

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
09-KOSH-0068

KOSHRC 4653-09

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

v

STEEL TECHNOLOGIES, INC

RESPONDENT

* * * * *

**ORDER OF THIS COMMISSION
GRANTING COMPLAINANT'S
REQUEST FOR INTERLOCUTORY
APPEAL, REVERSING THE HEARING
OFFICER'S ORDER PERMITTING
RESPONDENT TO TAKE TWO
DEPOSITIONS AND REMANDING
THE CASE TO THE HEARING OFFICER
FOR A TRIAL ON THE MERITS.**

This case is before the review commission on the complainant's request for permission to file an interlocutory appeal from the hearing officer's September 28 order which allows Steel Technologies to take the depositions of the two inspecting compliance officers. 803 KAR 50:010, section 45 (2). As matters stand, a trial on the merits is scheduled for December 1 and 2, 2009.

While we do not have a trial record, we do have before us the single, serious citation issued to Steel Technologies, the administrative complaint and answer, the compliance officer's report, Steel's motion to take the two depositions, labor's response to the motion, the hearing officer's order to take the depositions, labor's motion for interlocutory appeal and Steel's response to that motion. Although our rules of procedure grant us the authority to order briefs on

interlocutory review, we find the hearing officer's order and counsels' arguments in their various motions and responses, with attachments, have sufficiently informed us so we can decide the matter before us without causing further delay.

Having been fully advised by our hearing officer and the two parties, we grant labor's request for interlocutory appeal, reverse the hearing officer's decision to permit the depositions of the two compliance officers, cancel the two depositions and remand the case to the hearing officer for a trial.

On September 4 of this year Steel Technologies served its motion requesting a "special order permitting Respondent to depose Compliance Officers Drew Rapp and Jesse Lewis."

Section 27 (1) of our rules. In its motion Steel said:

Respondent is entitled to a clear explanation and understanding of the basis for the citation, so that it may defend against it at the hearing of this matter. To date...the Secretary of Labor has offered little or no explanation as to why it believes that cited standard applies, how it was violated, and in what way employees were exposed to any danger as a result of that alleged violation.

In its response to the motion, the secretary attached the compliance officer's report which included his photographs taken at the inspection and the citations. This report was again attached to labor's petition for interlocutory appeal and so it is available for our consideration. We understand from our hearing officer's deposition order that Steel has this report as well.

In our hearing officer's deposition order, he said "Respondent contends that the discovery materials provided by the Secretary [the CO's report] do not make clear how the Secretary intends to prove that the Respondent's employees were or could be exposed to the hazards of the unguarded recoiler machines." Page 1. Our hearing officer's order goes on to say "Based on the lack of specificity of the argument about exposure [we presume employee exposure], the Hearing Officer stated that the requested depositions were appropriate." Pages 1 and 2.

In its petition for interlocutory appeal, the secretary said in part:

The report provided to both Respondent and Hearing Officer details how employees were or could be exposed to the hazards of the unguarded machinery, particularly pages twelve (12) through seventeen (17), where each machine is specifically named and the hazard clearly articulated.

Pages 1 and 2

Steel Technologies, in its response to the secretary's petition, said "Respondent is entitled to a clear explanation and understanding of the bases for the citation items, so that it may adequately defend against them at the hearing..." Page 2.

Our decision to grant review and cancel the two depositions, and so reverse our hearing officer, is based solely on the documents and arguments before us. Once the trial has been held, the hearing officer will make findings of fact based on the testimony, documents and photographs received into evidence. In the allegedly serious citation, the secretary said Steel exposed its employees to unguarded machinery:

29 CFR 1910.212 (a) (1): One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazard such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks:

a¹. One or more methods of machine guarding was not provided to protect the operator and other employees in the vicinity of the "Pro-Eco" 60" [sic] Slitter machine from hazards of being pulled into the "Wilson Machine" recoiler located in the West End of Bay C.

From the citation Steel has learned several things; the secretary has alleged these recoilers are not guarded, a violation of the machine guarding standard. Each machine operator is allegedly exposed to the specified hazards, point of operation, nip points, rotating parts, flying chips and sparks. Other employees who are not machine operators are also allegedly exposed to the same

¹ The citation is composed of five instances, a through e, which deal with five separate slitters, each with its own recoiler which winds the steel into a coil after the slitting, cutting to size, is accomplished.

hazards. From this citation and the cited machine guarding standard, Steel understands 29 CFR 1910.212 (a) (1) specifies various types of guarding which may satisfy the standard: "Examples of guarding methods are – barrier guards, two-hand tripping devices, electronic safety devices, etc." For citation 1, item 1, instance b, the compliance officer's report said the company has used the Paxson 36 inch slitter since 1971. Page 14. A prudent employer, from his lengthy association with these recoilers, will likely know more about how they function than an inspecting compliance officer can ever learn.

Steel Technologies contends it does not know what evidence the secretary of labor will present about employee exposure to the recoilers. In addition to the citation itself, here in part is what the compliance officer's report says about the machines:

a) the revolving recoiler drum wraps steel into coils at speeds up to 800 ft/min. The ingoing motion could pull an employee into the coil resulting in serious or fatal injuries such as bone fractures or trauma to vital organs...

The operator stated that while the machine is in operation he would remain at the control station located 8' from the recoiler drum. The recoiler drum may be approached by any of the other employees at this work site...

The employer had actual knowledge of the hazards directly associated with the unguarded ingoing nip points of the recoilers as demonstrated by the employer having required the operators to remain at the control panel when the machine is running and stay clear of the recoiler drum.

Compliance officer's report,
pages 14 and 15

These observations found in the report apply to each of the five cited recoilers.

In its memorandum of law accompanying its motion to take the compliance officers's depositions, Steel Technologies cites to Jefferson Smurfit Corp, CCH OSHD 29,551, BNA 15 OSHC 1419 (1991), a federal review commission decision which dealt with the same machine guarding standard, 1910.212 (a) (1). This case sheds light on the employee exposure issue in the instance matter. Smurfit employees kept themselves at a certain distance from the machines they

operated while other employees were on foot in the vicinity of the unguarded machines. Steel Technologies's citation to Smurfit indicates it is well aware of the issues, factual and otherwise, presented in our case: operators working from fixed positions while other employees may or may not have access to the unguarded recoilers. From a lengthy discussion of Smurfit employee exposure, we cite to two illustrative examples:

Compliance officer Jackie L. Hunt...observed a machine operator... standing 1 or 2 feet away from the nip points while watching the machine.

CCH page 39,951, BNA 15 OSHC 1420

in order for employees to be exposed to a hazard while merely walking past the gluer, they would have to deliberately turn from the aisle into the alcove, walk alongside the length of the folder belt, and then turn again...

CCH page 39,954, BNA 15 OSHC 1422

We do not pretend to know the particulars of the placement of these cited recoilers or the precise proximity of either the machine operators or their fellow employees to the hazards; those facts will be developed in the trial. Steel Technologies certainly knows the placement of its machines and the whereabouts of its own employees.

Steel Technologies knows, much better than the compliance officer, how its machines operate relative to its employees. Steel has had the opportunity to accompany the compliance officers on their inspection, a considerable benefit in the preparation of its defense. Steel has also seen the citation and the compliance officer's report. Steel Technology is very familiar with the issues which arise from 1910.212 (a) (1) and the interplay of the standard with the conditions at the factory. See Jefferson Smurfit, cited in Steel's memorandum of law which was attached to its motion to take the two depositions.

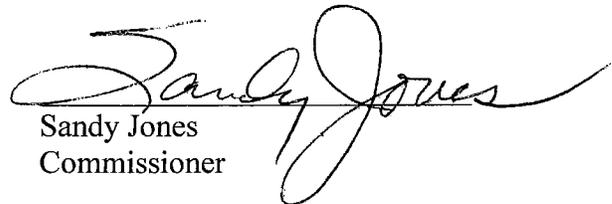
Steel Technologies has not made the showing necessary, under our rules of procedure, to take the depositions of the two compliance officers. Section 27 (1) of our rules.

The depositions of Compliance Officers Rapp and Lewis are cancelled. We remand this case to the hearing officer for a trial on the merits.

It is so ordered.

November 3, 2009.


Faye Liebermann
Chair


Sandy Jones
Commissioner


Michael Lee Mullins
Commissioner

Certificate of Service

This is to certify a copy of the order of the commission on interlocutory appeal for Steel Technologies, Inc., KOSHRC 4653-09 was served on the parties on this November 3, 2009 in the manner indicated:

Messenger mail:

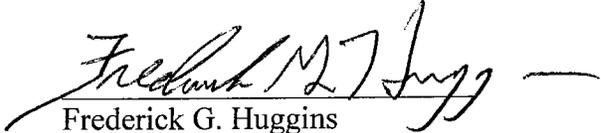
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