State Of Ohio,)
County of Cuyahoga.) SS:

IN THE COURT OF COMMON PLEAS

ANNA OLLER, et al.,)
)
Plaintiffs,)
)
vs.) Case No. 99 CV 160
)
WILTON CORP., et al.,)
)
Defendants.)

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THE DEPOSITION OF RICHARD HAYES
FRIDAY, JUNE 29, 2001

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The deposition of RICHARD HAYES called by the Plaintiffs for examination pursuant to the Ohio Rules of Civil Procedure, taken before me, the undersigned, Tracy L. Barker, a Registered Merit Reporter and Notary Public within and for the State of Ohio, taken at the offices of Gallagher, Sharp, Fulton & Norman, Seventh Floor Bulkley Building, Cleveland, Ohio, commencing at 1:10 p.m., the day and date above set forth.

APPEARANCES:

On behalf of the Plaintiffs:

John R. Liber, II, Esq.
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Chagrin Falls, Ohio 44022

On behalf of the Defendant Cincinnati Milacron:

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Gallagher, Sharp, Fulton & Norman
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Cleveland, Ohio 44115

On behalf of the Defendant Wilton Corp.:

C. Richard McDonald, Esq.
Davis and Young Co., LPA
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101 Prospect Avenue
Cleveland, Ohio 44115

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DEPOSITION INDEX OF RICHARD HAYES

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(Plaintiff's Exhibit Nos. 30 and 31 were marked.)

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EXAMINATION OF RICHARD HAYES

BY MR. LIBER:

Q Say your name, please.
A Richard H. Hayes, H-a-y-e-s.
Q Mr. Hayes, you are here on behalf of Wilton Corporation as an expert in the area of safety?
A That's correct.
Q Could you give us your office address, please?
A It's 5727 Airport Highway, Suite A, Toledo, Ohio 43615.
Q Mr. Hayes, for identification purposes, I've marked two documents which I'm placing in front of you.

The one you're looking at right now is marked Plaintiff's Exhibit 31 and the other one is Plaintiff's Exhibit 30. Would you please identify those two documents for me.

A One is my current CV and the other is my report dated July 11, 2000.
Q Your CV is identified as Number 31, correct?
A That's correct.

5

Q And your report is identified as Exhibit 30, correct?
A That's correct.
Q Are there any additions, corrections, modifications you would like to make to either exhibit?
A There is a correction on the CV, and that is for the American Board of Forensic Examiners. It's now Diplorie.
Q Would you refer me to which page?
A The last page.
Q At the bottom?
A That's the only change. No changes.
Q Are you a native of Ohio, sir?
A Yes.
Q Where did you go to high school?
A Tiffin, Ohio; Tiffin Calvert.
Q Let me begin by going through your background and experience.
I have had a chance to review your CV and the bulk of your experience is with the Occupational Safety and Health Administration; is that fair to say?
A That's correct.
Q I take it you've also had your deposition taken

6

before?
A A few times, yes.
Q As best as you can ballpark, how many times has that occurred?
A More than 300, less than 800.
Q And according to your vitae, you indicate that you consult on behalf of both parties to legal matters, plaintiffs and defendants; is that correct?
A Yes.
Q Do you have any breakdown as to how many percentage wise is between plaintiffs and defendants who you end up consulting for on litigation matters?
A In the past, what, five years, I can give you a ballpark on that.
Q Okay.
A I'm going to say about 20 percent plaintiff and about 80 percent defense.
Q So the majority of the --
A It works out. I need to add to that to about six plaintiffs' cases a year.
Q You do review plaintiff cases, but it's fair to say that the majority of the cases you review and end up working on are on behalf of

7

defendants?
A As of late, we've been doing more plaintiffs' work, and I think it's only because we started doing more -- we get calls and -- but we look at both.
Q But the majority of your work is for defendants in litigation?
A Currently, correct.
Q Other than the case we're here about today, how many other matters have you reviewed or consulted for with respect to an allegation involving a workplace intentional tort?
A How many?
Q Yes.
A Oh, many.
Q And once again, your best estimate.
A Oh, I'm going to say more than 800, less than 1,200.
Q An easier question, how many of those have you appeared on behalf of a plaintiff or an injured party involving an allegation of a workplace intentional tort?
A For deposition or for actual trial?
Q Let's start with deposition.
A For deposition, probably 60.

8

Q And how many for trial?
A None for trial. They've all been settled. For plaintiff.
Q For a plaintiff.
Can you recall the name of the plaintiff or the name of the plaintiff's lawyer on the last case you served as with respect to a safety expert in an intentional tort case?
A Well, I've got several pending right now, and I didn't bring my list of cases. There's a fellow by the name of Richard Louis down in Jackson, Ohio against -- I can't give you the site. It's a medical lot company. I have --
Q Mr. Louis is the plaintiff's attorney?
A He's the plaintiff's attorney. Lynch versus Kissel Brothers, which is a carnival type show, case of a trip and fall hazard. And there's several others. I can't remember what they are.
Q Okay. How many times have you testified in court as an expert witness?
A For what -- which kind of cases? In OSHA, a number of times.
Q That's a good point. Thank you.
With respect to your litigation services

9

as a consultant, how many times have you testified in trial?
A Well, since I consult on OSHA cases as well as tort cases, more than 12, less than 20.
Q In any case that you've consulted in, have you ever been disqualified or found not of sufficient experience or training in order to offer expert opinions?
A No.
Q I understand you get paid for your services.
A I do.
Q What is your fee schedule?
A It's 175 an hour for straight preparation, review of materials. That's 250 an hour for depositions in trial work with a minimum of four hours for trial work.
Q Is that portal to portal for the deposition?
A That's correct.
Q Do you have any way to determine how much money -- or strike that. How much time you have spent on the case that we are here about today, that is, Anna Oller versus Wilton Corporation, et al?
A I'm going to say less than 25 hours. That includes a site visit.

10

Q With respect to the litigation cases which you have acted as a consultant, how many of those have involved an issue of machine guarding?
A Most. Since we do construction cases as well as general manufacturing, general industry, even under construction cases, it generally involves some type of machinery.
Q Other than the case which we're here about today, have you ever consulted or worked on a lawsuit involving a milling machine?
A Not horizontal milling machines, not in the intentional tort arena, but in the OSHA arena, before the Occupational Safety and Health Review Commission. And it was not involving the cutters, it was involving a coolant issue.
Q Okay. So let me turn that into the positive, if I may.
Is it fair to say that as a litigation consultant, you have not worked on a case before involving a horizontal milling machine?
A Not a Cincinnati Milacron horizontal milling machine. I have worked on vertical multispindle milling machines.
Q Was that the coolant issue you mentioned?
A No, that would be the vertical head. It moved

11

unintended and it hit the guy in the head.
Q Was there a guarding issue involved in that case?
A There was.
Q Okay. Other than the case that you just mentioned involving the vertical multihead machine, have you worked on any other milling machine case involving a guarding issue as a litigation consultant?
A No.
Q Now, let's back up in your time at OSHA.
Explain for me your experience in working with milling machines on guarding issues.
A Well, as a supervisor and as -- well, let me back up a little bit. As a senior compliance officer, inspector, for lack of a better word, we've had the occasion to look at literally thousands of locations that had milling machines, and looking at those, of course, we took -- there were occasions when we would address guarding issues. The compliance staff that worked under my supervision would bring in milling machine issues. Those, there would be a little bit of work involved in issuing citations and supporting data and stuff like

12

that. That's my experience from an OSHA perspective with milling machines.
Q When I say core allegations of this case, can we agree that they basically mean that our claim is that there should have been some form of a rotating cutter guard on a horizontal milling machine; is that what --
A If you want to get out of here at 3:30, we can cut to the chase, John.
Q Yes?
A Yes, I agree with that.
Q Have you ever dealt with that type of issue before either as a litigation consultant or in your experience at OSHA?
A Yes.
Q Is it more than once?
A Yes.
Q Okay. Tell me about each instance as best you can, beginning with the most recent.
A From OSHA, right? Are you still talking about OSHA?
Q Well, have you ever dealt with that in a litigation context?
A In a litigation context?
Q I'm sorry, let me clarify.

13

A You have to clarify that for me.
Q As a litigation consultant, have you ever dealt with that issue before?
A No.
Q Let's go back --
A Not on a horizontal.
Q -- to OSHA.
With respect to our claim that there should have been a spindle guard or a rotating cutter guard on a horizontal milling machine, tell me about your experiences with that while you were at OSHA.
A I've probably had over a dozen cases of that when I was with OSHA in the years that I was with them, and that's with approximately 15,000 cases that I've reviewed, either directly involved with the case, or actually gone out to the site and looked at them.
Q And of that, about a dozen?
A About a dozen or so. That's just a ballpark.
Q I understand.
A In OSHA, you don't track your cases by the type of machine. It's by the company.
Q Sure. But it's certainly less than 25?
A I would say so.

14

Q Okay. Would that type of a focus, the dozen or so, less than 25 that you've handled, how many of those involved a situation where the injury had already occurred and OSHA was investigating the situation after the fact?
A None.
Q So is it fair to say then that your involvement in those situations was reviewing a particular issue of the guarding prior to any injury occurring?
A No. Usually on a milling machine, if it's a captive machine shop or if it's a production type milling operation, what generally would lead us to look at a milling machine would be any recordable injuries that showed up on what's called the OSHA 200 injury notice form.
Q Okay.
A By examining those records, if we saw anything that dealt with machine guarding issues, we were obligated to go look at it. All of those cases -- and it could be more than a dozen -- usually the clue was in the records, and generally, it involved a minor injury, slight laceration that required a little bit more than first aid. Nothing serious, of those that I

15

ever recall.
Q Okay. And what would your role be involved in actually examining the, or inspecting the premises and conducting a review therefrom?
A We look at the machine, see how it's being used. If it's a production machine, a jobbing machine; whether it's vertical, horizontal, whether or not; where the operator's position was, loading, unloading; that would be about it.
Q Before the Anna Oller case, had you ever consulted or reviewed the ANSI milling machine guarding standard which we know as B8.11?
A Correct.
Q Is that a yes?
A Yes.
Q Okay. You had heard of that before, seen it before, consulted it before?
A Yes.
Q And had you done that in your capacity in the different positions you held while at OSHA?
A Yes.
Q Had you ever found an employer in violation of that standard for a horizontal milling machine?
MR. McDONALD: I'm going to object.

16

Q Okay.
MR. McDONALD: Go ahead and answer.
A What was the question?
Q Sure. While you were at OSHA, did you ever find an employee in violation of ANSI B11.8, I think it is, I want to make sure I'm saying it right. I thought I had it down straight.
MR. McDONALD: You're saying it right.
MR. LIBER: Let's mark this as 32.

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(Plaintiff's Exhibit No. 32 was marked.)

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Q Placing in front of you what we've marked as Plaintiff's Exhibit 32, is that a copy of the American National Standard B11.8 with respect to the safeguarding standards for milling machines?
A It's -- yes. The 1974 version.
Q Okay.
A Yes, I did review that before, when I was with OSHA.
Q While you were with OSHA, did you ever find an employer in violation of that standard?

17

A With a milling machine, no.
Q And is it correct to say that through OSHA, 1910.212, employers are required, for milling machines, to follow the ANSI standard?
MR. McDONALD: Objection.
A I don't agree with that. 212 is primarily a general machine guarding standard, and it does reference milling machines, but that's about it. It's a very broad, broadly interpreted, catch-all type standard. That's why I probably would have looked at the B11 standard, though, because there's not enough detail in the standard itself.
Q Is it correct that 1910.212 states that under paragraph three with two little ii's -- I guess you'd say (a)(3)(iii), correct?
That point of operation -- it's talking about point-of-operation guarding, but it states that, "The guarding device shall be in conformity with any appropriate standards therefor, or in the absence of applicable specific standards, shall be so designed" -- on and on; is that correct?
A That's what it says, yes.
Q And you're saying that as far as ANSI is

18

concerned, ANSI would not fall within what OSHA states is appropriate standards?
MR. McDONALD: Objection.
A Well, there has to be an adoption of a specific OSHA standard, and as we sit here today, I'm not sure -- I don't believe that OSHA adopted B11.8 making 1974 as the guiding document for milling machines.
Q Okay. Are you familiar with any other standard that would apply to milling machines?
A No.
Q So is it your testimony in this case that B11.8 does not apply to this accident?
A Well, it may apply to it, but from a regulatory position, my position is that it does not apply.
Q Okay.
A Not in terms of a regulatory issue.
Q Aside from a regulatory issue, how would B11.8 apply to this case?
A Well, B11.8 is a national consensus standard that's developed with the cooperation of the industry itself. In order to cite an ANSI standard under OSHA, you have to cite what's called the general duty clause, which is Section 5A-1 of the act. That's number one.

19

Number two, you have to show that there's an exposure to a condition that is addressed in a national consensus standard.
Number three, you have to show that there's likelihood of serious physical harm or death.
And number four, you have to show that the employer knew that it existed. So you have to show all those things.
Q I'm sorry, that was very well said. Can you repeat them for me? Or I can ask her to read it back.
THE WITNESS: Why don't you read it back.
(Record was read.)
Q There was a fifth one?
A And fifth, probably one of the most important aspects of it, there has to be a feasible method of fixing the problem.
- - - - -
(Plaintiff's Exhibit No. 33 was marked.)
- - - - -
Q Placing in front of you what's been marked as Plaintiff's Exhibit 33, could you tell me what that is, please.

20

A Is there a question?
Q Yes. Could you tell me what that is, please?
A I have a hearing deficiency, that's why.
This is the 29 CFR 1910.212 general requirements for all machines, the Occupational Safety and Health standard.
Q Is that what you identified as item number 13 in your report of July 11, 2000?
A Yes.
Q What is the purpose of the OSHA standard 1910.212?
A It's a -- what we all a horizontal standard, and the difference between a horizontal standard and a vertical standard is that a horizontal standard would apply to all machines, whereas a vertical standard would only apply to specified equipment. A vertical standard -- a good example of that would be the bakery industry has vertical standards. The logging industry has vertical standards. This is a general standard that applies to all machines in the workplace.
Q Is there a vertical standard under OSHA which applies to milling machines?
A No.
Q With respect to 1910.212, it specifically

21

mentions milling machines, does it not?
A That's correct.
Q And there under, I think it's subparagraph three, Roman numeral IV, it identifies some machines which usually require point-of-operation guarding; is that correct?
A That's correct.
Q With respect to milling machines, do any of the OSHA regulations provide any other guidance for employer to assess or evaluate whether or not a horizontal milling machine requires point-of-operation guarding?
A In terms of what, like guidance documents?
Q Yes.
A Yes. There are guidance documents.
Q And what would those be?
A There's a 1979 guidance document that deals with the 1974 B11.8 standard that talks about not being able to guard the point of operation. And the genesis for that guidance document, which is still in effect today, is paragraph 212(a)(3)(ii) because some of our compliance officers, including myself, attempted to cite that back in the'70s. So to avoid the litigation effort that was taking place, the

22

guidance document was signed by a fellow by the name of Barry White who was the Assistant Secretary of Labor.
Q And the purpose of that was for what?
A Well, to clarify the fact that you can't guard the point of operation on most milling machines.
Q Isn't it correct that ANSI B11.8 clarifies that by separating out point of operation in the rotating cutter hazard?
A It separates it out and excludes it from guarding, yes.
Q Right. Except when the operator is working within a foot of the blades; is that correct?
A Generally, that's true.
Q Well, specifically that's true according to that standard; is that correct?
MR. McDONALD: Which standard are you talking about? I'm sorry.
MR. LIBER: ANSI B11.8.
MR. McDONALD: Objection.
Q Correct?
A That's correct.
Q And, in fact, OSHA 1910.212 states that items such as rotating parts require machine guarding as well; is that correct?

23

A That's correct. That's what it states.
Q And would, in your opinion, a rotating cutter on a milling machine be considered a rotating part under 1910.212 paragraph A?
A Rotating parts encompass a lot of things. It could be that too, yes.
Q In this case, you concluded that, under paragraph number five of your opinions, that Wilton did not violate any federal, State of Ohio safety rule, regulation, ANSI standards or industry practice by operating the milling machine in this case; is that correct?
A What paragraph are you on?
Q Five.
A That's correct.
Q Okay. What's your basis for concluding that Wilton did not violate ANSI B11.8?
A Essentially, from reviewing the documents, I felt that they were in compliance with the distance factor.
Q Based upon what?
A Based upon no one knows how far the loading table was from the cutter heads, and that's one of the options in the ANSI standard and OSHA recognizes. They call it guarding by location

24

as a viable means for protection on milling machines. In fact, it's in a number of other standards too, but --
Q If the individual who trained Anna Oller on the operation of the machine testified that it was his estimate that the distance of the fixture from the blades was approximately eight inches, would that change your conclusion in paragraph five at all?
MR. McDONALD: Objection.
A Not unless he measured it and recorded what those measurements were.
Q Why does the exact measurement make a difference?
A Well, when you're dealing with four inches and people estimating things -- for example, I have a car that is full of dings from my wife estimating where the garage corner is. I need exact measurements in order to -- at least in my business, you have to be pretty precise.
Q Right. And nobody can get those exact measurements in this case; is that right?
A That's what I found out, correct.
Q And why is that?
A Because the machine's gone.

25

Q It was disposed of by Wilton; is that correct?
A That's my understanding.
Q But with respect to an operation such as this, if the employee's perception is that the operation of the machine, the work area is within 12 inches of the blade, it is significant for any safety engineer, safety person, safety personnel to be able to then fully evaluate that by making specific and direct measurements and analysis; is that fair to say?
MR. McDONALD: Objection. Go ahead.
A That's a big question. A lot of stuff in that question. Can you get right to the question itself? If you're talking about the injured party -- let me see if I understand this.
If the injured party has a perception that it's 12 inches or less -- and I don't know really where I'm going with this question.
Q Well, let me restate it if you don't understand it.
A I don't.
Q And you've taken enough depositions to know that it's important for us to communicate here; is that fair to say?

26

A Yeah. I want to communicate with you.
Q If any time you don't understand something that I ask you, just like that situation, you will let me know so I can rephrase it so that we communicate?
A Sure.
Q Is it fair to say that the point of the OSHA regulations, and indeed the point, in general, of the ANSI standards, is to improve workplace safety?
A That's correct.
Q Okay. And the fact of the matter is that if there is an operation which is perceived as dangerous, and it may, in fact, apply to OSHA standards, that it is incumbent upon the employer to have that evaluated to see if any changes need to be made?
MR. McDONALD: Objection.
A I think it's prudent for an employer to do that, yes. That's another part of our business. We do that.
Q So in this case, if the operators of the general purpose milling machine were under the impression that they were required to work within a foot of the blades, it would be

27

incumbent upon the employer to evaluate that operation to determine if, number one, it complied with OSHA, and number two, if any type of protective measures had to be taken?
MR. McDONALD: Objection.
A Naturally, an employer wants to look at things that their employees bring to their attention that they fear. I wouldn't have a problem with that.
Q With respect to your report, Plaintiff's Exhibit 30, do you have any additional opinions, other than those that are delineated in paragraphs one through eight?
A Not at this time, no.
Q I take it you've been able to review -- re-review the information that was provided to you in forming the opinions delineated in this report?
A Yes.
Q And I'm sure you've talked to Mr. McDonald in preparation for your deposition today; is that correct?
A Yes.
Q As a result of your preparation for this deposition, do you anticipate that you will be

28

offering any opinions which are in addition to or different than those which are listed on Plaintiff's Exhibit 30?
A I suspect not.
Q Okay. And I take it, that in fairness, that if you do have an earth-shattering revelation on your drive back to Toledo, you will let Mr. McDonald know the changes in your opinion so I have would have a chance to review them?
A I'll be on a phone very quickly.
Q You've also listed on Plaintiff's Exhibit 30 18 items, one of which we've already identified being the OSHA standard, as materials which you've reviewed in preparation for your opinions; is that correct?
A That's correct.
Q Since you listed those 18 items, have you been provided with any additional information to review in preparation for either your opinions and/or your deposition in this case?
A No.
MR. McDONALD: Can I interject?
MR. LIBER: Of course.
MR. McDONALD: There's the Rennell affidavit.

29

THE WITNESS: Yes, I'm sorry.
A Yeah, there was a subsequent affidavit by Jerry Rennell that I was able to look at.
Q That was what was submitted in support of the plaintiff's brief in opposition to summary judgment?
A That's correct.
Q Other than that, were there any other matters?
A No.
Q Any other documents, anything else?
A Just the OSHA documents. When I refer to any OSHA documents, I try to make it all-encompassing.
Q Have you spoken with any of the witnesses in this case?
A When I made my site visit, I sat in on some conversations with counsel and one or two of the witnesses, and I had a few questions of my own, but nothing earth-shattering.
Q What were the names of the witnesses that you had conversations with?
A Oh, boy. Dempsey --
MR. McDONALD: No, Dempsey wasn't there. He was gone.
Q I don't think you can ask Rick for help, but as

30

best you can recall.
A I don't recall their names.
Q Did you tape any of those conversations?
A No, I did not.
Q Do you recall the substance of any of those conversations?
A No.
Q Other than the ANSI standard and the OSHA standard, have you done any research on either point-of-operation guarding or rotating cutter guarding for general purpose milling machines?
A Yes.
Q Tell me about the research you performed.
A Internet search, going back through my own ANSI documents, going back through machine guarding classes that I've taken over the past 30 years, going through OSHA's documentation on court cases involving milling machines.
Q Anything else?
A No. That's it.
Q And from that research, did you produce anything of significance in this case?
A Just the 1979 Barry White document.
Q Do you have a copy of that with you today?
A I believe I brought one, yeah. Or one that we

31

can make a copy of.
MR. McDONALD: Sure.
A This is the only copy I have, John, so.
MR. McDONALD: Go ahead and mark and then we'll get copies.
MR. LIBER: Let's mark this as Exhibit 34.
- - - - -
(Plaintiff's Exhibit No. 34 was marked.)
- - - - -
A I'm sorry. We need to change the date on that. It's 1976.
Q What date does it say?
A 2-18-76. Not '79.
Q And when's the date that you pulled that up on the Internet?
A Oh, 6-28, 2001.
Q Yesterday?
A Well, I had a tattered copy in my machine guarding standard, but it had coffee stains on it, so I pulled this up. It's a fresh copy.
Q So you had seen that document before yesterday?
A Yes, but I can't tell you when.
Q Was it back when you were with OSHA or since you've been a consultant in litigation matters?

32

A Well, it would have been with OSHA for sure, and it probably would have been a few times since OSHA. One of those things that you know you've read it and you just don't know where it's at.
Q And Plaintiff's Exhibit 34 came about as a result of what you explained earlier as OSHA compliance officers misconstruing the OSHA regulation 1910.212?
A Not misconstruing, but applying 212 and then finding out that litigation or through settlement negotiations of the problems folks have with milling machines.
Q Okay.
A That would be the genesis for this document.
Q And in general terms, that situation would arise as a result of checking a 200 form, as you said, a minor injury, or going to inspect the scene, observing the operation and seeing an unguarded machine, and the compliance officer would say, "You've got to put a guard on that" and would issue some type of order or even a citation?
A They would try to, yes.
Q Sure. And then that would be litigated?
A In many cases, yes.
Q As a result of the correction, or the

33

clarification, I guess I should say, for Plaintiff's Exhibit 34, what then was the process to go through to determine if guards were feasible in a particular operation?

A Well, we would explore with in-house engineers from OSHA what methods are available. We would ensure that they would meet the minimal requirements, if there were any, if it was feasible and practical, because the way this is written, that's where it talks about practicality, and if nothing could be done, that would be the end of it. The citation would be vacated, and we would probably have a side agreement that the operator be trained, those kind of things. We'd explore different ways to get around the document.

Q You said minimum standards. Where would that come from?

A Well, of course -- you would look at ANSI, of course. You would look at the instruction books that come with the milling machines and find out if there could be any relief granted. You've got to understand that the compliance officer primarily was worried about the point of operation. And when you look at the ANSI

34

standard, of course, the point of operation is excluded. We were always trying to cite that point of operation, couldn't do this.

Q What's the difference between the point of operation, a point-of-operation guard, and a rotating cutter guard on a horizontal milling machine?

A Well, point of operation is clearly defined in all the ANSI standards, as well as OSHA standards. The point of operation is the specific area where the work is performed on the piece. A punch press, for example, is not the guide rods as point of operation. They're moving, they can take your head off, but it's where the punch actually goes through and forms the metal. It's very clearly defined.

In the same is true, and my view, of milling machines. It has a point of operation. It's where the work is performed.

Q And the difference between that and the rotating cutter itself?

A Well, I see no difference between that. That is the point of operation to me, based upon the definition of what it is.

Q As a safety engineer, how do you reconcile ANSI

35

where it says that you can't or don't have to guard point of operation; then it says, on the other hand, in some circumstances you have to provide a rotating cutter guard?

A That's a good question.

Q Do you have an answer for it as a safety specialist?

A As a safety person, it probably causes me great angst, and ANSI standards are full of those kind of dichotomies. But part of the problem with the milling machine is the feasibility to do it and still create a part. And it isn't just milling machines, there's many other machines that this crops up.

So they leave an open-ended standard like that and manufacturers have to fend for themselves. And quite frankly, in the literally thousands of machines that I've looked at that are true horizontal milling machines, I've never seen one guarded.

Q That was my next question.

A In 30 years, I haven't seen one guarded.

Q How long were you with OSHA?

A Sixteen and a half years.

Q And after that, have you been a litigation

36

consultant?

A Since 1989.

Q And all that time you've never seen a rotating cutter guard on a horizontal milling machine in operation?

A Never.

Q Have you ever seen any brochures or designs or diagrams of such a device?

A Yes.

Q And do you know why that is the case?

A Why what is the case?

Q I'm sorry. Do you know why, in your experience, you have never seen such a device, a rotating cutter guard in operation?

A I have an opinion as to why they don't, and I've had clients tell me why they don't guard it. The guards don't work, A. B, it could exacerbate a condition that they don't want getting trapped in the guard -- between the guard and the cutter itself. And B -- C, sorry.

Q C.

A C, sorry. That the guard that I'm familiar with, once it moves -- and I guess Mr. Rennell referred to it -- you still have an entrapment

37

point. You still have a rotating cutter that's exposed. So that feasibility thing jumps up to me.
Q The clarification memo from Mr. White indicates that there are other options in the event that guarding of the cutter is not feasible; is that correct?
A Yes.
Q And what types of things has he mentioned?
A Barry talks about splash shields, chip shields, or barriers. And I'm quoting, "...Splash shields, chip shields or barriers which provide protection to the operator or employees may be acceptable; and if necessary, a de minimis notice may be issued."
Q What does a "de minimis notice" mean or refer to?
A A "de minimis notice" means that if they have or do not have any of those things -- a "de minimis notice" in OSHA parlance means that there is no record of the -- it's not a citation. There is no record of it except in OSHA's files against an employer, and there is no fine that accompanies the citation. It's just that.
It's obviously Latin, and it appears to

38

me to be belittling, that there's nothing to it. In fact, there isn't even any paper that says -- sheet with a de minimis citation.
Q The purpose is to simply notify the employer?
A It's to notify the employer, and generally when they issue a de minimis notice, it's verbal and they ask them to keep looking at the technologies to see if anything changes that affects their equipment. Most employers agree with that.
Q What is the National Safety Council?
A National Safety Council is a national organization started many, many years ago by insurance companies in order to assist employers in reducing their premiums by enforcing safety standards.
Q As a safety engineer, do you receive their publications?
A I used to. I don't any more.
Q Why don't you anymore?
A Because they have no impact of law. A lot of what they look at are statistic driven as opposed to -- as opposed to factual statistics. There's a lot of estimation and it just didn't do anything for me.

39

Q But at one point in time you did receive their publications?
A At one point in time I actually was a member of the NSC.
Q Did you leave voluntarily?
A Oh, sure. You don't get kicked out of the National Safety Council.
Q You never know. And I'd certainly be interested if you were the first.
A I've been thrown out of better places. They like your money.
Q Are there publications --
A That was a good one, John. I'm going to have to remember that one.
(Off the record.)
Q Are their publications in your opinion reliable and authoritative?
A No. The NSC?
Q Yes.
A Some are, some aren't.
Q Why would they not be reliable and authoritative in the area of safety, workplace safety?
A Because their -- in my humble opinion, their data is sometimes skewed, and in the real world, it's not a perfect world and they tend to -- and

40

that's why you don't see the National Safety Council showing up as -- under OSHA's promulgation procedures as anything other than commenters. They don't develop standards themselves. ANSI's more important to me.
Q Forgive me for jumping around a little bit, but I got off track with a couple things.
With respect to your contact with Wilton in this case, have you ever worked for them before in any other capacity?
A No.
Q Had you ever heard of Wilton Corporation or Wilton Tool or any other subsidiaries prior to this case?
A No, I have not.
Q Other than this case, have you been in contact with Mr. McDonald before?
A No.
Q How about any of the other members of his office?
A Not that I recall.
Q Do you know how you were first -- or how you were contacted initially in this case?
A I believe it was a word-of-mouth referral.
Q Do you know who that was through?

41

A I believe it was Roetzel & Andress. I could be wrong.
Q I notice on your CV in the education that you're not a licensed engineer; is that correct?
A That's correct.
Q You don't have any training, undergraduate or graduate, in an engineering field?
A No.
Q Does that make a difference in the safety industry, whether you're an engineer or not?
A No.
Q With respect to the other individuals who have been offered as experts in this case, have you ever been in contact with Ralph Barnett before?
A Barnett?
Q Yes.
A No.
Q How about Gerald Rennell?
A Jerry and I are in a lot of cases together. And I look forward to meeting him someday and --
Q You have not met him before?
A Not that I know of.
Q Okay. You have a smile on your face. Do you have an opinion as to Mr. Rennell?
A No. I read many of his reports and he's a fine

42

gentleman.
Q You're not aware of any other opinion or reputation he holds in the area of safety analysis or safety review?
A Other than being prolific in a number of states that I work in as a safety person, no.
Q You mean "prolific" by doing a lot of work?
A He does a lot of -- a lot of plaintiffs' work, yeah.
Q Have you ever heard of or worked with Professor Igor Paul from MIT?
A Yes, but I don't know the case. It was one other case.
Q And you just recalled his name by reading it on a report?
A He has a unique name and one of those ones that stick with you.
Q You wouldn't know him if he walked in this room today?
A I can picture him by his name.
Q So you've met the gentleman before?
A No.
Q That was a tongue-in-cheek comment
A Tongue in cheek.
Q As part of the information you had to review in

43

the preparation of your report was the report of Ralph Barnett; is that correct? Item number two on your report?
A Yes.
Q And with respect to opinion number eight, your final opinion, you mentioned the items which have arisen in this case as being attachments to the machine which left the Cincinnati manufacturing facility in 1943, you mentioned the splash guards and arbor supports; is that correct?
A That's correct.
Q You do not make any mention of item called an automatic spindle stop device; is that correct?
A That's correct.
Q Is there a reason why you omitted that from your report or any observations or opinions that you hold in this case?
A I don't consider the spindle stop to be a safety device.
Q Okay. Why not?
A Because it's at the option of the operator. Any time you allow the employee to decide whether they want to use it or not, it doesn't fit the category of a safety device for me.

44

Q Is there a reason why you omitted it from your report?
A Nothing in particular, no.
Q Because you also reach the same opinion with regards to the splash guards and arbor supports; is that correct?
A That's correct.
Q And it would be fair to say that the splash guards and arbor supports could form some type of a barrier in this case, similar to that suggested by Mr. White at OSHA as a protective device on a horizontal milling machine?
A Well, Mr. White left enough room in his opinion that any time they use "may or may be acceptable," that when they use that kind of language, it's not mandatory. And I noticed that he -- his last sentence was, may be acceptable for splash shields, chip shields and barriers.

I believe that as a safety person, if I looked at that same set of circumstances -- and in my experience, I'd recognize that splash shields, chip shields do not provide any particular protection to the employee except from chips and splashes, and therefore, it's

45

just -- wouldn't make any sense to rely on that for rotating parts or point-of-operation guarding. And I think Mr. White -- and I can't speak for him. I know him. I can imagine that's the dilemma he was in when he drafted this opinion.
Q Have you ever seen a horizontal milling machine with a splash guard in place?
A Yes.
Q During operation?
A Yes.
Q In that operation was the operator working within a foot of the rotating blade?
A They could be.
Q As a safety consultant, have you ever been assigned the task of evaluating the safety utility of a splash guard or an overarm support brace on a horizontal milling machine?
A Only in consideration of the slipping and tripping hazard from oil and chips splashing out from a machine.
Q How about with respect to offering a chance to avoid or deflect contact between the operator's extremities and the rotating cutter?
A Well, I've been asked by various employers

46

whether or not that met any particular standard, and I always refer them to either this document, if that is germane at the time, or -- in reading ANSI standards. And it would appear that the ANSI standard, if you put a splash shield up, gives you a pass on the one foot issue, because it says either/or, splash shield or one foot. I happen to prefer the distance thing.
Q The same would go for an automatic spindle stop; is that correct, that could be considered a guarding device under ANSI?
A A fully -- I don't know. It could be. I didn't see it in there.
Q Well, it would stop the rotating of the cutter, which would avoid the application of ANSI?
A Which I like.
Q And you would agree with me that it is -- from the safety standpoint of the operator, it would be optimal to have them loading the fixture without the spindle turning?
A If it's controlled by the employer and not by the operator, yes, I 100 percent agree with you.
Q And would the disabling of an automatic spindle stop, which is controlled only by the employer, result in a violation of ANSI and/or OSHA?

47

MR. McDONALD: Objection. Go ahead.
A With OSHA, it's in the eyes of the beholder. As a supervisor that scrutinized those cases, there would have to be a lot of other stuff that would have to show up in the file before I would issue a citation for that or recommend it. That being, is it recognized as a safety device by whatever documents you use? That would have to be clear to me. I'm just not sure that it is a safety device in any of the written literature I've read. That said, I really believe that, you know, a spindle stop is kind of a nice thing to have on a milling machine.
(Recess taken.)
BY MR. LIBER:
Q Mr. Hayes, would you agree with me that as far as safe operations are concerned, an employer in an industrial operation should not have to wait for OSHA to come along and tell them whether or not they're in violation of a particular standard before they should make an operation safe for the operator?
MR. McDONALD: Objection.
A Sure. That's reasonable.

48

Q And as a matter of fact, there could be dangerous operations existing which creates significant hazards to employees without OSHA ever knowing about it, correct?
A Sometimes that occurs.
Q And you'd agree with me, wouldn't you, that the unguarded, unprotected rotating blade of a horizontal milling machine poses a hazard of significant harm to the operator?
MR. EDDY: Objection.
A I would say it poses a hazard. Significant harm is in the -- it depends on your perspective of if you're the injured party or not.
Q But is it fair to say from a safety standpoint, when you're assessing the safety operation of a machine or an industrial operation, that's incumbent upon the safety specialist to presume the worst case scenario?
A That's how OSHA trains its compliance staff, that's correct. You take the worse possible situation.
Q And with respect to the hazard that is posed by that unguarded horizontal milling machine, we're talking about an operator coming in contact with that blade; is that correct? Whether it's a

49

hand, whether it's hair, whether it's a knee, a foot, a face; is that correct?
A That would be the hazard, correct. That's one hazard.
Q And from a safety analysis standpoint and a guarding standpoint, does it really make any difference how that body part actually gets to the point where it's in contact with the blade?
A No. We're talking about the specific hazard itself. It wouldn't matter how it occurred.
Q It wouldn't matter if the person is pushed; it wouldn't matter if they slipped; it wouldn't matter if they fainted; it wouldn't matter if they're startled by an explosion in another part of the plant; or it wouldn't matter if it's by horseplay. Is that fair to say?
A It wouldn't matter. That's fair to say.
Q And in this case, the operator, Anna Oller, was not involved in horseplay. Would it be fair to say that she was the innocent victim of another's horseplay? Would you agree with me there?
A That is what she said.
Q Do you have anything, with your knowledge of the case, that would lead you to conclude something

50

differently?
A No.
Q Under paragraph seven of your opinion, you say that the primary cause of the plaintiff's injury was the resultant response of her being startled by another employee; is that correct?
A That's my opinion, that's correct.
Q Okay. But as we've stated before -- or as we alluded to before, is it fair to say that if the rotating cutters were not rotating but had been stopped when the startling event occurred, it's more likely than not that Anna Oller would not have had all four of her fingers amputated by this machine?
A If the cutter head had been stopped?
Q Yes.
A That's fair. Sure.
Q With respect to your evaluation of the utility of the coolant splash guards, the arbor support, and the automatic spindle stop features, did you make any measurements of any of those devices?
A I could not.
Q Okay. Did you perform any type of a human factors analysis on a similar machine to determine if those devices would pose as any

51

type of a utility to preventing, avoiding, or deflecting the actual injury operation in this case?
A I don't do human factor analysis.
Q Did you take any measurements of, or seek to take any measurements of Mrs. Oller herself, the length of her arm, the length of her fingers, how high her armpit was off the ground, how tall she was, how much she weighed?
A No.
Q As far as your opinion that the coolant splash guard and arbor supports could not have prevented an unfortunate accident, are those factors, that is: The size, the height of the guards; the size, the height, the measurements of the operator, do those have any bearing on your opinion?
A If I understand -- you're going to have to repeat that question. If I understand your question right --
Q Let me repeat it.
A There is a word that you referenced, that's why --
Q You, in simple terms, say that the splash guard and arbor supports wouldn't have helped out in

52

anything in this case?
A They're totally worthless.
Q Do the dimensions of those devices, had they been there, in conjunction with Mrs. Oller's dimensions, play any role in your opinion?
A No.
Q What's the basis for your conclusion that Mrs. Oller was adequately trained on the operation and hazards associated with the machine?
A It's my understanding that she had had several months of training, had been operating in the production capacity for some time, and there really isn't a lot of sophistication with the operation of the machinery. She had been shown how to operate the machine by other employees and had no problems with it prior to her accident.

MR. LIBER: Mark that as 35, please.

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(Plaintiff's Exhibit No. 35 was marked.)

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Q What is your understanding of how long the plaintiff had been an employee of Wilton?

53

A Oh, boy. I can't recall. I keep wanting to say six months, but that's just a stab in the dark.
Q Can you tell me how long she had been operating this particular machine prior to the injury?
A Several months, three or four months.
Q Would it make any difference in your opinion if her testimony was that she was working the machine only seven days before the date of the accident?
A No.
Q Why not?
A Well, there is no -- for that kind of a machinery, there is no magic number that jumps out by any literature or in my opinion of how many days would be adequate to make her comfortable with the machine. I thought she had been on it longer, but she may have been on a similar machine doing different things.
Q What type of similar machine is that?
A I can't recall. I'd have to refer to my notes.
Q Are you familiar with ANSI standard B11.8-6 on the training of employees for drilling, milling, boring and related machines?
A Yes.

54

Q And are you satisfied that Wilton complied with that standard?
A Well, again, ANSI doesn't discuss a time frame or length of training, it just says they shall be trained. Yeah, just says they should be trained.
Q The question was: Are you satisfied that Wilton complied with that standard in this case?
A Yes.
Q Would you agree with me that as far as the machine tool industry is concerned, Anna Oller at the time of the accident was a relatively novice machine operator?
A That I can't answer.
Q Are you familiar with any information or studies with respect to the assignment of experienced or nonexperienced employees to general purpose milling machines?
A There's none that I'm aware of.
Q Did you read Mr. Dempsey's deposition?
A Yes.
Q Do you remember the portion where he's talking about the fact that the general purpose milling machines -- and I'm paraphrasing -- should be reserved for the most experienced of machinists,

55

machine operators?
A I don't recall that he said that, but he may have.
Q Do you agree or disagree with that observation or statement?
A For a production machine, I don't agree with that.
Q Why not?
A Because the machine is so straightforward. It's not a sophisticated CNC machine. It's purely mechanical. Load the part, hit the switch, take the part out.
Q And is the training for that type of machine just like you described it, show them how to do that and that's about it?
A Well, yes. And observe them under production -- the production routine, because I'm sure that if parts aren't loaded correctly, you've got scrap and that's going to be caught in final inspection, and that's, generally, where you see that the machine is not being operated correctly, is in the scrap that it produces.
Q I'm sorry. Are you finished?
A Yes.
Q Under opinion number two, you identified several

56

modifications of the machine; is that correct?
A That's correct.
Q One of the terms you use is an emergency stop button; is that correct?
A That's correct.
Q Is an emergency stop button a term of art in the field of industrial safety or in industrial engineering, to your knowledge?
A They're called E-stops, emergency stops, correct.
Q With respect to a device that merely serves as a power cutoff, would an emergency stop button be a mischaracterization of such a device?
A Not necessarily. You can have an emergency stop that is the disconnect switch. It could be a trip wire. It can be a button. It can be a momentary contact switch, can be interlock. There's a number of things that constitute what an E-stop is.
Q Is it fair to say when you use the term "emergency stop" when you explain it to a new operator, they are operating under the understanding that if you operate that button or that facility, whatever it may be, that the machine will come to a complete stop?

57

A If you tell them that, sure.
Q And is it fair to say that in this case, that was not the way the emergency stop operated?
A That I don't know.
Q Opinion three, you say, "The cutter area or point of operation where the plaintiff received her injuries cannot be guarded due to the size and the configuration of the cutters"; is that correct?
A That's correct.
Q How do you know that?
A Just based upon the description that was given in the depositions.
Q Any specific reference that you can recall?
A Plus the photographs that I reviewed.
Q You say that the installation of a guard would create an in-running nip point which would be equally as hazardous as no guard at all, correct?
A That's correct.
Q And could you explain the basis for that?
A Well, you still have a hazard there, which is a rotating cutter. If the guard moves out of the way, you still have a hazard there, which is your rotating cutter. I believe that, as I

58

said before, it would exacerbate the condition and just create another trap point for the operator, as some guards do.
Q How would it exacerbate the situation?
A Well, it creates another trapping point dependent upon cutter rotation. You can still get your hand or finger caught in it. It really does nothing for what we're talking about, which is rotating cutters. A badly engineered guard is worse than no guard because you think the badly engineered guard is going to somehow protect you, when, in fact, it won't.
Q But nevertheless, you don't think there even is a guard that can be engineered to address the safety issue imposed by the rotating cutter on a horizontal milling machine?
A Well, in my experience, I have not seen one that I would accept in 30 years.
Q Do you know what a miter saw is?
A Yes.
Q Are there any current guarding standards for consumer miter saws?
A There probably is, but it's probably a consumer CSPC standard.
Q Any that would apply to miter saws used in the

59

workplace, to your knowledge?
A There would have to be possibly a self-closing -- they're called an awareness barrier.
Q Are you familiar with the blade guards that are now available on all commercially sold miter saws?
A No.
Q You have no idea what I'm talking about?
A I have a suspicion you're talking about the self-retracting guard, but that's on a -- that design came from a radial arm saw, as opposed to a miter saw. Miter saws came later with that type of guard system.
Q Right. As far as the hazards that the blade would pose to an operator, is there a distinction between that of a miter saw and that of a horizontal milling machine, in your mind?
A It's the same issue. You still can whack your hand off with the miter saw and the radial arm saw guard.
Q But it's the best they could come up with?
It's a fact, isn't it, that ANSI makes no such distinction between the installation of a rotating cutter guard and the creation of

60

in-running nip point?
A You're saying there is no distinction?
Q Right.
A I think it's defined. I think "in-running nip point" is defined in the standard, as I recall.
Q But as a matter of fact, the ANSI standard states that if it's a general purpose milling machine and in the automatic or semiautomatic mode, the rotating cutter has to be guarded if the operator is working within a foot of the cutter.
A I believe it says something like that, yes.
Q Does ANSI provide any distinction or any type of option for a feasibility study?
A I -- it may. I don't recall.
Q Do you see it anywhere on what we've marked as Exhibit --
A 32 --
Q -- 32?
A -- and 35 both. And you're asking for a feasibility study?
Q Yes.
A I don't see anything about feasibility studies.
Q ANSI is straightforward. If the operation comports with the element set forth in B11.8, it

61

states that a guard has to be installed; is that fair to say?
A Yeah. It's pretty straightforward.
Q Paragraph four -- excuse me, opinion four. You find nothing wrong with a person's use of gloves in close proximity to rotating bladed equipment?
A Define "close proximity" for me.
Q Within a foot.
A Less than a foot?
Q Yes.
A It depends. If you're talking about a heavy mule skin work glove, I'd say that would be problematic working around any kind of rotating machinery. And it would be true with drill presses, milling machines. But if you're talking about a lightweight type of PPE, personal protective equipment, that's designed to protect the employee from water hazards and coolant hazards and those kind of things that are dermatological, I think at that point then one has to determine what's the worst case scenario for the operator.
If the gloves -- that's another dichotomy with the OSHA standards. Employers are expected to provide the appropriate personal

62

protective equipment and have to make the right selection and decision.
I personally have never seen a citation issued in my 30 years that dealt with employees wearing gloves on any kind of machinery. I'm not saying that it's proper, I just haven't seen it from an enforcement perspective.
Q What's the difference between a heavy cloth work glove and a light rubber protective glove?
A Well, for example, I carry around surgical gloves in the trunk of my car. That's a lightweight glove that is not designed for anything other than tactile, very minute tactile work. Whereas a heavy work glove, I'd be moving railroad ties.
Q And what's the difference, from those two types of gloves, as far as operation within a foot of a horizontal milling machine?
A Oh, the tearing factor. The rubber gloves, of course, are going to tear quite quickly. The heavy gloves won't.
Q Have you ever heard of the term tear-away gloves?
A No.
Q And what's the relevance of the ability of a

63

glove to be able to tear, as between a rubber, light rubber glove, and a heavy fabric glove?
A What's the ability of it to tear?
MR. McDONALD: What's the relevance?
Q What's the relevance?
A Well, obviously, a lightweight surgical glove can shred a lot quicker than a horse hide glove or a mule skin glove. There is no relevance that I can see because there is no tear-away glove that I'm aware of. There's tear-away clothing.
Q Let me back up. When I asked you the difference between the use of a light rubber glove for protective means from liquid as opposed to a heavy fabric glove in working in close proximity to a milling machine, you mentioned something about the tearing propensity?
A Oh, yes.
Q What's the relevance of that to machine operations?
A The lightweight glove is not going to make the condition any worse or less or greater. It isn't going to matter in a lightweight glove.

64

Anything made out of latex, thin latex, I don't see how it's going to affect what can occur with what we're talking about.
Q So are you suggesting that, in other words, if a machine operator who's working within a foot, a foot or less of a horizontal milling machine, if their gloved hand would have to inadvertently come in contact with the blade, it's more likely that a heavy fabric glove would do more damage than a lightweight rubber glove?
A That sounds fair.
Q And in this case, do you know the reason for why the operators were required to wear rubber gloves?
A I would suspect because of the coolant. It could be a matter of individual choice. I'm not sure.
Q Are there coolants, to your knowledge, which are available, which are not irritating to the skin?
A No. It depends upon the individual.
Q When were you a member of the National Safety Council?
A Back in the '80s; '85, '86, '87.
Q Would you have still been a member in 1991?
A I don't think so. It's possible, though.

65

Q Okay. Would you do me a favor, and if we have to try this case, would you get that information so that we know it at trial?

MR. McDONALD: When he was a member?

MR. LIBER: Yes.

A If I can figure out a way to do that, yeah. We keep all our checks that were written. The reason I think that '91 may have been that year, because I started weapons work about that same time, and I remember going to an NSC meeting in Washington as part of that. So let me check, though. Sure.

Q Placing in front of you what has been marked previously as Plaintiff's Exhibit 18b5, a National Safety Council bulletin on milling machines.

MR. EDDY: Is there a date on that, John?

MR. LIBER: It's copyrighted 1991 on the back.

MR. EDDY: Thank you.

Q That was part of the material submitted in support of Mr. Rennell's affidavit.

Mr. Hayes, were you familiar with that

66

bulletin prior to perhaps this case?

A No.

Q On the first page it lists the primary hazards associated with milling machines, and in the second column on the top it identifies wearing loose-fitting clothing and gloves. Is that fair to say?

A That's usually part of any machine operation, yes. That's what it says.

Q Do you agree with that National Safety Council bulletin, that to reduce the hazard of milling machines, when all practical, gloves should not be worn, as well as loose-fitting clothing, near or around the operation of a milling machine?

A Well, I agree and disagree both. If -- that's the problem with the NSC data. It just says "wearing gloves." It doesn't say that there's alternatives to heavy work gloves. Whereas loose sleeves, that's pretty well-defined.

But just wearing gloves, I disagree that there is not a glove -- I think there is a glove that is acceptable when working with coolants that isn't going to make a hill of beans no matter where you get caught it's so lightweight. And the reason I say that is because today, as

67

well as when I was with OSHA, there is significant enforcement actions for the coolant oil responses that operators were getting from the conversion of what's called nitrosamines in the oil.

So we would make them wear gloves if there was a response, a dermatological response from the coolant, no matter what they were running.

Q Do you have an opinion of the role of the gloves that Anna Oller was wearing made in this case?

A I don't think that would have made a difference at all.

Q Why?

A Because, obviously, the gloves shredded. The pictures that were taken timely to the event, with the blood still there, there's lots of pieces of glove fabric lying around that area. I don't believe it was cut off after the accident. I think the cutter had shredded it, and that's what I'm talking about a lightweight glove I anticipate would do.

Q Did you review or does any of the testimony come to mind where the eye witnesses testified that the glove was caught first and pulled her hand into the rotating cutters?

68

MR. McDONALD: Objection.

A If that's what was said, I would strongly discredit that statement.

Q Why?

A I don't believe that anybody was there to actually see that occur, and if they did, they'd have to look around the end of the spindle head. That's pretty hard to do unless you're left or right of it. It would make no sense that anybody saw that.

Q Once again, you were not there at the time of the accident to observe it yourself?

A That's correct.

Q And you did not deny the opportunity to actually inspect the machine yourself?

A That's correct.

Q We've talked about opinion number five.

Opinion number six, you say the fixture loading station from the cutters was adequate and in compliance with current ANSI standards.

What do you base that upon?

A The fact that it falls somewhere, in my view, if I take -- if I look at all the evidence, nobody knows how far it was away from the loading point to the cutter head. There's a lot of

69

assumptions that it's eight inches. I read that. Why couldn't it equally be assumed that it was 12 inches? Nobody measured it. There's estimations.

The photographs are deceiving. When you look at them, it makes it look like it's within two inches of the cutter head, which is something -- in fundamental evidence photography classes I remember saying I could make something look any way I want it to look. So the photographs are useless. So without measurements taking timely to the event, I discount the inches. That's just a number that somebody grabbed out of the sky, as far as I'm concerned.

Q As far as a nonbias review of this case then, wouldn't it be more fair to say that they were not compliant with the ANSI standards, rather than relying --

A If the evidence clearly shows one thing or the other, you can go either way with it. It's one of those deals that you've got to show me.

Q Right. Well, that's my point, is that it doesn't clearly show that it was, in fact, in compliance, correct?

70

A Not clear, that's true.

Q So, in fact, your opinion in number six should accurately state that it is, in your opinion, not possible to determine whether ANSI has been complied with in this case, or words to that effect?

A Well, why would I assume that it was not in compliance would be the question I would ask myself, and that's the question I did ask. Is there any evidence to tell me that it wasn't in compliance?

Q And is there any evidence to tell you that it was in compliance?

A Well, that's a catch-22. I'm chasing my tail around.

Q But you're assuming the one side and refusing to assume the other.

A Well, without evidence to support that other position, I tend to think most employers try to be good employers and be in compliance. I saw a lot of evidence that their engineering staff had done things in the plant to make it a safer place. That gives them a little more of a leading edge of credibility for me.

Q That's after the fact, though.

71

A Oh, no, before the fact.

Q When was your inspection?

A I can't tell you that.

Q It wasn't before this accident, was it?

A No. No.

Q As a matter of fact, your inspection couldn't have been until after this lawsuit was filed. Is that fair to say?

A I doubt if they would hire me before then. If they did, I'd like to know it.

Q Is it necessary for someone to be injured on a machine before it's determined to be dangerous?

A I would think not.

Q So what is the relevance of your observation that the milling machine in this matter was operated for many years without causing an accident?

A They must have been doing something right. As I said initially, we don't see a lot of accidents on milling machines. That's a fact. There are not a lot that I can point to over the years that I have seen. Don't ask me why. I mean, it looks dangerous, it seems to me. It's like flatulence, it's irritating but not deadly. Can I use that as an analogy?

72

Q You already did.

We'll have fun with that one.

(Off the record.)

Q Do you have anything else to say on the observation that it was operated for many years without causing any accident?

A Well, yeah. Obviously, the squeaky wheel gets the oil in a lot of these safety issues. For example, right now beryllium is getting a lot of oil. For years now they're starting to show up with beryllosis, a lot of sickness going on, and OSHA has not promulgated a new standard that specifically changes the fundamental requirements since I was with the agency from 1973 until 1989.

It doesn't seem that milling machines are on the list of big events for them, and that tells me that there has not been a lot of injuries, or else they would have developed a vertical standard to deal with it. They have not done that.

Q So it's your opinion that that makes the machine less hazardous?

A No. It just doesn't seem that there's a big enough problem with it. You know, obviously,

73

you stick your hands in those cutters, you're going to get a pretty good cut, whether the cutter is rotating or not. The cutters are sharp. You can get a pretty severe laceration by inadvertently contacting the cutter head. And the fact that they haven't had any accidents prior to that -- I mean, usually an accident puts an employer on notice.

Q There's no evidence of any prior accidents; is that correct?

A None that I've seen, correct.

Q Is it fair to say that regardless to OSHA or ANSI, you don't believe that either of those standards would apply to the machine in this case?

A That's correct. I don't believe there was enough to support a violation being issued is a better way to put it.

Q From a safety standpoint, can an employer get away with stating that they did not know of a standard in order to get out from under a violation?

A No.

Q Does that apply equally to the OSHA standard and the ANSI standard?

74

A Not the ANSI standard, but the OSHA standard itself.

Q Okay.

A However, I have to add that, if there is a trade association journal that deals with it, or if they're part of a committee that's on an ANSI standard, conceivably that would be the knowledge prerequisite to issue a citation.

Q Can you believe that a company of Wilton's size which includes a machinery division that produces milling machines could legitimately claim that it did not know of the ANSI guarding standard?

MR. McDONALD: Objection.

A I can't answer that. I don't know what -- how much effort they put towards that. We see it frequently in a lot of companies, including very, very large companies.

Q Well, so then are you saying that it's okay for a large company such as that to violate industry safety standards and get away with it?

MR. McDONALD: Objection.

A No. I'm just saying that there's large, very large companies and small companies that miss things and don't keep up with the standards

75

and --

Q Does that justify hazardous or unsafe practices?

MR. McDONALD: Objection.

A Not necessarily, no. Of course not.

MR. LIBER: Thank you. That's all the questions I have for you.

MR. EDDY: I've got a few.

MR. McDONALD: Okay.

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EXAMINATION OF RICHARD HAYES

BY MR. EDDY:

Q You indicated that -- you said in all your years you don't see many milling machine injuries?

A I haven't, no.

Q When you were working with OSHA, did you ever investigate a milling machine injury such as this?

A Small -- such as this?

Q Yes.

A Well, I don't know. Involving a horizontal milling machine.

I have investigated accidents on horizontal milling machines as a result of a record review of minor injuries.

Q Oh, okay.

76

A Only.

Q With respect to your belief that the automatic spindle stop -- which I think you did indicate you refer to as kind of a nice thing to have on the machine, but you said you didn't consider it a safety device because it's optional with the employee, I think was your exact testimony.

Do you recall that?

A Correct. Yes.

Q Actually, this generation of machine, way back 50 some-odd years ago, when it was designed and built, the device itself was optional with purchaser. Is that what you meant to say, that it was optional with the purchaser, or were you meaning to say it was an optional device for the employee?

A For the employee.

Q Okay. And by that I take it you're referring to the fact that an automatic spindle safety stop can be flipped on and off by a switch, essentially?

A That's my problem with it.

Q If it was a device that -- would you consider it a safety device if it was both nonoptional with the purchase of the machine and it couldn't be

77

turned off?
A Yes.
Q Okay. And so, in fact, if you're one of the purchasers that buys that feature way back when, when machines like this were being built and sold and you purchased the option, and, in fact, it's being used, you would consider it -- well, it would operate as a safety device while it's being used. Is that a fair statement?
A And if the employee actually used it.
Q Right.
A And that was verified through direct observation, yes.
Q Had it flipped on rather than flipped off, it would operate -- it would function as a safety device; you would agree with that?
A Yes.
Q Okay. Have you ever operated a milling machine?
A I have, but not for very long.
Q You have an understanding of why on a machine such as this the automatic spindle safety stop feature -- the automatic spindle stop feature can be toggled on or toggled off? Do you have an understanding that there are milling operations that may be done on these machines

78

that require finely hand milling, that is cranking the piece that's being milled into the cutter and back, and back and forth into the cutter, away from the cutter?
A That's my understanding, yes.
Q And so on a machine like that where you want to have certain milling operations that you're going to do by hand like that, an automatic spindle safety stop would be an impediment during that sort of fine milling operation; is that correct?
A That lends itself to the feasibility issues I was talking about before. You couldn't do the job.
Q Right. Now, with respect to the splash guard and arbor support feature, you indicated that you thought that the splash guard and overarm support -- arbor support brace were -- your words were "totally worthless" in terms of preventing any accident or preventing this accident?
A Preventing this accident.
Q Okay. What do you base that on?
A The fact that it really doesn't serve to guard the cutters.

79

Q Okay.
A The whole issue of guarding cutters is why we're here.
Q Let's just take the splash guard.
As the splash guard was originally intended, it's intended from a functional point of view to protect the operator from having liquid sprayed on him or her that comes off the piece that's being milled.
A That's correct.
Q All right. And so I think we can agree, it wasn't intended as a design feature to guard as a point-of-operation guard, the cutters themselves. We can agree on that, correct?
A Absolutely.
Q Is it your testimony, however, that a splash guard that's in place simply would never, from a practical point of view, operate as a device that blocks inadvertent travel of a hand or arm toward a rotating cutter?
A That's my position, yes.
Q That it never can?
A I don't see how it could.
Q Well, have you ever seen any of the pictures of this type of horizontal milling machine with a

80

splash guard and arbor support brace on it?
A Yes.
Q Have you? And I would show you just -- I have an operator's instruction book that was part of the interrogatory responses in our discovery request to the plant, page two of the operator's instruction book, and it shows a horizontal milling machine of the same vintage, correct?
A Uh-huh.
Q And it shows -- you can tell on here what the arbor -- overarm support brace is or the arbor support brace. Do you see that on here?
A Yeah.
Q And you can see the splash guard is actually behind it, correct?
A Yes.
Q And if you're an operator and you're standing -- I'm just taking hypothetically, I'm not saying this case. I'm just saying hypothetically, if you're an operator standing directly in front of the center portion of the arbor -- and the arbor is where the cutter is loaded on the arbor, correct?
A Correct.
Q And if you're standing right in front of where

81

the arbor comes into the overarm support brace, you're standing right in front of that, and you moved your hand, your right hand from the right position to a left position along the bottom edge of the table, don't you think it would be likely that at some point your hand would actually come in contact or perhaps your wrist in contact with the leading edge of the splash guard before it would hit the cutter?

A It could.

Q And you would agree then that there are some circumstances depending on the exact position of the operator, the exact location and width of the splash guards -- because they come in different sizes -- that it might, under some circumstances, in fact, operate in a fashion that would block inadvertent contact with the cutters?

A With all that, all those variables, yes.

Q Okay. That's fine.

You're not saying it could never do that?

A No.

Q And you made no effort in this case to try to figure out how tall the plaintiff is and where a standard splash guard might be configured to try

82

to figure out whether there could be, in this case, some blocking action that might have prevented this accident?

A I did nothing like that.

Q Now, I want to understand what Plaintiff's Exhibit 34 is, this OSHA standards interpretation and compliance letter.

You obtained this?

A Yes.

Q And is it available on the website as noted in the bottom left-hand corner?

A Yes.

Q Okay.

A You have to go through Ochas to get it, though.

Q What is that?

A It's a consultant secret.

Q Is it -- you have to waive a magic wand to --

A You have to know somebody inside to get in there.

Q So if I'm surfing the Web --

A Yes, you can. There's a link. I'm just -- I didn't want John to hear that.

Q That's all right.

And what is an interpretation and compliance letter?

83

A It is the formal document that is sent out to the field in response to either an OSHA inquiry from within OSHA or from an inquiry outside of OSHA. It's the official document that guides the field staff.

Q Does it qualify as, I guess, the agency's official interpretation of some aspect of one of the OSHA standards and regulations?

A It's their position, based upon a lot of input from manufacturing, the people that make the machinery. I think a good example was, as I said before, press brakes. There is no good way to guard a press brake for some applications. And then they have to come up with a memorandum to get field staff guidance because the compliance staff would be citing all the press brakes and eating up the litigation budget. So this is the official document that they point to or they send to their staff if a question comes up.

Q And this was, apparently, first issued by the Occupational Safety and Health Administration of the United States Department of Labor back in mid February of 1976, correct?

A Yes. And it's never changed.

84

Q Okay. That was my next question. It's never changed.

There were some press guards on electric miter boxes and with regard to saws, and you said that even with those modern guards, those are guards that -- I see them, in a miter box situation when you've got the blades rotating, it's got a plastic cover guard around the underside of the rotating blade. And then as you force the handle down, that plastic cover strikes the piece of wood that's going to be cut and retracts, correct?

A Correct.

Q That was the guard that you were talking about?

A Correct. It's called an unused portion guard.

Q A what?

A An unused portion guard.

Q You said it's just as possible to whack your hand off with one of those on it?

A It's very convenient for that.

Q How does that happen?

A In woodworking, in particular, and in meat cutting where they use the same kind of a saw, the guard gets sticky with flour and other materials, resins, and the guard will kind of

jam up when you're pulling it down. It hesitates. This is what I see. And usually the guard only has to cover the outer periphery of the saw teeth, whether it be a miter saw or whether it be a radial arm saw. And what it's intended to do is to tell you, okay, something's touching my fingers, the next thing that's going to touch is going to be the blade.

Q You mean the wood --

A Well, if your hand's in there, it's going to cut your hand.

Q Right.

A What happens is, this guard tends to stick up just a little bit and the blade always hits your hand anyway. We've done accidents with those.

Q Okay.

A So they don't really work for any other reason other than to prevent any inadvertent contact when the saw's at rest.

MR. EDDY: I don't have anything further. Thanks.

THE STATE OF OHIO,) SS:
COUNTY OF CUYAHOGA.)

I, Tracy L. Barker, a Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that RICHARD HAYES, was first duly sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony then given by him was by me reduced to stenotypy in the presence of said witness, afterwards transcribed on a computer/printer, and that the foregoing is a true and correct transcript of the testimony so given by him as aforesaid.

I do further certify that this deposition was taken at the time and place in the foregoing caption specified. I do further certify that I am not a relative, counsel or attorney of either party, or otherwise interested in the event of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Cleveland, Ohio, on this 19th day of July 2001.

_____
Tracy L. Barker, Notary Public
within and for the State of Ohio
My Commission expires June 6, 2005.

THE STATE OF _____)
) SS:
COUNTY OF _____)

Before me, a Notary Public in and for said state and county, personally appeared the RICHARD HAYES, who acknowledged that he did sign the foregoing transcript and that the same is a true and correct transcript of the testimony so given.

IN TESTIMONY WHEREOF, I have hereunto affixed my name and official seal at _____ this ____ day of _____, 2001.

_____
RICHARD HAYES

_____
Notary Public
My Commission expires: _____