

BEFORE THE WORKERS' COMPENSATION BOARD

STATE OF OREGON

HEARINGS DIVISION

Oregon Occupational Safety & Health Division (OR-OSHA),)	Docket No. 16-00039SH
)	
)	
Plaintiff,)	
)	
vs.)	Citation No.: Z0591-002-16
)	
STAHLBUSH ISLAND FARMS, INC.,)	
)	
Defendant.)	OPINION AND ORDER

Pursuant to notice, a hearing was held in Salem, Oregon, on November 13 and 17, 2018, before Administrative Law Judge Naugle. Plaintiff, OR-OSHA, was represented by Assistant Attorney General Kyle Martin. Defendant, Stahlbush Island Farms, Inc., was represented by James Edmonds and Ashley Brown. Lasha Ruiz appeared as defendant's representative on November 13, 2018. Bruce Phillips appeared as the OR-OSHA representative. John Griffin was appointed as the interpreter for the proceedings.

Plaintiff's Exhibits A, 1-25 and 7A and Defendant's Exhibits 6A, 8A and 26-29 were submitted and admitted into evidence without objection.

OR-OSHA, in its reply brief, attached a certified true copy of Administrative Order 4-1998. Defendant objected to OR-OSHA's submission of new evidence on the grounds that it was untimely and prejudicial and requested that it be excluded from consideration.

OR-OSHA contended the Administrative Order was not submitted as evidence, but rather, as an adoption history of the rule at issue in the case, and that it should be considered regardless of whether it was relied upon or submitted by a party.

As follows, the adoption history submitted with OR-OSHA's reply is excluded from consideration. Here, the parties agreed at the conclusion of the hearing they had presented all the documentary evidence they were going to. I do not find OR-OSHA's argument that the submission was not evidence persuasive. Rather, I am persuaded that the submission of a certified true copy reflects the evidentiary nature of the submission. I also note that OR-OSHA submitted a copy of the Oregon and Federal rules cited in the citation as exhibits, which were admitted into evidence.

As I consider the submission to be evidentiary in nature, and as OR-OSHA did not request reopening the record for its admission, I hereby exclude the adoption history submitted with OR-OSHA's reply brief from consideration.

The record closed on February 23, 2018, upon receipt of OR-OSHA's Response to Defendant's Objection to Plaintiff's Reply Brief.

ISSUE

Propriety of the April 13, 2016 Citation and Notification of Penalty alleging one violation and a total proposed penalty of \$500.

FINDINGS OF FACT

Stahlbush Island Farms, Inc., (SIF), produces and sells fruits and vegetables and has its headquarters in Corvallis, Oregon.

On October 13, 2015, Julio Briones Mendez (Briones) was working at SIF and cleaning up squash that had spilled onto the platform of an elevated conveyor-driven hopper that feeds product to a steam peeler below. (Ex. 14-3.) Employees normally get on the platform to pick up spilled product two times per eight-hour shift. (Tr. 18.) Mr. Briones testified that Mr. Sosa joined him on the platform and told him to step on the conveyor belt to get it going.

The belt on the hopper cycles for approximately seven seconds every two to three minutes. (Testimony of Sosa.) The belt loops around rollers at each end with the bottom of the belt about 6 inches below the bottom of the hopper frame and about 6 inches above the platform surface. (Exs. 7, 2, 4.) At the time of Mr. Briones' accident, the approximately 12 inches between the platform surface and bottom of the hopper frame was open space.

Leo Sosa (Sosa) was a plant supervisor and saw Mr. Briones on the platform by the hopper. Mr. Sosa climbed up the ladder and joined Mr. Briones on the

platform to check on how everything was going. Mr. Sosa testified Mr. Briones told him the belt for the hopper was not moving and that he called maintenance on a walkie-talkie regarding the issue while on the platform. Mr. Sosa further testified that he heard Mr. Briones saying "my foot," went around the platform to where Mr. Briones was and saw him grabbing his right foot, with Mr. Briones telling him the belt grabbed his foot.

Mr. Briones was helped to the floor, and Mr. Sosa testified that while attending to Mr. Briones, he said he put his foot on the belt. Mr. Briones was taken to the hospital, with SIF notifying OR-OSHA of an overnight hospitalization for a foot injury. (Exhibit 2.)

Mr. Sosa testified that he did not tell Mr. Briones to put his foot on the conveyor belt to get it moving. (Tr. 41.)

On October 26, 2015, Oregon OSHA Compliance Officer Bruce Phillips (CO Phillips) went to SIF and began an investigation which involved taking photographs and interviewing employees. (Exs. 6, 7, 9.)

CO Phillips' interview notes with Mr. Briones reflected that Mr. Sosa told Mr. Briones to step on the belt at the bottom, that he didn't have time to remove his foot once the belt started moving, and that he obeyed Mr. Sosa for fear of being reprimanded or let go from work. (Exhibit 9-2, 3.)

On April 13, 2016, OR-OSHA issued a Citation and Notification of Penalty on Defendant. Citation 1 Item 1 alleged a serious violation of OAR 437-004-1910(4)(a)(A), contending employees were exposed to the hazard of not having an ingoing nip point on a belt conveyor guarded against contact resulting in serious injury to an employee. Or, in the alternative, of 29 CFR 1910.212(a)(1), contending employees were exposed to the hazard of not having an ingoing nip point on a belt conveyor guarded against contact resulting in serious injury to an employee. Medium probability and serious severity ratings were determined, and a proposed penalty of \$500 was assessed. (Exs. 12, 19-2.)

Defendant timely appealed the Citation. (Ex. 13.)

At hearing, CO Phillips testified that a nip point is where an in-going conveyor belt or chain goes around the roll or sprocket. CO Phillips further testified that the hazard at issue was an unguarded conveyor pinch point. He did not feel the hazard was guarded by location and determined that when employees were on the hopper platform they would be in a danger zone to the hazard. He indicated the danger zone consisted of the area where an employee could inadvertently come into contact with the hazard either personally or by using tools.

CO Phillips assigned a medium probability rating based on the number and frequency of employees accessing the hopper platform and being exposed to the hazard. He also assigned a serious severity rating as he did not believe the most serious injury from the hazard would result in a death.

John Reese testified that he is a senior superintendent at SIF. He further testified that the steam peeler was installed in 1997, and in the time up to Mr. Briones' accident, he was unaware of any accidents where an employee's body part was pulled into the conveyor. (Tr. 164, 178.)

CONCLUSIONS OF LAW AND OPINION

OR-OSHA has the burden of proving, by a preponderance of evidence, the denied violation and the reasonableness of the contested penalty. *See* OAR 438-085-0820(1), (3). SIF does not dispute that it is an agricultural employer under OR-OSHA Division 4.¹

In addition to proving applicability of the cited standard and the employer's noncompliance, OR-OSHA must prove employee exposure to the hazardous condition. *See OR-OSHA v. Moore Excavation, Inc.*, 257 Or App 567 (2013).

Further, where the employer is charged with a serious violation, the citation will not be upheld if employer "unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." ORS 654.086(2). *See OR-OSHA v. CBI Services, Inc.*, 356 Or 577 (2014).

Citation 1 Item 1:²

OR-OSHA alleged a serious violation of OAR 437-004-1910(4)(a)(A), contending employees were exposed to the hazard of not having an ingoing nip point on a belt conveyor guarded against contact, resulting in serious injury to an employee.

OAR 437-004-1910(4)(a)(A) provides that contact with moving machinery parts be prevented by a guard or shield or guarding by location.

OAR 437-004-1910(6) provides that "a component is guarded by location during operation, maintenance, or servicing when, because of its location, no employee can inadvertently come in contact with the hazard."

¹ SIF closing argument, p.2

² OR-OSHA, in its reply brief, indicated that, based on SIF's acknowledgement that it was an agricultural employer under OR-OSHA Division 4, it withdrew the alternative alleged violation of 29 CFR 1910.212(a)(1).

Here, SIF does not dispute that it subject to OR-OSHA's agricultural standards in Division 4 of OAR Chapter 437. As to a violation, there is conflicting evidence whether Mr. Briones stepped on the belt on his own initiative or at the direction of Mr. Sosa. However, both versions reflect that Mr. Briones' stepping on the belt was intentional and not inadvertent. I am also persuaded that the record reflects Mr. Briones' foot was suddenly and accidentally pulled into the nip point once the conveyor began moving.

SIF argued that guarding by location was the method of guarding in place at the time of the accident. I do not find SIF's argument persuasive. Although Mr. Briones intentionally stepped on the conveyor, his foot getting caught in the nip point was accidental or inadvertent. As such, I am unable to conclude the hopper nip point was guarded by location due to Mr. Briones' inadvertent contact with the hazard. Accordingly, I conclude there was a violation of an applicable standard.

As to employee exposure, the record reflects that workers normally pick up spilled product on the platform two times per eight-hour shift. As to employer knowledge, SIF installed the peeler in 1997 and either knew or, with the exercise of reasonable diligence (i.e., by inspection), should have known about the absence of physical guards between the bottom of the hopper frame and top of the platform.

Based on the foregoing, OR-OSHA has met its burden of proof to establish a violated applicable standard, employee exposure and employer knowledge. Therefore, OR-OSHA has established the cited violation. The remaining analysis is the reasonableness of the penalty.

OAR 437-001-0135(1) requires that the probability of an injury from a violation be determined by the Compliance Officer and be expressed as a "probability" rating. A "low" probability rating is appropriate if the factors considered indicate it would be "unlikely" that an accident could occur. A "medium" probability rating is appropriate if the factors considered indicate it would be "likely" that an accident could occur. A "high" probability rating is appropriate if the factors considered indicate it would be "very likely" that an accident could occur.

CO Phillips completed an OR-OSHA Violation Worksheet reflecting that employees were exposed on a daily basis to the hazard and assigned a "medium" probability. (Ex. 19.) Here, however, given that no prior accidents occurred over the 18 years of operation before Mr. Briones' accident, and that the accident involved Mr. Briones intentionally stepping on the conveyor, I am persuaded that a "low" probability rating is more appropriate for the Citation Item.

OAR 437-001-0140(1) requires that the Compliance Officer determine the severity rating for the violation based on the degree of injury or illness which is reasonably predictable, and if more than one injury or illness is reasonably predictable, the Compliance Officer will determine the severity based upon the most severe injury or illness.

Severity ratings are classified as "Other than Serious," "Serious Physical Harm" and "Death." *Id.*

The definition for Serious Physical Harm includes "[i]njuries that could shorten life or significantly reduce physical or mental efficiency by inhibiting, either temporarily or permanently, the normal function of a part of the body. Examples of such injuries are amputations, fractures (both simple and compound) of bones, cuts involving significant bleeding or extensive suturing, disabling burns, concussions, internal injuries, and other cases of comparable severity." OAR 437-001-0015.

Here, Mr. Briones' injuries required overnight hospitalization. Accordingly, I find the serious physical harm rating appropriate.

Penalties are addressed by OAR 437-001-0135 through OAR 437-001-0203. OAR 437-001-0145(1) provides that a penalty shall be assessed by considering the penalty established by the intersection of the probability and severity ratings in Table 1 of the rule. Under that table, a violation with a low probability and serious severity has a penalty of \$300.

Accordingly, this Citation Item is modified to reflect a low probability and to assess a penalty of \$300.

ORDER

Citation 1 Item 1 is modified to reflect a low probability and to assess a penalty of \$300.

NOTICE TO ALL PARTIES: You are entitled to judicial review of this Order. Proceedings for review are to be instituted by filing a petition in the Court of Appeals, Supreme Court Building, Salem, Oregon 97301-2563, within 60 days following the date this Order is entered and served as shown hereon. The procedure for such judicial review is prescribed by ORS 183.480 and ORS 183.482.

Entered at Salem, Oregon, on **April 24, 2018**

Workers' Compensation Board

/s/ Gregory J. Naugle

Gregory J. Naugle

Administrative Law Judge