STATE OF MICHIGAN

COURT OF APPEALS

KAY ALEXANDER,

Plaintiff-Appellant,

v

DEMMER CORPORATION,

Defendant-Appellee.

UNPUBLISHED
August 20, 2002

No. 230417
Eaton Circuit Court
LC No. 99-000907-NZ

Before: Neff, P.J., and White and Owens, JJ.

PER CURIAM.

Plaintiff filed suit under the intentional tort exception of the Workers' Disability Compensation Act (WDCA), MCL 418.131(1), following a workplace accident at defendant Demmer Corporation's Delta plant that resulted in amputation of both her hands and both of her lower arms. Plaintiff appeals as of right the circuit court's dismissal of her claim. We reverse and remand for further proceedings.

I

Defendant's Delta plant is a metal fabrication and stamping business employing approximately seventy employees. One of the Delta plant's six or seven presses is called the "new Danly" line. Plaintiff's injuries occurred while she was helping her crew leader hand-clean the pinch rollers of one of the new Danly line's components, a McKay Combination Strip Cleaning & Processing Machine (which defendant denominated the "R-1062" for in-house purposes).

Sheet steel drawn from large coils passes through the R-1062's two sets of rollers, pinch rollers and leveling/straightening rollers, in that order. The pinch rollers are approximately ten inches in diameter and about eight feet long, are electrically controlled, and air powered, i.e., are raised and lowered/opened and closed together pneumatically. When in forward motion, the pinch rollers rotate toward each other, creating an in-running pinch point that draws the steel in and crushes or flattens it. The pinch and leveling/straightening rollers are powered by the same motor and run together. Power is directed to both sets of rollers by a single switch and an operator can control the rotation direction of both sets of rollers with a single switch.

Plaintiff had worked for defendant several days in December 1997 as a stacker (stacking truck hoods as they came off presses).[1] Several weeks later, she was returned to work at the Delta plant, on January 5, 1998, as a stacker on the second shift. Plaintiff was one of a four-member crew assigned to the new Danly line. Mary Garcia was the crew leader, and Antonio Winston and Dexter Robertson were the remaining two crew members. Garcia's crew was running "exposed" steel through the new Danly line on January 5, 1998, and continued to run exposed steel on the day of plaintiff's accident, January 6, 1998. Demmer's automotive customers install "exposed steel" on the exterior of vehicles, thus it must be free of surface flaws or defects. As a result, Demmer instructed its employees that the rollers through which the steel is fed be cleaned between each coil when running exposed steel.[2]

Plaintiff's complaint alleged that the "smooth, rotating [R-1062 pinch] rollers can grip clothing, hair, rags, skin and force a hand or arm into the pinch point causing severe crushing injuries which frequently result in amputation;" that "machine designers, tool makers, metal stampers and others engaged in the metal forming industry know and have known for at least 90 years that it is essential that a means be provided to protect the workers from the hazards of in-running pinch points;" that safety regulations adopted by statute require that employers implement procedures and train newly assigned employees regarding their hazards and procedures; that the R-1062's rollers have to be cleaned periodically to avoid contamination of the steel; that defendant's workers typically clean the rollers by hand-wiping them with a cloth; that in order to clean the rollers' entire circumference, the rollers must be turned; and that given the physical setup of the R-1062 the "employee is required to clean the rollers from the front side of the rollers, within inches of the in-running pinch point, thereby exposing the workers to the well-known hazard presented by the rollers." Plaintiff alleged that defendant had actual knowledge that hand cleaning of rollers had caused its employees many tragic and serious injuries in the past, to wit:

> (a) on or about March 9, 1987, a newly assigned employee was using a cloth to clean the rollers when his hand was suddenly drawn into the pinch point and crushed;
>
> (b) on or about March 7, 1988, another newly assigned employee lost his hand while using a cloth to wipe down the pinch rollers;

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[1] After working at Demmer for approximately four days through a temporary placement agency, Skilltech, plaintiff missed work to attend an aunt's funeral. Defendant apparently did not call her back, until one of it's supervisors asked that she come back, in January 1998.

[2] The McKay machine was built in 1954. Defendant purchased the machine used, in 1991. Plaintiff presented evidence that Demmer materially altered the R-1062 in the early 1990s, including by removing the machine's "wash unit." Plaintiff alleged and defendant did not dispute that defendant's removal of the wash unit caused the pinch rollers to be out in the open and exposed to employees, and made it necessary for employees to wash the rollers by hand between each coil.

(c) on or about March 14, 1995, another employee severely injured their [sic] hand resulting in amputation of three (3) fingers when it was crushed in said rollers;

(d) on or about July 3, 1997, another employee was seriously injured while cleaning these same rollers.

Plaintiff alleged, and defendant did not dispute, that defendant was required to but did not comply with MIOSHA "Lockout/Tagout"[3] regulations at the Delta plant, that those regulations require that energy sources be disconnected and internal energy reduced to zero before servicing or maintenance work can be performed on the equipment, and require that employees be trained[4]

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[3] The regulation in its present form, R 1910.147, entitled "Control of Hazardous Energy (Lockout/Tagout)," took effect in 1993, and provides in part:

(a) Scope, application and purpose.

(1) Scope.

(i) This standard covers the servicing and maintenance of machines and equipment in which the unexpected energization or start up of the machines or equipment, or release of stored energy could cause injury to employees. This standard establishes minimum performance requirements for the control of such hazardous energy.

* * *

(2) **Application.**

(i) This standard applies to the control of energy during servicing and/or maintenance of machines and equipment.

(ii) Normal production operations are not covered by this standard. Servicing and/or maintenance which takes place during normal production operations is covered by this standard only if:

(A) An employee is required to remove or bypass a guard or other safety device; or

(B) An employee is required to place any part of his or her body into an area on a machine or piece of equipment where work is actually performed upon the material being processed (point of operation) or where an associated danger zone exists during a machine operating cycle. [Michigan Department of Labor's General Industry Safety Standards, part 85, Regulation 1910.147.]

[4] There is no dispute that the General Industry Safety Standards, Rules 11 and 33, also govern Demmer's Delta presses and require that Demmer provide training to each newly assigned employee regarding the operating procedures, hazards, and safeguards of the job, and require that powered machines attended by more than one employee be equipped with an actuation device.

(continued…)

in Lockout procedures.[5] Plaintiff's complaint alleged, and there is no dispute, that MIOSHA repeatedly cited defendant for Lockout/Tagout violations "regarding the danger of serious bodily injury when its employees were required to clean the rollers, to-wit:"

> (a) Citation No. GI 77-7046. March 10, 1987. Part 1. General Rules. R408.1011 Employer Responsibilities. Rule 11 [see n 4, *supra*]. "An employer shall comply with all of the following: (a) provide training to each newly assigned employee regarding the operating procedures, hazards, and safeguards of the job."

(…continued)

Rule 11 [R 408.10011], entitled "Employer Responsibilities" provides:

> Rule 11. An employer shall comply with all of the following:
>
> (a) Provide training to each newly assigned employee regarding the operating procedures, hazards, and safeguards of the job.
>
> (b) Not knowingly authorize a process, machine, or equipment to be used which does not meet applicable state safety standards.
>
> (c) Establish, maintain and assure the utilization of a lockout procedure as prescribed in rule 32.

R 408.10033, entitled "Machine controls," provides:

> Rule 33. (1) When unexpected motion would cause injury, an actuating machine control, except an emergency device for a powered fixed or transportable machine shall be guarded or so located as to prevent accidental actuation.
>
> (2) Unless their function is self-evident, each operating control device shall be identified as to its function.
>
> (3) A powered machine attended by more than 1 employee shall be equipped with an actuation device for each employee exposed to a point of operation hazard. The machine shall activate only after concurrent use of all actuation devices.

[5] Jimmy Hindman, occupational safety inspector for the state of Michigan's Bureau of Safety and Regulations, General Industry, who inspected Demmer's Delta plant in 1998 following plaintiff's injury, testified at deposition that "probably more injuries occur from [Lockout/Tagout] than any other standard that we have, so I am required any time that I go into a firm to check their lockout program."

(b) Citation No. GI 77-7046. March 10, 1987. Part 26. Metalworking Machinery. R408.12637. "Powered Feed Rolls. Rule 2637. *Powered feed rolls shall have 1 of the following: (a) the in-running side of the feed rolls guarded by a barrier, fixed or adjustable, so designed that the material can be fed without permitting the fingers to be caught between the feed rolls or feed rolls and guard. (b) An emergency stop device which can be activated by the body to stop the feed rolls. When an emergency stop device has been activated, it shall be required that the machine be restarted manually.*

(c) Citation No. GI 77-8090. March 22, 1988. Part 1. General Rules R408.1011. *This citation is a repeat violation of Citation No.* GI 77-7046 (see above). (Training new assigned employees.)

(d) Citation/Inspection 124928565, issued September 12, 1995. Part 85. The Control of Hazardous Energy Sources. R1910.147(c)(7)(i)(a): "Each authorized employee shall receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace and the methods and means necessary for energy isolation and control." [Emphasis added.]

Plaintiff's complaint alleged, and there is no dispute, that MIOSHA issued repeated warnings to defendant that it must comply with Lockout/Tagout regulations, in 1987, 1988, and 1995. Plaintiff alleged that defendant promised on each occasion that it would adopt the procedures, train its employees in, and enforce safe procedures for cleaning the rollers; and that in spite of its knowledge of employee injuries and promises to MIOSHA, defendant deliberately, consciously and willfully:

(a) failed or refused to adopt safe procedures to protect its employees when cleaning the rollers in the R1062 McKay Roller and Leveler machine;

(b) failed or refused to adequately train its employees in the safe procedures to follow when cleaning the rollers on the R1062. . .

(c) failed or refused to enforce its written operating procedure DDOP-9.3 entitled "Press Line Pinch and Feeder Roll Cleaning," when its employees were engaged in cleaning the pinch rollers on the R1062 McKay Roller and Leveler machine.

29. That Defendant Demmer willfully condoned the unsafe and extremely dangerous practice of its employees wiping of the pinch rollers with cloth in hand with the power on and the rollers running inward to the pinch point.

Plaintiff alleged that on the date she was injured, January 6, 1998, defendant "had actual knowledge that it had not developed, documented or utilized procedures for the control of potentially hazardous energy when its employees were engaged in cleaning the rollers where unexpected start-up of the rollers could cause serious physical injury," "had actual knowledge

that [plaintiff] had not been trained or instructed on the proper procedures for cleaning the rollers or the dangers associated therewith," and further:

> That given Defendant Demmer's claimed expertise as a metal fabricator, its knowledge of the danger of in-running pinch points, its knowledge that many newly assigned employees had been seriously injured while hand cleaning those rollers, the repeated citations and warnings provided by MIOSHA, its failure to develop, document and enforce safe procedures to protect its employees, its actual knowledge of the extremely dangerous practices of its employees, and its failure to adequately train Plaintiff Kay Alexander, Defendant Demmer is deemed to have intended to injure Kay Alexander when it assigned her to help clean the rollers on January 6, 1998, her second day on the job.
>
> That Defendant Demmer deliberately failed and refused to inform Plaintiff Kay Alexander about the dangerous conditions and history of the rollers so that she could take the steps necessary to keep from being injured, when the employer had actual knowledge that absent proper training, injury was certain to occur.

Plaintiff alleged that on her second day on the job, she was assigned to clean the R-1062 rollers, that when she began to do so, the safety gate was open and the rollers were stopped, that after she began cleaning the rollers her supervising fellow employee stepped out of the roller area, and less than five minutes later, the rag she was using in her right hand was suddenly caught and drawn into the pinch rollers when the rollers, without warning, suddenly started up, taking plaintiff's right hand along, crushing her hand, wrist and arm between the rollers, that the sudden start-up took plaintiff by surprise and she instinctively reached with her left hand to free her right hand, causing her left hand, wrist and arm also to be crushed between the rollers, and that as a result both of her hands and lower arms had to be amputated.

There is no dispute that following plaintiff's injury, MIOSHA investigated the circumstances and issued a "Willful Serious" citation to defendant for failing to develop, document and utilize Lockout/Tagout procedures. See n 15, *infra*.

II

This Court reviews summary disposition determinations de novo. *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd,* 466 Mich 11, 15; 643 NW2d 212 (2002). MCL 418.131(1) of the WDCA "provides that employee compensation is the exclusive remedy for a personal injury, except for an injury resulting from an intentional tort." *Bock v GMC,* 247 Mich App 705, 710; 637 NW2d 825 (2001).

> An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. . . . . [MCL 418.131(1).]

Whether the facts alleged by the plaintiff are sufficient to constitute an intentional tort is a question of law for the court; whether the facts are as the plaintiff alleges is a jury question.

Gray v Morley (After Remand), 460 Mich 738, 743; 596 NW2d 922 (1999), citing *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 188; 551 NW2d 132 (1996).

A plaintiff claiming an intentional tort must establish a "deliberate act," and that the employer "specifically intended an injury." *Palazzola v Karmazin Product Corp*, 223 Mich App 141, 148-149; 565 NW2d 868 (1997). Employer omissions, "such as a failure to remedy a dangerous condition. . . may constitute the 'act' necessary to establish an intentional tort." *Travis, supra* at 169. To establish that the employer specifically intended an injury, the employer "must have had a conscious purpose to bring about specific consequences." *Id.*

"Recognizing that direct evidence of intent is often unavailable, the *Travis* Court explained that the second sentence of the exception provides an alternative means of proving an employer's intent to injure:" a plaintiff can prove intent to injure by establishing "actual knowledge," that an injury is "certain to occur," and that the employer "willfully disregarded" that knowledge. *Palazzola, supra* at 149-150; *Travis, supra* at 179. Implied, imputed or constructive knowledge is insufficient to show actual knowledge. *McNees v Cedar Springs Stamping Co (After Remand)*, 219 Mich App 217, 224; 555 NW2d 481 (1996). The element of "injury certain to occur" is not met "by reliance on the laws of probability, the mere prior occurrence of a similar event, or conclusory statements of experts. Further, an employer's awareness that a dangerous condition exists is not enough." *Palazzola, supra* at 149-150.

"When an employer subjects an employee to a continuously operative dangerous condition that it knows will cause an injury, yet refrains from informing the employee about the dangerous condition so that he is unable to take steps to keep from being injured, a factfinder may conclude that the employer had knowledge that an injury is certain to occur." *Travis, supra* at 178, discussing 2A Larson, Workmen's Compensation, § 68.15(e), pp 13-105 to 13-106.

The parties agree that *Travis, supra*, and its companion case, *Golec v Metal Exchange Corp*, control. The plaintiff in *Golec* worked for an aluminum smelting factory and on the evening in question was loading a furnace with scrap metal. Around 11:00 p.m., the plaintiff was splashed with molten aluminum and suffered slight burns to his left hand after a minor explosion occurred in the furnace he was loading. The plaintiff reported the explosion to his shift leader, Mazur, and told Mazur he believed the explosion was caused either by the presence of closed aerosol cans in the scrap pile or by the scrap pile being wet. 453 Mich at 157-158. Mazur testified that he telephoned his supervisor, Rziemkowski, at home, and told him plaintiff had been injured by a small explosion and that the scrap was damp because rain from a leak in the roof was dripping on it. Mazur testified that Rziemkowski told him that the plaintiff had to return to work. The plaintiff returned to work and at around 3:00 a.m., a huge explosion from the furnace covered him with molten aluminum and burned over thirty percent of his body. The furnace operators normally used a tractor equipped with a splash guard, but that vehicle was out of service, and the plaintiff was using a tractor with no guard. The plaintiff alleged that he was provided no protective clothing other than a helmet and mask. The plaintiff further alleged

> that defendant was aware that the scrap was damp and that aerosol cans were present in the scrap, and that scrap that is wet or that contains closed aerosol cans could lead to an explosion if placed in the furnace. Defendants contended that its employees were instructed to examine the scrap for aerosol cans before loading it into the furnace, and were also instructed on how to safely load damp scrap into

> the furnace. The defense also asserted that plaintiff failed to follow these instructions. Plaintiff acknowledged in his deposition that he was instructed to load wet scrap slowly, and it would 'melt." However, contrary to the defendant's assertions, plaintiff testified that he was not told to separate closed aerosol cans from the scrap pile. [453 Mich at 158.]

The Supreme Court concluded:

> Accepting the facts to be as alleged by plaintiff, we determine that proper application of the rules regarding summary disposition require the conclusion that plaintiff established a genuine issue of material fact with respect to whether defendant Metal Exchange committed an intentional tort. If the facts as alleged by plaintiff are proven at trial, they would support a finding that his employer possessed the requisite intent to injure. Focusing first on the level of defendant's knowledge, we find that plaintiff established a genuine issue of material fact regarding whether his employer had actual knowledge that an injury would occur. The first inquiry is whether defendant was aware of the cause of the explosion. Plaintiff contends the cause may have been the aerosol container, may have been the water, or may have been a combination of the two factors. Plaintiff presents deposition testimony of defendants Mazur, Meyer, and Szybowicz in which they acknowledge that closed aerosol cans and water could cause explosions and that both were present in the scrap loaded by plaintiff. If plaintiff definitively proves at trial that water, aerosol cans, or a combination of the two created the dangerous condition that caused the explosion, and that defendant knew this condition could lead to an explosion, then plaintiff will have established actual knowledge. On the other hand, defendant correctly observes that plaintiff has not ruled out that the cause may have been plaintiff's loading technique or a defect in the furnace, which under plaintiff's theory of the case would not be within the scope of defendant's actual knowledge. Under defendant's theory, an argument may be made that, unlike [*People v*] *Film Recovery Systems*, [194 Ill App3d 79; 141 Ill Dec 44; 550 NE2d 1090 (1990)], the cause of the injury has not been identified in a manner in which it can be established that the employer knew of the presence of that condition, and knew that exposure to it would cause injury. Under the present procedural posture of the case, however, we cannot rule out the possibility that plaintiff's theory will prevail at trial. Accepting plaintiff's facts as true, we find that a genuine issue of material fact exists with respect to whether defendant had actual knowledge of the condition that caused plaintiff's injury.
>
> Likewise, the evidence conflicts with regard to whether the injury was "certain" to occur. Starting with the premise that either the aerosol cans or the water caused the explosion, defendant contends that plaintiff was instructed to sort out all the aerosol cans before loading the scrap into the furnace. Defendant also presented deposition testimony that plaintiff was instructed regarding a method of loading wet scrap that would avoid an explosion. If the finder of fact determines that the events transpired as set forth by defendant, then defendant must prevail. On the other hand, plaintiff contends that he was told to load all the scrap, which he understood to include the aerosol cans. Plaintiff testified in his deposition that he

> was loading the wet scrap in the way in which he was trained, but that the explosion occurred anyway. In addition, defendant contends that if an injury were certain to occur, the large explosion would have occurred earlier in plaintiff's shift or, at the very least, the smaller explosions would have been far more numerous. Defendant misconstrues plaintiff's argument, however. Plaintiff does not contend that every load of scrap would have exploded, but that every load of scrap had the potential to explode because each load could have contained a closed aerosol can or water. If the facts as alleged by plaintiff are established at trial, then plaintiff has proved the existence of a continually operative dangerous condition. . . .
>
> Finally, the facts as alleged by plaintiff create a genuine issue of material fact with respect to whether his employer willfully disregarded that an injury was certain to occur. Defendant argues that while it may have been negligent to require plaintiff to load wet scrap containing aerosol cans, defendant did not willfully disregard a certain injury because no explosion of this magnitude had occurred previously. While this is true, plaintiff has presented evidence that, despite knowledge of the earlier explosion, defendant failed to remedy the condition that caused it. . . .
>
> . . . a genuine issue of material fact exists with respect to whether plaintiff's employer disregarded actual knowledge that an injury was certain to occur. . . . [453 Mich at 185-187. (Boyle, J.)]

The plaintiff in *Travis, supra,* had worked for the defendant wire products company when she was assigned to operate a press brake equipped with a die that formed refrigerator wires. 453 Mich at 155. The plaintiff's supervisor, Clarke, had shown her how to operate the press, which "was designed not to run unless the operator's hands were on the palm buttons." *Id.* The plaintiff's supervisor operated the press for a few cycles without incident to show the plaintiff how to do the job. After operating the press for about an hour, the press "double cycled," i.e., it cycled without the plaintiff having pressed the palm buttons, while the plaintiff's hands were in the die space, and she was unable to remove her hands before the die came down. The plaintiff's hands were severely injured, and both of her fifth fingers were amputated. *Id.* at 155. Further,

> [u]nbeknownst to plaintiff, the press had been malfunctioning for approximately one month. Clarke testified in his deposition that maintenance employees had been adjusting the exterior mechanisms of the press, which would temporarily correct the problem, sometimes for one to two weeks, and sometimes only for a day or two. Clarke testified that, except in plaintiff's case, each time the press double cycled, the operator was able to identify the problem, avoid injury, and report it to Clarke. At that time, the press would be shut down until further adjustments could be made that corrected the problem. Clarke opined that because the press cycled so slowly, an operator could avoid injury even when it was double cycling.
>
> Rodney King, Greenville Wire's tool room supervisor, testified in his deposition that he learned the day before plaintiff's injury that the press was double cycling again when another press operator refused to run it for that reason. King believed

> that the problem was such that exterior adjustments could not correct it. King concluded that the press had to be torn down in order to properly repair it, and consequently advised Clarke to shut it down. Clarke refused to do so, King testified, because Clarke believed that would take too long and the parts would have to be sent out. [453 Mich at 155-156.]

The Supreme Court determined that the defendant employer had "actual knowledge" that the press was malfunctioning, but concluded that Clarke did not have actual knowledge that an injury was "certain to occur," and that the plaintiff's sole remedy was thus under the WDCA:

> Although Clarke had actual knowledge that the press was malfunctioning, he did not have knowledge that an injury was certain to occur. Plaintiff argues that because she was a novice press operator and was not informed that the press was double cycling an injury was certain to result from the malfunctioning press. It is true that concealing a known danger from an employee who has no independent knowledge of the danger may be evidence of an intent to injure. However, in this case, unlike [*People v*] *Film Recovery Systems*, [194 Ill App 3d; 550 NE2d 1090 (1990), discussed in *Beauchamp v Dow Chemical Co*, 427 Mich 1; 398 NW2d 882 (1986)], plaintiff was not required to confront a continually operating dangerous condition. The press double cycled only intermittently. Further evidence that the injury was not certain to occur is that Clarke was willing to operate the press himself. Additionally, Clarke had adjusted the machine just before assigning plaintiff to it. In the past, such adjustments would allow the press to run for at least one or two days without double cycling. Moreover, the press cycled so slowly that no one had ever been injured when the press double cycled previously. All prior operators were able to withdraw their hands in time. We find that an injury was not certain to occur because plaintiff was not required to confront a continuously operating dangerous condition.
>
> Even assuming Clarke knew an injury was certain to occur, plaintiff is unable to prove that Clarke "willfully disregarded" that information. Although King informed Clarke the press should be broken down to be properly repaired, in Clarke's experience, adjusting the exterior of the machine allowed the machine to run without double cycling for at least one or two days. Clarke adjusted the exterior of the press, and thereafter felt comfortable operating the press himself. Unlike a situation in which an employer orders an employee to confront a continuously operating danger while concealing the danger from the employee, the evidence does not suggest that Clarke disregarded a continuously operative dangerous condition that would lead to certain injury.
>
> In conclusion, plaintiff Travis is unable to establish that her employer possessed the specific intent to injure her. Although her employer may have negligently permitted an unsafe work environment to exist, no intentional tort was committed. Plaintiff's sole remedy should be under the WDCA. [453 Mich at 182-183 (Boyle, J.).]

As in *Golec*, plaintiff in the instant case proceeded under the second sentence of the intentional tort exception, under which an employer's intent to injure may be inferred if the

plaintiff establishes that managerial or supervisory personnel had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.

III

Plaintiff alleged sufficient facts to survive summary disposition regarding whether Production Manager Tim McKenna and Plant Manager Andrew Collins, managerial employees of defendant, had the requisite "actual knowledge."

A

There is no dispute that plaintiff was the fifth Demmer employee to be seriously injured *while cleaning pinch rollers at the Delta plant*,[6] and the *third to be injured on the **R-1062's** pinch rollers while they were being cleaned*. Injuries on the R-1062 specifically occurred in March 1995 (Eddie Williams-three fingers crushed), and July 1997 (Wallace Bush-right hand crushed), and then to plaintiff in January 1998. Documentary evidence plaintiff submitted below established that McKenna (who had been employed at Demmer since 1980 and in the Delta plant since 1990) knew of the two previous employee injuries on the R-1062, knew that MIOSHA had investigated and cited Demmer for failure to implement and enforce Lockout/Tagout, was one of the main participants in MIOSHA's investigation following Williams' 1995 injuries, and signed documents assuring MIOSHA that the violations would be addressed. Similarly, Collins knew of Williams' and Bush's injuries on the R-1062, participated in the abatement process required by MIOSHA following its citation of Demmer in July 1995 for violating Lockout regulations, and signed documents submitted to MIOSHA pledging to remedy the violations in 1995 and 1996.

McKenna's actual knowledge

Production Manager McKenna testified at deposition that he began employment at Demmer in 1980, went to the Delta plant around 1990, and around 1993 became the production/manufacturing manager. McKenna testified that everyone except the Plant Manager (Collins) reports to him, and he schedules the work done in the shop.[7] There is no dispute that

[6] The first two pinch-roller-cleaning injuries occurred in 1987 and 1988, before defendant purchased the R-1062 in late 1991. In 1987, Gary Kellogg was wiping pinch rolls with a rag when his hand was caught, resulting in amputation of three fingers and fracture of his thumb. In 1988, Danny Bullion was hand cleaning pinch rolls with a rag when his hand was pulled in and crushed, requiring amputation.

[7] We also note that plaintiff presented ample evidence that Bob Kristofferson, the second shift foreman on the day plaintiff was injured, had actual knowledge that Lockout was not enforced and that plaintiff was not adequately trained. He testified at deposition that he assigned plaintiff to Mary Garcia on the new Danly line on January 6, 1998. Kristofferson testified that he instructed plaintiff to watch other employees do the cleaning process, and when the employee was comfortable, they could try it. Kristofferson testified that he thought plaintiff watched the cleaning process twice, and that on the third time, she felt comfortable and started participating.

> *Q*. Now, was it – you had been in the – you said you had been in the area earlier that day?

(continued…)

(…continued)

A. Right.

Q. And you had been in the area the previous day?

A. Yes.

Q. And you had been in the area other days before that, correct --

A. Yes.

Q. --when these rollers were being cleaned?

A. Yes.

Q. And is it your testimony that the employees ran the rollers in reverse when they cleaned them on those occasions?

A. I am going to say most of the time.

Q. That sounds like there were times when they didn't use reverse?

A. Yes.

Q. You agree with me?

A. Yes.

Q. And you knew it, right?

A. Yes.

Q. Had you ever formally disciplined or reprimanded anybody for cleaning these rollers without using reverse before Kay was hurt?

MR. SCHULZ: I am just going to object to the form of the question because when you say formally discipline I don't have any idea what that means.

MR. BOUGHTON: So that there would be a record of it.

THE WITNESS: No.

* * *

Q. Do you know how long they had been running exposed metal on this line before she was hurt?

A. Quite a while. I couldn't give you an exact --

(continued…)

(…continued)

Q. Period of months?

A. --period of time.

* * *

Q. Do you think it was a few months?

A. Yes, I do.

Q. So during that period of time the crew was required between coils to clean the rollers?

A. Yes.

Q. And you knew that, of course?

A. Yes.

Q. And you were often in the area and saw them doing this?

A. Yes.

Q. There is a safety gate that provides entry into this area just in front of these coils, is there not?

A. Yes, there is.

* * *

Q. . . . And that's because it's recognized that the area on the other side of the gate or guard is a dangerous area?

A. Yes, it is.

Q. And this gate or guard is interlocked, correct?

A. Correct.

Q. Which means what?

A. It meant you unplug that, it stops the press from running.

Q. And if you open the gate you unplug it, right?

A. Yes.

(continued…)

(…continued)

Q. So that would, even if you didn't intend to, it would stop the press?

A. Yes, it would.

Q. And that's the purpose of it?

A. Yes.

Q. Does it stop the rollers?

A. Yes, in the automatic position.

Q. Okay. So if the line is running it normally runs in automatic?

A. Yes.

Q. And so if somebody went up there while it was running and pulled that gate open, boom, it would shut things off?

A. Yes, it does.

Q. But you are saying you can run the rollers in manual?

A. Yes.

Q. With the gate open?

A. Yes.

Q. And why is it set up so that you can do that?

A. So you can load a coil or clean the rollers.

Q. Do you have to go to the control panel and place it in manual before the rollers will turn if the gate is open?

A. Yes, you do.

Q. Was that true at the time Kay was injured?

A. Yes.

Q. And had it been true for as long as you remember?

A. Yes, it has.

(continued…)

(…continued)

Q. And we have already touched on this, there was no lockout being used at the time these rollers were being cleaned, correct?

A. That's correct. [Emphasis added.]

* * *

Q. Do you know why the employees weren't always putting these rollers in reverse when they cleaned them?

A. Sometimes I found out why, yes.

Q. What did they tell you or what did you find out?

A. They were cleaning the other set of rollers at the same time.

Q. These would be the leveler?

A. Leveling rollers.

Q. And if they were cleaning the levelers at the same time, then why wouldn't they put these rollers in reverse?

A. Because the other set would be in the opposite direction.

Q. Create a pinch point on the other side?

A. Correct.

Q. Why were they – were they not supposed to clean both sets of rollers at the same time?

A. Nope.

Q. And that was in the procedure [Demmer's cleaning procedure for pinch and feeder roll cleaning, dated 11-12-96] also?

A. Yes.

Q. So they were supposed to do these one at a time?

A. Yes, they were.

Q. Do you know why they were cleaning both sets of rollers at the same time?

MR. SCHULZ: Who is they now?

(continued…)

following the March 1995 pinch rollers injury to Eddie Williams, MIOSHA cited defendant for "serious" violations of the hazardous energy sources/Lockout regulations and the regulation requiring that employees be trained in Lockout. Plaintiff presented deposition testimony of the occupational safety inspector that inspected Demmer in July 1995, following Eddie Williams' injury on the R-1062 pinch rollers, Ruth Ann Poole. Poole testified that McKenna was present at all times while she was at Demmer in 1995, including for the opening conference, the walk-around, and the closing conference. Poole testified that she was speaking with McKenna "the whole time I was on the floor" during her July 1995 investigation. A copy of the 1995 investigation file was submitted below, including the citations issued against Demmer on Poole's recommendation. At deposition, Poole testified from the written MIOSHA investigation report, including:

> *Q.* . . . . Citation one, item 14. Would you tell us what rule that pertains to and what you found in that connection?
>
> *A.* This is lockout training. It's Part 85, speaking of training authorized employees on the requirements of lockout, when it's appropriate and what is lockout.
>
> *Q.* And what did you find with respect to the regulation pertaining to lockout in this instance?
>
> *A.* That there was employees [sic] that hadn't received training on lockout.
>
> * * *
>
> *Q.* But could you just read for us what you have written up to the redaction?
>
> *A.* *No lockout training. Employees cleaning feed rolls with a rag with it on, the feed rolls on together*. On 3-15-95 blank stated blank. [Emphasis added.]
>
> * * *
>
> *A.* *Received no training at all. Also still cleaning feed rolls with someone cleaning and another person pushing jog. . . .* [Emphasis added.]
>
> * * *
>
> *Q.* What does this refer to, please?
>
> *A.* This is part 85, which is lockout, the rule that we use for enforcing lockout.

(…continued)

> MR. BOUGHTON: The crew, Mary and the other employees.
>
> THE WITNESS: This is just my own personal idea of why they were doing that *was to speed up the cleaning time of the equipment.* [Emphasis added.]

Q. And you have written again a narrative of what you found during the course of your inspection?

A. That's correct.

Q. And would you just read that for us, please.

A. *Not enforcing lockout while cleaning roll. Blank took a rag with the power on the feed rolls, started cleaning the feed rolls, rag was drawn through and hand. Lost index finger, crushed hand. Blank stated blank saw others do the job, was only blank stated saw others do that, so blank did too with the power on. You don't question what goes on, blank, blank. Employee blank also stated blank cleaned with power and so did blank. But rolls separated with a rag. On 3-15 of '95 cleaned rollers with power on, crushed hand, amputated ring finger right hand. Can't use hand still. Currently they – I am not sure what this is – currently they, probably should say one rolls two inches and someone else jogs while the employee cleans. No lockout machine specific. Presses have air and electrical possible confusion, so there was multiple [sic] problems.* [Emphasis added.]

* * *

Q. Is there any requirement that the employer has to post the citations in the working area?

A. Yes.

Q. What's the requirement of the department in that regard? What do they have to do?

A. It states that they have to post them a minimum of three days or until the items are completely settled with the State, which means if I already abated the item, the minimum I have to post it is three days, and then if I want an informal settlement agreement or I want to appeal an item, then that correspondence or any other correspondence has to be posted next to the citations so the employees understand where they are at until it's completely settled with the State.

Q. Now, in this case where you have a number of citations, would they have to post the citation at the location of the equipment that it's in violation, or how would that – just post them in one location, or how does that work?

A. We accept a centrally located spot where the employees can read it, because the whole bottom line is that the employees understand what happened during the inspection.

McKenna testified at deposition that he was aware that Lockout was not being used on the R-1062 for months before plaintiff's accident and on the date of plaintiff's accident, that he was

aware on the date of plaintiff's accident that Garcia and plaintiff were cleaning the pinch rollers in jog, stop fashion, while they operated in forward motion, rather than reverse, that they were doing so with rags over their hands, and that the crews cleaned the rollers in this fashion because it would take too much time to clean using Lockout procedures:

Q. Who would be responsible for enforcing the lockout procedures at Demmer?

A. The safety coordinator does, but that's David Trew's responsibility as the maintenance supervisor, to make sure that's done, and the supervisors, if that's who has to do it.

Q. So you have a supervisory role in that connection?

A. Me?

Q. Make sure that Mr. Trew is doing his job?

A. Yes.

* * *

Q. Now, as I understand it, on January 6th, 1998, the day that Kay Alexander was injured, you were present at the plant at that time, is that right?

A. Yes.

* * *

Q. So you had been there most of the day?

A. Yes.

Q. You had been on the floor earlier [i.e., before plaintiff's accident, which occurred around 5:00 or 5:30 p.m.] during that day?

A. Yes.

* * *

Q. Were you aware of what the state of their production was at that time, whether they were changing jobs or just exactly what was going on?

A. Minute by minute I don't know what they are doing, but I would say, yeah, I knew what they were – I had a pretty good idea what they were doing.

Q. What's your recollection in that regard?

A. I believe we were in die change at that time.

* * *

We were done with the previous job and moving on to the next one.

Q. Is it your recollection that there was any problem with the production process itself on the new Danly line at that time that resulted in a die change?

A. No.

* * *

Q. . . . . Is it your understanding that at the time Kay was injured that the interlock gate was open?

A. Yes.

Q. And that there were two employees inside the gated area cleaning the pinch rollers?

A. Yes.

Q. And that there was no lockout of the pinch rollers?

A. No.

* * *

Q. And is it also your understanding that as Mary and Kay were working on the pinch rollers they were set to rotate in forward rather than reverse?

A. Yeah, that's the only way that it could have happened. I mean--

Q. And that they were cleaning these rollers with rags in hand?

A. Yes.

Q. And that the procedure they were following, apparently, was jog, wipe, jog, wipe?

A. Yes.

* * *

Q. (BY MR. BOUGHTON) The crew cleaned the pinch rollers on this machine many times during that six- or eight-month period before Kay was injured?

A. Yes.

Q. And there would be a significant opportunity to watch their practices and procedures when they were doing that, correct?

MR. COLLINS: I am still going to object to the form, because I don't know who you are saying is watching them, and I don't know what significant opportunity is.

Q. (BY MR. BOUGHTON) *You would have an opportunity to watch them during that period of time if you wanted to, correct?*

A. Yes.

Q. And so would the foreman?

A. Yes.

Q. Did you ever make it your business to watch the practice that Mary and her crew used to clean the pinch rollers and levelers during the six- to eight-month period of time?

A. Yes.

Q. Did you ever have to give them any instructions about the practices and procedures that they were using during this period of time?

A. I don't recall ever giving them any. [Emphasis added.]

* * *

Q. Do you recall anybody being disciplined in any way before Kay for a practice or procedure used on cleaning these rollers?

A. I don't recall.

Q. So would it be fair to say that it was the practice of the crew to clean the pinch rollers with rag in hand during this period of time.

MR. COLLINS: What set of rollers are you talking about?

Q. (BY MR. BOUGHTON) The pinch rollers, yes.

A. Yes.

Q. Why isn't lockout used when cleaning the pinch rollers?

A. I am going to say that it was – it's a time, a time situation where it would take too long to lock it out, clean it, unlock it, clean it, unlock it. That's pretty much my thoughts on it. [Emphasis added.]

Collins' actual knowledge

Andrew Collins testified at deposition that he began employment at Demmer in August 1995, as Plant Manager, oversaw the plant's general operations and supervised all Demmer employees, directly or indirectly. Although Collins was not yet employed at Demmer when Eddie Williams was injured on the R-1062 in March 1995, or when the state investigated and cited Demmer for MIOSHA violations in July 1995, Collins testified that he was aware of Williams' injury and of MIOSHA's investigation and issuance of violations to Demmer, and that he was "somewhat" involved in the "abatement process" Demmer undertook to cure the 1995 MIOSHA violations. In October 1995, Collins and McKenna signed a "Safety Mission Statement"[8] defendant submitted to MIOSHA as evidence of its commitment to protect

[8] Collins admitted signing a Delta plant operating procedure titled "Delta lockout/tagout procedure" on October 9, 1995:

> *Q.* And [this new operating procedure was] designed, according to the document, to protect against any accidental and/or initial generation of a power source, correct?
>
> *A.* Yes.
>
> *Q.* And scope, this applies to all equipment, machinery and power sources located at the Delta plant, correct?
>
> *A.* That's what it says.
>
> *Q.* This would include, would it not, the R-1062?
>
> *A.* It would include all equipment in the plant.
>
> * * *
>
> *Q.* Do you know if lockout was ever enforced on the R-1062 between the time you took the job at the Delta plant and the time of Kay's injury?
>
> *A.* I don't know. I have no reason to believe that if we were performing maintenance operations that it would not be locked out.
>
> *Q.* I am sorry. Okay. I should restate my question. During the cleaning of the pinch rollers do you know if lockout was ever enforced from the time you took your position in 1995 until the time of Kay's injury?
>
> *A.* I do not know.

The safety mission statement is on Demmer letterhead, and states in pertinent part:

DELTA STAMPING PLANT

SAFETY MISSION STATEMENT

(continued…)

employee safety. As a result of the July 1995 inspection of Demmer, Demmer and the state's Bureau of Safety and Regulation, General Industry Safety Division, entered into an "Informal Settlement Agreement" pursuant to which Demmer agreed "to provide assurance of abatement as requested for all violations," "to correct the violations as cited," "to pay the proposed penalties," and to submit "Abatement Assurance, a written Safety and Health Program . . . and the payment of penalty . . . by October 30, 1995." Demmer submitted a written safety and Health Program to MIOSHA, which included a list of "General Safety Rules," among which was "13. Always lock-out and tag-out equipment before performing service or maintenance. Get training and authorization first." Demmer issued a "Lock-Out Tag-Out Procedure," effective October 5, 1995, which was signed by Andrew Collins and others. The procedure stated that it applied "to all equipment, machinery and all power sources located at the Delta Plant," and that its purpose was to "insure that all machinery and equipment have been properly protected against any accidental and/or initial generation of a power source along with the proper identification and logging of each source of power." Collins also testified that he was aware of Wallace Bush's injury on the R-1062 in 1997.

IV

We also conclude that plaintiff presented sufficient evidence that injury was "certain to occur" from defendant's failure to implement and enforce Lockout on the R-1062 and failure to implement training of crew leaders like Garcia, and employees like plaintiff, to safely clean the pinch rollers.[9] McKenna and Collins, and others, knew that there had been two previous serious injuries on the same R-1062 machine. Plaintiff presented evidence that McKenna and Collins knew that defendant had been cited by MIOSHA in 1995 for violation of Lockout regulations; knew that defendant assured MIOSHA in 1995 that it would correct and abate its Lockout violations and enforce Lockout in the future; knew that defendant did not do so and that serious

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(…continued)

> Employee safety is essential and integral to our operations and our success. It is at our highest priority [sic]! Will [sic] provide a safe and healthful workplace where our employees can feel secure and proud producing quality products. Our goal is zero accidents, and we will strive for continuous improvement of our performance in this area.
>
> We are a team where each of us will have an absolute commitment to safety as our fundamental focus. We will all be genuinely involved on this endeavor at all times, and we will each do our share. In so doing, we will be a world class leader in our industry, and we will all be safe and successful together.
>
> We owe this to ourselves, to each other, to our families, to our customers and to our community.
>
> [signed by Andrew Collins, Tim McKenna, and Mark Richards, Safety Coordinator.]

[9] The "deliberate act" a plaintiff must establish under the intentional tort exception may be one of omission and "encompasses situations in which the employer 'consciously fails to act.'" *Palazzola, supra* at 149.

injuries resulted to employees again in 1997; and that defendant required plaintiff to clean the R-1062 pinch rollers without proper training and while it was being operated in violation of Lockout regulations, with knowledge that others had suffered serious injuries on the R-1062 while cleaning the pinch rollers and with knowledge that Garcia, the crew leader, was operating the machine in dangerous fashion.[10] Notably, defendant does not dispute that had the Lockout regulation been followed at the Delta plant, plaintiff's injuries would not have occurred.

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[10] MIOSHA investigation files submitted below contained Mary Garcia's interview statement, which states:

> S[afety] O[fficer] ask[s] How long have you worked as Leader Press Operator[?]
>
> About 1 year
>
> SO ask[s] How were you trained to clean rolls [?]
>
> At that time we were told to put the rollers in manual, open them up, turn the speed to 2. Two people cleaned the pinched rollers and two the leveling rollers. At that time I was told there was a button that would only turn them in reverse, we found that the button didn't do that, unless the button on the panel was on rerverse [sic], which was not the purpose of the other button, it was to go in reverse no matter what. Also we noticed that cleaning the rollers in reverse made it hard on the people cleaning the leveling rollers, the towels we[re] being take [sic] out of their hands. The roller were [sic] moving as long as the speed was kept down on 2 so the cleaning would be better.
>
> SO ask How long have you been cleaning rolls this way[?]
>
> *About six months*
>
> SO ask Who trained you how to clean rolls[?]
>
> Rob [Kristofferson] and Chris [Carrier]– supervivors [sic]
>
> SO ask *Has there been when [sic] Supervisor have observed you and crew cleaning rolls[?]*
>
> *Yes*
>
> SO ask How many time [sic] have they Observed you[?]
>
> *In about 3 coil changes 2 out of 3 one of them will be there*
>
> SO ask If you were training another employee how to clean rolls would it be different than you were trained[?]
>
> Yes

(continued…)

(…continued)

SO ask What different type of training would it be[?]

Since the accident [plaintiff's January 6, 1998, accident] we have all been retrained on the procedure of cleaning the rollers. [Emphasis added.]

Garcia testified at deposition that a MIOSHA inspector interviewed her soon after plaintiff's injury.

Q. Then you continue [in the MIOSHA interview], you say, Also we noticed that cleaning the rollers in reverse made it hard on the people cleaning the leveling rollers. The towels were being taken out of their hands.

A. Yes.

Q. And you have already explained that, right?

A. Yes.

Q. The rollers were moving as long as the speed was kept down on two so the cleaning would be better?

A. Yes.

Q. And what does that refer to?

A. That refers to the leveling rollers.

Q. That they were moving while they were cleaning?

A. Yes.

Q. And the cleaning would be better if they were doing it while they were moving?

A. Yes.

Q. *And then you are asked how long have you been cleaning the rolls this way, and you say about six months, right?*

A. *Yes.*

Q. And you are asked who trained you how to clean the rolls, and you say Rob [Kristofferson, 2d shift foreman] and Chris [Carrier, assistant 2d shift supervisor], supervisors, that's correct?

A. Yes, yes.

(continued…)

Plaintiff presented evidence from which a reasonable jury could conclude that despite their knowledge, Demmer's supervisors, to save time, failed to order the statutorily mandated Lockout. Reasonable jurors could conclude that Demmer specifically intended an injury by its deliberate failure to implement, enforce and train its employees in Lockout. Plaintiff presented evidence that she and Garcia were cleaning the R-1062's pinch rolls as intended by defendant, i.e., without the protection of Lockout and without adequate training.[11]

We also conclude that sufficient evidence to raise a genuine issue of fact was presented regarding whether defendant subjected plaintiff to a continuously operative dangerous condition. *Golec, supra,* makes clear that if a danger is continuous with a potential to cause injury at any time, then the employer's failure to act allows a circumstantial inference of intent sufficient to create an issue for the jury on the question whether injury was "certain to occur." The *Travis* Court, stated:

> When an employer subjects an employee to a continuously operative dangerous condition that it knows will cause injury, yet refrains from informing the employee about the dangerous condition so that (s)he is unable to take steps to keep from being injured, a fact finder may conclude that the employer had knowledge that an injury is certain to occur. [*Travis, supra* at 178.]

Plaintiff presented sufficient evidence to create a question of fact whether that is the case here. Plaintiff presented evidence that Demmer's supervisors subjected her to a continuously operative dangerous condition, i.e., hand cleaning the pinch rolls without the protection of Lockout, without adequate training to either plaintiff's supervisor or to plaintiff, knowing that would cause injury based on the R-1062's record of past injuries, yet did not inform plaintiff about the dangerous condition or provide her with proper training, thus she was unable to understand the danger and take steps to avoid being injured.

This case is similar to *Golec, supra,* in that plaintiff presented evidence that raised a genuine issue of fact whether McKenna and Collins had actual knowledge that Demmer's failure

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(…continued)

> *Q.* And you are also asked has there been times when the supervisor has observed you and the crew cleaning the rolls, and you say yes, correct?
>
> *A.* Yes. [Emphasis added.]

[11] Defendant argues that Garcia "knew not to clean the rollers while rotating," pointing to Garcia's deposition testimony in response to the question "were there ever times when you wiped the rollers while they were still turning?" that "I myself did it once. I was reprimanded for it, so never did it again." Garcia testified that she believed this reprimand occurred when Rob Kristofferson saw her reach up to wipe the roller while it was turning, about a year before plaintiff worked for Demmer.

As discussed *supra,* documentary evidence plaintiff presented raised a genuine issue of fact whether the "established method" being practiced at the time of plaintiff's injury was in contravention of Lockout, and in contravention of procedures defendant maintains it implemented in 1996 (which themselves did not include Lockout).

to adopt and enforce Lockout would lead to certain injury, and knew that untrained employees without knowledge of Lockout or of adequate procedures to clean the pinch rollers could be exposed to unexpected start ups of the rollers. Unlike in *Travis, supra,* in which the press double-cycled so slowly that employees could avoid injury, the two Demmer employees that were injured before plaintiff **on the R-1062 specifically**, suffered serious injuries, including lost fingers. In *Travis,* before the plaintiff's injury, the defendant's employees had escaped injury when the press had double-cycled. Unlike in *Travis,* the conditions that led to plaintiff's January 1998 accident in the instant case had been present since at least July 1995, when MIOSHA cited

Demmer for violating Lockout regulations after Williams' workplace injuries on the R-1062. The instant case is stronger than *Golec* in the sense that the plaintiff in *Golec* received some instruction in loading the furnace, while plaintiff in the instant case was merely told to observe Garcia clean the rollers, and Garcia herself had not been adequately trained and was improperly and unsafely cleaning the rollers, i.e., hand cleaning the rollers with a rag and having her crew clean both the leveling and pinch rollers simultaneously, and operating the R-1062 switch that controlled the start-up and direction of the rollers. See n 10, *supra.*

Under the circumstances that plaintiff had been given no training in how to safely clean the pinch rollers, and that plaintiff was assigned to help clean the R-1062 pinch rollers at a time when defendant's managers knew that Lockout was neither implemented or enforced; that plaintiff was told to "observe" how it was done and did observe Garcia hand-cleaning the pinch rollers with rags, while both sets of rollers were being cleaned simultaneously, and while the R-1062 was being operated without Lockout; and under the circumstances that Garcia herself was inadequately trained; plaintiff was not warned that the rollers were not locked-out and that jogging the rollers would expose her to unexpected start-ups of the rollers, and that the rollers did not rotate only in reverse while being cleaned, we conclude that sufficient facts were alleged that plaintiff was exposed to a continually operative dangerous condition.

V

Regarding whether defendant "willfully disregarded" actual knowledge that injury was certain to occur, defendant argues that Demmer "willfully disregarded nothing," and points to precautions it purportedly established in 1996 to avoid injuries like that plaintiff suffered, and argues that those precautions prevented injury when employees obeyed them.

Documentary evidence plaintiff submitted below raises a genuine issue of fact whether defendant's 1996 procedures[12] did anything to correct its lack of enforcement of Lockout and

---

[12] Defendant attached a Demmer "Line Pinch and Feeder Roll Cleaning" written corporate procedure, DDOP-9.3, that became effective November 12, 1996,

> 1.0) PURPOSE AND SCOPE: To insure that the cleaning of the rollers are [sic] done in a safe and proper manner. This procedure applies to all press lines and employees at the Demmer Corporation's Delta Stamping Plant.
>
> 2.0) PROCEDURE:

(continued…)

Lockout training and contradicts defendant's assertions that, before plaintiff's injury in January 1998, it had abated the conditions that led to the 1995 MIOSHA violations, and that it took steps in 1996 (or at any time before plaintiff's January 1998 injury) that ameliorated its failure to implement and enforce Lockout and Lockout training of employees. Defendant's managers admitted that the 1996 procedures **did not require Lockout**. Further, plaintiff presented evidence that the 1996 procedures were a fiction.[13] Managerial and supervisory employees at

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(…continued)

> 2.1 Follow the steps listed below to insure the process is done in a safe manor [sic]:
>
> 2.1.1 After the coil has been run completely out, visually inspect the rollers for any dirt or foreign material. If at this time no cleaning is required then load the next coil. If cleaning is needed then continue with the procedure.
>
> 2.1.2 Place the entire press line in manual mode.
>
> 2.1.3 Check to confirm that the emergency stop buttons has [sic] been set.
>
> 2.1.4 At least (2) people are required to do the actual cleaning.
>
> 2.1.5 Manually turn the rollers to where the foreign material can be safely removed. Note: when possible always clean from the exit side of the rollers.
>
> 2.1.6 Be sure rollers are completely stopped and then verbally let the other person know that you are going to wipe the debris off the rollers with a lint free cloth attached to a handle.
>
> 2.1.7 Never clean rollers while they are in motion and do not touch the rollers with you [sic] hands or gloves.
>
> 2.1.8 Repeat the procedure until the rollers are completely cleaned.
>
> 2.1.9 Remember to think and work safely at all times.

[13] Importantly, the second-shift foreman on duty at the time of plaintiff's injuries, Kristofferson, testified regarding the 1996 procedures:

> *Q.* [Re: exhibit 2, roll cleaning procedure dated 11-12-96] this would be effective a little over a year before Kay was injured –
>
> * * *
>
> *Q.* And this is the procedure that would have been posted on the machine?
>
> *A.* Yes.

(continued…)

(…continued)

Q. And this is the procedure that they were, quote, not following at the time of Kay's injury, is that correct?

A. That's correct.

Q. Just a couple of questions. Paragraph 2.1.3, you see that, check to confirm that the emergency stop buttons has been set?

A. Yes.

Q. Now, does this mean that before cleaning these feed rollers you are supposed to set the emergency stop buttons?

A. Yes, it was.

Q. And they weren't doing that, were they?

A. They were doing it – what I understand at the time of cleaning, at the time of rotating them to a different position it had to be unset.

Q. They couldn't turn the rollers if the emergency stop button was set, correct?

A. Correct.

Q. And the emergency stop button is around on the control panel?

A. Yes.

Q. So somebody would have to walk around there and set it and then walk around and clean and then walk back and unset it and then walk back and jog the rollers?

A. Yes.

* * *

Q. You are referring to paragraph 2.1.5, correct?

A. Yes, I am.

Q. And which says, Manually turn the rollers to where the foreign material can be safely removed, right?

A. Correct.

Q. And the next sentence, *Note, when possible always clean from the exit side of the rollers*?

(continued…)

Demmer did not train their employees regarding the 1996 procedures, were aware that the 1996 procedures were not being followed but did not enforce them, and indeed, were ongoing witnesses to the cleaning of the pinch rollers in contravention of the 1996 procedures.

Collins testified at deposition about measures Demmer implemented after plaintiff's accident.[14] He testified that all of the changes implemented after plaintiff's injury could have

(…continued)

A. Yes.

Q. Now, what is your understanding of what that means?

A. *It means the rollers have to be in reverse to make them the exit side* of the rollers.

Q. Ah-ha, and as distinguished from my understanding of cleaning from the exit side or the loop pit side of the rollers; it doesn't mean that right?

A. No.

Q. But they do clean rollers on that side, do they not?

A. The leveling rollers.

Q. Yeah, right.

A. Correct.

* * *

Q. But the word "reverse" is not used in here?

A. No, the word "reverse" is not.

Q. *And there is no instruction in here to do these sets of rollers separately, the pinch rollers and the leveling rollers, is there*?

A. *No*.

Q. That's not stated?

A. That's not really stated, no.

Q. And there is no instruction in here that before you clean the pinch rollers to set them to reverse, is there?

A. No, there isn't. [Emphasis added.]

[14] A revised procedure that became effective March 31, 1998, after plaintiff's injuries, provided:

(continued…)

(…continued)

1.0) PURPOSE AND SCOPE:

To insure that the cleaning of the rollers are [sic] done in a safe and proper manner. This procedure applies to R-1060 line and employees at the Demmer Corporation's Delta Stamping Plant. Any revision changes to this document requires the affected operators to be retrained.

2.0) PROCEDURE:

2.1 Follow the steps below to clean press line pinch rolls and feeder rolls

2.1.1 Before performing this procedure you must have been properly trained by an authorized person.

2.1.2 Do not wear gloves while performing this procedure.

2.1.3 Never clean the pinch rolls and leveling rolls at the same time. Perform these operations in two separate functions.

2.1.4 Place the pinch roll machine in manual mode to perform any roll cleaning.

2.1.5 The machine is set to the manual mode by pushing the manual button on the machine control panel. Check the indicator light on the top of the panel to see if manual mode is indicated. *If the indication light is not energized contact your supervisor and do not perform this procedure.

2.1.6 Remove all paper on floor in work area.

2.2 To clean the pinch rolls perform the following procedure. <u>Only one person is to clean the pinch rolls.</u>

2.2.1 Open the pinch rolls by pushing the "Open Rolls" button on the machine panel.

2.2.2 Check the rotation of the rolls. Make sure the rolls rotate in reverse. When looking into the rolls they rotate out towards you. The rotation is controlled by the "Pinch Roll – FWD/REV" switch located in the upper left hand corner on the machine panel.

2.2.3 Wipe off any foreign material from the rolls. Only wipe the front upper quarter of the top roll and the front bottom quarter of the lower roll. Make sure your hands do no enter [sic] the pinch point and **Never** clean the rolls when they are in motion.

(continued…)

been implemented before plaintiff's injury, including installation of a light screen, which prevents employee exposure to sudden startup, and does not require use of Lockout regulations.[15]

Under these circumstances, we conclude that a genuine issue of fact remained whether defendant had actual knowledge that injury was certain to occur and willfully disregarded that knowledge.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Donald S. Owens

(…continued)

2.2.4 Step away from the rolls and depress the double palm buttons to rotate the rolls. Continue steps 2.2.3 and 2.2.4 until the rolls are completely cleaned.

2.2.5 Reset the light curtains.

2.3 To clean the leveling rolls perform the following procedure . . . .

* * *

2.4 This concludes the cleaning procedure, remember to think and work safely at all times.

[15] Following plaintiff's January 1998 injury on the R-1062 pinch rollers, Demmer was again investigated and fined, and cited for "WILLFUL VIOLATION" of the Lockout MIOSHA safety regulation. The 1998 investigation file expressly states that Demmer had been cited for the same dangerous condition in 1995, that the dangerous condition had existed since before 1995, that Demmer's management had done little to nothing to enforce LOCKOUT, and that Mary Garcia and plaintiff had not received adequate training in LOCKOUT. The MIOSHA inspector's (Jimmy Hindman) recommendation, which was adopted, concluded that defendant should be cited for a "willful" violation of MIOSHA's regulation on Lockout, and a "serious" violation of the regulation requiring employee training on Lockout, and Demmer was fined $7,700.