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DEPARTMENT OF LABOR

OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

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STATE OF ALASKA,)
DEPARTMENT OF LABOR,)
)
Complainant,)
)
vs.)
)
JOHANSSON PLUMBING COMPANY,)
)
Contestant.)
_____)

Docket No. 94-1042

DECISION AND ORDER

This matter arises from an occupational safety and health citation issued by the State of Alaska, Department of Labor (Department) to Johansson Plumbing Company (Johansson) following a workplace inspection on November 22, 1993.

Citation 1 alleges that Johansson violated Construction Code 05.090(a)(2)(A) by allowing an employee to operate a disc grinder without the manufacturer's safety guard. The citation was classified as "serious" and a penalty of \$750 was assessed.

Upon Johansson's contest of the citation, a hearing was held before the Board in Anchorage on December 7, 1994. The Department was represented by Assistant Attorney General Toby Steinberger. Johansson was represented by owner Leo Johansson. The parties presented witness testimony, documentary evidence, and oral argument. Upon consideration of the evidence and arguments of the parties, the Board makes the following findings of fact, conclusions of law and order in this matter.

FINDINGS OF FACT

1. On November 22, 1993, Department compliance officer Danny Sanchez conducted an occupational safety and health inspection of a worksite under the control of Johansson Plumbing Company at North Star Elementary School, 605 West Fireweed Lane, Anchorage, Alaska.

2. Johansson had three employees at the worksite. The employees were operating two 9 1/2-inch Black & Decker right-angle disc grinders while working on a six-inch pipe. (Exh. 2.)

3. Compliance officer Sanchez observed one of Johansson's employees operating a disc grinder without the manufacturer's safety guard. When Sanchez mentioned that the safety guard was missing, the guard was immediately retrieved and put on the grinder.

4. According to Department assistant chief of enforcement Dwayne Houck, the safety guard on a disc grinder protects the operator from accidental "kickback" that might cause injury. Grinders operate at speeds of approximately 1,700 rpm. In the event of kickback by an unguarded grinder, the blade can act much like a saw blade and can produce severe cuts and injuries to the operator.

5. Because of the potential for serious injury from using an unguarded disc grinder, the Department classified the violation as "serious."

6. In calculating the monetary penalty for the violation, the Department estimated the probability of injury as low based on only one exposed employee using a grinder for a limited amount of time. However, the severity of injury was rated as high because of the potential for serious injury or, in extreme cases, death. Based on its

assessment of probability and severity of injury, the Department determined an initial unadjusted penalty of \$2,500. (Exh. 1.)

7. Under its penalty calculation guidelines, the Department reduced the unadjusted penalty by 60% for employer size; and 10% for no previous history of violations, resulting in a proposed penalty of \$750. However, at the hearing the Department acknowledged that Johansson should have been given an additional penalty reduction of 25% for good faith in having a written safety program. Therefore the final proposed penalty should have been \$125.

8. In the opinion of company owner Leo Johansson, the operation of a disc grinder with the safety guard attached is more dangerous than not using the guard. Much of his company's pipe work takes place in confined areas near ceilings or corners where maneuverability is limited. Johansson asserted that the safety guard blocks the operator's view and forces the operator to hold the grinder in a manner that is more unwieldy and less maneuverable, placing the operator in greater danger in the event of a kickback. Because of these difficulties, Johansson stated that he and his employees routinely remove the guard when working on pipe in areas other than on a horizontal table surface.

9. According to Johansson, because the safety guard limits the operator's maneuverability, there is an increased risk of sparking to the operator from contact between the grinder disc and the pipe. In his opinion, sparks are the most serious hazard to the operator. Johansson's employees wear face masks during grinding but the masks do not always protect against sparks entering from the side.

10. Johansson asserted that many plumbers routinely remove the safety guards from grinders prior to working on pipe. He acknowledged, however, that certain large companies that perform pipe work, such as Bechtel, require safety guards to be used on power tools as a matter of policy.

11. Johansson offered the testimony of Billy Powers, a certified welder with whom he has worked in the past. Powers testified that he has been a welder for approximately 25 years and always removes the safety guard from a disc grinder for the type of pipe work done by Johansson. Although the position of the safety guard can be changed, the guard is in the operator's way to some extent regardless of its position. In Powers' opinion, the safety guard slows down the work and increases the safety risk. Powers stated that most accidents occur with grinders because the operator is not properly trained in the use of a grinder.

12. There is no evidence that Johansson has ever applied to the Department for a variance to allow his company to use disc grinders without their safety guards. Johansson was not aware that a variance procedure existed.

CONCLUSIONS OF LAW

Construction Code 05.090(a)(2)(A) provides:

When power operated tools are designed to accommodate guards, they shall be equipped with such guards when in use.

It is undisputed that (1) the above code provision applies to the disc grinder used by Johansson at the North Star Elementary School worksite; (2) Johansson was in noncompliance with the code provision by operating the disc grinder without the safety guard supplied by the manufacturer; (3) at least one of Johansson's employees was using

an unguarded disc grinder and therefore was exposed to the violative condition; and (4) Johansson was aware that the disc grinder was being used without the manufacturer's safety guard. Accordingly, we conclude that the Department has established a prima facie case of violation. See Mark A. Rothstein, *Occupational Safety and Health Law*, § 102 at 138-39 (3rd ed. 1990) (hereinafter Rothstein).

Johansson's sole defense is that it is more dangerous to comply with the cited code provision than not to comply. This is known as the "greater hazard" defense, which is an affirmative defense that the employer must prove by a preponderance of the evidence. *Dole v. Williams Enterprises, Inc.*, 876 F.2d 186, 188 (D.C. Cir. 1989). To establish the defense, the employer must prove that (1) the hazards of compliance are greater than the hazards of noncompliance; (2) alternative means of protecting employees are unavailable; and (3) a variance was unavailable or inappropriate. Rothstein, § 121 at 169-71; *Trinity Industries, Inc.*, 15 OSHC 1985, 1992 OSHD ¶ 29,889 (OSHRC 1992). We will analyze Johansson's greater hazard defense under the established three-part test.

1. Existence of Greater Hazard

Johansson must prove that it is more hazardous to use a disc grinder with the safety guard attached than without the guard. The evidence of the greater hazard must be clear; mere "verbalized fears" of employees or an employer's unsupported opinion have been held to be inadequate. Rothstein, § 121 at 169, citing *State Sheet Metal Co.*, 16 OSHC 1155, 1993 OSHD ¶ 30,042 (OSHRC 1993); *Hurlock Roofing Co.*, 7 OSHC 1108, 1979 OSHD ¶ 23,358 (OSHRC 1979); *House Wood Products Co.*, 3 OSHC 1993, 1975-76 OSHD ¶ 20,386 (OSHRC 1976).

We believe that Mr. Johansson is sincere in his opinion that using the safety guard on a grinder is more dangerous than not using it. However, his personal opinion and that of Mr. Powers are simply insufficient as a matter of law to establish that a greater hazard is created by use of the guard. Johansson presented no objective evidence, such as technical studies or evaluations by a neutral expert, that would overcome the presumption that the safety guard requirement enhances employee safety. Since the cited code provision is presumed to be valid, the Department is not required to present such evidence.

Further, we believe that the safety guard requirement is designed to protect *all* employees using power tools. While certain experienced contractors such as Mr. Johansson or Mr. Powers may feel that safety guards are a hindrance, there are many employees who do not have the same level of skill and experience in handling a grinder and are entitled to the protection of the safety and health codes. We would be remiss in our duty under the Occupational Safety and Health (OSH) Act if we were to exempt all of Johansson's employees from the safety guard requirement on the basis of the skill and experience of a few operators.

We also find that many of Johanssen's objections to the use of the safety guard relate more to the inconvenience and impracticality of using the safety guard rather than to an increased safety risk. While it may be more inconvenient, impractical or time-consuming to use the safety guard, these reasons are not sufficient to justify an employer's failure to comply with applicable standards. Rothstein, § 120 at 168-69.

2. Alternative Means of Protection

Johansson has also failed to demonstrate that there were no alternative means to protect its employees from the risks of using a disc grinder on pipe. Such alternative

means of protection might include the use of lighter or smaller-sized grinder when working in confined areas; the use of tools other than disc grinders to accomplish the pipe work, for example a needle gun; or the use of additional personal protective equipment such as full-face hoods instead of face masks to more fully protect operators against sparks and flying chips. If Johansson were truly concerned about the safety and protection of its employees performing pipe work, at a minimum it should have thoroughly investigated alternative means of protecting employees or demonstrated that alternative means of protection were not available.

3. Variance Request

AS 18.60.077 of the Alaska Occupational Safety and Health Act provides that an employer who wishes to be exempted from a particular safety or health standard may request a variance. The Department may grant a variance if the employer is able to satisfactorily demonstrate that it can provide equally effective safety protection to employees without complying with the required standard. Alternatively, Alaska law allows interested parties to petition a state agency for the repeal of regulations (such as OSHA standards) promulgated under the Administrative Procedure Act. *See* AS 44.62.220.

Johansson did not petition for repeal of the Alaska OSHA standard requiring the use of guards on power tools. Nor did Johansson request a variance from the requirements of that standard, or demonstrate that a variance request would have been inappropriate. Thus, Johansson failed to take any of the available steps to exempt his company from the application of the guard requirement.

4. Conclusion

Construction Code 05.090(a)(2)(A) requires the use of manufacturer-supplied safety guards on all power tools. The code makes no exception for work in cramped or confined areas. While we recognize that use of the safety guards may be inconvenient or time-consuming, we find no evidentiary basis to conclude that use of the guards is more dangerous than not using them. Many employers routinely require that power tool guards be used even if the work takes longer or is more difficult. Further, we find that Johansson has failed to demonstrate that alternative means of protecting employees were unavailable. Finally, Johansson made no effort to seek a variance from the requirements of the cited standard nor did it demonstrate that a variance request would be inappropriate. Because Johansson has not satisfied any of the established elements of the "greater hazard" defense, we must reject its contest of the citation.

ORDER

1. Citation 1 is affirmed as a "serious" violation.
2. The penalty for citation 1 is reduced to \$125.

DATED this 22nd day of March, 1995.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

By: Wayne A. Gregory
Wayne A. Gregory, Chairman

By: Donald F. Hoff, Jr.
Donald F. Hoff, Jr., Member

By: James J. Ginnaty
James J. Ginnaty, Member