SECRETARY OF LABOR, Complainant, v. MARINE PROPULSION SERVICES, INC., and its successors, Respondent.	OSHRC DOCKET NO. 03-1547

APPEARANCES:

For the Complainant:
Jeannie Gorman, Esq., U.S. Department of Labor, Office of the Solicitor, Seattle, Washington

For the Respondent:
J. Michael Gleeson, Esq., Beaverton, Oregon

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, Marine Propulsion Services, Inc. (MPS), at all times relevant to this action maintained a place of business at Terminal 2, in the port of Portland, Oregon, where it was engaged in ship repair. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On July 22, 2002 the Occupational Safety and Health Administration (OSHA) conducted an inspection of MPS' Portland work site. As a result of that inspection, MPS was issued a citation alleging violations of the Act. By filing a timely notice of contest MPS brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On November 13, 2003, an E-Z hearing was held in Portland, Oregon. Briefs were not required and none were filed. This matter is, therefore, ready for disposition.

Alleged Violation of §1910.212(a)(1)

Citation 1, item 1 alleges:

29 CFR 1910.212(a)(1): Machine guarding was not provided to protect operator(s) and other employees from hazard(s) created by rotating parts.

> (a) The chuck head on the LeBlond Regal engine lathe located in the mobile machine shop at Terminal 2, was unguarded.

Facts

OSHA Compliance Officer (CO) Alex Bedard testified that on the day of the inspection he found that the chuck head on a LaBlond Regal engine lathe in MPS' mobile machine shop was not guarded (Tr. 20; Exh. C-1 through C-4). According to CO Bedard, the lathe operator places the stock to be lathed in the jaws of the chuck, which is located at one end of the machine (Tr. 22). The rotating chuck spins the stock; the cutting tool moves along the lathe's carriage to the area where the work on the stock is to be done (Tr. 22, 26). Bedard testified that shafts rotate at high speed, and can create static electricity, which can suck clothing or shop rags into the equipment (Tr. 50). An employee working close to the rotating chuck could catch his fingers, hair and/or clothing in the uneven jaws of the chuck, on the opening for the chuck key, or in the spinning collar between the chuck head and the housing of the lathe (Tr. 29-31, 52; Exh. C-3, C-4). Bedard estimated that the zone of danger posed by the rotating chuck head extended four to six inches from the equipment (Tr. 51). Bedard stated that a machinist operating the lathe may be within the zone of danger posed by the rotating chuck when ensuring the stock is clamped down, adjusting the speed of the lathe (Tr. 48, 53, 63).

At the hearing John Scott, an MPS machinist with 20 years of experience, testified that he had last used the lathe "months prior" to the OSHA inspection (Tr. 91-92). At that time, it had last been used for boring a small piece of copper/nickel stock (Tr. 43, 54, 91). According to Scott, the copper/nickel piece was small, and protruded from the chuck only about two to three inches (Tr. 93, 103-04). Scott stated that for some operations, such as polishing, the operator works within four to six inches of the chuck while the lathe is running (Tr. 94, 107-08). Scott testified that he needed to be able to see the stock

Neither Scott nor Jim Bixel, MPS' owner, believed that it was the practice in the industry to guard the chuck on the LaBlond lathe (Tr. 91, 111, 116). No guard was supplied by the original equipment manufacturer (Tr. 113). Neither Scott nor Bixel believed the lathe could be used with a guard for all operations, as the operator needs to see the piece being worked, and chips or metal shavings from the stock would interfere with the shield (Tr. 95, 106, 118, 120, 144). Moreover, after reading an Oregon Occupational Safety and Health program directive (Exh. R-35), an OSHA interpretation referencing

American National Standard (ANSI) specification B11.6-1975 (Exh. R-7), and the relevant ANSI standards (Exh. R-10 through R-16), Bixel concluded that no guards were required on "manual machine tools" (Tr. 127). Finally, Bixel did not believe that guarding the chuck would eliminate the possibility of injury, as an operator could reach around the shield into the face of the chuck (Tr. 123).

Complainant introduced testimony, as well as literature showing that barrier guards for covering rotating chuck heads were available and in wide use within the industry (Tr. 33-39, 107; Exh. C-8, C-9, C-10, C-12, C-13, C-14, C-15, C-16, C-17, C-18, C-19). Specifically, Complainant showed that barrier guards were available for the 17 inch chuck head in use on the cited lathe (Tr. 39-40; Exh. C-17). After the inspection, MPS installed a barrier guard, or shield, on the cited lathe (Tr. 55; Exh. R-1). The guard has not interfered with the work Scott has done on the lathe since it was installed (Tr. 102, 105-06).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

The cited standard provides:

> One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are – barrier guards, two-handed tripping devices, electronic safety devices, etc.

Complainant established the existence of a hazard, in that employees working within four to six inches of the rotating chuck head of the LeBlond lathe could catch their clothing or shop rags in the rotating head and be drawn into the equipment. The standard is, therefore, applicable. Mr. Bixel's opinion that the standard was not meant to apply to this particular type of lathe is unsupported by the evidence in the record. The Oregon OSH program directive, the Federal OSHA interpretation, and the ANSI standards all make the same point, *i.e.*, that each chuck lathe must be individually evaluated to determine employee exposure to a hazard before a guard is required. CO Bedard evaluated the chuck and found it had irregular protruding jaws, and that the operator came enough to the chuck when working the piece being turned to be exposed to the hazard created. I find nothing in the materials submitted which supports MPS' theory that manual chuck lathes are exempt from this analysis. To the contrary, the 2001 ANSI standards specifically address "manual turning machines with or without automatic controls" at

B11.6-2001. At Paragraph 6.21 **Safeguarding**, the standard states ". . . For manual machines only: ◦ chuck guard and chip and coolant splash shields as required." (Exh. R-28). All the evidence in the record supports the application of the cited standard where, as here, a hazard is proven to exist.

MPS' contention that a barrier guard could not be used in all operations is also unconvincing. First, there is no evidence that MPS actually uses the lathe for any of the operations of which the lathe was capable, but in which a guard could not be used. Complainant introduced evidence that transparent guards were available so that operators could view the stock while working it (Exh. C-13). MPS' machinist testified only that he has used the lathe since a guard was installed, and had no problems with it. On this record I cannot find that the use of a chuck guard is infeasible.

Finally, an employer may not decline to comply with an OSHA standard merely because the means for protection required do not completely eliminate the hazards to which an employee may be exposed. It is true the chuck guard will not afford complete protection from all injuries, nonetheless it does provide significant protection against the hazard identified by OSHA.

It is undisputed that the LeBlond lathe was unguarded. It is also undisputed that MPS' lathe operator worked, with the knowledge of Mr. Bixel, within two to three inches of the unguarded chuck. The violation is established.

Penalty

A gravity based penalty of $2,000.00 was proposed for this item (Tr. 86). Though Bedard believed the probability of an accident occurring was low, he stated that the consequences of an accident could be severe. An employee pulled into the lathe could suffer lacerations, broken fingers, wrists and/or arms (Tr. 23, 85). I find that the gravity of this violation was overstated. One employee, John Smith, an experienced machinist, operated the lathe only a few times each month (Tr. 83-84). Smith did not have long hair. There is no evidence that he wore loose clothing or jewelry which might have been caught in the machinery. MPS employees had suffered no injuries from the unguarded lathe chuck (Tr. 49, 101, 129). Given the infrequent usage of the lathe and the remote chance of injury occurring, and the fact that there has never been an injury, I find that a gravity based penalty of $500.00 is appropriate.

MPS is a small company. It had a safety and health program, and no history of OSHA violations. The hazard was immediately abated (Tr. 86). Bedard testified that Respondent was entitled to a 65% reduction in the gravity based penalty based on those factors (Tr. 86). A penalty of $175.00 will, therefore, be assessed.

Alleged Violation of §1910.219(e)(1)(i)

Citation 1, item 2, as amended (Tr. 11) alleges:

29 CFR 1910.219(e)(1)(i): Horizontal belts which had both runs seven feet or less from the floor level were not guarded with a guard that extended to at least fifteen inches above the belt:

> (a) The Bridgeport milling machine, located in the mobile machine shop had an unguarded V-belt 70-3/4 inches from the floor.

Facts

CO Bedard further testified that on MPS' Bridgeport milling machine, a ½" horizontal v-belt in the housing on top of the machine was inadequately guarded (Tr. 20, 69, 81; Exh. C-5, C-6, C-7). At the time of the inspection the machine was operated as a drill press. The cited belt moves in excess of 250 feet per minute, driving the equipment's rotating bit (Tr. 72, 81). A lever outside of the belt housing loosens the belt, allowing the operator to move the belt between different pulleys within the housing. Moving the belt adjusts the speed at which the bit rotates (Exh. 71-73). Openings in the pulley housing allow the operator to reach in to move the belt (Tr. 73, 129-30). This is accomplished while the machine is off (Tr. 73). A second lever raises or lowers the drill to the work table below. That lever is located approximately six inches below the belt and pulley housing. Bedard believed there was a danger of the operator accidentally reaching for that lever and putting his fingers into the housing while the machine was running (Tr. 74).

Scott testified that the open slot in the housing was approximately eight inches from his hand when he used the lever to lower the assembly (Tr. 98). He had never accidentally inserted his hand into the belt and pulley casing (Tr. 98). He had never heard of anyone else being injured in this manner (Tr. 99). Bixel testified that he was unable to determine how the standard applied to his milling machine, as the reference to a guard extending at least "fifteen (15) inches above the belt, or to a standard height" was incomprehensible (Tr. 130). Bixel testified that he did not object to covering the belt drives (Tr. 130-31).

Complainant introduced evidence that belt covers are readily available and are in use within the industry (Tr. 76; Exh. C-11). Industry catalogues marketing guarding equipment specifically reference 29 C.F.R. §1910.219, noting that the standard requires that sheaves and belts on milling machines be completely covered (Exh. C-19). After the OSHA inspection MSP added a guard to the Bridgeport milling machine's belt and pulley housing (Tr. 77-78; Exh. R-6).

Discussion

The cited standard provides:

> Where both runs of horizontal belts are seven (7) feet or less from the floor level, the guard shall extend to at least fifteen (15) inches above the belt or to a standard height (see Table O-12), except that where both runs of a horizontal belt are 42 inches or less from the floor, the belt shall be fully enclosed in accordance with paragraphs (m) and (o) of this section.

The applicability of the cited standard is far from clear from its plain language. In order to ascertain that the cited standard applied in this case, this judge relied on an internal OSHA directive, STD 1-12.14, dated October 30, 1978. That instruction states that "c. 'fully enclosed' applies to the sides of a power transmission system not guarded by location as described in 29 CFR 1910.219(e)(1)(i) which includes both runs of a horizontal belt, pulley and flywheel. . . ." The instruction omits any distinction between belts 42" or less from the floor, but less than seven feet above the floor. It appears from this directive, and the industry literature, that the Secretary does interpret this standard to apply to the type of milling machine cited here.

The Secretary, however, failed to establish exposure to the cited hazard. The mere fact that a guard is manufactured and sold for this machine does not, in itself, show that employees are exposed to the hazard posed by the belts inside the machine housing. In order to show employee exposure, the Secretary must prove that employees have been, are, or will be in that zone of danger during either their assigned working duties, their personal comfort activities while on the job site, or their movement along normal routes of ingress to or egress from their assigned workplaces. *Kaspar Electroplating Corp.,* 16 BNA OSHC 1517, 1521, 1993 CCH OSHD ¶30,303, p. 38,886, (No. 86-0274, 1993). Complainant argues that the milling machine's operator is exposed to the cited hazard while operating the lever that raises and lowers the equipment.

The Commission has held that the zone of danger created by a cited hazard is determined by the specific hazard, and is normally the area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent. *RGM Construction Co. (RGM),* 17 BNA OSHC 1229, 1234, 1995 CCH OSHD ¶30,754 (No. 91-2107, 1995). In this case, the zone of danger is the area inside the housing where the belts and pulleys are located. Machinist Scott testified that he placed his hand no nearer than eight inches from the cited horizontal belts when operating the lever which raises and lowers the apparatus. The pulley housing itself acts as a partial guard. While it would not be impossible for Scott to insert his hand through the openings in the housing into the drive belts, the Secretary failed to establish that such exposure was reasonably predictable.

The Secretary's theory of exposure is based on the CO's speculation that Scott, an experienced operator, is so lacking in hand coordination that in reaching for the positioning lever he will miss it entirely and put his fingers into the pulley housing eight inches above and behind the lever. It is not enough for the Secretary to describe a scenario in which exposure, no matter how implausible, is not impossible; she must prove, by a preponderance of the evidence, that such exposure is reasonably predictable. *Id.* This she has not done.

The evidence fails to show that it was reasonably predictable employees would be in the zone of danger posed by the partially enclosed pulley housing. Because the Secretary failed to establish employee exposure, citation 1, item 2 is vacated.

ORDER

1. Citation 1, item 1, alleging violation of 29 C.F.R. §1910.212(a)(1) is AFFIRMED and a penalty of $175.00 is ASSESSED.
2. Citation 1, item 2, alleging violation of 29 C.F.R. §1910.219(e)(1)(i) is VACATED.

/s/
James H. Barkley
Judge, OSHRC

Dated: January 2, 2004