover on the battery charger was a serious violation of 29 CFR 1910.305(d).

8. The Complainant has proven by the greater weight of the evidence that the condition of the panel cover on the battery charger was a nonserious violation of 29 CFR 1919.305(d).

9. The Hearing Examiner did not err by affirming Citation No. 1, Item 2 as a nonserious violation of 29 CFR 1910.305(d) with no penalty rather than affirming the citation as a serious violation with a penalty of $1,250.00.

DISCUSSION

The scope of review for errors of fact is the whole record test. Brooks v. Snow Hill Metalcraft Corporation, 2 NCOSHD 377 (RB 1983). N.C. Gen. Stat § 95-135(i) states that upon appeal to the Review Board "the Board shall schedule the matter for hearing, on the record, (emphasis added) except that the Board may allow the introduction of newly discovered evidence, or in its discretion the taking of further evidence upon any question or issue." The Board is "entitled, if not obligated, to review the entire record to discern whether the hearing officer's findings and conclusions are adequately supported." Brooks v. Schoss Outdoor Advertising, Co., 2 NCOSHD 552, at 560, 561 (RB 1985). "De novo review is applied for errors of law. Commissioner v. Tuttle Enterprises dba Jim Fleming Tank Company, 5 NCOSHD 115, at 117 (RB 1993), citing, Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981).

The Board follows the policy that ordinarily "facts found by a hearing examiner will be held conclusive when such facts are supported by substantial evidence. . . Substantial evidence means 'such relevant evidence as a reasonable man might accept as adequate to support a conclusion' ", Brooks v. Snow Hill Metalcraft Corp., 2 NCOSHD 377, at 380 (RB 1983), quoting Dunlop v. Rockwell International, 540 F.2d 1283 (6th Cir. 1976).

"In all proceedings commenced by the filing of a notice of contest, the burden of proof shall rest with the Commissioner to prove each element of the contested citation by the greater weight of the evidence." Rule .0514(a) of the Rules of Procedure of the Safety & Health Review Board of North Carolina, revised February 3, 1992, amended effective April 1, 1993. OSHA enforcement proceedings are civil in nature, rather than penal, and the applicable burden of proof is the ordinary burden of proof for civil actions, the preponderance of the evidence. Brooks v. Daniel Construction Company, 2 NCOSHD 299 (RB 1981); Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981).

I. THE VIOLATION OF THE PERSONAL PROTECTION PROVISION

The court must decide whether the failure to wear steel mesh gloves on both hands while sawing chickens on an electrical circular saw constitutes a violation of the personal protection standard for general industry, 29 CFR 1910.132(a). The standard reads as follows:

> "Protective equipment, including personal protective equipment for eyes, face, head and extremities, protective clothing, respiratory devices and protective shield and barriers, shall be provided, used and maintained in a sanitary and reliable condition wherever it is necessary by reasons of hazards of

processes or environment, chemical hazards, radiological hazards or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact."

In a case which involved a violation of the above quoted standard for failure to wear safety-toe shoes, the Review Board stated: "we are of the opinion that a hazard existed . . .; that the employer knew, or should have known, under the 'reasonable man test' developed under the Federal decisions and applied by this Board, that the hazard existed, and finally, that the wearing of the safety shoes could reasonable be expected to lessen or eliminate the hazard of injuries to the foot or toes." Brooks v. Biggers Brothers, Inc., 2 NCOSHD 183, at 185-186 (RB 1980)

In interpreting the personal protection provision for the construction industry, 29 CFR 1926.28(a), the Review Board stated: "The main purpose of OSHA is to ensure employees a safe work place. A serious violation of OSHA can be established only if a preponderance of the evidence shows that employees are exposed to a hazardous condition requiring the use of personal protective equipment that would eliminate the hazard." Brooks v. Daniel Construction Company, 2 OSHANC 299, at 303 (RB 1981), affirmed, 2 OSHANC 309, Docket No.81 CVS 5703 (Superior Ct. 1983), affirmed, 2 OSHANC 311, 73 N.C. App. 426 (Ct. of Appeals 1984). Pursuant to Brooks v. McWhirter in order to prove a serious violation it must also be shown by substantial evidence "that the violation created a possibility of an accident a substantially probable result of which was death or serious physical injury." Brooks v. McWhirter Grading Co., INC., 2 OSHANC 115, 303 N.C. 573 (Supreme Court 1981). In addition, G.S. 95-127(18) which gives the definition of a serious violation requires an element of employer knowledge: " A 'serious ' violation shall be deemed to exist in a place of employment . . . unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation."

The Court of Appeals has stated that this standard requiring employee knowledge was an adaption of the "reasonable man standard of the common law and adopted the First and Third Circuits interpretation that "the practice in the industry is but one circumstance to consider, along with the other circumstances, in determining whether a practice meets the reasonable man standard. These Courts have noted, quite properly we think, that equating the practice of an industry with what is reasonably safe and proper can result in outmoded, unsafe standards being followed to the detriment of workers in that industry." Brooks v. Daniel Construction Company, 2 OSHANC 311, at 315, N.C. App. 426 (Ct. of Appeals 1984).

Following the principals of these precedents, the following elements must be proven in order to show a serious violation of 29 CFR 1910.132(a), the personal protective provision for general industry:

1. A hazard existed;

2. employees were exposed;

3. the use of the personal protective equipment would have eliminated the hazard;

4. the hazard created the possibility of an accident;

5. the substantial probability of an accident would be death or serious physical injury and

6. the employer knew or should have known (applying the reasonable man test developed by the Court of Appeals in Daniels, supra) of the condition or conduct that created the hazard.

If there were actual knowledge by the employer of the hazardous condition or knowledge of the hazardous condition by the employer's supervisors that is imputable to the employer, then due process would not require that the reasonable man test be employed to prove employer knowledge for element numbered six above. See, Brooks v. Daniel Construction Company, 2 OSHANC 299, at 305 (RB 1981), affirmed, 2 OSHANC 309, Docket No.81 CVS 5703 (Superior Ct. 1983), affirmed, 2 OSHANC 311, 73 N.C. App. 426 (Ct. of Appeals 1984); Secretary v. Grand Union Company, 1975-1976 OSHD 23,926 at 23,927 note 3.

The Commissioner is required to prove each and every element of a violation by a preponderance of the evidence. If the commissioner fails to meet its burden of proof on any one of the above elements then the violation cannot be sustained. The hearing examiner below made the correct decision but the reasons on which the decision was based need clarification. It is true that the Commissioner failed to prove the violation by the greater weight of the evidence but it is not true that the Commissioner failed to prove the hazard.

The preponderance of the testimony was that the employee's hands came within two to three inches of the moving circular blade and that the fingers or hand could be drawn into the blade. Officer Long gave his opinion based on his observation of the employees that the employee's hands came within two inches of the blade and that the hazard in the operation of the saw was that an employee could be cut and suffer severe lacerations and amputation of fingers. On cross examination he further testified that the relatively monotonous and repetitive work on a saw that was designed to cut flesh and bone created a hazard. (T-58, L. 17-23). Employee Baker testified that his hands came within three inches of the blade. Vice-President Thompson and Ms. George both testified that employees had cut their fingers while using the saw. Ms. George also testified that she cut off the tips of her steel mesh gloves while using a similar saw while working for a previous employer. The preponderance of the evidence is that there was a hazard of getting ones fingers and hands cut while operating the saw. There is conflicting evidence as to the seriousness of an injury but we need not decide that element in light of our holding on the burden of proof for the third element.

The second element, employee exposure was proven by a preponderance of the evidence by the uncontroverted testimony of Officer Long that he observed the employees sawing chickens with the saw and that he interviewed the employees and determined that they were exposed to the hazard for eight hours out of the day.

The Commissioner fails to meet his burden of proof for the third element. He failed to show by a preponderance of the evidence that the wearing of the steel mesh gloves would have eliminated the hazard. Officer Long gave his opinion that the wearing of the steel mesh gloves would eliminate the hazard but on cross examination he admitted that he had very little experience with steel mesh gloves and that he had been told that it was possible for the gloves to get caught in a part close to the blade if not the blade itself. The testimony of employee Baker, Vice President Thompson and Manager George all indicated that the gloves made it more dangerous and increased the risk of drawing the hand into the cutting blade. Some or all of the above three mentioned employees testified that the gloves became slick from the chicken fat and flesh and that the fingers became numb from wearing three gloves with a loss of tactile stimulation and that parts of the fingers of the gloves dangled beyond the ends of the fingers creating the risk that the gloves could be caught on the blade and pull the hand into the blade. The manufacturer of the gloves issued a disclaimer that the gloves should not be used with power tools. The evidence is overwhelming that the wearing of the steel mesh gloves would not eliminate the hazard but would increase the hazard.

This very issue was litigated by the federal OSHA courts in the mid 1970's. Although the Review Board does not consider federal OSHA decisions as binding, we will look to Federal Decisions for guidance. In a case cited in the Hearing Examiner's opinion, Secretary v. Grand Union Company, 1975-1976 OSHD 23,926 (RC 1975), the issue on appeal was whether 29 CFR 1910.132(a) required butchers working in retail grocery stores to wear wire mesh gloves as hand protection while using knives to trim and debone meat. A review of the digests of the administrative law judges opinion of the two cases which were consolidated for the hearing before the Review Commission and a review of the dissent in Grand Union, supra, indicates that the compliance officers, employers and the judges in both cases had agreed that the wire mesh gloves should not (emphasis added) be used around power equipment. The compliance officer testified that it was the employer's obligation to establish and enforce administrative controls to see that the wire mesh gloves were not (emphasis added) used around power equipment. Secretary v. Grand Union Company, 1975-1976 OSHD 23,926, dissent at 23,930 (RC 1975); Secretary v. Grand Union Company, 1974-1975 OSHD 22,818 (1974); Secretary v. Grand Union Company, 1974-1975 OSHD 23,170 (1974). A long line of these cases was litigated by the federal courts in the mid 1970's and presumable led to the federal OSHA issuing the following instruction:

> Mesh gloves or equivalent protection shall be worn by retail market meatcutters performing boning or breakdown work with a knife. However, protective gloves need not be worn if job demands require frequent removal and replacement of gloves, such as during customer service requests. **Mesh**

> **gloves may not be worn by meatcutters operating power equipment.** Wire mesh aprons or equivalent protection shall be provided for and used by retail meatcutters breaking down hanging meat with knives.

(emphasis added) OSHA Instruction STD 1-6.1, October 30, 1978. This instruction and the reasoning of the judges, compliance officers and employers are apposite to our case and support our finding that the overwhelming evidence is that the wearing of the steel mesh gloves would not eliminate the hazard but would increase the hazard.

II. THE ISSUE OF THE ACCESSIBILITY OF THE BATTERY CHARGER COVER AS A NON-SERIOUS RATHER THAN A SERIOUS VIOLATION OF 29 CFR 1910.305(d).

The court must now decide whether the Commissioner failed to meet his burden of proof that the failure to have the panel cover to the battery charger secured is a violation of 29 CFR 1910.305(d) which provides in pertinent part: "However, panelboards other than the dead front externally-operable type are permitted where accessible only to qualified persons."

The Hearing Examiner below found that a cover on a battery charger which was closed but was missing a screw would not result in an accident that was serious and that the cover would not be disturbed by an employee using the battery charger in the normal fashion but that the screw should be in place for maximum protection. His findings of fact are supported by substantial evidence in the record as a whole and we are not inclined to disturb those findings of fact. Although the inspector testified that the substantially probable result of contact with the battery charger would be serious injury or death, the Respondents expert testified that the conditions described would result in a minimal shock. (T- pp 123-124). In order to prove a serious violation the Commissioner must prove by a preponderance of the evidence that should an accident occur the substantially probable result of that accident would be serious injury or death. There is contradictory testimony by Officer Long that the substantial probable result of contact with the battery charger would be serious injury or death. The Hearing Examiner gave greater credence to the testimony of the Respondents expert, and the record on a whole supported his findings of fact and conclusions of law in that regard.

For the reason stated herein, the Review Board hereby **ORDERS** that the Hearing Examiner's December 31, 1993 Order in this cause be, and hereby is, **AFFIRMED**, subject to the clarifications set out in our discussion of the case and the Respondent is ordered to pay the $2,000.00 in penalties.

This the 31st day of July, 1995.

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ROBIN E. HUDSON, CHAIR

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KENNETH K. KISER, MEMBER

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HUGH M. WILSON, MEMBER