UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR
Complainant

v.

TOPCO, INC.,
Respondent

Docket Nr. 97-0299

Appearances

For Complainant
Marvin Krislov, Esq.
Deputy Solicitor of Labor

Patricia M. Rodenhausen, Esq.
Regional Solicitor

Barnett Silverstein, Esq.
Steven D. Riskin, Esq.
Attorneys
U.S. Department of Labor
New York, New York

For Topco
Joseph P. Paranac, Esq.
Jasinski and Paranac
Newark, N.J.

Before: JOHN H FRYE, III, Judge, OSHRC

DECISION AND ORDER

I INTRODUCTION

Topco, Inc., is a metal stamping company that manufactures lighting fixtures, waste receptacles, and pressed metal ceilings. Topco utilizes presses, lathes, grinders, and other large machinery in its operations. Topco's plant is located in the old Singer sewing machine factory at 107 Trumbull Street, Elizabeth, New Jersey.

From August 19, 1996, to February 5, 1997, Compliance Officer Patricia Kulick conducted an inspection of the Topco factory. She was assisted at various times by Compliance Officer Lisa Trecartin and Compliance Officer Carol Tiedeman. The inspection was planned in connection with a local emphasis program on the metal stamping industry initiated by the Avenel Area Office. As a result of Ms. Kulick's inspection, the Secretary issued three citations to Topco, one serious, one serious willful, and one other-than-serious.[1] The serious citation alleged 38 separate violations of OSHA standards and sought a total penalty $120,500. At trial, the Secretary withdrew three of these alleged violations. The serious willful citation alleges that Topco failed to have adequate point of operation guards on certain presses and failed to maintain a program of periodic and regular inspections of the power presses. The Secretary seeks a $55,000 penalty for each of these alleged violations. The other-than-serious citation alleges four violations, but seeks no penalties.

[1] In a motion filed simultaneously with her brief, the Secretary sought to amend Citation 1, items 3, 18, 19, 21b, 23a, and 33; Citation 2, items 1 and 2; and Citation 3, items 1a, 1b, and 1c to allege, in addition to their present classifications, that they are repeat violations. Were this motion granted, it would be necessary to afford Topco an opportunity to address these added allegations, perhaps with evidence on the similarity of violations. Given the protracted nature of this proceeding and the fact that the motion was not made until well after the close of the trial, it is denied.

Following Topco's notice of contest, the Secretary filed a complaint. Topco, answered and subsequently amended its answer. Topco admits that it is engaged in a business affecting commerce and has not challenged the Commission's jurisdiction. This case was tried in Newark, N.J., beginning in March, 1998.

A. The Legal Standard

In order to establish a violation of a specific standard, the Secretary must show by a preponderance of the evidence that: (a) the standard applies to the cited condition; (b) Topco failed to meet the terms of the standard; (c) employees had access to the violative condition; and (d) the employer had actual or constructive knowledge of the conditions (i.e., the employer either knew or could have known of the conditions with the exercise of reasonable diligence). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994); *Pride Oil Well Service*, 15 BNA OSHC 1809, 1811 (No. 87-692, 1992); *Seibel Modern Manufacturing & Welding Corp.*, 1991 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991); *Astra Pharmaceutical Prod., Inc.*, 1981 CCH OSHD ¶ 25,578, pp. 31899-900 (No. 78-6247, 1981), *aff'd in part*, 681 F.2d 69 (1st Cir. 1982).

B. The Penalties Proposed by the Secretary

In proposing penalties, OSHA's FIRM (Field Inspection Reference Manual) was used as a guide (179). First a gravity-based penalty was determined considering severity and probability (180-187, 191, 193-194). This method was considered and used for every item (180). Gravity is a unique penalty consideration for each different item (182). In determining gravity, severity and probability are considered. Severity considers the type of injury that can occur (183). There is a four-part scale for severity: minimal, low, medium, or high (184). The probability that an accident will occur is evaluated on a two-part scale, lesser or greater, considering the number of exposed employees, duration of exposure, frequency of exposure, proximity of employees to the conditions, use of personal protective equipment, and stress (185).

The gravity-based penalty is then mitigated for size, good faith, and history. The FIRM limits the application of the mitigating factors of size, good faith and history, so as not to deprive the gravity-based penalty from having a deterrent effect (187). The Secretary determined that no adjustment to the proposed penalties should be made for the following reasons: good faith because high gravity (181) and willful violations (193) violations were found during the inspection; history because Topco had been previously cited for many violations, some of which were being repeated (193); and size because the Secretary wanted to achieve a greater deterrent effect (194, 597-599). Topco complains that the Secretary erred in not considering good faith, history, and size, and that, as a result, the Secretary proposed penalties that "... fail to reflect Topco's actual level of culpability and far exceed the amount necessary to effectuate the purposes of the Act." (Topco's brief, p.91.) However, the Secretary clearly considered these factors and determined that it would not be appropriate to make any adjustments because of them (598-99). Topco also argues that the Secretary erred in issuing duplicative citations in instances where the hazards cited were the same and subject to the same abatement. In reviewing the penalties for those items which are affirmed in this decision, I have also considered whether adjustments should be made to the proposed penalties, and whether certain items are duplicative. In considering the appropriate penalty for those items which I have affirmed, I have made adjustments to some proposed penalties. I have also consolidated certain items. These adjustments and consolidations are reflected in the discussion of the items to which they apply.

C. The Alleged Violations, Their Classification, and the Proposed Penalties

Citation 1, Items 1a and 1b Alleged Serious Violations of 29 C.F.R. '' 1910.22(b)(1) and 29 C.F.R. § 1910.22(b)(2)

Citation 1, Item 1a, alleges a violation of 29 C.F.R. § 1910.22(b)(1), which requires sufficient safe clearances for turns or passage where forklifts must maneuver. In the press room (217) and Shanker

(218) areas, two forklifts (216) had difficulty maneuvering in the aisles because of crowded, cluttered conditions (223, 233, 748-749). They came in contact with material that could have been knocked over, which would result in injuries to employees (217-219, 227). The employees were in close proximity to the forklifts (218). The forklifts went by frequently, and these conditions did not improve and were not corrected while OSHA was at the site from August 1996 to February 1997 (219). The Secretary points to Exhibits C-5, photographs numbered 1 and 2, C-10, and C-11 to show and describe the conditions of these blocked aisles (220-222, 224). To come into compliance, Topco had to move materials out of the aisles (222). A forklift truck accident could result in fractures and contusions (218-219, 227). Topco knew of the conditions and the type of injury that could result if an accident occurred (218-20).

Topco asserts that this citation is based on one isolated observation by Ms. Kulick of an operator trying to turn a forklift around in the middle of an aisle, that the aisles were of sufficient width (10 feet) (1261-62), that the obstructions in the aisles were wheeled carts that were moved when full (1266-70), and that Exhibit C-5, photos one and two, depicts a storage area that is not entered by forklifts (1272-77). While there is no basis to question Topco's second and third assertions, its first is in error. Ms. Kulick testified that the aisle was very cluttered and that the condition was constantly changing. Sometimes an aisle would be completely blocked. She specifically testified that she noted this condition throughout her inspection (223-24). The standard requires that:

> Aisle and passageways shall be kept clear and in good repair, with no obstruction across or in aisles that could create a hazard.

The Secretary has established this violation. This item is affirmed.

Citation 1, Item 1b alleges a violation of 29 C.F.R. § 1910.22(b)(2), which requires that aisles be marked. None of the aisles were marked (229, 231-233, 237, C-5 [photographs 1 and 2], C-11, C-12,

C-13). The Secretary asserts that about thirty employees (235) were exposed to the serious hazard of being hit by the forklift trucks (229-230), and that this condition was in plain view. Topco counters that the aisles were demarked by a row of columns on one side and presses on the other (1261-62, 1270). This demarcation is sufficient. This item is vacated.

The gravity-based penalty for this violation proposed by the Secretary was $3,500 (228) based upon the assumption that an accident 1) would inflict an injury of medium severity and 2) had a greater probability of occurrence (227). It is assessed.

Citation 1, Items 2a and 2b Alleged Serious Violations of 29 C.F.R. ''

1910.26(c)(2)(vii) and 29 C.F.R. § 1910.26(c)(3)(iii)

Section 1910.26(c)(2)(vii) requires that portable metal ladders with defects be marked and removed from service for repair, and ' 1910.26(c)(3)(iii) requires that ladders be placed with a secure footing. Ms. Kulick testified that a fourteen foot, metal, portable ladder with the third rung from the top bent (240, C-14) was not tagged or marked and removed from service for repair (246, 887, 1457, 1496) and was in use (239, 241, 246). She also testified that this ladder lacked safety feet and was on a greasy, oily floor (242, 247, C-15).

Topco argues, first, that the ladder was not defective. A review of the photographic evidence convinces me that it was. Indeed, Mr. Gindoff acknowledged that it was not safe (1254). Next, Topco argues that Ms. Kulick's never established that an employee was exposed to the hazard. This argument must be rejected because the ladder was available for use. Finally, Topco asserts that Mr. Gindoff ordered that the ladder be taken out of service three weeks prior to the OSHA inspection (Tr. 1253-18 to 1254-25), and reprimanded the employee who failed to discard it (Tr. 1255-1 to 18). Mr. Gindoff testified, without contradiction, that immediately on seeing the defective ladder on the press where Ms. Kulick observed it, he directed the employee involved to use a new ladder that had just been purchased (1255). However, he did not indicate that he had taken this action to Ms. Kulick a few minutes later when she joined him at the press (1457, 1496). While Topco regards the presence of the ladder to be the result of unforeseeable employee misconduct, it failed to establish this defense. Item 2a is affirmed.

Topco argues that item 2b must be vacated because, although Ms. Kulick testified that the ladder was set on a "greasy, oily floor" and did not have safety feet (Tr. 245-6 to 8; Exh. C-15), she admitted that Ex. C-15 fails to show a particularly oily or greasy floor. (Tr. 245-6 to 8). Further, Topco asserts that there

is no support for Ms. Kulick's contention that it was necessary to secure the footing of the ladder with safety feet. The standard merely requires that the ladder "base be placed with a secure footing" -- not that all ladders have safety feet. Topco's position is well-taken. Item 2b is vacated.

An employee using the ladder would have been exposed to a fourteen-foot fall onto concrete. A serious injury would occur from such a fall (248-249). A gravity-based penalty of $2,500, based upon a high severity and a lesser probability (250), is assessed.

Citation 1, Item 3 Alleged Serious Violation of 29 C.F.R. § 1910.36(b)(4)

The cited standard prohibits the locking of exits to prevent free escape from inside of the building. In the press room, the designated exit (253) located between presses 59 and 60 remained padlocked shut (251, 253, C-16) for three hours after the plant opened (256). Thirty employees in the press room were exposed to the hazard (252). The door and the padlock on it were in plain view (256). This item was as serious based upon the potential injury of severe burns that could result if a fire broke out and employees were delayed in escaping (256). Topco was previously cited for violating this same standard in 1990 (C-1 at p. 3 of 9). The Secretary proposed a penalty of $5,000 based upon a high severity and greater probability (256-257).

Topco asserts the employee misconduct defense. Mr. Gindoff testified that each foreman is responsible for unlocking exit doors before the start of the day's shift. In this instance, when the lock was pointed out, Mr. Gindoff immediately summoned the foreman in question and had the lock removed. He later reprimanded the foreman (1247-49). Although Ms. Kulick's inspection spanned more than five months, this is the only instance of a locked exit door which she cited. Topco's position is well taken. This item is vacated.

Citation 1, Item 4 Alleged Serious Violation of 29 C.F.R. § 1910.37(h)(1)

Citation 1, Item 5 Alleged Serious Violation of 29 C.F.R. § 1910.37(k)(2)
Citation 1, Item 6 Alleged Serious Violation of 29 C.F.R. § 1910.37(q)(1)

Section 1910.37(h)(1) requires that exits discharge directly to the street or to open space that gives access to a public way. Here there is a fence running parallel to the rear of the building, about six feet from the building (260), without any openings in it (271), which does not permit one to get to a street or open space or public way (270). Five doors that the Secretary alleges serve as emergency exits (265, 267, 276, 792, 794, 1460-1461, 1504-1505, C-5 [photographs 3 through 6], C-17) open to the rear of the building where this fence is located (260).

Section 1910.37(k)(2) requires that means of egress be continuously maintained free of obstructions or impediments to full instant use in case of fire or other emergency. Here, the area between the rear of the building and the fence is filled with an accumulation of weeds, bricks, garbage, and overgrown plants, preventing escape in the event of an emergency (261, 263, 271, 273).

Section 1910.37(q)(1) requires that exits or access to exits be marked by readily visible signs. Here, two exits along the rear of the building (276), one in the packaging and shipping area and the other in the tool room (275), were not marked. Directional signs to these exits were also needed because they were not readily visible due to the placement of large equipment which obstructed a view of these doors (274, 276). Mr. Gindoff told the OSHA inspectors that these were exit doors and that the employees would use them in the event of an emergency (276, 792, 794, 1460-1461, 1504-1505). The doors were also equipped with panic hardware, further indicating that they were emergency exit doors (276, C-5 [photograph 3]).

Mr. Gindoff testified that the rear doors were not intended as exits and were not used as such. He testified that when he arrived at Topco in the mid-1970's, he observed that the rear doors were equipped with

exit signs but that the doors opened onto an unsafe passageway bounded by a long fence. (Tr. 1239-1 to 8). Concerned that these doorways were not safe exits, Mr. Gindoff contacted the local fire inspector who examined the rear doors, determined that they were not safe emergency exits and suggested that Mr. Gindoff remove the exit signs from these doors. (Tr. 1239-14 to 1240-15; 1241-20 to 1242-12). Accordingly, Mr. Gindoff immediately removed the exit signs, and from that point on, the rear doors were no longer used as exits. (Tr. 1242-1). Mr. Busicchia confirmed that, when he inspected the premises for OSHA in 1990, these rear doors were not being used as exits. (Tr. 996-98). These items are vacated.

Citation 1, Item 7 Alleged Serious Violation of 29 C.F.R. § 1910.107(b)(5)(i)

The cited standard requires that the average air velocity over the open face of the paint spray booth exceed 100 linear feet per minute. Here, after taking and averaging nine readings, it was found that the average air velocity over the open face of the paint spray booth was only 68.88 linear feet per minute (283, 284, 760-762). An employee used the spray paint booth (285). The booth was equipped with a manometer which showed that the minimum standard of 100 feet per minute velocity was not maintained (285-286). This item was classified as serious because of the injury of severe burns that could result should a fire result from the accumulation of vapors (283, 285). Mr. Gindoff could see by looking at the manometer within the booth, in plain view, that the required minimum air velocity was not being maintained. The Secretary proposed a penalty of $1,500 based upon a low severity and lesser probability (287). Topco has not addressed this item in its brief. Accordingly, it is affirmed and a penalty of $1,500 assessed.

Citation 1, Item 8 Alleged Serious Violation of 29 C.F.R. § 1910.132(d)(1)

This standard requires Topco to assess the workplace to determine if hazards are present which necessitate the use of personal protective equipment. During the course of the OSHA inspection, the

lack of use of required eye protection was observed in several operations (290-291). Ms. Kulick testified that: “I asked Mr. Gindoff if he performed a hazard assessment of the facility and he said no.” (289). The Secretary classified this item as serious because of the eye injury that could result (292). She maintains that the need for personal protective eye equipment was obvious and in plain view (291). The Secretary proposed a penalty of $2,500 based upon a high severity and lesser probability (292).

Topco asserts that this allegation flies in the face of the overwhelming evidence establishing that Topco in fact maintains a comprehensive hazard assessment program. It states:

- Mr. Gindoff, along with Jose Diaz, the plant Foreman, and Bob Vastano, plant Engineer, regularly "review the operations that are taking place" to determine what equipment is necessary "to protect the employees." (Tr. 1277-23 to 25);
- With respect to eye protection, "we look for any hazards having to do with flying particles that could damage the eye" and "see if there are any chemicals that can be splashed in the eye" (Tr. 1278-1 to 9) and have provided eyeglasses, safety glasses, goggles and face shields where necessary (Tr. 1278-1 to 9);
- With respect to hand protection, leather gloves, cotton gloves, heavy cotton gloves and rubber gloves are provided for tasks such as deburring and polishing (Tr. 1278-13 to 1279-11);
- With regard to dust, dust masks are provided when it is determined "that dust or smoke in an area can be an irritant" (Tr. 1279-23 to 1280-2); and
- Topco enforces safety regulations regarding clothing and hair where there is a potential safety hazard of hair or clothing getting caught in machinery (T1280-18 to 23).

Ms. Kulick acknowledged seeing employees wearing gloves and dust masks (762-64). This item is vacated.

Citation 1, Item 9 Alleged Serious Violation of 29 C.F.R. § 1910.133(a)(1)

This standard mandates that protective eye equipment be required where there was a reasonable probability of injury that could be prevented by such equipment. Employees used grinders (7, 10, 293), a belt sander (294-296), milling machine (293), compressed air for cleaning (8, 13), and compressed air for cooling hot solder (294) while not having their eyes protected with safety glasses (7-8, 293, 295-296, 298, 763-764, 920-921). Employees were exposed to the hazards of eye injuries from flying particles during these operations while using this equipment (7-8, 293-294, 763-764). The Secretary classified this item as serious because of the eye injury that could result (293-295). The need for personal protective eye equipment was obvious and in plain view (291), and Mr. Gindoff knew that some of his employees were not wearing protective eye equipment (296, 298). The Secretary proposed a penalty of $2,500 based upon a high severity and lesser probability (297).

Topco argues that the Secretary's evidence was limited to observing one employee cooling a piece he had soldered with an air nozzle and to observations of grinding machines that were not available for use (brief, pp. 52-53). However, Ms. Kulick, Ms. Tiedeman, and Ms. Trecartin all testified to having observed employees performing operations where eye protection was necessary, including grinding and milling operations. This item is affirmed and a penalty of $2,500 assessed.

Citation 1, Item 10 Alleged Serious Violation of 29 C.F.R. § 1910.147(c)(4)(i)
Citation 1, Item 11 Alleged Serious Violation of 29 C.F.R. § 1910.147(c)(5)(i)
Citation 1, Item 12 Alleged Serious Violation of 29 C.F.R. § 1910.147(c)(7)(i)

Section 1910.147(c)(4)(i) requires documented procedures for the control of potentially hazardous energy for employees performing maintenance/servicing on machinery such as presses and shears, i.e., written lockout/tagout procedures (item 10). Section 1910.147(c)(5)(i) requires that hardware be

provided by the employer for isolating, securing, or blocking machines or equipment from energy sources, i.e., hardware for lockout/tagout procedures (item 11). Section 1910.147(c)(7)(i) requires training to ensure that the purpose and function of the energy control program were understood by employees, i.e., training in the employer's lockout/tagout program (item 12).

Topco's only written program was about hazard communications (82). There were no written procedures for lockout/tagout (82-83, 300, 302-305). Topco did not have or use locks or tags when machinery was being maintained/serviced (309-311). The employees were not trained with regard to Topco's lockout/tagout program (312, 313, 315).

The classification of these items was serious because of the fractures and crushing or amputation injuries that could result in the event that the machinery suddenly came on or was switched on by an unwitting person, not realizing that a mechanic/maintenance man or set up man was working on the machinery (301, 306-308, 310, 316). Mr. Gindoff knew that his maintenance man was following a procedure that was not documented, had no hardware with which to lockout machinery, had no tags with which to tag equipment being serviced, and Mr. Gindoff knew that the set up men and operators were not trained in lockout/tagout (305-307, 310-311, 315-316). Each one of these three items has a proposed penalty of $2,500 based upon a high severity and lesser probability (307-308, 311, 317). Because each one of these items requires different and separate abatement, and abatement of one does not abate the others, the Secretary did not combine these items.

Topco counters that Ms. Kulick's own 1B worksheet (Ex. C-18[2]) shows that Topco had a safe, effective lockout/tagout program and that Mr. Morgado -- the only employee who performed maintenance on the machines -- consistently utilized that program. Ms. Kulick recorded:

> Only 1 maint. man who performs all maintenance on all the machinery. CSHO's spoke with maint. man - he stated that he has been employed for 27 years as their maint. man. He was instructed to remove the fuse (he puts it in his maint. office) to disconnect the electrical, when working on machines that have air or hydraulics he closes the valve, bleeds the lines and removes the hoses. On 10/21/96 (video) CSHO observed maint. man working on DP #11 press. He was investigating the valves at the top. The fuse had been removed, valves for the hydraulic and air lines were closed and the lines pulled. He had to remove the valve and replace it. On 10/30/96 employee was working on DP #8 - reassembling the clutch (elect./pneumatic) which involved replacing and rebuilding the bearing in the clutch assembly. The fuse had been removed, valves closed, and hoses disconnected.

Ms. Kulick testified that this procedure (i.e., removing a fuse and bleeding the air and hydraulic lines) safely de-energized the machines. (*See* Tr. 306-11 to 14; 768-11 to 17).

Topco urges that it is manifestly unfair to cite it for failing to have its lockout/tagout program in writing when implementation of the program affected only one employee and he was obviously aware of its requirements, or to cite it for failing to provide training and hardware when Mr. Morgado was fully versed in proper lockout/tagout procedures and did not require additional hardware to effectively de-energize the machines. Topco states that the Secretary has failed to prove more than, at most, a *de minimus* violation of the lockout/tagout standard.

The Secretary has stated three technical violations. However, Topco is correct that, given the effective program it has in place, these items are *de minimus*. Accordingly, the alleged violations are affirmed and a penalty of $00 each assessed.

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[2] It appears that Ex. C-18 was not offered at the hearing. Because it is material to the resolution of these items and stands on the same footing as other Forms 1b admitted at the hearing, it is hereby admitted.

Citation 1, Item 13 Alleged Serious Violation of 29 C.F.R. § 1910.176(b)

The cited standard requires that material stored in tiers be stacked, blocked, interlocked or limited in height so that it was stable and secure against sliding and collapse. The Secretary argues that throughout the premises, especially in the Lincoln, packaging/shipping, and lamp storage areas, wherever materials and boxes were stored, stacking was so disorganized and haphazard that the materials so stored were not secure from collapsing or falling (317-322, C-5 [photograph 1], C-19). The Secretary classified this item as serious because of fractures could result from a heavy box falling onto an employee (318-320). This condition was in plain view (322). The Secretary proposed a penalty of $1,500 based upon a low severity and lesser probability (323).

Topco maintains that the photographs proffered by the Secretary to support this citation show that the material is uniformly stored in a stable and secure manner, and points out that on cross-examination Ms. Kulick acknowledged that she did not have a photograph of the cited condition. Consequently, Topco argues that the Secretary cannot satisfy her burden of proving a violation of 29 CFR 1910.176(b) by a preponderance of the evidence.

While Topco is correct that the photographs do not show the cited condition, Ms. Kulick's unequivocal testimony was that there was material stacked in an unstable manner. That is sufficient to satisfy the Secretary's burden. Accordingly, this item is affirmed. However, the photographs depict material which is properly stacked, leading to the inference that the condition was not widespread. Accordingly, it is appropriate to reduce the Secretary's proposed penalty. A penalty of $1,000 is assessed.

Citation 1, Item 14 Alleged Serious Violation of 29 C.F.R. § 1910.178(l)

The cited standard requires that operators be trained in the safe operation of forklift trucks. Topco had two employees who usually drove the forklifts, and its maintenance man would drive as needed.

The Secretary, relying on the testimony of Ms. Kulick and Ms. Tiedeman, argues that these three men were not trained in the safe operation of the forklifts (323-326, 1464, 1492). The Secretary classified this item as serious based upon the hazard of using an untrained, potentially unsafe operator (323). Employees were directly exposed to the hazards created by unsafe driving (324) and the potential injuries that could result from unsafe operation and driving of the forklift trucks. The Secretary proposed a penalty of $2,500 based upon a high severity and lesser probability (326).

Mr. Gindoff contradicted Ms. Kulick's testimony. He testified at the hearing, that the two forklift operators employed by Topco at the time of the inspection, Richard Martin and Gene Gamble, had each been trained by Topco's former plant manager, Pat Mazza. (Tr. 1290-7 to 1291-8). In rebuttal, the Secretary's counsel asked Ms. Kulick once again to relate Mr. Gindoff's response, and she indicated that he had said the operators were not trained by Topco, and that the maintenance man had never been trained (1464). Counsel asked Ms. Tiedeman for Mr. Gindoff's precise answer to the question whether the operators had been trained. She responded: "'Not by Topco.'" She indicated that she found this statement in her field notes (1492). While it is plausible that Mr. Gindoff would indicate that he himself did not train the operators when asked, it is not plausible that he would have failed to indicate that the operators had been trained by another. Accordingly this item is affirmed and a penalty of $2,500 assessed.

Citation 1, Item 15 Alleged Serious Violation of 29 C.F.R. § 1910.178(n)(7)(iii)

The cited standard prohibits driving of the forklifts, which are ascending or descending grades, with the forks elevated more than necessary to clear the road surface. It states:

> (7) Grades shall be ascended or descended slowly.
>
> * * *
>
> (iii) On all grades the load and load engaging means shall be tilted back if applicable, and raised only as far as necessary to clear the road surface.

While Ms. Kulick testified that the standard includes zero grades, that interpretation is at odds with its specific language; one does not ascend or descend a zero grade. This item is vacated.

Citation 1, Item 18 Alleged Serious Violation of 29 C.F.R. § 1910.212(a)(1)

The cited standard requires machine guarding "to protect operators and other employees from hazards created by point of operation, ingoing nip points, rotating parts, flying chips and sparks." The Secretary issued the citation because Topco failed to guard a rotating part (instance 1, the unused portion of the blade on a Johnson horizontal band saw) and an ingoing nip point (instance 2, on a belt sander) (C-21). According to the Secretary, the saw was used by employees (342) to cut metal (345). When the employees used the saw, they were exposed to an amputation hazard (342-343) in that their fingers were close enough to go right into the unguarded saw blade (343). The saw is shown in C-22 (341). Twelve inches of the blade on the left and seven inches of the blade on the right were exposed and unguarded (346). The belt sander is depicted in C-5 (photograph 7)(343) and lacked a side guard for the in-running nip point (344). The employee would be within two inches of the unguarded, in-running nip point when using the sander (344). The Secretary classified this item as serious based upon the potential injury of amputation (343-344, C-21). The Secretary proposed a penalty of $2,500 based upon a high severity and lesser probability (346-347).. Topco was previously cited for violating this same standard (C-1, p. 6 of 9).

By contrast, Mr. Gindoff testified that both the band saw and belt sander were not in service and thus not accessible to employees at the time of the inspection. (Tr. 1287-1289). Mr. Gindoff testified that the belt sander "hadn't been in service since nineteen ninety-four" and the band saw was "spotlessly clean and it obviously hadn't been used and it wasn't being used." (Tr. 1287-1289). According to Mr. Gindoff, Topco had no jobs for the belt sander after it stopped producing decorator lamps for retail stores in 1994 (1281-82).

Both machines appear to have been located where employees had access to them. There is no indication that they were tagged out or otherwise rendered inoperable. Nor is there any indication that employees were instructed not to use them. While the lack of jobs for the belt sander persuades me that it should not be regarded as presenting a hazard, the same is not true of the band saw. Indeed, Mr. Gindoff testified that when he observed this machine with Ms. Kulick, it appeared that someone was adjusting its belts (1288-89). That strongly implies that it was about to be used. This item is affirmed. A penalty of $2,500 is assessed.

Citation 1, Item 19 Alleged Serious Violation of 29 C.F.R. § 1910.212(a)(3)(ii)

The cited standard requires point of operation guarding on machinery to prevent employees from having any part of their body in the danger zones during operating cycles. The Secretary issued this citation because of: an inadequate point of operation guard on one sheer on which there had been a previous amputation (364, C-24); no guarding whatsoever on two lathes, an amputation having occurred on one of the two (361, 374-375, C-25, C-26); and no guarding whatsoever on two riveters (377-381, C-1, C-27, C-28). Topco was previously cited for violating this same standard (382, C-1). There were two amputations caused by these machines at Topco's premises (381-382). During normal operations, the employees' fingers would be in the danger zone, i.e., in the actual point of operation, and within four to six inches of it (379, 381). The Secretary classified this item as serious because of the fractures, amputation/crushing injuries that could result, and which in fact had resulted (381, 384). The Secretary's proposed penalty of $5,000 is based upon a high severity and greater probability (386-387).

Topco, relying on *Miniature Nut and Screw Corp.*, 17 OSHC 1557, 1560 (1996) and *Hughes Brothers, Inc.*, 6 OSHC 1830 (1978), argues that it is well-settled that in order to prove a machine guarding violation, the Secretary must prove "employee exposure" to a point of operation hazard. Topco takes the

position that this element of proof cannot be met where the stock itself acts as a sufficient guard "so that employees cannot accidentally come in contact with the point of hazard during the machine's operation." Measured against these standards, Topco asserts that the subject lathes and riveters provide no bases for a violation of Section 212(a)(3)(ii).

1. Lathe Nos. 733 and 7

Mr. Gindoff testified that: (1) the No. 733 lathe operates by the operator placing "a piece on the chuck with his right hand" and lifting a lever to advance the roller towards the piece with his left hand; (2) when the operator "releases the lever the tool retracts"; and (3) "both hands are always occupied." (Tr. 1298). He did not describe the operation of No.7, nor did he address Ms. Kulick's testimony that an amputation occurred on this lathe during the course of the inspection. I find that the Secretary failed to demonstrate the hazard presented by No. 733. I also find that the unrebutted testimony that an amputation occurred on No. 7 demonstrates that a hazard existed and that the employees operating that machine were exposed to it.

2. Stimpson Rivetor and SC-18 Rivetor

Mr. Gindoff testified that when operating the Stimpson rivetor, the operator rivets the stock by "supporting the can in the left hand and holding the handle in the right hand" so that both hands are always occupied. (Tr. 1295-1296). In fact, Mr. Gindoff stated that the piece "couldn't be done unless both parts of that were supported." (Tr. 1296). Similarly, in order to operate the SC-18 rivetor, Mr. Gindoff testified that "the operator has to hold both sides of the can... she has to hold it and keep pressure against the table at both sides to make sure she's picking up the grooves so that the rivets can be inserted in the right position." (Tr. 1294). He further testified that no guard was necessary on the SC-18 rivetor because the operator's hands were always 6 to 8 inches away from the point of operation. (Tr. 1294-1295). Ms. Kulick confirmed Mr.

Gindoff's testimony that in order to operate the rivetors, the operator must use be both hands to hold the piece. (Tr. 845).

While there is no basis to question Mr. Gindoff's description of the operation of these two machines, it is obvious from the photographs that there is nothing preventing an operator from coming into contact with the points of operation except the need to follow established operating procedures. Thus the operators of these machines are exposed to the hazard. "The standard requires ... that guarding be provided by a 'device' and eschews reliance upon the skill or attentiveness of employees." *Hughes Brothers, Inc., supra,* 6 OSHC at 1832. I find that these two machines were not in compliance with ' 1910.212(a)(3)(ii).

3. Peck, Stow & Wilcox Shear

Topco points out that when Ms. Kulick observed the shear, the operator had failed to properly adjust the guard. Mr. Gindoff testified that because this was contrary to company rules, he "immediately stopped Ms. Montez from operating and told her to adjust the sheer" because "she adjusts that herself as the job changes." (Tr. 1292). He further testified that as he left the area with Ms. Kulick, "I got Jose Diaz, who was her superior, told him what happened and told him to make sure that he disciplines her appropriately." (Tr. 1292-1293). Ms. Montez was subsequently disciplined and warned that "if this happened again she would then get a suspension." (Tr. 1293). Thus Topco relies on the employee misconduct defense.

Whether Topco established the employee misconduct defense is problematic. However, it is not necessary to decide this issue. Ms. Kulick indicated that the shear had a guard, and did not question its adequacy. Rather, she indicated that the guard was not properly adjusted. The cited standard speaks only to the provision of point-of-operation guards. Because the shear had such a guard, it was in compliance with this standard.

Lathe No. 7 and the two riveters were not in compliance with ' 1910.212(a)(3)(ii). Consequently, the Secretary has established that Topco was in violation of that standard, and this item is affirmed. A penalty of $5,000 is assessed.

Citation 1, Item 20 Alleged Serious Violation of 29 C.F.R. § 1910.212(a)(5)

The cited standard requires that "[w]hen the periphery of the blades of a fan is less than seven (7) feet above the floor or working level, the blades shall be guarded. The guard shall have openings no larger than one-half (½) inch." Topco's employees used, among others, pedestal fans, which stood within 4'6" off the floor, whose fan blade guard openings measured 3" x 6", 2", and 3" x 6" (388-391, 394-396, C-5 [photograph 8], C-29, C-30). Employees worked within a foot of the fans (391); right next to the fans (392). To turn these fans on and off, the employees would get within six inches of the blades (395). The classification for Citation 1, Item 20 was serious based upon the injury of amputation of fingers (396) which could occur if an employee contacted the rotating fan blades. The Secretary proposed a penalty of $2,500 based upon a high severity and lesser probability of occurrence (397-398). Topco has not addressed this item in its brief. Accordingly, this item is affirmed and a $2,500 penalty assessed.

Citation 1, Item 21a Alleged Serious Violation of 29 C.F.R. § 1910.215(a)(4)
Citation 1, Item 21b Alleged Serious Violation of 29 C.F.R. § 1910.215(b)(9)

Citation 1, Item 21a was issued for an alleged violation of 29 C.F.R. § 1910.215(a)(4) which requires work rests on grinders. Citation 1, Item 21b was issued for an alleged violation of 29 C.F.R. § 1910.215(b)(9) which provides that on a bench grinder "the distance between the wheel periphery and the adjustable tongue or the end of the peripheral member at the top [of the safety guard] shall never exceed one-fourth inch." The Secretary maintains that Topco's employees used, on a daily basis (402, 403, 407, 412-413, 418, 420, 422), bench grinders not equipped with work rests (407, 411-412, 414, C-31, C-32) and with improperly adjusted tongue guards, i.e., more than one-fourth inch from the wheel

(403, 414, 418, 420, C-32, C-33). The tongue guards were from one-half inch to one and one-quarter inches away from the wheels (407, 414, 418, C-32, C-33).[3] The grinders were used on a daily basis as needed (403, 407, 412-414, 418, 420, 422). The Secretary classified these items as serious based upon the potential injury of fractures and severe abrasions from being hit by broken wheel parts or getting one's fingers caught in the wheels (399, 407, 420-421). The proposed penalty of $2,000 is based upon a medium severity and lesser probability of occurrence (409, 421).

Topco argues that these machines were not available for use.

1. Tool Room Baldor Bench Grinder and Dayton Pedestal Grinder

Topco urges that Ms. Kulick failed to determine if the Baldor bench grinder and Dayton pedestal grinder were available for use at the time of her inspection. It points out that she testified that she never observed the grinders in use. (Tr. 849). Nor did she ask an employee if and when they used the grinders. (Tr. 413-414; 849-850). Finally, Ms. Kulick testified that because she did not determined when exactly the grinders were used, she simply "put it into a range" of "within the last month." (Tr. 851).

Mr. Gindoff testified that the Baldor bench grinder and Dayton pedestal grinder "hadn't been used for some time ...[if] they were to be used, of course the work rest would be reinstated." (Tr. 1309). Mr. Gindoff further testified that the grinders were obviously unavailable for use because "they were in rear of the tool room" (Tr. 1308) and “just not convenient for the dye [sic] makers to use” (Tr. 1309). Mr. Gindoff indicated that there were other "adjusted" grinders in the tool which the employees used. (Tr. 1308-1309).

[3] The size of the wheel opening is the distance between the wheel periphery and the adjustable tongue or the end of the peripheral member at the top, which the cited standard requires to be no more than one-fourth inch. *See*, *e.g.*, Figures O-20 through O-22 (discussing "openings") in the standards.

That a machine is ‘just not convenient ... to use’ is an insufficient basis on which to conclude that the machine is ‘not available’ for use. Clearly, an employee was not prevented from using the cited machines should he decide to do so. This defense is rejected.

2. US Electrical Tool Pedestal Grinder

A review of the item itself shows that at the time of Ms. Kulick's inspection, the grinder was in the maintenance shop for repairs and thus out of service and unavailable. This fact was confirmed by Mr. Gindoff, who testified that the grinder "was in the maintenance shop, being repaired, the motor was being replaced." (Tr. 1309). Insofar as this item relates to the US Electrical tool pedestal grinder, it is vacated.

3. Dayton Bench Grinder

Mr. Gindoff testified that the Dayton bench grinder was unavailable for use at the time of Ms. Kulick's inspection. (Tr. 1310). This position is accepted for the reasons given in connection with the belt sander discussed in item 18.

This item is affirmed and a penalty of $2,000 assessed.

Citation 1, Item 22 Alleged Serious Violation of 29 C.F.R. § 1910.217(b)(3)(i)
Citation 1, Item 25 Alleged Serious Violation of 29 C.F.R. § 1910.217(b)(6)(ii)
Citation 1, Item 27 Alleged Serious Violation of 29 C.F.R. § 1910.217(b)(7)(v)(c)

Section 1910.217(b)(3)(i) requires a single stroke mechanism on mechanical power presses using full revolution clutches. The Secretary issued this item because the Bliss white foot pedal press, press P-38, and press 7A-12 used full revolution clutches (422) and continued to operate after being tripped, without stopping (423, 428-431, C-5 [photographs 9 through 12], C-34). The Secretary classified this item as serious based upon the potential amputation/crushing injury to which employees were exposed (422, 425-426, 433). The operators' hands were within six inches of the points of operation (436). The proposed penalty was $5,000 based upon a high severity and greater probability of occurrence (433).

Citation 1, item 25, charges certain presses violated ' 1910.217(b)(6)(ii) in that they were actuated by a two-hand trip but did not incorporate an anti-repeat feature. Item 27 charges the same violation under ' 1910.217(b)(7)(v)(c), which pertains to part revolution machines. Ms. Kulick testified that the presses continued to cycle so long as the trip was depressed, rather than stopping after one cycle (Tr. 485-86, 503-504, C-53).

Ms. Kulick testified, and the Secretary argues, that the standard unequivocally requires that presses being fed by hand rather than automatically must incorporate single stroke or anti repeat mechanisms. While Mr. Gindoff indicated that each of the presses has a single stroke or anti repeat mechanism, each is also capable of operating in the continuous mode so that "the press [would] make more than one cycle ... so if the operator needed two or three or four strokes to do a job, that would be the mode that would allow the operator to do that." (Tr. 1164-65). There is nothing in Mr. Gindoff's description of the operations of some of these presses that indicates that multiple strokes are needed. Moreover, all are fed by hand.

The standards require that the presses have an anti-repeat or single stroke feature, and Ms. Kulick interprets that to require that this feature be functioning. This is a reasonable interpretation of the standard. Consequently, in the absence a showing of a need for operation in the continuous mode, I find that the Secretary has established this violation.

The Secretary points out that the hazards and exposure are the same for Citation 1, Items 22, 25, and 27. She classified each item as serious based upon the potential amputation/crushing injury to which employees were exposed (486-487), and proposed a penalty of $5,000 for each based upon a high severity and greater probability (491). The fact that three separate items and penalties were put forward to cover the same hazards and exposure seems to result from the fact that three separate subsections of

a very detailed standard are involved. Were this a more usual case in which only one subsection was involved, one item and one penalty would have been proposed. Accordingly, I assess a single $5,000 penalty for all three items.

Citation 1, Item 23a Alleged Serious Violation of 29 C.F.R. § 1910.217(b)(4)(i)

Citation 1, Item 23b Alleged Serious Violation of 29 C.F.R. § 1910.217(b)(4)(ii)

The cited standards require that on full revolution power presses, foot-pedal mechanisms must be protected to prevent unintended operation from falling or moving objects or by accidental stepping onto the pedals (1910.217(b)(4)(i)) and the foot pedals must have a pad with a nonslip contact area firmly attached to the pedal (1910.217(b)(4)(ii)). The Secretary issued the citation because the three presses, P-38, Havir 69, and Rouselle 67, did not have any foot pedal protection (437, 439-444, C-5 [photograph 11], C-35 through C-38) (item 23a), and the seven presses, Bliss 19, Bliss white foot pedal, Bliss SI-15, P-38, 7A-12, Rouselle 67, and Havir 69, did not have non-slip pads attached to the foot pedals (449-454, C-5 [photographs 9 through 11, 13 through 15, 17], C-39, C-40) (item 23b). The listed presses were used without foot pedal protection and without non-slip pads on the foot pedals (445-448, 449). The classifications for Citation 1, Items 23a and 23b were serious because of the fractures, amputations/crushing injuries that could result were a press to be accidentally tripped when an operator's hands or fingers were in the press (438, 445-446). Mr. Gindoff was on the plant floor daily and could see by looking that these foot pedals were not guarded and lacked pads, all of which was in plain view (438, 445, 450). The Secretary proposed a penalty of $2,500 based upon a high severity and lesser probability (445).

Topco attacks the photographic evidence supporting this item, arguing that it does not demonstrate the conditions Ms. Kulick testified existed. While Topco's criticisms of the photographs may be well taken, that

does not detract from the fact that Ms. Kulick's testimony was unequivocal on the existence of the conditions cited. This item is affirmed. A $2,500 penalty is assessed.

Citation 1, Item 24 Alleged Serious Violation of 29 C.F.R. § 1910.217(b)(6)(i)
Citation 1, Item 26 Alleged Serious Violation of 29 C.F.R. § 1910.217(b)(7)(v)(a)

These two items are directed toward the same hazards. Because the standard provides separate requirements for full revolution and part revolution presses, the Secretary incorporated these allegations into two separate items. Each item alleges that certain presses had two hand trips that were not adequately guarded and that certain two hand trips did not operate concurrently. Given that the hazards are the same for each item, I have consolidated these items.

The standard cited in item 24 requires that two hand trips on full revolution clutch mechanical power presses must have the individual operator's hand controls protected against unintentional operation and must require concurrent operation of the individual operator's hand controls. The Secretary issued this item because the six presses listed under instance description "a" had unguarded two hand trips. Because the trips were not guarded, the presses could be activated unintentionally (456-457, 459-460, 463, 467, 470, 473-474, 476-477, 478-482, 484, C-5 [photograph 18], C-41, C-43 through C-49) which could result in an amputation to a worker. The seven presses listed in the item under instance description "b" had two hand trips that operated nonconcurrently, with delays as great as four seconds (458-460, 463, 465, 467, 478, 1450-1456, C-41, C-42, C-48, C-79). The trips must work concurrently as a guarding device to insure that the employee's hands are out of the point of operation when a press cycles (458). The classification for Citation 1, Item 24 was serious based upon the potential amputation/crushing injury to which employees were exposed (456, 461, 464). This standard, too, is a specification standard and presumes the hazard. The Secretary proposed a penalty of $5,000 based upon a high severity and greater probability of occurrence (461).

The standard cited in item 26 requires on part revolution mechanical power presses that each two-hand control must be protected against unintentional operation and must require concurrent use of both hands to trip the press. The Secretary issued the citation because in the press room, the two hand controls on power press OBI-125 # 55 were not guarded (496, 498-501, C-51, C-52) and the eleven presses listed on citation 1, item 26, in instance "b" had nonconcurrent operating two hand controls (497, C-51). The standard applies to these twelve presses which were part revolution mechanical power presses with two hand control systems (492-493). The hazards and exposures for this item are the same as the hazards and exposures set forth above for Citation 1, Item 24 (at paragraph IV.B.20 above). The classification for Citation 1, Item 26 was serious based upon the potential amputation/crushing injury to which employees were exposed (495, 502). The Secretary proposed a penalty of $5,000 based upon a high severity and greater probability of occurrence (501-502).

Topco asserts that the evidence establishes that the hand controls on each of the cited presses were, as required by Sections 217(b)(6)(i) and 217(b)(7)(v)(a), protected against unintentional operation. Topco argues that the hand controls on the SCI-14 press, the Perkins No. 48 press and the Bliss No. 8 press, were protected by a manufacturer-supplied guard which bends over each control button at a height about an inch above the button "to deflect anything that might fall on it." (Tr. 816-9 to 14; 1178-24 to 1184-22; Exh. C-5, No. 18; Exh. C-44; Exh. C-45). Moreover, the control buttons themselves, which are operated pneumatically, must be depressed 3 inches before the press is activated. (Tr. 1182-12 to 1183-9). With regard to the Bliss No. 10 press and the Havir No. 69 press Topco argues that the controls on both are located below the press bed so that if an object were "to fall across it, it would be stopped by the press, could not reach both trips at the same time." (Tr. 1186-11 to 12). Moreover, in order to activate the Bliss No. 10 press, each trip has to travel 8 inches. (Tr. 1185-24 to 1186-3). Similarly, in order to operate the Havir No. 69 press, both trips

have to be depressed a distance of 6 inches and the operator "has to keep constant, even pressure on both so that one doesn't get locked out." (Tr. 1188-5 to 11).

Topco's arguments with regard to these presses are well taken. However, Topco has not addressed two presses, the Bliss 58 and OBI-125 55. Ms. Kulick's testimony established a *prima facie* case with regard to these presses. In the absence of evidence to the contrary, items 24a and 26a must be affirmed with respect to these presses.

Topco takes issue with Ms. Kulick's interpretation of the term concurrent as used in the standard. According to Ms. Kulick, concurrent operation means simultaneously. (Tr. 675-12 to 25). Thus, under her definition, only those trips which operate if depressed at precisely the same instant operate concurrently. (Tr. 675-12 to 25). Topco points out that ' 1910.217 is derived from ANSI Standard B 11.1, and that ' 3.7 of that ANSI standard defines "concurrent" as "a situation wherein two or more controls exist in an operated condition at the same time." Explanatory Comment E3.7 then makes clear that:

> The use of the word "concurrent" is intended to exclude any inference that a simultaneous moment of activation must exist between the operation of the individual two-hand controls.

Topco urges that the Secretary's claim of a violation here is based on a flawed interpretation of the standard directly at odds with common sense and the explicit provisions of the ANSI standard on which the instant standard is based.

Section 1910.211(d)(8) states:

> "Concurrent" means acting in conjunction, and is used to describe a situation wherein two or more controls exist in an operated condition at the same time.

It is clear that the standard does not require both controls to be actuated at precisely the same moment. Obviously, such a condition would make the press too difficult to operate. Unfortunately, the standard gives no guidance with regard to the time lag that would be acceptable, and this record provides no

guidance. Moreover, Ms. Kulick's testimony provides no insight into the actual time lags she observed on specific presses. She did testify that she observed delays as great as four seconds. I find that this delay is too great, and affirm items 24b and 26b.

The Secretary proposed a penalty of $5,000 for each of these items. In view of the fact that I have consolidated them, and in view of the fact that the Secretary's evidence fell far short of establishing widespread violations of these two standards, I assess a single penalty of $2,500.

Citation 1, Item 28 Alleged Serious Violation of 29 C.F.R. § 1910.217(c)(2)(i)(d) The cited standard requires that point of operation guards on power presses not be readily removable by the operator, so as to create the possibility of misuse or removal of the guards. The Secretary issued the citation because presses 23, 69, and P-38 had guards that were not properly secured (509-515, C-5 [photographs 13, 20], C-54). The Secretary classified this item as serious based upon the potential amputation/crushing injury to which employees were exposed (509, 515). The Secretary proposed a penalty of $2,500 based upon a high severity and lesser probability of occurrence (516).

Ms. Kulick testified that she could easily remove the Plexiglas guard from press P-38 (Tr. 511). Mr. Gindoff testified that it was securely attached (Tr. 1119). Photographs 11 and 12 (C-5) appear to confirm Mr. Gindoff' testimony. I find that the Secretary has not established a violation with respect to this press.

Ms. Kulick testified that the guard on press 69 was not secured (Tr. 514-15). Mr. Gindoff testified that press 69 was set up to be operated by a two-hand trip when Ms. Kulick inspected it, and that the die in the press was too large to permit the guard to be fastened on both sides of the point-of-operation. He indicated that when the press was operated by foot pedal, the die was also changed and the guard

attached (Tr. 1112-17). The Secretary has failed to establish that this press was in violation of the standard.

Ms. Kulick testified that the guard on press 23 was secured by a 'C' clamp, and that 'C' clamps are readily removable (Tr. 511). Mr. Gindoff testified that the 'C' clamp had been tightened using a lever and could not be removed without a tool. (Tr. 1129). However, such a tool would be readily available. The Secretary has established a violation with regard to this press. A penalty of $2,500 is assessed.

Citation 1, Item 29 Alleged Serious Violation of 29 C.F.R. § 1910.217(e)(1)(ii)

The cited standard requires weekly testing and inspecting of mechanical power presses to determine the condition of the antirepeat feature and single stroke mechanism. The Secretary issued this item because weekly inspections and testing were not being done (517-518, 661, C-55). The Secretary classified this item as serious based upon the potential amputation/crushing injury to which employees were exposed (C-55). The Secretary refers to deficiencies found as are set forth in items 22, 25, and 27. The Secretary proposed a penalty of $5,000 based upon a high severity and greater probability (520).

Topco argues that the standard does not apply here. Section 217(e)(1)(ii) expressly provides that its inspection requirements "do not apply to those presses which comply with paragraphs (b)(13) and (14) of this section." Mr. Gindoff's unrebutted testimony indicated that Topco's power presses did comply with paragraph (b)(13) by incorporating the requisite "control reliability feature" and with paragraph (b)(14) by being equipped with the required "brake system monitoring." (Tr. 1310-23 to 1312-16). And significantly, Ms. Kulick admitted (1) that she did not address control reliability; (2) that she found no problems with the presses' brake system monitoring; and (3) that OSHA did not cite a single Topco press for failure to comply with either Paragraph (b)(13) or (b)(14) of the standard. (Tr. 817-20 to 818-18). Consequently, because

Topco's presses complied with Section 217(b)(13) and (14), Topco takes the position that the press inspection requirement contained in Section 217(e)(1)(ii) is not applicable, and the instant citation should be vacated.

Topco's position is well-taken.[4] This item is vacated.

Citation 1, Item 30 Alleged Serious Violation of 29 C.F.R. § 1910.217(f)(2)

The cited standard requires adequate supervision to ensure that correct operating procedures are followed on presses. The Secretary issued the citation because there was inadequate supervision of the press operators in the press room. Three separate situations were observed by the OSHA inspectors in the press room. None of the presses were being automatically fed. Rather, the employees hand-fed stock into the presses. In that situation, the Secretary asserts that none of the presses should have been in the continuous operation mode, but should have been operating in the single stroke mode. On September 12, press # P36 was being operated in the continuous mode. On September 26 or October 1, the mode selection switch was broken on press OBI-125 press # 55. On the same dates, the key to the control box of a second press, Bliss # DP2, was left in the key slot under the unsupervised control of the press operator (C-56). Adequate supervision to ensure that correct operating procedures are followed on presses would have prevented these unsafe conditions (520-526, C-56). The Secretary classified this item as serious based upon the potential for amputation/crushing injuries (520, 524). The

[4] Although the Secretary points out that violations were identified with the single stroke and anti repeat features on many presses, Topco introduced testimony that these presses were being operated in a mode in which those features were not available. The Secretary did not controvert this testimony. However, Topco proffered no evidence on the need to operate with those features unavailable, and the scant evidence on the operations performed by those presses indicated that they should have been operated subject to the single stroke and anti repeat features. I found the Secretary's interpretation of the standard to require those features to be operable to be a reasonable one, and in the absence of a showing of need to operate in a mode where those features are not available, affirmed the items. Thus my finding of violations results from the operation of a legal presumption, and not from the presence of affirmative evidence.

Secretary proposed a penalty of $2,500 based upon a high severity and lesser probability of occurrence (524).

Topco argues that the standard expressly authorizes the use of different operating modes -- including the continuous mode observed -- and that consequently the Secretary cannot rely on operation in this mode as evidence of inadequate supervision. Topco applies the same logic to the instance of a key left in a press control box. Topco goes on to point to the ratio of operators to supervisors, the extensive instructions on safe press operation given by the set-up men to the operators each time a press is inspected, the periodic return of set up men to the press throughout the production run to monitor the operators' performance, and Topco's low ratio of "five or six operators per supervisor". (Tr. 1174-18 to 1175-1; Tr. 1220-21 to 1221-12; Tr. 1313-12 to 15; Tr. 1391-20 to 25; Tr. 1438-7 to 13).

Topco misses the point. The fact that the standard provides for the operation of a press in continuous mode does not mean that it is acceptable to so operate in any circumstance. A press being hand fed individual pieces is an obvious circumstance in which the continuous mode of operation is unacceptable under the standard. Moreover, whatever Topco's program of supervision, it is obvious that it broke down in these three instances. This item is affirmed. A penalty of $2,500 is assessed.

Citation 1, Item 31 Alleged Serious Violation of 29 C.F.R. § 1910.217(f)(3)

The cited standard requires that the floors surrounding presses be kept free from obstructions, grease, oil and water. The Secretary issued this item because in the press room and in the Lincoln department, there was oil around the presses along with cardboard boxes, carts, scrap material, 55 gallon drums, etc. (526-528, 530, C-57, C-58). These conditions present fall and fire hazards to the employees. The Secretary classified this item as serious based upon the potential injury of sprains or contusions from

falling on the concrete floor (528-529). The Secretary proposed a penalty of $2,500 based upon a low severity and greater probability of occurrence (528-529).

Topco focuses on the allegation of oil and grease on the floor around the presses. It points out that Mr. Gindoff explained that a small amount of oil may be present because "in many of our press operations oil is used to lubricate the parts, it's a necessary part of the production." (Tr. 1318-4 to 6). Thus, Topco regards this as part of normal operations and unpreventable. Moreover, Topco notes that Mr. Gindoff testified that Topco's practice is to keep the floors as dry as possible -- "if oil drips on the floor, the operators are instructed to notify their setup man so we could -- they could get Speedy Dry put down and then take it up to absorb the oil." (Tr. 1318-6 to 9).

Ms. Kulick referred not only to oil, which she said was accumulating on her shoes and causing her to slip, but to other debris as well. (*See* Tr. 528, C-57). This item is affirmed. A penalty of $2,500 is assessed.

Citation 1, Item 32 Alleged Serious Violation of 29 C.F.R. § 1910.217(g)

The cited standard requires the employer to report to OSHA, within thirty days of the occurrence, all power press point of operation injuries. The Secretary issued this item because an amputation on a power press at its point of operation occurred on June 18, 1996, and the employer failed to timely report the accident to OSHA (532-533, 891). The Secretary classified this item as serious because of the amputations to which employees were exposed and that were occurring (533-534). Had OSHA received timely notice of the accidents, OSHA may have been able to perform a proper accident inspection, learned of the cause of the accident, and prevented further such incidents. The Secretary proposed a penalty of $5,000 based upon a high severity and greater probability of occurrence (535).

Topco argues that the press accident in question was promptly reported to Ms. Kulick on her arrival on August 19, 1996. (Tr. 531-10 to 20). In point of fact, Ms. Kulick found the accident recorded on Topco’s

OSHA 200 log when she reviewed it. (Tr. 532). This hardly amounts to prompt reporting on Topco's part. This item is affirmed. However, it is more properly classified as a low severity, lesser probability accident. While OSHA might have immediately investigated the accident and caused the removal of a hazard, it also might not have. A penalty of $ 1,500 is assessed.

Citation 1, Item 33 Alleged Serious Violation of 29 C.F.R. § 1910.219(b)(1)

The cited standard requires that flywheels with parts within seven feet of the floor be guarded. The Secretary issued this item because eleven flywheels with parts within seven feet of the floor were not guarded (535-536, 538-541, 543-550, C-5 [photographs 12, 14, 15, 17], C-47, C-59 through C-63). Employees, during the normal course of their work activities, were within six inches of these moving wheels (539, 544, 546-547, 549-550). The classification for Citation 1, Item 33 was serious based upon the potential injury of fracture, sprain, or laceration that could occur from being hit by, or coming into contact with, the unprotected flywheel parts (535-536, 539). The Secretary proposed a penalty of $3,500 based upon a medium severity and greater probability of occurrence (550-551). Topco has not addressed this item in its brief. Accordingly, it is affirmed and a penalty of $3,500 assessed.

Citation 1, Item 34a Alleged Serious Violation of 29 C.F.R. § 1910.219(d)(1)
Citation 1, Item 34b Alleged Serious Violation of 29 C.F.R. § 1910.219(e)(1)(i)
Citation 1, Item 34c Alleged Serious Violation of 29 C.F.R. § 1910.219(e)(3)(i)

The cited standard require that pulleys and belts within seven feet of the floor be guarded as required in the standard. The Secretary issued this item because on three machines (Bridgeport milling machine, Johnson horizontal bandsaw, and Walker Turner drill press) three pulleys, two horizontal belts, and one vertical or inclined belt were not guarded although all were within seven feet of the floor (551, 553-557, 559-561, 563-565, 567-568, 570-571, C-5 [photograph 23], C-64 through C-68). Employees, during the normal course of their work activities, were within six inches of these moving parts (555-556). The

classifications for Citation 1, Items 34a, 34b, and 34c were serious based upon the potential injuries of severe lacerations or fractures that could occur from being drawn into the belts and pulleys (552, 562, 564-565, 567-568, C-64). The Secretary proposed a penalty of $2,000 based upon a medium severity and lesser probability of occurrence (554, 562).

Topco urges that the Secretary has failed to prove that the operator was in danger of contacting the nip points inside the Bridgeport milling machine. Mr. Gindoff testified that the design of that machine makes it impossible to contact the nip point. (Tr. 1317-2 to 16). This is because:

> the nip point is behind the front section, that - that machine is built with an open door so you have access to change the speeds and access to the pulleys but you'd have to get in behind that the housing, the front part of the housing, the-the wheel, the pulley and the belts are recessed into the front part of the housing.

(Tr. 1317-2 to 8). Topco states that, because there is no hazard of contacting the nip point on the Bridgeport milling machine, there can be no employee exposure and hence, no violation of 29 CFR 1910.219(d)(1). It appears from Mr. Gindoff's description that the nip points on the milling machine were not accessible to employees. Accordingly, the citation is vacated as to this machine.

Topco attacks the Secretary's allegation concerning the Walker Turner drill press and the Johnson horizontal bandsaw for a different reason. Mr. Gindoff testified that the drill press had been taken out of service prior to the inspection and was not available for use. (Tr. 1314-14 to 21). Topco says that this is corroborated by the drill press photograph which shows that the drill press is missing the drill. (Exh. C-5, no. 23). However, Ms. Kulick testified that she observed the drill press in use with the cover off the opening for the belts and pulleys. Further, I found that the band saw was available for use in connection with item 18.

I find that the Secretary has established violations with respect to the band saw and the Walker Turner drill press. A penalty of $2,000 is assessed.

Citation 1, Item 35 Alleged Serious Violation of 29 C.F.R. § 1910.253(b)(2)(ii)
Citation 1, Item 36 Alleged Serious Violation of 29 C.F.R. § 1910.253(b)(2)(iv)
Citation 1, Item 37 Alleged Serious Violation of 29 C.F.R. § 1910.253(b)(4)(iii)

Section 1910.253(b)(2)(ii) requires that compressed gas cylinders be secured when stored so that they could not be knocked over or damaged by passing or falling objects. The Secretary issued this item because five compressed gas cylinders were not secured to prevent their falling or being knocked over or damaged in the warehouse area (571, 573-578, 580-581, C-69 through C-71). This condition was in full view (854-856, 900). The Secretary classified this item as serious based upon the potential injury of fractures from being hit by a falling or toppling cylinder (572-574, 578). The Secretary proposed a penalty of $2,000 based upon a medium severity and lesser probability (578, 580).

Section 1910.253(b)(2)(iv) requires valve protection caps be in place on compressed gas cylinders. The Secretary issued this item because an acetylene gas cylinder was missing a valve protection cap while it was in storage (581-583, 585, C-71). The Secretary classified this item as serious based upon the potential hazard of injury were the valve to be damaged and the cylinder to then become a projectile (582). The cylinders were full (854-856, 900). The Secretary proposed a penalty of $2,000 based upon a medium severity and lesser probability of occurrence (583).

Section 1910.253(b)(4)(iii) requires oxygen and fuel gas cylinders be stored separately. The Secretary issued this item because of the storage together of two oxygen cylinders with three acetylene cylinders (583-587, C-71, C-72). The Secretary classified this item as serious based upon the fire/explosion hazard that could cause burns (584). The cylinders were full (854-856, 900). The Secretary proposed a penalty of $2,500 based upon a high severity and lesser probability of occurrence (587).

The Secretary alleges that there was a lot of employee traffic through the area where these cylinders were stored, both forklift trucks and carts being pushed by, within a foot of these cylinders (574, 575, 577-578).

Topco argues that Ms. Kulick did not observe any welding during her inspection. (Tr. 762-23 to 24). Consistent with this, Mr. Gindoff testified that Topco does not use either oxygen or acetylene for welding. (Tr. 1300-10 to 15). Topco's position is that, because the Secretary's citations assert violations of a standard which does not apply, Items, 35, 36 and 37 should be vacated.

Topco advances a separate reason exists for vacating Item 35, which alleges that two oxygen and three acetylene cylinders were "not located away from elevators, stairs or gangways." Topco argues that C-70 establishes that the cylinders are not located near any "elevators, stairs or gangways," and that this was corroborated by Mr. Gindoff, who testified that there are no stairs or gangways at Topco's facility and there are no elevators located near the area shown in the photograph. (Tr. 1299-10 to 16). Item 35 itself indicates that these cylinders were located in the warehouse area, and charges that they were not secured. Storage in the warehouse area is in compliance with the standard. Moreover, the standard does not require that the cylinders be secured. Item 35 is vacated.

Items 36 and 37 are affirmed. The hazards to which the standards cited in those items speak are present whether or not the employer uses the cylinders for welding. A penalty of $2,000 is assessed for item 36 and a penalty of $2,500 is assessed for item 37.

Citation 1, Item 38 Alleged Serious Violation of 29 C.F.R. § 1910.304(f)(4)

The cited standard requires that the electrical path to ground from equipment be permanent and continuous. The Secretary issued this item because three pedestal fans were missing their ground pins at the plugs, breaking the path to ground (588-590, C-73). The Secretary classified this item as serious based upon the injury of electrical shock that could occur in the event that an employee made contact with any of these fans if their outer metal casings became energized (588, 590). Employees worked within a foot of the fans (391); right next to the fans (392). To turn these fans on and off, the employees would get within six inches of the blades (395). The Secretary proposed a penalty of $2,500 based upon a low severity and lesser probability (590).

Topco has not addressed this item in its brief. Accordingly, it is affirmed and a penalty of $2,500 assessed.

Citation 2, Item 1 Alleged Willful, Serious Violation of 29 C.F.R. § 1910.217(c)(2)(i)(a)

This standard requires point of operation guards on mechanical power presses that will prevent entry of hands or fingers into the point of operation by reaching in, under, over, around or through the guards. The Secretary issued this item because on eight of Topco's presses, the guarding was inadequate or nonexistent. Because of the lack of compliance with the standard, employees were exposed to a serious hazard that could, and was, causing serious physical injury, i.e., amputations (C-7). The OSHA 200 logs showed employees suffered four amputations since 1992 (85-86, 668, C-78).

Five of the eight cited presses were in the Lincoln department.

(1) The Bliss # SI-15 full revolution mechanical power press, foot activated, was used to make the seams on square garbage cans (106). It had no point of operation guarding, and Ms. Kulick measured a half-inch opening at the point of operation where an employee's hand or finger could enter and be amputated (106, C-7). Mr. Gindoff testified (Tr. 1065-69, C-5 [#16], C-6[#314]) that when the piece, which consists of a wrap around body of a square can, is inserted into the point of operation there is no opening remaining; the piece "consumes the whole space," and "rubs between the top and the bottom." (Tr. 1067-15 to 20). Mr. Gindoff's description of this operation is not controverted. Pursuant to ' 1910.217(c)(1)(ii), no guard is required. This item is vacated as to this press.

(2) Press 7A-12 is a full revolution mechanical power press, foot activated. It is used to make the seams on round metal cans (C-7). It has no point of operation guarding, and Ms. Kulick testified that there was a half-inch opening at the point of operation where an employee's hand or finger could enter and be amputated (C-7). Similar to the Bliss 15, when the can is inserted into the point of operation, "there is no distance" remaining because the lip on the can "occupies the entire space." (Tr. 980, 1073-74). Pursuant to ' 1910.217(c)(1)(ii), no guard is required. This item is vacated as to this press.

(3) The Bliss # 19 B1 is a full revolution mechanical power press, foot activated. It is used to make the lip on the opening of the square garbage cans (C-7). It had a point of operation guard. However, Ms. Kulick testified that once the material being worked on was in the press, there was a six and one-half inch opening at the top of the guard, through which an employee's hand could go, to the point of operation that was eight inches behind the guard. Thus, that guard would not prevent an employee's hand or fingers from entering the point of operation and being amputated (C-7).

Topco introduced testimony that the closest distance from point-of-operation to the guard is 10 inches. (Tr. 1080-13 to 16). However, because the ram is straight back from the top of the guard and the

point of operation is located four inches below, the operator's hand would have to contort into an "S" curve and travel 12 to 15 inches to reach the point of operation. (Tr. 984-11 to 985-5; Tr. 1078-23 to 1081-7). Topco maintains that it is impossible for the operator's hand to reach the point of operation, which is "way deep inside the can." (Tr. 984-2 to 23; 1080-6 to 8).

Topco points out that Ms. Kulick acknowledged that she measured the distance from the guard straight back to the ram which she called the point of operation (Exh. C-7, p. 242; Tr. 702-23 to 703-1), although she acknowledges that the point of operation was located below the level of the guard. (Tr. 702-19 to 22). Section 1910.211(d)(45) defines “point-of-operation” as “... the area of the press where material is actually positioned and work is being performed ....” Under this definition, Ms. Kulick did not measure the distance to the point-of-operation. The operator does not have access to the point-of-operation of this press. This item is vacated as to this press.

(4) Press P38, full revolution mechanical power press, foot activated, was used to put notches in the body of the round cans (C-7). Ms. Kulick testified that press P-38’s guard had too wide an opening. (Tr. 163.) Ms. Kulick indicated that the opening between the guard and the steel was five-eighths of an inch, and that the point-of-operation was one and one-half inches from the guard (Tr. 706). Under ' 1910.217, Table O-10, this is too close. Table O-10 requires that a five-eighths inch opening be at least three and one-half inches from the point-of-operation. Ms. Kulick measured the distance to the point-of-operation from the closest point on the guard. Mr. Gindoff testified that the position of the operator and the necessity that she hold the steel with both hands placed her closest distance to the point-of-operation at about fifteen inches. (Tr. 1086).

The Secretary has shown a violation of ' 1910.217(c)(2)(i)(a). While in normal operation, it is unlikely that the operator would come into contact with the point-of-operation, the possibility remains that a mistake could be made. This item is affirmed as to this press.

(5) The Bliss (white foot pedal guard) press, a full revolution mechanical power press, foot activated, was used in the round can manufacturing (C-7). Ms. Kulick testified that the white foot pedal press had a gap of one and one-quarter inches between the bottom of the existing guard and the can inserted into the press. (Tr. 127-29). Mr. Gindoff indicated that this press was demonstrated for Ms. Kulick using a can that had already been subjected to its operation. The press operates on an opening in the side of the can to round the edges of that opening into an internal flange. The opening serves the purpose of providing for the foot pedal used to open the top of the completed trash can. The operator of this press takes a can into which an opening for the foot pedal has been made and inserts it upward into this press. When fully inserted, the operator raises the end she is holding to lower the opening over a post used to ensure that the can is properly positioned. In so doing, she closes the gap which Ms. Kulick measured between the can and the guard. In the photographs (C-6 #317), the operator was unable to fully lower the can because the internal flange had been created. (Tr. 1088-93). The guard serves both as a guard and as a gauge to position the piece. (Tr. 1089).

From the above, it is clear that the Secretary has not shown that the guard on the white foot pedal press violates ' 1910.217(c)(2)(i)(a). In the normal operation of the press, the gap which Ms. Kulick found is not present. Nor does it appear that the gap of which Ms. Kulick complained could be eliminated without interfering with the function of the press. This item is vacated as to this press.

The other three presses were in the press room:

(6) Rousselle Press # 67, a full revolution mechanical power press, foot activated, was used to make different things, as needed. It had been used early in the week of September 26, 1996 (C-7). Ms. Kulick testified that it had an inadequate Plexiglas point of operation guard that did not cover the entire front of the ram and left the sides and back of the press totally unguarded. An employee's hand or finger could enter around the sides of the guard, or at the sides of the press, and be amputated (C-7). The photographs of this press relied on by the Secretary (Exh. C-6, Nos. 307 and 315) were taken when there was no die in the press. Ms. Kulick conceded that in order to ascertain a press's point of operation and determine whether it is adequately guarded, the die must be in the press, and indicated that she must have observed the die or she would not have cited the press. (Tr. 713-16). On cross, Ms. Kulick admitted that (1) although she claimed that the guard depicted in the photographs was not adjustable, the guard could in fact be moved up and down on a bracket mounted on the press, which was plainly visible in the photos, (2) notwithstanding her assertion that the "sides of the guard were open," she did not observe the subject die, (3) she has in the past observed dies with sides high enough to guard the point of operation. (Tr. 711-12 to 712-7; Tr. 715-9 to 18). This evidence is insufficient to show that the Rousselle No. 67 press was inadequately guarded. This item is vacated as to this press.

(7) The Bliss # 23 full revolution mechanical power press, foot activated, was used to make different sized materials (C-7). It had an inadequate Plexiglas point of operation guard that moved up and down (C-7). Ex C-5 [#20] shows the press being operated. The operator is reaching under the guard to hold the piece. As Ms. Kulick put it, "... she's up to her wrists beyond the guard." (Tr. 718).

Topco counters that the guard on the Bliss No. 23 press was specifically fabricated by Topco for the flagged piece it manufactures. (Tr. 1106-12 to 19). The guard on this press "can be adjusted up and down" to

maximize protection. (Tr. 1108-20 to 24). The guard blocks the operator's hand from the point of operation: "If the operator tried to lift to rotate her hand to come in contact with the guard, it would prevent her from getting her hand around and over to the point of operation." (Tr. 1109-10 to 14). Finally, Topco points out that, as made clear in photographic Exh. C-5, No. 20, the flagged piece itself, which must be held with two hands "in a precise position to make the part properly," serves as a guard to protect the operator's hands. (Tr. 1111-22 to 1112-2).

The fact that the employee must hold the piece is the only protection afforded from the point of operation. The guard on this press, Mr. Gindoff notwithstanding, is ineffectual. This item is affirmed as to this press.

(8) The Havir Press Rite # 69, a full revolution mechanical power press that, when foot activated, used a rolled mesh across the point of operation as a guard. The Secretary urges that it was inadequate. The Secretary points to a one inch opening in the guard through which an employee's hand or finger could enter and be amputated (C-7).

Topco points to Ms. Kulick's acknowledgment that, in order to ascertain the location of a press's point of operation and determine whether it is adequately guarded, the die that is used with the guard must be installed on the press. (Tr. 714-2 to 5). Here, it is undisputed that, at the time of Ms. Kulick's inspection of the Havir No. 69 press, the die in the press "was for a job that was done in two-hand control" -- not the foot pedal mode cited by Ms. Kulick. (Tr. 149, 1113-14). It is also undisputed that Ms. Kulick did not observe this press operated in the foot pedal mode she cited. (Tr. 720-21 to 22). Consequently, the Secretary's allegations with regard to this press are speculative. This item is vacated as to this press.

The Secretary classified this item as serious based upon the amputation hazards (154). This classification is correct. The Secretary also classified this item as willful based upon the facts that Mr. Gindoff:

1) knew the standard and had a heightened awareness of the standard's requirements as he had been cited before (95-96, 100, C-1, C-2);

2) knew the conditions of his presses (95, 100-101, 488); and,

3) notwithstanding that, and the accidents that were happening (154), continued to operate the presses. The Secretary cites to a number of statements attributed to Mr. Gindoff by the compliance officers. Mr. Gindoff stated on several occasions during his testimony that he was misunderstood and misinterpreted. Typical of these purported misunderstandings, the Secretary cites a statement to the effect that the difference between a bruise and an amputation is only a matter of distance as illustrating an intentional disregard of the standard's requirements and an outrageous contempt for employee safety. Mr. Gindoff was asked about that statement on direct:

> Q: When you go to the document in front of you, C-77, go to the next to the last page, page four and there are some statements on there that allegedly took place on October Thirtieth, again in Mr. Zuk's office where you said, "Yes but I look at it as the difference between an amputation and a bruise or minor cut is only a matter of distance, depends where your hand is when the machine comes down. If your hand is almost out of the point of operation, you may only get a bruise or cut. If your hand is completely in the point of operation, you're going to get an amputation, it's only a matter of distance". Now, did you say something like that to her?
>
> A: Absolutely, I did, I mean, that's critical to our entire principle of -- of the way we watch our presses.
>
> Q: What do you mean?
>
> A: I mean, again, when I saw this here, it's -- it's -- again, I don't know if she wasn't listening or chose not to listen, what I said to her was, "To us, a near miss is exactly the same as an amputation, it's an accident, the only difference is the position of the person's hand when the press malfunctioned or when the problem happened, it's still an accident as far as I'm concerned, it doesn't go in any log, it doesn't go in any report -- excuse me -- but it's an accident and as far as I'm concerned, if that happens on a press, that press has to come out of service, it has to be treated as though somebody lost an arm because God forbid, the next time we won't be so lucky, the next time if that happens, if we ignore it, that matter of distance could be on the

> other side of the point of operation and a -- and a bruise or a cut or a scare could be an amputation so any -- any near miss, any accident that occurs, even if no one is injured, is treated with the same severity, the same effort that an injury is and the same procedure is followed, if it's reported, the press is taken out of operation, it's investigated the same way and it's not put back in operation until it's determined what happened, why it happened, how we can correct it and -- and until we actually do correct it". Yes, I told her that and she obviously didn't understand what I was trying to say, she was only interested in -- in paperwork and not in safety, I think.

(Tr. 1229-30).

Having heard the witnesses and reviewed the record, I am not persuaded that the Secretary has demonstrated that Topco's noncompliance with respect to two of the eight presses she cited illustrated a conscious disregard or plain indifference to employee safety. *Williams Enterprises, Inc.*, 13 OSHC 1249, 1256-57 (1987). Consequently, I vacate the willful classification. The Secretary's proposed penalty was based upon a medium severity and greater probability of occurrence (188). I adopt this evaluation of the violation and assess a penalty of $3,500.

Citation 2, Item 2 Alleged Willful, Serious Violation of 29 C.F.R. § 910.217(e)(1)(i)

This standard states:

> (e) Inspection, maintenance, and modification of presses - (1) Inspection and maintenance records. (i) It shall be the responsibility of the employer to establish and follow a program of periodic and regular inspections of his power presses to ensure that all their parts, auxiliary equipment, and safeguards are in a safe operating condition and adjustment. The employer shall maintain a certification record of inspections which includes the date of inspection, the signature of the person who performed the inspection and the serial number, or other identifier, of the power press that was inspected.

Ms. Kulick testified that Mr. Gindoff, on being asked for the record of inspections, indicated that Topco had done inspections for a month or two after being cited by OSHA in 1990, but had decided that they were a waste of time and weren't doing any good. After a few months, Topco ceased doing inspections. (Tr. 90-91). Mr. Gindoff, on the other hand, testified that Topco conducted monthly

inspections from February through April, 1990 (Tr. 1190-91), but was not satisfied with them because they did not take into account the degree to which an individual press was used. (Tr. 1200-01). Consequently, Topco went to a system of having the set-up men, who are required to prepare each press for each specific job assigned it, inspect each press when they set it up for that job. (Tr. 1204-05). Mr. Gindoff spoke to OSHA about this change and was assured that it would satisfy ' 1910.217(e)(1)(i). (Tr. 993-95, 1206-08). However, Topco ceased keeping records because it regarded these as burdensome and serving no useful purpose. (Tr. 1217-18). Thus there is room for debate about whether Topco was in compliance with the first sentence of the standard. That sentence requires the employer "to establish and follow a program of periodic and regular inspections." If one accepts Mr. Gindoff's account, it is possible that Topco fulfilled that requirement.

However, there is no doubt that Topco failed to comply with the second sentence. Moreover, the requirements of that sentence are not precatory. They are mandatory and leave no room for discretion: "The employer *shall maintain* a certification record of inspections ...."[5] (Emphasis supplied.) That certification record is to include at least three items of information: (1) the date of inspection; (2) the signature of the person who performed the inspection: and (3) the serial number, or other identifier, of the power press that was inspected. If there were any doubt as to where the standard places emphasis, it is eliminated by referring to its title: "Inspection and maintenance *records*." (Emphasis supplied.) Without such records, Mr. Gindoff cannot know whether his inspection program is accomplishing its objective and whether it is periodic and regular.[6] The Secretary has established a violation of this

[5] When OSHA assented to Topco's new inspection procedure, it did so on the understanding that Topco would maintain records. (Tr. 995-96).

[6] For instance, the presses in Topco's Lincoln Department are dedicated to one function. Consequently, it is unclear whether the set-up men visit and inspect them on a regular basis.

standard. In view of the fact that since 1992, this plant has suffered six or seven amputations, four of which were on power presses (85-86, 668), there can be no doubt as to the serious nature of the violation.

Topco was aware of the requirements of the standard. It had been cited in 1990 for a violation and had taken the trouble to discuss with OSHA the means by which it would come into compliance. To then brush aside the mandatory provisions of the standard as serving no useful purpose (Tr. 1218) clearly illustrates a conscious disregard or plain indifference to the requirements of the standard. The Secretary has established that the violation was willful. The Secretary proposed a penalty of $55,000 based upon a medium severity and greater probability of occurrence. It is assessed.

Citation 3 Alleged Other Than Serious Violations
Item 1a 29 C.F.R. § 1910.141(d)(1)
Item 1b 29 C.F.R. § 1910.141(d)(2)(iii)
Item 1c 29 C.F.R. § 1910.141(d)(2)(iv)

The cited standards require that bathrooms be maintained in a sanitary condition, and be provided with hand soap and towels or other means of hand drying. The Secretary issued this item because of the conditions in the men's bathroom (644-647, C-74) and the lack of soap and towels in the ladies' bathroom (645-648). Topco was cited before for these conditions in these bathrooms (648, C-2 starting at p. 8 of 12, previous citation 2, items 12, 14, and 15). The classification for Citation 3, Items 1a, 1b, and 1c was other than serious because the likely result caused by these conditions would be a non-life threatening illness or infection (643, 645). These conditions were in plain view (218), and Mr. Gindoff knew of the conditions (646, 649). The Secretary proposed a penalty of $0 based upon a minimal severity and lesser probability of occurrence (649). Topco has not addressed this item in its brief. Accordingly the violation is affirmed and the Secretary's proposed penalty assessed.

Citation 3, Item 2 Alleged Other Than Serious Violation of 29 C.F.R. § 1910.303(g)(1)(i)

The cited standard requires that at least thirty inches of space be kept clear and open in front of electrical equipment operating at less than 600 volts. The Secretary issued this item because pallets and boxes occupied the thirty-inch free-zone at an electrical panel by the stand pipe for the sprinkler system (649-650) and at the electrical panel for the still in the degreasing area (649-651, C-75). The classification for Citation 3, Item 2 was non-serious based upon the potential hazard that a delay would cause in obtaining access to these two electrical panels (651-652) in the event of a situation where access to the panel was necessary to shut off the power (652). These conditions were in plain view, and Mr. Gindoff went by them frequently (649). The Secretary proposed a penalty of $0 based upon a minimal severity and lesser probability of occurrence (651). Topco has not addressed this item in its brief. Accordingly the violation is affirmed and the Secretary's proposed penalty assessed.

Citation 3, Item 3 Alleged Other Than Serious Violation of 29 C.F.R. § 1910.1200(f)(5)(i)

The cited standard requires the identification labeling and tagging of containers containing hazardous chemicals. The Secretary issued this item because of the failure to have an identification label on an acetylene cylinder when it was in the lamp fabrication department (652, C-5 [photograph 24]). The classification for Citation 3, Item 3 was non-serious based upon the potential hazard of not knowing the contents of the cylinder and the proper precautions of dealing with the cylinder's unknown contents (652). As can be seen in exhibit C-5, photograph 24, the cylinder was in plain view on the floor of the plant. The Secretary proposed a penalty of $0 based upon a minimal severity and lesser probability of occurrence (651). Topco has not addressed this item in its brief. Accordingly the violation is affirmed and the Secretary's proposed penalty assessed.

Citation 3, Item 4 Alleged Other Than Serious Violation of 29 C.F.R. § 1910.1200(h)

The cited standard requires that employees receive information and training in the hazard communications program. The Secretary issued this item because the employees had not received training on the Topco's hazardous communications program nor on some of the chemicals in the workplace, such as those listed in the citation (655-656). The classification for Citation 3, Item 4 was non-serious based upon the potential injury in that the substances listed in the citation are eye and skin irritants (656). Mr. Gindoff trained the supervisors and one spray painter only and not the rest of the employees (655). The Secretary proposed a penalty of $0 based upon a minimal severity and lesser probability of occurrence (651). Topco has not addressed this item in its brief. Accordingly the violation is affirmed and the Secretary's proposed penalty assessed.

CONCLUSIONS OF LAW

The Commission has jurisdiction of this matter pursuant to ' 10(c) of the Act. Respondent Topco, Inc., was in violation of the standards in 29 C.F.R. Part 1910 as set out above. Civil penalties are assessed as set out above.

ORDER

A total civil penalty of $115,500 is assessed.

JOHN H FRYE, III
Judge, OSHRC

Dated:

Washington, D.C.

APPENDIX

The citation and item numbers where violations have been affirmed are set out below, along with the classification of the violations and the penalties assessed.

Citation 1, item 1a	Serious	3500
Citation 1, item 2a	Serious	2500
Citation 1, item 7	Serious	1500
Citation 1, item 9	Serious	2500
Citation 1, item 10	Serious	00
Citation 1, item 11	Serious	00
Citation 1, item 12	Serious	00
Citation 1, item 13	Serious	1000
Citation 1, item 14	Serious	2500
Citation 1, item 18	Serious	2500
Citation 1, item 19	Serious	5000
Citation 1, item 20	Serious	2500
Citation 1, item 21a, b	Serious	2000
Citation 1, item 22, 25, 27	Serious	5000
Citation 1, item 23a, b	Serious	2500
Citation 1, item 24, 26	Serious	2500
Citation 1, item 28	Serious	2500
Citation 1, item 30	Serious	2500
Citation 1, item 31	Serious	2500
Citation 1, item 32	Serious	1500
Citation 1, item 33	Serious	3500
Citation 1, item 34a, b, c	Serious	2000
Citation 1, item 36	Serious	2000
Citation 1, item 37	Serious	2500
Citation 1, item 38	Serious	2500
Citation 2, item 1	Serious	3500
Citation 2, item 2	Serious, Willful	55000
Citation 3, item 1a, b, c	Other than serious	00
Citation 3, item 2	Other than serious	00

Citation 3, item 3	Other than serious	00
Citation 3, item 4	Other than serious	00
TOTAL		$115500