UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>L & B PRODUCTS, CORP.,<br>Respondent. | DOCKET NO. 95-1721 |

Appearances: For Complainant: Esther D. Curtwright, Esq., Office of the Solicitor, U. S. Department of Labor, New York, NY.; For Respondent: Sidney Manes, Esq., Green & Seifter , Syracuse, NY.

Before: Judge Covette Rooney

## *DECISION AND ORDER*

This proceeding is before the Occupational Safety and Health Review Commission pursuant to Section 10(c) the Occupational Safety and Health Act of 1979 (29 U.S.C. §651, *et seq.*)("the Act"). Respondent, L & B Products, Corp., at all times relevant to this action maintained at a worksite at 99 South Third Street, Hudson, NY., where it was engaged in the business of furniture manufacturing. Respondent admits that it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

From May 15, 1995 to September 14, 1995, Compliance Safety and Health Officer ("CO") Terry A. Harding conducted a general inspection of the aforementioned worksite. During the course of this inspection CO Harding inspected all eight departments. She was accompanied by Dean Vander Schaaff, who identified himself an employee whose responsibilities included safety (Tr. 12)[1]. As a result of this inspection, on October 20, 1995, Respondent was issued two citations, alleging serious and other-than-serious violations with a proposed total penalty in the amount of $57,600.00 (51 items). By timely Notice of Contest L&B brought this proceeding before the Review Commission. A hearing was held before the undersigned on January 28-23, and June 16-17, 1997. Counsel for the parties have submitted Post-Hearing Briefs and Reply Briefs, and this matter is ready for disposition.

[1] "Tr" refers to trial transcript. "Exh." refers to exhibits.

**THE INSPECTION**

CO Harding's inspection began on May 15, 1995. The work performed at the facility involved many aspects of the furniture manufacturing business, including metal working, spray painting, wood working, and the packing and shipping of furniture. The work performed at the sight is furniture manufacturing, primarily for hotels. The inspection continued on various dates, for a total of approximately eight days, between May 15th and September 14th (Tr.11-12, 13, 232) The facility is comprised of approximately eight separate departments, including a wood chair department, a table top department, a welding department, a press department, a wood chair department, and a metal working department (Tr. 13). One the first day of the inspection, she asked to speak to the highest ranking person — or the safety director — whoever was available. She was put in touch with Dean Vander Schaaff (Tr. 732-733). An opening conference was held with Dean Vender Schaaff, who had informed CO Harding that safety was a part of his job and part of his title (Tr. 12, 250, 733). He accompanied her throughout the entire inspection during each of her visits. When he was not able to accompany her he determined who would accompany her on her inspection (Tr. 643-644). When they entered the various departments, Mr. Vander Schaaff identified group leaders and supervisors, and supervisors or foremen from those departments accompanied them on the inspection (Tr. 12-13, 644). Employees were freely moving around the plant during the course of her inspection (Tr. 239). During the course of her inspection, she questioned Mr. Vander Schaaff, supervisors, and employees about the condition of the machines she observed (Tr. 639). She also took photographs of machinery during her inspection. She determined which items to photograph by asking employees if the machine was used, and if it is used in the condition she observed it in (Tr. 634).

Dr. Carter, Tom Chantry, Ralph Grand, Mr. Harring, DV, and Arthur Rochester, the union representative were all present at the closing conference (Tr. 728-29). During that conference CO Harding went over what each instance of the apparent violations and discussed them at length. They tried to agree on some abatement dates, and then CO informed the employer of what their rights and responsibilities are following an inspection, including right to contest, informal conferences, etc. (Tr. 729).

**SIX MONTH LIMITATION**

It is Respondent's contention that the issuance of the citation 2, item no. 5 was in contravention of Section 9(a) of the Act, which provides as follows:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a ... standard, ... he shall with reasonable promptness issue a citation to the employer.

Section 9(c) of the Act further provides that "[n]o citation may be issued . . . after the expiration of six months following the occupance of any violation".

Respondent argues that the Complainant's acknowledgment at Paragraph IV that citation 2, item no. 5 was observed on March 10, 1995, reveals that this violation occurred six months before the citation was issued.(Respondent's Brief, p.10). The record reveals that this violation was issued for Respondent not reporting the occurrence of an injury which occurred February 9, 1995, within 30 days of its occurrence, March 10, 1995. The Review Commission has held that the "reasonable promptness" requirement of Section 9(a) and the six-month period of Section

9(a)(c) work together:
The Review Commission has held that a citation issued within the six month limitation period of Section 9(c) meets the reasonable promptness requirement of Section 9(a), unless the employer is able to demonstrate prejudice to the defense of its case. See *Bland Constr. Co.*, 15 BNA OSHC 1031, 1041-41(No. 87-992, 1991). The undersigned finds that the citation in this case, issued October 20, 1995, was issued within six months of the inspection date (April 25, 1995 to September 14, 1995), and furthermore, Respondent does not claim prejudice to the defense of its case. Accordingly, the citation was not issued in contravention of Section 9(a) of the Act. (See also *Furry Grain Company, D.K..B., Inc.*, 1 BNA OSHC 3193 (No. 1700, 1973)(the 6 month period for issuing the citation began on the date of the inspection resulting from the report, not on the date of the accident itself). Respondent's affirmative defense that the Secretary failed to issue this citation item with reasonable promptness has no merit and is rejected.

**PARTICULARITY OF THE NATURE OF THE VIOLATIONS**

Respondent alleges that the drafting of the citations in a manner which paraphrased the cited regulation was not of sufficient particularity to have afforded him adequate notice of what he did wrong and the issues in controversy. CO Harding utilized the language found in Standard Alleged Violation Elements (SAVEs) handbook what is commonly called "SAVE" language in the preparation of her citations.[2] (Tr. 924-925; Respondent's Brief, p. 9-10). The citation particularity requirement of Section 9(a) of the Act is intended to given an employer fair notice as to the nature of the alleged violation. The extreme sanction of vacating a citation for lack of particularity should only be taken where the employer has shown it was prejudiced in its ability to defend on the merits. An examination of the record as a whole reveals that Respondent was neither prejudiced in its ability to contest nor in its efforts to defend itself against the allegations of the citation. Additionally, I find that the language of the citation is substantially similar to the language of the standard, and that the areas at issue are described in reasonable detail. Consequently, I hold that the citation did provide adequate notice to the Respondent. Furthermore, CO Harding testified that the closing conference was attended by six representatives of the Respondent, none of whom indicated that they did not understand the citations as they were reviewed each instance as well as abatement dates (Tr. 729). The undersigned also notes that Respondent's witness, Dr. William S. Carter, testified that he participated in the closing conference with CO Harding, and he discussed with her each of the violations including the abatement of a number of the violations (Tr. 971). Accordingly, the undersigned finds that this affirmative defense has no merit.

**CREDIBILITY OF WITNESSES**

Both parties in this matter called only one witness. The undersigned having observed CO Harding's demeanor on the stand and her manner of responding on cross examination find her testimony credible. CO Harding was completely forthright and objective, and she displayed no hostility or biased towards the Respondent. CO Harding's demeanor in conjunction with the photographic evidence unequivocally establish her credibility. Respondent called Dr. William S, Carter, a certified industrial hygienist and consultant who became engaged in the employ of

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[2] This document issued by issued by the Directorate of Compliance Program contains current text for all standards - alleged violation elements (SAVEs) for OSHA standards.

Respondent through Respondent's attorney in early August 1995 (Tr. 872). Dr. William S. Carter testified for L & B. Dr. Carter is an associate professor in environmental health and safety at the University of Findlay. (Tr. 870). Dr. Carter gave an extensive description of the layout of L & B. (Tr. 872-906) He testified that between the end of July, 1995 and October 20, 1995, he walked through L & B's facility four to five times. (Tr. 901) However, Dr. Carter was unable to testify from his own knowledge about many of the conditions observed by CO Harding at the time of her inspection. He was did not accompany the compliance officer during her inspection, and a review of his testimony indicates that he was not able to provide any information with regard to the alleged violative conditions at the time the compliance officer observed them.(Tr. 921; 928-959). His counsel explained that his testimony would provide information regarding the abatement of the violations (Tr. 920). Accordingly, his testimony is given no weight with regard to the rebuttal of the Complainant's prima facie case.

**ADMISSIONS OF EMPLOYEES**

Respondent objects to the statements made to CO Harding by employees and management during the course of her inspection. (Respondent's Brief, pp. 6-8).[3] The Review Commission had acknowledged that statements to compliance officers by employees and foremen during the course of inspections are not hearsay but admissible admissions under Rule 801(d)(2)(D) of the Federal Rules of Evidence. *Regina Construction Co.,* 15 BNA OSHC 1044, 1048 (No.87-1309, 1991). The rule states:

> (d) Statements which are not hearsay.
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> > A statement is not hearsay if . . .(2) Admissions by party opponent. The statement is offered against a party and is . . . (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship.

"Although admissions under Rule 801(d)(2)(D) are not inherently reliable, there are several factors that make them likely to be trustworthy, including: (1)the declarant does not have time to realize his own self-interest or feel pressure from the employer against whom the statement is made; (2) the statement involves a matter of the declarant is well-informed and not likely to speak carelessly; (3) the employer against whom the statement is made is expected to have access to evidence which explains or rebuts the matter asserted. 4 D. Louisell & C. Mueller, *Federal Evidence* §426 (1980 & Supp. 1990)." *Id.* The record reveals that these statements met the aforementioned tests. CO Harding simultaneously questioned employees and management as she made each observation. The employees were persons who actually worked with the equipment and their statements were made spontaneously. There was no evidence introduced by Respondent that these witnesses were concerned about their own self interest or felt pressure from the employer. Additionally, other than cross examining CO Harding about her discussions with employees, Respondent produced no evidence to rebut these statements. Respondent has had ample opportunity to rebut these statements. The undersigned also notes that Respondent did not

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[3] Respondent asserts that these employees were unidentified, however, a review of the record reveals otherwise. CO Harding provided the names of various employees - management and hourly - during the course of her testimony. (e.g.,Tr. 658-660 ).

call as a witnesses, Mr. Dean Vander Schaaff, who accompanied CO Harding during the course of her inspection, and or the person whom Mr. Vander Schaaff designated to accompany CO Harding. These persons were not called to rebut the statements CO Harding testified were provided to her during the course of her inspection. Accordingly, these statements constitute admissions whose reliability is unrefuted. *See George Campbell Painting Corp.,* 17 BNA OSHC 1979, n. 7 (No. 93-0984, 1997).

**SECRETARY'S BURDEN OF PROOF**

The Secretary has the burden of proving his case by a preponderance of the evidence.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (the employer either knew or with the exercise of reasonable diligence could have known, of the violative conditions).

*Atlantic BatteryCo.,* 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The undersigned finds that Respondent's manufacturing business is subject to the requirements of the general industry standards, and finds that a review of the record reveals that all of the cited violative conditions observed were conditions which the cited standards were effectuated to prevent. Accordingly, the cited standards are applicable. Furthermore, the undersigned rejects Respondent's argument that it lacked fair notice of the cited standard's applicability. The undersigned finds that the each of the cited standards gave Respondent fair warning of what the cited standard required. *See Phoenix Roofing, Inc.,* 17 BNA OSHA 1076, (No. 90-2148, 1995), *aff'd without op.,* 79 F. 3d 1146 (5th Cir. 1996); *Kiewit Western Co.,* 16 BNA OSHC 1689, 1693 (No. 91-2578).

**EMPLOYEE EXPOSURE GENERALLY**

CO Harding testified that she determined from a combination of personal observation and/or employee and management interviews that each piece of equipment and/or condition she cited in citation one and two were used in the condition she observed. Respondent challenges Complainant's establishment of employee exposure where CO Harding did not actually see the equipment in operation and relied upon employee statements to establish usage and exposure. The Secretary must show employee access to the condition by a preponderance of the evidence. *Olin Constr. Co. v. OSHRC, 52*5 F.2d 464 [3 BNA OSHC 1526] (2d Cir. 1975). The Secretary may prove employee exposure to a hazard" by showing that, during the course of their assigned working duties, their personal comfort activities on the job, or their normal ingress-egress to and from their assigned workplaces, employees have been in a zone of danger or that it is reasonably predictable that they will be in a zone of danger. (citations omitted) The zone of danger is determined by the hazard presented by the violative condition, and is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent.(citation omitted)". *RGM Construction,* 17 BNA OSHC 1229, 1234 (No. 91-2107). Thus, the Secretary may prove exposure by actual exposure or that it was reasonably foreseeable that they would have access to the violative conditions.

During the cross examination of CO Harding Respondent's counsel continually inquired whether she had actually observed the cited equipment during the course of her inspection and if

not upon what information did she base her opinion that the equipment was operable. In response to these challenges, CO Harding testified during this inspection she inquired of Mr. Vander Schaaff or the foreman in that department, if the machines she cited were used by the employees, and if they had been used in recent months, how often they were used, and if they were used in the condition in which she observed them. She further testified that any piece of machinery which was totally out of service was excluded from these citations (Tr. 731). She testified unequivocally that each piece of equipment cited had been used by employees with six months of her inspection (TR. 633). She testified that prior to photographing a machine, she first determined whether the machine was used in the condition she was observing. She also did not include any machine in her citation description which was not being used by employees, or which was being serviced or down for maintenance, or which Mr. Vander Schaaff or a supervisor or employee told her was inoperable (Tr. 634-636). The undersigned finds that CO Harding's lack of actual observation of the operation of each cited machine and /or condition was not harmful to the establishment of her prima facie case. The undersigned finds that her observations of equipment in the cited condition and the statements she obtained from employees and management during her observations provided sufficient evidence to met her burden of proof where her testimony set forth the manner in which an employee would be exposed to the cited condition during his/her performance of a task on a machine or in a cited area.

**EMPLOYER KNOWLEDGE: GENERALLY**

To satisfy the element of knowledge, the Complainant must prove that a cited employer either knew, or with the exercise of reasonable diligence could have known of the presence of the violative condition. *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1221 (No. 88-821, 1991); *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1320-1321 (No. 86-351, 1991). Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation. It need not be shown that the employer understood or acknowledged that the physical conditions were actually *hazardous. Phoenix Roofing, Inc., 17 BNA OSHA 1076,1079 (No. 90-2148, 1995), aff'd without op., 79 F. 3d 1146 (5th Cir. 1996)* citing *East Texas Motor Freight v. OSHRC, 671 F.2d 845, 849 [10 BNA OSHA 1456] (5th cir. 1982); Vanco Constr., 11 BNA OSHA 1058, 1060 n.3 (No. 79-4945, 1982).* With respect to constructive knowledge the Secretary establishes it by showing that an employer could have known of the violative conditions if it had exercised reasonable diligence. In *Pride Oil Well Service*, 15 BNA OSHC 1809 (No. 87-692, 1992), the Review Commission set forth criteria to be considered when evaluating reasonable diligence.

> Reasonable diligence involves several factors, including an employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981) . . . Other factors indicative of reasonable diligence include adequate supervision of employees, and the formulation and implementation of adequate training programs and work rules to ensure that work is safe. (citations omitted).

*Id.* at 1814.

"Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corporation,* 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). *See also Dun Par Engineered Form Co.*, 12 BNA OSHC 1962 (No. 82-928, 1986)(the actual or constructive knowledge of an employer's foreman can be imputed to the employer); *Superior Electric Co.,* 17 BNA OSHA 1636 (No. 91-1597, 1996)( when an supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer). In the instant matter, not only did CO Harding interview a number of foremen during her walkaround, but she was accompanied by the employee who was introduced to her as in charge of safety - Dean Vander Schaaff. The actions and/or inactions of these individuals were imputable to L & B.

The record establishes that all of the cited conditions were in plain view - which the photographic evidence admitted into the record unequivocally establishes and that supervisory personnel were present throughout the work operation. This constitutes constructive of the violative conditions. *American Airlines, Inc.* 17 BNA OSHC 1552, 1555 (No. 93-1817 and 93-1965, 1996). In the instant matter, the undersigned finds that Respondent's supervisory personnel had a duty to determine the hazards to which their employees may have been exposed and to have eliminated such hazards. In view of the conspicuous location, the readily observable nature of the conditions and the presence of supervisory personnel in the cited areas, the undersigned finds that had Respondent's supervisory personnel exercised reasonable diligence, they would have known and recognized the cited conditions. Accordingly, a finding of constructive knowledge has been established.

**SERIOUS VIOLATIONS**

**Citation 1, Item 1**

§1910.23(c)(1): Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a toeboard wherever, beneath the open sides,

(I) Persons can pass,

(ii) There is moving machinery, or

(iii) There is equipment with which falling materials could create a hazard.

*Instance (a)*: Storage area for the main paint line where the covers for the top of the bases are stored, there was no mid rail for the entire length of the storage area which was approximately 48 ft. long, 7 ft. wide and 7 ft. 3 inches above the floor below, on or about 6/23/95.

**1. Employer Noncompliance**

CO Harding observed this storage area near the main paint line on four different occasions, May 15 and 23, and June 9 and 23. The area was located 7' 3" above the floor. Although the storage area had a railing, there was no mid-rail (Tr. 22-25, Exh. C-2). CO Harding testified that she checked the height of the top rail, and it met the height for a standard top rail (Tr. 261-62). Stored in the area were covers for the tops of bases. (Tr. 14).

Section 1910.23(c)(1) requires that open-sided platforms four feet above the floor be

guarded by a standard railing. The term standard railing as defined is 29 C.F.R (e)(3) includes an intermediate rail/ mid-rail.[4]

**2. Employee Access to the Violative Condition**

CO Harding observed an employee going up into the storage area (Tr. 30). This employee was on the platform for "a few minutes" and thus exposed to a fall hazard (Tr. 267). CO Harding also determined through employee interviews that employees go onto the storage area. (Tr. 30).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors, who should have exercised reasonable diligence, were present throughout the workplace. CO Harding testified that she informed Mr. Vander Schaaff of the condition, and that he told her that he would take care of the situation (Tr. 24-25). Mr. Vander Schaaff later informed her on June 10, 1995, that a mid-rail had been installed. (Tr. 262-63, 266-67)

*Instance (b):* Packing Department, Mezzanine which was 8 feet above the floor, had a guardrail around the entire area that measured 30 inches high, midrail was lacking for most of the area, on or about 7/13/95.

**1. Employer Noncompliance**

CO Harding observed this storage area, elevated eight feet above the floor, in the packing department. She observed boxes stored on what is referred to in the citation as the mezzanine - a term which the Respondent called the area (Tr. 656). The top rail of the storage area was 30" high, with no mid-rail (Tr. 24, Exh. C-3).

**2. Employee Access to the Violative Condition**

CO Harding observed employees pass within a foot or two of the edge of the storage area in the packing department mezzanine (Tr. 654-55). CO Harding observed employee Gary Mason retrieving a part from the storage area on the mezzanine ( Tr. 734-35).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors, who should have exercised reasonable diligence, were present throughout the workplace. CO Harding testified that on each occasion she observed the condition, she informed Mr. Vander Schaaff of the condition and he promised to rectify the condition each time. (Tr. 24-25)

**Penalty**

CO Harding considered the severity of the violation to be low. She testified that if an

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[4]29 C.F.R. § 1910.23(e)(3) provides: Railing, toe boards, and cover specifications. (1) A standard railing shall consist of top rail, intermediate rail, and posts, and shall have a vertical height of 42 inches nominal from upper surface of top rail to floor, platform, runway, or ramp level. The top rail shall be smooth-surfaced throughout the length of the railing. The intermediate rail shall be approximately halfway between the top rail and the floor, platform, runway, or ramp. The ends of the rails shall not overhang the terminal posts except where such overhang does not constitute a projection hazard.

injury were to occur, it would probably be a sprain or a broken bone. The probability of injury was deemed "lesser," because both areas were storage areas, where employees do not continuously work but periodically they go to theses areas to retrieve supplies. (Tr. 29-30). CO Harding testified that a standard railing protects employees from the hazard of falling from the elevated area. (Tr. 261) The Secretary's proposed penalty of $1,350.00 reflects a ten percent reduction, as L & B has no history of a significant violation within the last three years.[5] (Tr. 27)

**Citation 1, Item 2**

§1910.37(q)(5): A sign reading "Exit", or similar designation, with an arrow indicating the directions, shall be placed in every location where the direction of travel to reach the nearest exit is not immediately apparent.

*Instance (a)*: Wood Chair Warehouse, it was not evident from aisle ways where the nearest exit was located, on or about 8/29/95.

**1. Employer Noncompliance**

When walking through the wood chair warehouse with Mr. Vander Schaaff and Tom Chantry, a safety consultant working for Dr. Carter, CO Harding observed that in some areas of the warehouse, including several aisles, she could not see the nearest exit. (Tr. 30-32, 270, 872). When CO Harding made this observation, she was various distances from the exit. Section 1910.37(q)(5) requires the placement of an exit sign when the direction of travel to reach the nearest exit is not immediately apparent. CO Harding defines "immediately apparent" as "not apparent in and instant."(Tr. 268).

**2. Employee Access to the Violative Condition**

CO Harding testified that during her observation, employees were in the area moving stock in the aisles around the wood chair warehouse (Tr. 271-72). Although this area could not be characterized as a general work area, Dr. Carter characterized the area as one that employees would enter to retrieve items (Tr. 928).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors, who should have exercised reasonable diligence, were present throughout the workplace. CO Harding testified that when she informed Mr. Vander Schaaff and Tom Chantry of the condition, Mr. Chantry acknowledged the condition, while Mr. Vander Schaaff indicated that he would hang signs in the warehouse (Tr. 30-32). CO Harding also testified that at the closing conference, Dr. Carter expressed concern that due the frequent changes in stock, any newly installed signs may not be visible at all times. (Tr. 277).

**Penalty**

CO Harding classified the violation as "low severity." Based on the contents of the warehouse, CO Harding was of the opinion that the severity of injury arising from the violation would be smoke inhalation or first degree burns. (Tr. 32). The probability of injury was also low. Because of the contents of the warehouse - no flammable liquids present. There were no injuries reported as a result of this condition. (Tr. 268). An adjusted proposed penalty of $1,350.00 was proposed by the Secretary.

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[5] All of the proposed penalties in citation one reflect a 10% reduction for history. *See* **Penalty,** infra. pp 52-52.

**Citation 1, Item 3**

§1910.106(e)(2)(ii)(b): The quantity of liquid that may be located outside of an inside storage room or storage cabinet in a building or in any one fire area of a building shall not exceed:

(1) 25 gallons of Class IA liquids in containers

(2) 120 gallons of Class IB, IC, II, or III liquids in containers

*Instance (a)*: Foam Storage Room, 35 gallons of contact adhesive, 5 gallons of lacquer thinner and two 55 gallon drums of 2143 adhesive, all which are Class 1B flammable liquids, were located outside of the storage room or a storage cabinet, on or about 8/3/95.

**1. Employer Noncompliance**

CO Harding testified that she observed 35 gallons of contact adhesive, five gallons of lacquer thinner, and two 55 gallon drums of adhesive in the foam storage room. These liquids were all located outside of a storage room or cabinet (Tr. 33-35, Exh. C-4). CO Harding determined that the materials were flammable by examining the labels on the containers, as well as the corresponding material safety data sheets ("MSDS") for the various liquids. All of the materials were classified in the MSDS's as class IB flammable liquids. (Tr. 36)

Section 1910.106(e)(2)(ii)(b) address the *quantity* of liquid that may be stored outside of a storage room or cabinet, in this case, no more 120 gallons of class IB flammable liquids. On cross examination, CO Harding testified that she did not look into the containers, and does not know whether the 55 gallon drums or other containers were empty or full (Tr. 282-283). She admitted that she did not know how many gallons of flammable material was present. In light of this testimony and the requirements of the standard, the undersigned finds that the Complainant has not proved by a preponderance of evidence that the standard was violated. Accordingly, this item is VACATED.

**Citation 1, Item 4a**

§1910.106(e)(2)(iv)(a): Flammable liquids shall be kept in covered containers when not actually in use.

*Instance (a):* Wood Chair, adjacent to the small touch up spray booth, one gallon container of thinner which is a Class 1B flammable liquid was left open on the work bench while not in use, on or about 7/13/95.

**1. Employer Noncompliance**

CO Harding observed an uncovered container of thinner that was not in use at the time of her observation (Tr. 39, 43, Exh. C-5). She asked Mr. Vander Schaaff to put her in touch with an employee who used the material so that she could determine what was in the container (Tr. 658). He identified Mary Coleman, who identified the material as thinner in response to CO Harding's inquiry about the substance (Tr. 658, 41, 748). CO Harding consulted the MSDS for the thinner, and determined that the substance was a Class IB flammable liquid (Tr. 41, 661). The undersigned finds that the information which Ms Coleman provided and the information obtained from the MSDS is unrebutted and establishes noncompliance.

**2. Employee Access to the Violative Condition**

Although there was not an employee working next to the material, there were employees working in the area, and in response to her inquiry as to who used the material, Mr. Vander Schaaff directed her to Ms. Coleman who worked in that department (Tr. 660). CO Harding

identified the hazard of the alleged violation as explosion. If there were any spark in the area, it would be exposed to the vapors that are given off of the type of the containers, exposing employees to an explosion (Tr. 44).

**3. Employer Knowledge of the Condition**

L & B had constructive knowledge of the violative condition. The container was located on a bench in plain view, in the wood chair department (See Exh. C-5), and the record indicates that supervisors, who should have exercised reasonable diligence, were present throughout the workplace. When CO Harding brought this alleged violation to the attention of Mr. Vander Schaaff, he indicated that he would ensure that covers were kept on flammable materials when they were not in use (Tr. 43).

*Instance (b):* Wood Chair, throughout the spray area, employees obtain 5 gallon pails of Class 1B flammable stains, such as, but not limited to, Victorian Mahogany, English Oak, Fruitwood #124 and Teak #189 from the flammable storage room and the open five gallon containers of stains are transported back to the spray booth on small carts)[6], on or about 7/13/95.

**1. Employer Noncompliance**

CO Harding observed that employees were obtaining containers of stain from the flammable storage room, bringing them back to the spray booths and leaving them open in the spray booths (Tr. 41, 661-62). The containers were not in use, or hooked up for spraying at the time of her observation (Tr. 41, 42, 661-62). CO Harding determined that the materials were flammable by asking employees about the contents of the containers and consulting the corresponding MSDS's. She also observed an employee, Jay Ostrowsky, pushing material on a cart. He informed her that the material was Victorian mahogany stain (Tr. 289-90). CO Harding also observed these same materials in the flammable storage room (Tr. 41-42, 292).

**2. Employee Access to the Violative Condition**

Although the material was not in use by an employee at the time of CO Harding's observation, there were employees in the department (Tr. 752-53). She was in the department, in which work was in progress, for a number of hours and the employees as well as Mr. Vander Schaaff were present (Tr. 752-53). As noted in instance (a), CO Harding identified the hazard of the alleged violation as explosion. Therefore, employees in the department would be exposed to the hazardous condition (Tr. 41-42).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The open containers were in plain view, and the record indicates that supervisors, who should have exercised reasonable diligence, were present throughout the workplace. In addition, the hazardous contents of the contains should have been apparent to the employer, as employees obtain the contents from the flammable storage area (Tr. 41). As in instance (a), Mr. Vander Schaaff indicated that he would insure that proper covers were placed on the containers (Tr. 43).

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[6] The phrase "are transported back to the spray booth on small carts" describes the means by which the stains got from the flammable storage area to the spray area. The citation was issued because the stains were open and sitting on the floor at the spray finishing area (Tr. 662, 755).

*Instance (c):*Upholstery, near the 3rd cutting table, container for glue, had a piece of wood sitting on top of it in lieu of a cover when not in use, on or about 8/3/95.

**1. Employer Noncompliance**

CO Harding observed a container of glue sitting on a bench in the upholstery department that was covered only by a piece of wood. The glue was not in use at the time of her observation (Tr. 41, 42, 760, Exh. C-6). She determined the contents of the container by asking Mr. Vander Schaaff and a department employee, Fred Fontaine. She further determined that the material was flammable by consulting the MSDS (Tr. 42, 756-58). Although CO Harding did not look into the pot of glue herself, she knew that the container held glue and was not empty based on her conversation with employee Fontaine (Tr. 757-58). L & B presented no evidence to rebut this information.

Section 1910.106(e)(2)(iv)(a) requires that the flammable material be kept in covered containers when not in use. The undersigned finds that the placement of a piece of wood over the container does not meet the intent of the standard (Tr. 760). For example, the piece of wood sitting on top of the glue would not provide any type of protection from the vapors released in the atmosphere.

**2. Employee Access to the Violative Condition**

CO Harding's conversation with the employee Fontaine who was working in the department illustrates that employees were working in the area of the alleged violation. As noted in instances (a) and (b), CO Harding identified the hazard of the alleged violation as possible explosion (Tr. 41). Therefore, employees in the department would be exposed to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors, who should have exercised reasonable diligence, were present throughout the workplace. As in instances (a) and (b), Mr. Vander Schaaff indicated that he would ensure that proper covers were place on flammable materials (Tr. 41).

**Citation 1, Item 4b**

§1910.107(e)(3): "Containers." Original closed containers, approved portable tanks, approved safety cans or a properly arranged system of piping shall be used for bringing flammable or combustible liquids into spray finishing room. Open or glass containers shall not be used.

(a) Wood Chair spray area, employee was observed wheeling an opened 5 gallon pail of Victorian Mahogany stain on a dolly-type cart from the flammable storage room to the spray booth where he was working, on or about 7/13/95.

**1. Employer Noncompliance**

CO Harding observed an employee wheeling a cart containing an open 5 gallon container from the flammable storage room to one of the spray booths (Tr. 44).. CO Harding questioned the employee and determined that the material was Victorian Mahogany Stain. She determined that the material was flammable by observing that the material was stored in the flammable storage room, and by consulting the corresponding MSDS. (Tr. 44-45)

**2. Employee Access to the Violative Condition**

CO Harding testified that a fire hazard is associated with the alleged violation. If the material were to spill over the side of the container during transport, a spark generated by either

spark producing activity or nearby electrical equipment could ignite the material and exposed the employee transporting the container to injury (Tr. 45). Furthermore, upon inspection of L & B's OSHA 200 Log, CO Harding discovered that an employee received third degree burns when an open container of material he was carrying through the workplace ignited (Tr. 46). CO Harding also testified that employees were sanding chairs with an electric sander within 15 feet of two spray booths. She classified this activity as "spark producing." (Tr. 47).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The practice of transporting open containers of flammable material through the workplace occurred in plain view, and the record indicates that supervisors, who should have exercised reasonable diligence, were present throughout the workplace. The volatility of the material should have been apparent to L & B, as employees retrieved the material from the flammable storage room. In addition, L & B was made aware of the employee practice of transporting open containers of flammable materials through a previous accident discovered by CO Harding in L & B's OSHA 200 logs.

**Penalty - Items 4a and 4b**

Items 4a and 4b were grouped because they involve similar or related hazards that may increase the potential for injury. The gravity of the violations reflects that due to the flammable nature of the liquids involved in items 4a and 4b, the violations should be classified to reflect high severity. The probability was classified as lesser, because the practice of carrying flammable liquids was not widespread throughout the workplace (Tr. 46). The Secretary proposed an adjusted penalty of $2,250.00.

**Citation 1, Item 5**

§1910.106(e)(2)(iv)(d): Flammable or combustible liquids shall be drawn from or transferred into vessels, containers, or portable tanks within a building only through a closed piping system, from safety cans, by means of a device drawing through the top, or from a container or portable tanks by gravity through an approved self-closing valve. Transferring by means of air pressure on the container or portable tanks shall be prohibited.

(a) Flammable Storage Room, employee dips a plastic container into open 55 gallon drums of class IB flammable liquids including stains #135 English Oak, #124 Fruit Wood, #189 Teak, lacquer and thinner and then dispenses into one gallon metal container to transport out onto the work floor, on or about 7/13/95.

**1. Employer Noncompliance**

From her observations and conversations with employees, CO Harding learned that employees were dipping into open topped 55 gallons drums using plastic containers, then dispensing the material into a metal one gallon container for transport (Tr. 48). She observed the open topped container and asked employees how the material was dispensed (Tr. 49, 304). When she observed the container, employee Bob Cousins, who was in the flammable storage room, stated that he dispensed the material as part of his job(Tr. 304). CO Harding determined that the materials were flammable by talking with employees; and observing the containers, which were marked with the contents, the physical properties of the material, flammability, and other hazard warnings; and consulting the corresponding MSDS (Tr. 48, 665). The drums did not have approved valves. (Tr. 762).

**2. Employee Access to the Violative Condition**

CO Harding testified that the hazard resulting from the alleged violation was that the resulting build-up of static charge from the liquid could result in a fire or an explosion. (Tr. 49). As revealed by CO Harding's conversation with Mr. Cousins, the employees during the course of their duties, would go into the storage room to obtain material from the drums, which in turn exposed them to this hazard.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors, who should have exercised reasonable diligence, were present throughout the workplace. In addition, some of the materials were dispensed using the appropriate approved self-closing valves on the drums (Tr. 48, 666). The use of these valves indicated that the employer had knowledge of the type of pump that should be used on the containers. (Tr. 666)

**Penalty**

The gravity of the violation reflects a high severity due to the flammable nature of the materials being dispensed. The probability of injury was lesser as the flammable storage room was the only location in the facility were CO Harding determined that materials were being dispensed in this manner (Tr. 48-49). The Secretary's adjusted proposed penalty was $2,250.00.

**Citation 1, Item 6**

§1910.106(e)(6)(ii): "Grounding." Class I liquids shall not be dispensed into containers unless the nozzle and container are electrically interconnected. Where the metallic floor plate on which the container stands while filling is electrically connected to the fill stem or where the fill stem is bonded to the container during filling operations by means of a bond wire, the provisions of this section shall be deemed to have been complied with.

*Instance (a)*: Foam Storage Room, where 2143 adhesive, which is a Class IB flammable liquid was dispensed into a metal coffee can and there was no bonding of the container with the can, on or about 8/3/95.

**1. Employer Noncompliance**

CO Harding determined from her observations and conversations with employees who retrieved the number 2143 adhesive, that they dispensing the liquid into a metal coffee can. There was no bonding wire or electrical inter-connecting wire between the two containers. This standard requires a bond between the two containers when flammable liquids are dispensed (Tr. 50, 52, 667). She determined that the material was flammable based on the fact that the container was labeled flammable, and the MSDS indicated that the adhesive was Class IB flammable material (Tr. 50; Exh. C-7). This practice violated the standard.

**2. Employee Access to the Violative Condition**

Employees were exposed to the hazard of static build up as they traveled into the foam storage room to retrieve foam or to dispense liquids (Tr. 38).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors, who should have exercised reasonable diligence , were present in the workplace. Additionally, Respondent was aware of the appropriate methods to dispense said liquids - some of the flammable liquids were properly dispensed (Tr. 54, 669).

*Instance (b):* Flammable Storage Room, where employees dip into open containers of

Class IB flammable liquids without bonding the containers, on or about 7/13/95. Flammable liquids include stains such as #135 English Oak, #124 Fruit Wood, #189 Teak, lacquer and thinner. (No safety cans are utilized.)

**1. Employer Noncompliance**

In the flammable storage room, CO Harding determined that employees were dipping plastic containers into open 55 gallons drums of stain. There was no bonding between the containers. (Tr. 51-52, 668). Although she did not actually observe any employee dispensing the materials in this manner, she testified that she observed the plastic containers, and spoke with the employee in the flammable materials room (Tr. 51-52, 54, 307, 668, 766). CO Harding testified that she determined that the materials were flammable by talking with employees; observing the containers, which were marked with the contents, the physical properties of the material, flammability, and other hazard warnings; and consulting the corresponding MSDS (Tr. 36, 665) .

**2. Employee Access to the Violative Condition**

This was an area in which employees worked (Tr. 36, 54). They were exposed to the hazard of static build up by this practice.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors, who should have exercised reasonable diligence , were present in the workplace. Additionally, Respondent was aware of the appropriate methods to dispense said liquids - some of the flammable liquids were properly dispensed (Tr. 54, 669).

**Penalty**

CO Harding determined that the severity of the alleged violation was "high," based on the flammable nature of the materials involved. She assessed the probability as "lesser," because there were instances when the material was properly dispensed. (Tr. 54). The Secretary's adjusted proposed penalty was $2,250.00.

**Citation 1, Item 7**

§1910.108(g)(6)(I)(6): "Dip tank covers." (I) Covers arranged to close automatically in the event of fire shall be actuated by approved automatic devices and shall also be arranged for manual operation. (a) Wood Chair, two dip tanks, which contained a Class IB flammable liquid wash thinner, did not have a working automatic system such as a fusible link, to close the top automatically in the event of a fire, on or about 7/14/95.

**1. Employer Noncompliance**

CO Harding observed two dip tanks next to the spray booths. She testified that she was told by the foreman of the department that the dip tanks contained wash thinner, a Class IB flammable liquid that was used to remove stains from chairs (Tr. 55-56, 310-11, Exh C-8). CO Harding also confirmed the contents of the container with the employee who used the dip tank, and consulted the corresponding MSDS for the material (Tr. 312). CO Harding did not lift the lid of the tank, however, the supervisor raised the lid, and she determined that there was material in the tank. (Tr. 310-11). She further testified that she asked the foremen of the department the whether the tanks had fusible links on the covers. He responded that the he did not notice any, but that he thought there had been fusible links on the covers at one time. She testified that a fusible link would automatically close the dip tank cover in the event of a fire, or heat in the area (Tr. 55).

The record clearly establishes that the only hazard abatement mechanism used by respondent was the dip tank covers. Respondent was obligated to use automatic dip tank dip covers with approved automatic devices - in the absence of any other fire suppression mechanism listed in the standard - which it did not do. See §1910.108(c)(5).

**2. Employee Access to the Violative Condition**

As evidenced by CO Harding's discussion with the employee who used the dip tanks, employees had access to the violative condition.

**3. Employer Knowledge of the Violation**

CO Harding testified that the supervisor of the department told her that the dip tanks did not have fusible links on the covers. In addition, L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors, who should have exercised reasonable diligence, were present throughout the workplace.

**Penalty**

CO Harding classified the severity of the all edged violation as "high," due to the flammable nature of the materials in the tank (Tr. 58). She also testified that the hazard associated with the violation was increased because there was an improper electrical outlet adjacent to one of the dip tanks (Tr. 57; Exh. C-8 ). She stated that such an outlet is not suitably located near dip tanks that contain class IB flammable liquids. Although the dip tanks were near potential ignition sources or spark producing equipment, they weren't completely surrounded. CO Harding therefore determined that the probability of the violation was "lesser." The Secretary's adjusted proposed penalty was $2,250.00.

**Citation 1, Item 8**

§1910.147(c)(7)(I)(7)(I) "Training and communication." (I) The employer shall provide training to ensure that the purpose and function of the energy control program are understood by employees and that the knowledge and skills required for the safe application, usage, and removal of the energy controls are acquired by employees. The training shall include the following:

(A) Each authorized employee shall receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control.

(B) Each affected employee shall be instructed in the purpose and use of the energy control procedure.

(C) All other employees whose work operations are or may be in an area where energy control procedures may be utilized, shall be instructed about the procedure, and about the prohibition relating to attempts to restart or reenergize machines or equipment which are locked out or tagged out.

(a) L & B Products, throughout the facility, none of the employees that would be classified as "affected" employees had received training in the purpose and use of the energy control procedure and none of the employees that would be classified as "other" employees had received training about the procedure, and about the prohibition relating to attempts to restart or reenergize machines or equipment which are locked out or tagged out. Equipment affected would include machinery such as mechanical power presses and various prices of woodworking equipment, on or about 5/15/95.

**1. Employer Noncompliance**

During her inspection of L & B, CO Harding examined L & B's lock out, tag out program. She testified that she asked Mr. Vander Schaaff which employees had been trained as required by the standard. He informed her that only the maintenance employees had been trained. In CO Harding's opinion, the maintenance employees would be classified authorized employees under the standard.[7] (Tr. 59, 323, 334, 671, 669, 767-68, 780-82). CO Harding gave her own definition of an authorized employee. Such an employee would be directly involved in the lock out, tag out process. This person would lock out a piece of equipment, perform the maintenance on the equipment, and remove the lock and tag from the equipment when the maintenance is completed. (Tr. 671, 322-23) CO Harding testified that she spoke with authorized employee Nate Morrison, the maintenance supervisor. (Tr. 778) As of May 15, 1995, the date listed on this citation item, maintenance supervisor Morrison was trained. (781-82)

CO Harding defined an affected employee as one who operates a piece of machinery, like mechanical press operators or woodworking equipment operators because they would have a direct impact on the safe implementation of lockout/tagout. (Tr. 325, 670-71). CO Harding testified that she spoke with two such employees, employee General Davis and employee Pablo Badillo. (Tr. 325-26). CO Harding stated that she identified the affected employees by walking through the facility, and asking the employees if they were machine operators (Tr. 772-73). She estimated that there were 100 such employees (Tr. 853). She defined "other" employees as employees that might pass near locked out, tagged out equipment. These employees may not work directly with the machinery. However, they may have access to the area to drop off supplies or pick up chairs (Tr. 670-71).

The undersigned finds that the employees identified by CO Harding should have been trained pursuant to the standard, as they could be considered either "affected" or "other" employees. (Tr. 670). The lock-out/tag-out standards are intended to protect not only maintenance employees, but "affected employees," that is, employees "whose jobs require them to operate or use a machine or equipment on which servicing or maintenance is being performed under lockout or tagout, or whose jobs requires them to work in an area in which such servicing or maintenance is being performed." *See* Section 1910.147(b) Definitions.

**2. Employee Access to the Violative Condition**

Based on the admission of Mr. Vander Schaaff, the employees identified by CO Harding as "affected" and "other" employees who were not trained as required by the standard, the record establishes that these employees can be considered to have access to the violative condition.

**3. Employer Knowledge of the Violation**

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[7] Section 1910.147(b) contains the following definitions:
"Affected employee." An employee whose job requires him/her to operate or use a machine or equipment on which servicing or maintenance is being performed under lockout or tagout, or whose job requires him/her to work in an area in which such servicing or maintenance is being performed.
"Authorized employee." A person who locks out or tags out machines or equipment in order to perform servicing or maintenance on that machine or equipment. An affected employee becomes an authorized employee when that employee's duties include performing servicing or maintenance covered under this section.

CO Harding determined that L & B's "affected" and "other" employees were not trained from an employee with safety and health responsibilities, Mr. Vander Schaaff. (Tr. 59, 669, 767-68). The undersigned finds that he could have known of the cited condition had he exercised reasonable diligence.

**Penalty**

CO Harding classified the severity of the alleged violation as "high," because there were a lot of hazardous pieces of equipment (for example, punch presses and wood working equipment) in the area (Tr. 59). She determined that the probability was "low," as the maintenance workers had received some training (Tr. 59-60). The Secretary proposed an adjusted penalty of $2,250.00.

**Citation 1, Item 9a**

§1910.157(d)(3): The employer may use uniformly spaced standpipe systems or hose stations connected to a sprinkler system installed for emergency use by employees instead of Class A portable fire extinguishers, provided that such systems meet the respective requirements of §1910.158 or §1910.159, that they provide total coverage of the area to be protected, and that employees are trained at least annually in their use.

(a) Through L & B Products for the 1 ½ inch fire hose stations located at seven different locations throughout the workplace, employees had not been trained in their use, on or about 7/13/95.

**1. Employer Noncompliance**

CO Harding observed hose stations at seven locations in the workplace, as well as standpipe equipment (Tr. 60, 343, 675, Exh. C-9).[8] She testified that she spoke with three employees, Darrin Upjohn, Gary Mason, and Phil Mateer, who told her that they had not been trained on how to use the equipment (Tr. 60, 341-43). CO Harding further testified that Mr. Vander Schaaff indicated that the employees had not been trained and would probably use the equipment (Tr. 61, 342).

**2. Employee Access to the Violative Condition**

CO Harding testified that the potential hazard involved in both items 9a and item 9b were the employees' lack of knowledge on how to use fire suppression equipment. She indicated that there are fire hazards in the facility from metal dust, wood dust, and the use of class IB flammable materials (Tr. 63-64). CO Harding stated that she asked employees if they would used the fire suppression equipment in the workplace. They told her that there had been a number of fires, including one in the spray finishing department, and that they had used fire suppression equipment. (Tr. 671-72). She was also told that in August 1993 there was a "larger fire" and that in the polishing department there had been many small fires on a regular basis (Tr. 62). The specific employees that CO Harding spoke to were clearly exposed to the violative condition. Moreover, other unidentified untrained employees in the facility were also exposed.

**3. Employer Knowledge of the Violation**

Mr. Vander Schaaff informed CO Harding that the employees had not been trained (Tr.

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[8] The undersigned notes that L & B did not produce any evidence indicated that the hose stations and standpipe equipment was not operable, and that Class A portable fire extinguishers were used instead of this equipment.

61).
The undersigned finds that he should have known of the cited condition had he exercised reasonable diligence.

**Citation 1, Item 9(b)**

§1910.157(g)(2): The employer shall provide the education required in paragraph (g)(1) of this section upon initial employment and at least annually thereafter.[9]

(a) Throughout L & B Products, employees had not received training, on or about 5/15/95.

**1. Employer Noncompliance**

CO Harding testified that she spoke with Mr. Vander Schaaff concerning the requirement that "employees be trained and familiarized with the general principles of fire extinguisher use." Mr. Vander Schaaff indicated that employees had not been trained, and that such training might be a good idea. (Tr. 63, 349). CO Harding interviewed employee Frank Simpson, as well as employees Upjohn, Mason, and Mateer. The employees indicated that there were portable fire extinguishers provided for their use throughout the facility (Tr. 347-49). She further testified that an employee group leader named "Ken". He told her that he had used a portable fire extinguisher, and that a fire extinguisher was missing from his department, presumably because it had been used and was being recharged (Tr. 350-51).

**2. Employee Access to the Violative Condition**

As indicated in item 9a, CO Harding testified that the hazard presented by the alleged violation is the employees lack of knowledge in using fire suppression equipment. Fire hazards in the facility from metal dust, wood dust, and the use of class IB flammable materials further highlights the potential dangers (Tr. 63-64). Ken informed CO Harding that in the department he worked there were frequent small fires- polishing department (Tr. 351).

**3. Employer Knowledge of the Violation**

CO Harding determined that the requisite training had not been performed from Mr. Vander Schaaff. The undersigned finds that he should have known of the cited condition had he exercised reasonable diligence.

**Penalty - Items 9a &9b**

Items 9 a and 9 b were grouped because they involved similar or related hazards that may increase the potential for injury resulting from an accident. CO Harding classified the alleged violations as "low" severity, because the most likely injury would be first degree burns or smoke inhalation. She classified the probability as "lesser." She testified that although she was told that there were fires at the facility, the fires were small and not widespread. She also considered the fact that not all of the employees had used fire suppression equipment (Tr. 64). The adjusted penalty proposed by the Secretary was $1,350.00.

**Citation 1, Item 10**

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[9] Section 1910.157(g)(1) provides:
(g) "Training and education." (1) Where the employer has provided portable fire extinguishers for employee use in the workplace, the employer shall also provide an educational program to familiarize employees with the general principles of fire extinguisher use and the hazards involved with incipient stage fire fighting.

§1910.212(a)(1): Types of guarding. 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-hand tripping devices, electronic safety devices, etc.

*Instance (a)*: Polishing Department, Bader Operation #11, ingoing nip point and unused belt edge exposed, on or about 6/9/95.

**1. Employer Noncompliance**

CO Harding observed the operation of the Bader sander, used to sand metal chair frames. She noted an ingoing nip point where the belt runs over the pulley.[10] She also observed that the belt itself was inadequately guarded (Tr. 67-68, 676, Exh. C-10). CO Harding believed that there should have been a partial guard that would extend up to include the unused portions of the belt, and would also cover the nip point (Tr. 68). CO Harding testified that while she was in the polishing department, either Mr. Vander Schaaff or "Ken," the group leader, accompanied her (Tr. 785).

**2. Employee Access to the Violative Condition**

CO Harding testified that the unguarded belt presented a hazard should employees strike or lean up against the unused portion of the belt. She further noted that the employee she observed operating the sander was wearing short sleeves, compounding the hazard should the employee contact the unguarded portion of the sander (Tr. 68-68). In discussing instances (a) through (c), CO Harding noted that employees work quickly in this area. As the employees are moving chairs around the belt sander, their hands come within a "couple of inches" of the nip point (Tr. 71-72). This machine was in use at the time of her observation. (Tr. 676)

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace. CO Harding observed the operation with Mr. Vander Schaaff, in order to determine if the sander could be guarded. Mr. Vander Schaaff indicated that he would instruct the maintenance staff to redesign the guard (Tr. 69).

*Instance (b):* Bader Operation East Wall near doorway, there was no guard on the right side of the machine, plus, unused edge and ingoing nip point would not be fully guarded even when guard is placed back on the machine, on or about 6/9/95.

**1. Employer Noncompliance**

CO Harding testified that the operation of this Bader sander was very similar to instance (a). The machine was unguarded, and the guard that was provided with the machine was leaning against the back wall (Tr. 60-70, Exh. C-11). Although the employee must move the chair around the sander in order to sand the chair, it was her opinion the employee could still sand properly if the machine was guarded. CO Harding saw the equipment in operation by two employees who were polishers. (Tr. 357-58).

**2. Employee Access to the Violative Condition**

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[10] Dr. Carter testified that he observed the wood shop area on July 28, 1995. He stated that he observed several pieces of equipment, but that he could not identify any of the specific drill presses, nor did he observed any of the drill presses in operation (Tr. 941-43).

CO Harding testified that employee operating the equipment in instances (a) through (c) are moving quickly in the area. As employees are moving chairs around the sander, their hands come within a "couple of inches" of the nip point. The operator is also in danger of striking the moving belt as he or she is working (Tr. 71-72).

**3. Employer Knowledge of the Violation**

As evidenced by the guard leaning against the back wall, the machine either came equipped with a guard, or was guarded at one time - indicating the Respondent's knowledge of a need for a guard (Tr. 70). The unattached guard was in plain view, as was the unguarded machine. L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

*Instance (c)*: Bader Operation, west wall, partially guarded, unused portion of belt and ingoing nip point no protected, on or about 6/9/95.

**1. Employer Noncompliance**

When CO Harding observed this machine, the operator was grinding chair frames (Tr. 358). She stated that as with instance (a), the belt was partially guarded, however, the section closest to the operator was not adequately protected (Tr. 71, Exh. C-12).

**2. Employee Access to the Violative Condition**

CO Harding testified that in instances (a) through (c), employees hands come to within a "couple of inches" of the nip point. The operator is also in danger of striking the moving belt sander as he or she is working. (Tr. 71-72).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

*Instance (d)*: Wood Shop, Greenlee Brothers 606 drill press, drill bit which was 8 inches long was not guarded, on or about 8/3/95.

**1. Employer Noncompliance**

CO Harding observed an operator using a Greenlee Bothers # 606 drill press to drill a chair seat (Tr. 359). The upper portion of the drill bit was not guarded (Tr. 72, Exh. C-13). She testified that she considers the 8" drill bit to be a rotating part that should be guarded. CO Harding indicated that, as with all the drill bits she observed, employees hands and fingers come within a few inches of the drill bit, depending on the nature of the item being worked (Tr. 72-73). She testified that the upper portion of the drill bit in the housing and the portion of the bit that is in the material being drilled are already considered guarded. (Tr. 74)

**2. Employee Access to the Violative Condition**

CO Harding testified that the employee's hands may come within a few inches of the drill bit. She indicated that the bit is an exposed moving part with grooves in it that may be sharp (Tr. 73).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

*Instance (e)*: Wood Shop, Walker Turner #1 Drill press, ser. # 2644, drill bit was not guarded, 1 ft. long from bit tip to top of collar, was not guarded, on or about 8/3/95.

**1. Employer Noncompliance**

CO Harding observed a Walker Turner # 1 drill press, serial # 2644. As with instance (d), the unused portion of the drill bit was not guarded. The drill bit was approximately one foot long. CO Harding testified that employees' fingers could be as close as "a couple of inches" to the rotating bit (Tr. 74). Unlike instances (a) though (d), CO Harding testified that she did not recall if this piece of equipment was operating. (Tr. 359-60) She did, however, testify that during her inspection of the drill presses, she asked the employer representative if and how the equipment was used. She also testified that she spoke with the employee who uses the equipment to determine how often the machine is used, and if it is used in its present condition. (Tr. 676)

**2. Employee Access to the Violative Condition**

As indicated above, CO Harding testified that although she did not see the machines in operation, she determined that the machines were in use in the condition in that she observed during her inspection. The Respondent presented no evidence to rebut this.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

*Instance (f)*: Wood Shop, commander Mfg. CO. Model 9 two head multi-drill, left side ser. #11120 with four drill bits, right side ser. # &177 with five drill bits, was not guarded, on or about 8/3/95.

**1. Employer Noncompliance**

CO Harding observed a Commander Manufacturing Company two-headed multi-drill. The left side of the drill had four bits and the right side had five (Tr. 75, Exh. C-14 and C- 15). She testified that she was told that the drill was used to drill material approximately one and one-half inches deep (Tr. 75). CO Harding indicated that as with the other drill in this citation item, the unused portion of the drill bits were not guarded. She testified that employees got as close as a few inches to the bits (Tr. 75).

As in instance (e), CO Harding did not actually see the drill operating. She determined that machine was operable by inquiring from employees whether the equipment was used (Tr. 360).

**2. Employee Access to the Violative Condition**

Although she did not see the drill operating, she determined from her interviews that it was operated in the condition that she observed the drill. The Respondent presented no evidence to rebut this.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

*Instance (g):* Wood Shop, Famco drill press, ser. #D-F37W88, was not guarded, on or about 8/3/95.

**1. Employer Noncompliance**

CO Harding observed the cited drill press, and noted that it had an approximately one foot long drill bit and no guard. When asked if she observed employees working in close proximity to the unguarded portion of the drill, CO Harding responded "[a]t one point or another I observed employees working on the various drills here and with each of these instances the employees hands may be from a few inches from the point of operation which would be the drill bit to further away."(Tr. 76).

**2. Employee Access to the Violative Condition**

As in instances (e) and (f), although CO Harding may not have seen this drill in operation, she testified that she determined if the drills were operable, and operated in their present condition during her inspection.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

*Instance (h):* Wood Shop, General Electric drill press, was not guarded, on or about 8/3/95.

**1. Employer Noncompliance**

CO Harding observed this drill press with a bit approximately one foot long. There was no guard to protect the unused portion of the drill bit (Tr. 76). CO Harding testified on cross examination that she did not recall seeing the press in operation (Tr. 361). However, she did testify that during her inspection of all the drill presses she asked the employer representative if and how the equipment was used. She also testified that she spoke with the employee who uses the equipment to determine how often the machine is used, and if it is used in its present condition (Tr. 676) .

**2. Employee Access to the Violative Condition**

Although CO Harding did not see the drill p press operated, as with instances (e) through (g), she did determine through her employee interviews that the press was used in the condition that she observed during her inspection.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

*Instance (I):* Wood Shop, Walker Turner drill press, ser. #1 944, was not guarded, on or about 8/3/95.

**1. Employer Noncompliance**

CO Harding observed this Walker Turner drill press with a six and one-half inch long drill bit. The unused portion of the dill bit was unguarded (Tr. 66-67). CO Harding testified on cross examination that she did not recall seeing this press in operation (Tr. 362). However, she testified that during her inspection of all the drill presses she asked the employer representative if and how the equipment was used, how often the machine is used, and if it was used in its present condition (Tr. 676). As in all of the previous instances, the Respondent presented no evidence to the contrary.

**2. Employee Access to the Violative Condition**

Although CO Harding did not see the press in operation, as with instances (e) through (h), she determined that the machines were operable, and operated in their present condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Penalty**

CO Harding testified that the potential injury from exposure to the various unguarded

drills would be laceration[11] to the fingers from the drill bits (Tr. 77). She classified the severity of the violations as low, based on the potential injury (Tr. 77). She determined that the probability was "lesser," because her interviews with employees did not reveal that an employee had contacted the bit, or been injured on the unguarded bit (Tr. 77-78). The Secretary adjusted proposed penalty was $1,350.00.

**Citation 1, Item 11**

§1910.213(b)(3): On applications where injury to the operator might result if motors were to restart after power failures, provision shall be made to prevent machines from automatically restarting upon restoration of power.

CO Harding described nineteen different instances of machines that automatically restarted when power was restored. Those instances, (a) through (s) are as follows:

(a) Wood Shop, first and second router table, on or about 8/3/95.
(b) Wood Shop, small upright sander, on or about 8/3/95.
(c) Wood Shop, two drum sanders, on or about 8/3/95.
(d) Wood Shop, Powermatic band saw, on or about 8/3/95.
(e) Wood Shop, Delta Rockwell table saw, on or about 8/3/95.
(f) Wood Shop, Walker Turner #1 drill press, on or about 8/3/95.
(g) Wood Shop, Band saw #2, on or about 8/3/95.
(h) Wood Shop, Commander Mfg. CO. two head multi-drill, on or about 8/3/95.
(I) Wood Shop, Famco Drill press, on or about 8/3/95.
(j) Wood Shop, Bandsaw #5, Tannewiz D-Saw, on or about 8/3/95.
(k) Wood Shop, Bandsaw #4, on or about 8/3/95.
(l) Wood Shop, Walker Turner table saw, on or about 8/3/95.
(m) Wood Shop, General Electric drill press, on or about 8/3/95.
(n) Wood Shop, Walker Turner drill press, ser. #1 944, on or about 8/3/95.
(o) Table Top, Toby table saw, ser. # Y 46119, on or about 8/29/96.
(p) Table Top, Delta table say used for formica, on or about 8/29/95.
(q) Table Top, Onsrud Router, W-122, on or about 8/29/95.
(r) Table Top, Pin Router, mfd. William H. Field CO., Boston, on or about 8/29/95.
(s) Table Top, Walker Turner saw ser. #50BE4A, marked 9'3", on or about 8/29/95.

**1. Employer Noncompliance**

CO Harding testified that during the inspection Mr. Vander Schaaff and the supervisor of the listed departments went to each machine, started the machines, then cut the power, de-energizing the machines.[12] She indicated that each machine listed in the instance descriptions above automatically restarted when power was restored (Tr. 78-79, 788). She stated that all of

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[11] CO Harding testified that a laceration is a "fairly serious cut." (Tr. 90). Such an injury would require medical treatment or sutures (Tr. 524-25).

[12] Dr. Carter testified that he visited the wood shop on July 28, 1995, and that he visited the table top department during the second week of August (Tr. 943-45). He did not determine whether any of the machines listed in instances (a) through (s) automatically restarted when re-energized.

the above listed machines are used to cut wood, therefore they fall under the cited standard. (Tr. 79) She testified on cross examination that the machines listed in instances (a) though (d) and instance (q) were in operation at the time of her inspection (Tr. 366-69, 372). The machine in instance (c) was operated by Bob Murch, a wood shop employee (Tr. 368). She did not recall who was operating the machines listed in instances (a), (b), (d), and (q). She further testified she determined that all of the machinery was in use based on conversations with Mr. Vander Schaaff and with a number of employees in the department, including the department foreman (Tr. 79-80, 677-78).

**2. Employee Access to the Violative Condition**

CO Harding determined that each of cited the machines were used by L & B employees. Therefore, employees working in the wood shop and the table top department were exposed to the violative condition.

**3. Employer Knowledge of the Violation**

L & B can be said to have constructive knowledge if, with the exercise of reasonable diligence, they could have known of the violative condition. L & B could have easily determined that the cited machines automatically restarted when the power was returned if reasonable diligence had been exercised..

**Penalty**

CO Harding classified the penalty as high severity. She indicated that machinery like table saws and routers could potentially amputate a finger or hand should they restart unexpectedly. She classified the probability as "lesser," because she surmised that the power would not be shut off on a regular basis (Tr. 79). The Secretary proposed an adjusted penalty of $2,250.00.

**Citation 1, Item 12a**

§1910.213(c)(1): Each circular hand-fed ripsaw shall be guarded by a hood which shall completely enclose that portion of the saw above the table and that portion of the saw above the material being cut. The hood and mounting shall be arranged so that the hood will automatically adjust itself to the thickness of and remain in contact with the material being cut but it shall not offer any considerable resistance to insertion of material to saw or to passage of the material being sawed. The hood shall be made of adequate strength to resist blows and strains incidental to reasonable operation, adjusting, and handling, and shall be so designed as to protect the operator from flying splinters and broken saw teeth. It shall be made of material that is soft enough so that it will be unlikely to cause tooth breakage. The hood shall be so mounted as to insure that its operation will be positive, reliable, and in true alignment with the saw; and the mounting shall be adequate in strength to resist any reasonable side thrust or other force tending to throw it out of line.

(a) Wood Shop, Walker Turner table saw with an wight inch blade did not have a guard, on or about 8/3/95.

**1. Employer Noncompliance**

CO Harding observed the Walker Turner table saw with an 8 inch diameter blade. The top portion of the blade was unguarded[13] (Tr. 80). Although she did not see the saw in operation, she

[13] Dr. Carter testified that he did not observe the Walker Turner saw before CO Harding's inspection (Tr. 949).

testified that she was told by employee Steve Bersch that the machine was operated about three to four hours a week (Tr. 80, 378, 790, 791). She indicated that employee Bersch also told her that there was a guard for the machine, but that he was unable to locate it (Tr. 678, 790). She further determined that the machine was operational through discussions with Mr. Vander Schaaff and the department supervisor.

**2. Employee Access to the Violative Condition**

CO Harding testified that the employee told her that they performed cross cut and ripped wood on this saw. She testified that if an employee were ripping wood, their hands would come within a few inches of the blade as they are feeding the stock into the saw (Tr. 81). She stated that the guard acts as a warning device. An employee's hand would strike a guard before it contacted the moving blade (Tr. 80). As noted above, CO Harding determined that the saw was used in the same condition the she observed at the time of her inspection.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Citation 1, Item 12b**

§1910.213(c)(2): Each hand-fed circular ripsaw shall be furnished with a spreader to prevent material from squeezing the saw or being thrown back on the operator. The spreader shall be made of hard tempered steel, or its equivalent, and shall be thinner than the saw kerf. It shall be of sufficient width to provide adequate stiffness or rigidity to resist any reasonable side thrust or blow tending to bend or throw it out of position. The spreader shall be attached so that it will remain in true alignment with the saw even when either the saw or table is tilted. The provision of a spreader in connection with grooving, dadoing, or rabbeting is not required. On the completion of such operations, the spreader shall be immediately replaced.

(a) Wood Shop, Walker Turner table saw with an eight inch blade, did not have a spreader, on or about 8/3/95.

**1. Employer Noncompliance**

A spreader is required to keep the stock that is being fed through the saw during the ripping process from squeezing back toward the saw blade and pushing towards the operator. The spreader keeps apart the pieces of the wood being ripped[14] (Tr. 82; Exh. C-16). Ripping refers to the direction that the wood is placed on the saw. The grain of the wood is place in the same direction as the saw blade (Tr. 680-81). Although CO Harding testified that she did not see the saw in operation, she examined the teeth of the saw blade, and determined that it was the type used for ripping wood. (Tr. 382-83, 791). She also noted that this is the same equipment cited in instance 12a. The employee that she interviewed in the above instance indicated that the saw was used for ripping wood (Tr. 679).

**2. Employee Access to the Violative Condition**

CO Harding testified that ripping creates a greater hazard because the operator is cutting the wood with the wood grain. When wood is cross cut, that is cut against the grain, the wood continues past the saw blade. When an employee is ripping with the grain, the wood may squeeze

[14] Exh. C-18, which documents the alleged violation in item 12c, instance c, portrays a spreader. (Tr. 84)

together and be pushed back towards the operator (Tr. 680-81). CO Harding determined that the saw was in use, and that the saw was used for ripping. Therefore, an employee using the saw would be exposed to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Citation 1, Item 12c**

§1910.213(c)(3): Each hand-fed circular ripsaw shall be provided with nonkickback fingers or dogs so located as to oppose the thrust or tendency of the saw to pick up the material or to throw it back toward the operator. They shall be designed to provide adequate holding power for all the thicknesses of materials being cut.

*Instance (a)*: Wood Shop, Delta Rockwell, table saw which is also used for ripping, did not have non kickback fingers or dogs, on or about 8/3/95.

**1. Employer Noncompliance**

Non-kickback fingers or "dogs" located on a saw would dig into the wood to prevent the wood from being thrown back toward the operator during the ripping process. CO Harding observed the Delta Rockwell table saw and determined that it did not have non-kickback fingers. (Tr. 82-83, Exh. C-17). Although she testified that she does not recall if she saw the equipment in operation, she indicated that an employee told her he used the saw, and the saw was used for ripping wood. (Tr. 83, 384, 682-83, 791, 950). She further testified that whether a saw has non-kickback fingers is "obviously visible." (Tr. 682 ).

**2. Employee Access to the Violative Condition**

Although she did not witness the operation of the saw, CO Harding determined that the saw was in use, and used for ripping wood - an employee old her he used the saw, and the saw was used for ripping wood.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

*Instance (b)*: Wood Shop, Walker Turner saw, 8 inch diameter blade, which is used for ripping wood, did not have non kickback finger or dogs, on or about 8/3/95.

**1. Employer Noncompliance**

This is the same saw addressed in items 12a and 12b. (Tr. 86-87, Exh. C-16). CO Harding determined that the saw was used for ripping and that it did not have non-kick back fingers (Tr. 86-87). (See discussion under "Employer Noncompliance," instance 12a).

**2. Employee Access to the Violative Condition**

Although she did not see the saw in operation, CO Harding determined that the saw was in use, and that it was used for ripping. Employees told her that the Walker Turner saw was also used for ripping (Tr. 86-87, 683).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

*Instance (c)*: Table Top, Toby saw, ser. # Y 46119, which is used for ripping wood, did not have non kickback finger or dogs, on or about 8/29/95.

**1. Employer Noncompliance**

CO Harding observed that the Toby saw did not have non-kick back fingers. She determined through employee interviews that the saw was used by approximately five employees, and that it was used for ripping wood (Tr. 88, 683-4, 385-6, 792, 905; Exh C-18).

**2. Employee Access to the Violative Condition**

CO Harding determined that the saw was in use, and that it was used for ripping wood and used by five employees (Tr. 88)..

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Penalty - Items 12a, 12b, and 12c**

CO Harding testified that the alleged violation cited in item 12a could produce severe lacerations to an employee's fingers or hands[15] (Tr. 88). The alleged violation cited in item 12b could result in the wood being thrown back towards the operator, causing laceration to the hands, body, or face (Tr. 88-89). The alleged violation cited in item 12c could cause injuries similar to the injuries discussed in item 12b (Tr. 89). CO Harding classified the severity of the violation as high, due to the risk of injuries to the hands, fingers, body, and face. She determined that the probability was "lesser," because although employees told her that the saws were used for ripping, they did not indicate that they had ever been struck by a piece of wood. The Secretary proposed an adjusted penalty of
$2, 250.00.

**Citation 1, Item 13**

§1910.213(g)(1): Each swing cutoff saw shall be provided with a hood that will completely enclose the upper half of the saw, the arbor end, and the point of operation at all positions of the saw. The hood shall be constructed in such a manner and of such material that it will protect the operator from flying splinters and broken saw teeth. Its hood shall be so designed that it will automatically cover the lower portion of the blade, so that when the saw is returned to the back of the table the hood will rise on top of the fence, and when the saw is moved forward the hood will drop on top of and remain in contact with the table or material being cut.

(a) Table Top Department, Baldor swing cutoff saw with 12 inch blade, which was used to cut wood strips for packing boxes, did not have a lower blade guard, on or about 8/29/95.

**1. Employer Noncompliance**

CO Harding observed a Balder swing cutoff saw with a 12 inch diameter blade. She testified that although the top part of the blade was guarded, the lower portion of the blade was unguarded (Tr. 90-91, 389, 685, Exh. C-19). CO Harding observed employee Keven Grau using the saw to cut wood strips for packing boxes (Tr. 90-91, 388). Using the handle on the saw, employees were pulling out the saw and cutting across pieces of wood stripping (Tr. 91-92, 391). There was a lock on the saw that controlled the extent of the saw's forward motion. (Tr. 391)

CO Harding indicated that a guard similar to the guard on the top of the saw should be

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[15] CO Harding defined a serve laceration as one that would requires sutures at a minimum. (Tr. 119).

used. She stated that in most cases there would be a slot in the upper guard to allow the lower guard to ride up over the stock, and then return to its original position when the cut is completed (Tr. 95-96).

**2. Employee Access to the Violative Condition**

CO Harding indicated that an employee could lacerate their hands or fingers on the blade. She testified that the employee's left hand would most likely received the injury, since the saw is designed to be pulled toward the operator with the right hand (Tr. 94-95). The employee's hand would be three to five inches from the blade (Tr. 92).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Penalty**

CO Harding assessed the severity of the violation as "lesser," since the saw was only used a couple of hours a week (Tr. 92, 95). She determined that the probability was also "lesser," because she was not aware of any employee injuries, and the saw is not frequently used (Tr. 95). The Secretary proposed an adjusted proposed penalty of $1,350.00.

**Citation 1, Item 14**

§1910.213(h)(1): The upper hood shall completely enclose the upper portion of the blade down to a point that will include the end of the saw arbor. The upper hood shall be constructed in such a manner and of such material that it will protect the operator from flying splinters, broken saw teeth, etc., and will deflect sawdust away from the operator. The sides of the lower exposed portion of the blade shall be guarded to the full diameter of the blade by a device that will automatically adjust itself to the thickness of the stock and remain in contact with stock being cut to give maximum protection possible for the operation being performed.

(a) Wood Shop, De Walker radial arm saw with a 13 inch diameter blade, did not have the right side of the lower portion of the blade guarded, on or about 8/3/95.

**1. Employer Noncompliance**

CO Harding testified that the standard requires that on radial arm saws, the lower blade be protected by a guard. She observed that the lower right side of the lower guard was missing. (Tr. 96, Exh. C-20). CO Harding testified that the operator would hold the stock with his or her left hand and grasp the saw handle using their right hand to pull the saw forward (Tr. 96-97, 399-400). The saw returned automatically when it was not in use (Tr. 399). The stock would not be fixed on the saw table (Tr. 97).

**2. Employee Access to the Violative Condition**

Although CO Harding testified that she did not see the saw in operation, she determined that the saw was in use at the time of her inspection - she inquired about how often it was used and what it was used for. (Tr. 97, 397-98, 795). She determined that the hazard was an employee or the operator of the saw striking up against the exposed portion of the blade with their fingers or hands when the saw was returning to its "fence" (Tr. 97). When the employee lets go of the saw, the blade continues to turn. Although there is a guard on the left portion of the saw, the operator's right hand could brush up against the blade. She further testified that operator could be exposed to the blade if they were feeding the stock from the left side and removing it with their right hand (Tr. 686).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace. The Department supervisor, David Tazinskyi, demonstrated how the saw was typically used (Tr. 400).

**Penalty**

CO Harding assessed the severity of the violation as low. She indicated that the most likely injury would be lacerations to the operator's fingers or hands. She classified the probability as lesser, due to the fact that the blade was guarded on the lower left side, and based on where the operator would hold his or her hands. (Tr. 97-98) The Secretary proposed an adjusted penalty of $1,350.00.

**Citation 1, Item 15**

§1910.213(I)(1): All portions of the saw blade shall be enclosed or guarded, except for the working portion of the blade between the bottom of the guide rolls and the table. Bandsaw wheels shall be fully encased. The outside periphery of the enclosure shall be solid. The front and back of the band wheels shall be either enclosed by solid material or by wire mesh or perforated metal. Such mesh or perforated metal shall be not less than 0.037 inch (U.S. Gage No. 20), and the openings shall be not greater than three-eighths inch. Solid material used for this purpose shall be of an equivalent strength and firmness. The guard for the portion of the blade between the sliding guide and the upper-saw-wheel guard shall protect the saw blade at the front and outer side. This portion of the guard shall be self-adjusting to raise and lower with the guide. The upper-wheel guard shall be made to conform to the travel of the saw on the wheel.

*Instance (a):* Wood Chair, 30 inch band saw which was labeled #4 did not have all of the unused portion of the blade guide wheel guarded, on or about 6/23/95.

**1. Employer Noncompliance**

CO Harding testified that this standard requires the non-working portion of the blade of he band saw be guarded and also for the band saw guide wheels to be guarded (Tr. 98). She testified to six violations of this standard. She observed a 30-inch band saw with portions of the blade unguarded. CO Harding testified that although there was a guard on the machine, there were seven exposed inches above the guard that should have been protected. In addition, the area of the guide wheel that faces the teeth side of the blade was unprotected (Tr. 98-100, 130, Exh. C-21). Mr. Vander Schaaff was with her at the time of her observation. (Tr. 109).

**2. Employee Access to the Violative Condition**

CO Harding testified that when employees used this type of band saw, their fingers come within a close proximity to the saw blade (Tr. 100). An employee's hands came in close proximity to the unused portion of the blade which was located immediately above the area where the guide wheel was not protected. Additionally, she testified that an employee could brush his fingers or hands against either the blade or guide wheel (Tr. 102). She also testified that she determined that all of the saws discussed in item 15 were operation by inquiring wether the saws were operated in the condition that she observed them. She indicated that she was told that they were in fact used in the observed conditions (Tr. 686-87).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain

view, and the record indicates that supervisors were present throughout the workplace.

*Instance (b):* Wood Chair, Walker Turner small bank saw labeled B-6, blade and guide wheels were partially unguarded, on or about 6/23/95.

**1. Employer Noncompliance**

CO Harding observed that the unused portion of this saw blade, where the saw teeth faced the operator, was not guarded (Tr. 103, Exh. 22). Although a partial guard was in place, the teeth of the blade were exposed, and the guide wheel was not guarded. (Tr. 104-05) Mr. Vander Schaaff was with her at the time of her observation. (Tr. 109).

**2. Employee Access to the Violative Condition**

In viewing Exh. C-22, the exposed blade is in close proximity to the point of operation of the saw - the teeth part that faced the operator was not covered (Tr. 104-105).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

*Instance (c)*: Upholstery Department, American Machinery & Motor Co., portion of saw blade and guide wheels were partially unguarded, on or about 8/3/95.

**1. Employer Noncompliance**

CO Harding observed that the portion of the saw immediately adjacent to the guide wheel was not guarded (Tr. 105-06, Exh. 23). The guide wheel itself was also unguarded (Tr. 105-06). Mr. Vander Schaaff was with her at the time of her observation (Tr. 109).

**2. Employee Access to the Violative Condition**

CO Harding testified the Mr. Vander Schaaff and the supervisor of the department explained that varying sizes of wood are cut on this saw.[16] The proximity of an employee's hands to the blade will vary depending on the type of stock that is being cut. (Tr. 107-08) She testified that the hazard is that an employee will strike the blade with their fingers or hands, or hit the exposed guide wheel. She testified that a pinch point exists where the saw blade passes by the guide wheel (Tr. 107).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

*Instance (d)*: Wood Shop, Powermatic bandsaw has partially unguarded band saw blade and guide wheels, on or about 8/3/95.

**1. Employer Noncompliance**

CO Harding observed that the unused portion of the band saw blade and the guide wheels were exposed.(Tr. 108). Mr. Vander Schaaff was with her at the time of her observation (Tr. 109). CO Harding testified that the she knew the saw was operational because the supervisor of the department demonstrated the machine (Tr. 409). As indicated in instances (a) through (c), CO Harding further testified that she determined that each of the saws were operated in the same condition as she observed them (Tr. 686-87).

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[16] Dr. Carter testified that he observed from a distance the America Machinery and Motor Co. saw being operated on July 28, 1995. He indicated that the saw appeared to be guarded, but he did not inspect the guard or the guide wheel. (Tr. 951).

**2. Employee Access to the Violative Condition**

CO Harding determined that the saw was operable, therefore, employees were exposed to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace. Furthermore, the supervisor demonstrated the saw in the condition it was cited.

*Instance (e):* Table Top, Oliver band saw #1, 15 inch long blade was unguarded on the left side, on or about 8/3/95.

**1. Employer Noncompliance**

CO Harding observed a 15 inch stretch of blade that was partially unguarded. Although the right side of the blade was guarded, the left side of the blade was unguarded down to and including the guide wheel(Tr. 108, 110-11, C-24). Mr. Vander Schaaff was with her at the time of her observation (Tr. 109). CO Harding again testified that she determined that all of the cited saws were operated in the condition that she observed at the time of her inspection. (Tr. 687)

**2. Employee Access to the Violative Condition**

CO Harding determined that the saws were operable, and used in the condition in which she observed them. As such, employees would be exposed to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

*Instance (f)*: Table Top, band saw which is used for the leaves for table tops had a partially unguarded blade, on or about 8/3/95.

**1. Employer Noncompliance**

CO Harding observed this unnamed band saw in the table top department. The saw had four and one-half inches of blade that was unguarded. (Tr. 108). Mr. Vander Schaaff was with her at the time of her observation. (Tr. 109) CO Harding testified as in instances (a) through (e), that she determined that all of the saws cited in item 15 were operated in the condition that she observed them in at the time of her inspection. (Tr. 686-87).

**2. Employee Access to the Violative Condition**

CO Harding determined that the saw was operated in the condition in which she observed. As such, employee would be exposed to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Penalty**

CO Harding testified that, through an examination of L & B's OSHA 200 injury logs and a workers compensation record, she determined that an employee had been injured when his hand contacted the unguarded portion of a band saw guide wheel. (Tr. 687, Exh. C-64). CO Harding assessed the severity of the violation as low, as the most likely injury would be lacerations to an employee's fingers or hands. She classified the probability of the violation as "lesser," since the employee that she spoke with did not indicated that he was injured on the machines. She indicated that "in retrospect" she should have assessed the violation as "greater," because OSHA does not

normally determine probability based on the occurrence of injury (Tr. 110). The undersigned finds that in light of the number of saws, the one incident of injury would support a finding of lesser, and the Secretary's adjusted penalty of $1350.00 reflects this finding.

**Citation 1, Item 16**

§1910.213(m)(l): The cutting heads of each wood shaper, hand-fed panel raiser, or other similar machine not automatically fed, shall be enclosed with a cage or adjustable guard so designed as to keep the operator's hand away from the cutting edge. The diameter of circular shaper guards shall be not less than the greatest diameter of the cutter. In no case shall a warning device of leather or other material attached to the spindle be acceptable.

(a) Wood Chair, Onsrud Router did not have a guard for the cutting head, on or about 6/23/95.

**1. Employer Noncompliance**

CO Harding observed an Onsrud router with an unguarded cutting head. (Tr. 111, Exhs. C-25, C-26, C-27). She testified that although she did not see the router in operation, she knew the router was operable, and that Mr. Vander Schaaff explained the different applications of the tool. (Tr. 113-14, 416, 429, 694-95). The router bit is stationary, and the stock revolves around the cutter. (Tr. 115-16, 419, 431). Templates are used by the router operator as a pattern to cut the material. (Tr. 111-12, C-25). Each of her descriptions was based upon a different template being attached to the router. Exhibits 25,26, and 27 are photographs showing the router with portions of different cutting bits exposed. The unused portions of the bits should have been enclosed. (Tr. 111-114).

For example, Exhibits C-26 and C-27 display a chair back fitted on a template using clamps. The router, with a three and one-half inch bit, is used to cut the hole in the center of the chair back. (Tr. 112-13, 424, Exhs. C-26, C-27). This bit could be used for both cutting and shaping. (Tr. 426) CO Harding indicated that in this example, the portion of the router bit that is not inside the chair back should be guarded. (Tr. 112, 424). The cutter could still operate, as a guard would cover only the unused portion of the bit. (Tr. 425). She further stated that the flat template displayed in Exh. C-25, used to create a straight backed chair, creates a greater employee exposure, as more of the router bit is exposed. (Tr. 111-12, 422, Exh. C-26, C-27).

**2. Employee Access to the Violative Condition**

CO Harding determined that the router was used by virtue of the demonstration provided by Mr. Vander Schaaff. Therefore, employees who use the router would have access to the violative condition. CO Harding testified that in Exhibit 25 there was greater exposure to the operator in that application because ore of the bit was exposed during its operation. In Exhibits 25 and 27 exposure occurred when the employee removed a chair from the clamps (Tr. 113-115).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace. CO Harding testified that she discussed the guarding of the router with Mr. Vander Schaaff for quite a while (Tr. 695).

**Penalty**

CO Harding assessed the severity of the alleged violation as medium, because if an

employee's hands were to strike the bit, they would receive severe lacerations. She classified the probability of the violation as "lesser," based on the fact that an employee told her that the router was used only every couple of months (Tr. 116-17). The Secretary assessed an adjusted penalty of $1,800.00.

**Citation 1, Item 17**

§1910.213(p)(2): Each drum sanding machine shall have an exhaust hood, or other guard if no exhaust system is required, so arranged as to enclose the revolving drum, except for that portion of the drum above the table, if a table is used, which may be necessary and convenient for the application of the material to be finished.

(a) Wood Shop, two pneumatic drum sanders with two sanders to each machine, did not have the drum that was not being used, covered or guarded, on or about 8/3/95. The revolving drum was adjacent to the aisle way that was used by employees passing though the area.

**1. Employer Noncompliance**

CO Harding observed the operation of two pneumatic drum sanders. Each sander was two-sided, with a sanding drum on either side. The unused drum was not covered or protected by either a guard or by an exhaust hood. During the operation of the sanders, both drums turn, since they are on the same spindle (Tr. 117-18, 430, Exh. C-28) .

**2. Employee Access to the Violative Condition**

The unguarded drum is located in an aisle where people frequently walk. A passing employee could walk into or strike the unguarded sander. (Tr. 118, 431-32). CO Harding indicated that she did not know if anyone used the other sanding drum. She did notice footprints in the sawdust near the drum. (Tr. 433-34).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The unguarded drum was located in plain view in the aisle, and the record indicates that supervisors were present throughout the workplace.

**Penalty**

CO Harding assessed the severity of the violation as low. If someone struck the drum sander, they would receive a severe laceration. She determined that the probability of the violation was "lesser," although there is some area to walk around the moving drum, it is located in a main aisle way. (Tr. 119). The Secretary assessed an adjusted penalty of $1,350.00.

**Citation 1, Item 18**

§1910.213(p)(4): Belt sanding machines shall be provided with guards at each nip point where the sanding belt runs on to a pulley. These guards shall effectively prevent the hands or fingers of the operator from coming in contact with the nip points. The unused run of the sanding belt shall be guarded against accidental contact.

*Instance (a):* Wood Chair, Rockwell International, vertical belt sander did not have nip points guarded and the unused run of the sanding belt was not guarded, on or about 6/23/95.

**1. Employer Noncompliance**

CO Harding observed a Rockwell vertical belt sander with the unused portion of the belt unguarded, and with two unguarded nip points where the belt runs onto the pulleys at the south and north end of the sander (Tr. 119-21, Exh. C-29, C-30). She noted that the guard had been

removed, and was in the area (Tr. 120). She further testified that she determined that each of the cited machines were operable through employee interviews. (Tr. 123, 695-96)

**2. Employee Access to the Violative Condition**

CO Harding determined that the sander was used in the condition that see observed it during the inspection. CO Harding testified that in all of the instances, the operator is exposed the hazard of catching a finger between the area where the belt runs onto the pulley, or they could come in contact with the edge of the belt sander. (Tr. 123)

**3. Employer Knowledge of the violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace. In addition, CO Harding observed the missing guard sitting in the area of the machine.

*Instance (b)*: Wood Chair, horizontal belt sander did not have the nip points guarded and the unused run of the sanding belt was not guarded, on or about 6/23/95.

**1. Employer Noncompliance**

CO Harding observed a horizontal belt sander with no guard on the unused portion of the belt, and two unguarded nip points where the sanding belt runs onto the pulley. (Tr. 121, 437, Exh. C-31). She indicated that she determined that the machine was operable by asking Mr. Vander Schaaff and that she determined that each of the cited machines were operable through employee interviews. (Tr. 123, 438, 695-96)

**2. Employee Access to the Violative Condition**

CO Harding determined that the cited sander was used by employees in the condition in which she observed it. CO Harding testified that in all of the instances, the operator is exposed the hazard of catching a finger between the area where the belt runs onto the pulley, or they could come in contact with the edge of the belt sander. (Tr. 123)

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

*Instance (c):* Wood Shop, horizontal edge sander, unused portion of sanding belt and ingoing nip were unguarded, 4 inch diameter pulley, 68 inch length of belt and 6 inch wide belt, on or about 8/3/95.

**1. Employer Noncompliance**

CO Harding observed a horizontal edge sander with two unguarded ingoing nip points and the unused portion of the sanding belt unguarded. (Tr. 121-122, 440). CO Harding testified that she determined that each of the cited machines in instances (a) through (d) were operable through employee interviews. (Tr. 123, 695-96).

**2. Employee Access to the Violative Condition**

CO Harding testified that she determined that the saw was used in the condition in which she observed it. CO Harding testified that in all of the instances, the operator is exposed the hazard of catching a finger between the area where the belt runs onto the pulley, or they could come in contact with the edge of the belt sander. (Tr. 123)

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

*Instance (d):* Wood Shop, small upright sander, unused edge of sanding belt was not protected, approximately 13 inches, on or about 8/3/95.

**1. Employer Noncompliance**

CO Harding testified that she observed a small upright sander with the unused portion of the sanding belt unguarded, and two unguarded nip points (Tr. 12, 443, Exh. C-32). She indicated that one of the nip points was just beneath the table near the front part of the pulley (Tr. 443). The other nip point is located at the top of the machine. CO Harding did not know how high the machine was, or how high the nip point was from the floor (Tr. 449). CO Harding testified that she spoke with Mr. Vander Schaaff and Mr. Tazinski, the department supervisor, about the sander. (Tr. 441-42). CO Harding testified that she determined that the machines described in stances (a) through (d) were operational through employee interviews. (Tr. 123, 440-41, 695-96).

**2. Employee Access to the Violative Condition**

CO Harding determined that the sander was used by employees in the condition in which see observed it. CO Harding testified that in all of the instances, the operator is exposed the hazard of catching a finger between the area where the belt runs onto the pulley, or they could come in contact with the edge of the belt sander (Tr. 123).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Penalty**

The record reflects that the gravity of the violation was low severity and a low probability. The Secretary adjusted prosed penalty was $1350.00.

**Citation 1, Item 19**

§1910.217(b)(3)(I): Machines using full revolution clutches shall incorporate a single-stroke mechanism.

(a) Press Area, the following presses did not incorporate a single stroke mechanism: Rousselle #3, Bliss #18, Walsh #3, Bliss #24, Rousselle #4, Walsh #3, Bliss back wheel press, Toledo #12 (labeled #6), #7 no name, #8 Bliss, #24 Walsh, Federal press #18, The Robinson Mfg. CO. #19, #20 Rousselle, #38 no name, #25 no name, #27 no name, #26 no name, Walsh #23, Rousselle #33, Willard press & Tool CO. #21, #17 Loshbough Jordan, Slaysman CO. #12, L & J Press Corp. #16, Consolidate Press & Tool Co., # 9 no name, Toledo press #10, Bliss # 11, Walsh #25, L & J Press # 34, Bliss # 30, Havir Mfg. CO. # 29 and Walsh # 31, on or about 5/23/95.

**1. Employer Noncompliance**

CO Harding she observed the supervisor of the press area test the machines listed in the citation. (Tr. 125-26, 451, 801) For each of the machines, the supervisor would depress the pedal to determine if the press had a single stroke mechanism (Tr. 125-26). A single stroke mechanism allows the press to make on complete revolution when it is activated. In order to make another revolution, the operator must re-activate the press. If the operator keeps the pedal of a machine with a single stroke mechanism depressed, the press will not automatically cycle again (Tr. 124, 697, 699-702). In each case, the power presses continued to cycle after being activated once (Tr.

125-126). This meant that an operator was required to remove his foot from the foot treadle for the cycling to stop (Tr. 701). CO Harding testified that she determined that the machines were used without a single stroke mechanism from observation and employee interviews (Tr. 697-99)

**2. Employee Access to the Violative Condition**

CO Harding determined that the presses were used in the condition that she observed. As such, any employee operating these presses would be exposed to the violative condition. CO Harding testified because some of the presses were partially guarded, the zone of danger that employees are exposed to would vary depending on the press. (Tr. 126-27). The operator and/or maintenance workers could be exposed to the point of operation if they were doing some work on the presses or if they were setting up the presses (Tr. 127).

**3. Employer Knowledge of the Violation**

L & B can be said to have constructive knowledge if, with the exercise of reasonable diligence, they could have known of the violative condition. This violation was readily determined when the presses were tested by the supervisor. In addition, as discussed below, an employee was injured when a press malfunctioned, beginning another revolution and catching a employee's hand in the press. CO Harding testified that the supervisor of the department identified the press that was involved in the accident as press number 30. This press is listed in the instance description. (Tr. 710). Accordingly, the record reveals actual knowledge of the hazard.

**Penalty**

CO Harding assessed the severity of the violation as high, based on a possible resulting injury of amputation of fingers or parts of the hand. She determined that the probability was greater, because there are many presses in the department, some of which are used daily (Tr. 126). She testified that an employee was injured on February 9, 1995 (Tr. 703-04, C-65). According to the accident report, the employee was injured when the press she was using malfunctioned. As the employee finished the operation, and began to remove the stock, the press "double punched, on its own, catching her finger in the press." (Tr. 706, C-65). The Secretary's adjusted proposed penalty was $4,500.00.

**Citation 1, Item 20a**

§1910.217(b)(4)(I): (I) The pedal mechanism shall be protected to prevent unintended operation from falling or moving objects or by accidental stepping onto the pedal.

(a) Press Area, various presses throughout the work area either did not have the pedal mechanism protected or did not have the pedal mechanism adequately protected. The presses without pedal protection included Press #29, Press #30, Press #23, Bliss back wheel press, Walsh #24, The Robinson Mfg. CO. #19, Press #38, Press #25, Press #26, Walsh #23 and Willard press & Tool Company. The presses without adequate pedal protection included the Rousselle #3, Bliss #18, Bliss #24, Federal press #18, Rousselle #33, L&J Press Corp. #16, Consolidated Press and Tool Co., Toledo Press #10, Walsh #25, L&J Press #34 and Walsh #31, on or about 5/15/95 and 5/23/95.

**1. Employer Noncompliance**

CO Harding testified that she looked at each of the presses listed in the instance description, and determined that some of the foot pedal covers either had a partial cover, or no cover at all. She defined a partial cover as either covering only two out of three side of the pedal, missing a top piece, having gaps in the cover, or having a large gap that a persons foot could slide

into. (Tr. 707-08).

Press #30, shown in Exh. C-33 and C-34, had an inadequate cover. (Tr. 129-31) The press pedal was inadequately guarded because there was too much space between the top of the pedal and the top of the guard. In addition, the pedal protruded from the guard. (Tr. 132) The pedal cover appeared fixed to the press. (Tr. 472) CO Harding testified that she believed this condition was hazardous, as something could strike the edge of the pedal and cycle the press, and the large size of the partial guard allows the operator's foot too much play in the pedal area. (Tr. 135). Press #29 is depicted in Exh. C-35. CO Harding indicated that there was no pedal protection. (Tr. 135, Exh. C-35). Exh. C-36 depicts press # 23 with no foot pedal cover. (Tr. 136, 139). CO Harding testified that she did not know when this press was last used. (Tr. 139). The Bliss back wheel press, shown in Exh. C-37, had no foot pedal protection (Tr. 136-37). CO Harding testified that supervisor Jerry Page told her that this press was last used "a couple of months" before her observations, and that there was no pedal cover on the press when it was used (Tr. 136-37, 139, 636, 37). Exh C-38 depicts the Walsh #24 (Tr. 140, Exh. C-38). CO Harding indicated that she was told this press was used two or three days a week. Exh. C-39 depicts the Robinson manufacturing Co. press #19. There was no foot pedal on this press at the time of her inspection (Tr. 154-55). Exh. C-40 depicts two presses. The exhibit shows the Walsh #23 with no foot cover, and the Rousselle #33, with an inadequate foot cover too short to cover the pedal surface (Tr. 156).

CO Harding testified that many of the presses were in use at the time of her inspection. (Tr. 139, 262, 461, 470). She indicated that the department supervisor told her that the use of the various presses changes depending on the work to be done (Tr. 136-37). CO Harding testified that through conversations with supervisor Page, she determined that all of the presses depicted in the photographed exhibits were used by employees (Tr. 148, 150, 707). She indicated that she determined if the presses were operated in the condition in which she observed them. If a machine was out of service, she testified that she would not have listed it in the citation (Tr. 707). She further testified that she personally observed the operation of machines that had unguarded or inadequately guarded foot pedals (Tr. 149, 707). She determined through discussion with supervisor and from her own observations that all of the press in the department were mechanical presses. (Tr. 156-57)

**2. Employee Access to the Violative Condition**

CO Harding determined that all of the cited machines were used in the condition that she observed. The hazard of inadequate guards or no guards was that the foot pedal could be activated or tripped inadvertently by an object falling onto the petal when the operators had their hands in or near the point of operation (Tr. 157). Additionally, the inadequate guarding would permit too much movement within or under the foot pedal cover, allowing the operators to move their foot the side - thus the pedal could be unintentionally activated (Tr. 157-58).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Citation 1, Item 20b**

1910.217(b)(4)(ii): A pad with a nonslip contact area shall be firmly attached to the pedal.

(a) Press Area, the following presses did not have a nonslip contact area on the foot

pedal: #1, 2, 3, 0, 24, 19, 20, 38, 25, 26, 27, 21, 23, 8, 7, 6, 5, 13, 16, 12, 11, 10, 9, 25, 28, 34, 30, 31, 32, on or about 7/12/95.

**1. Employer Noncompliance**

CO Harding observed the presses in the department to determine whether they had non-slip pads. She testified that she determined if employees used the machines without the non-slip pedal by observing the condition of the pedal, observing employees use of some of the machines, and speaking with the department supervisor (Tr. 708). She stated that she was accompanied by supervisor Page, as she examined all of the press foot pedals (Tr. 822-23). She further indicated that she interviewed at least ten employee during this part of her inspection. Press number 16, depicted in Exh. C-41, had a smooth finish on the pedal. There was no tread or slip resistant finish on the pedal (Tr. 159-59). Press 30, depicted in Exh. C-33 and C-33 also has a smooth finish on the pedal (Tr. 160). Press 23, depicted in the Exh. C-36 has a smooth pedal, as does the Bliss back wheel press, depicted in Exh. C-37 (Tr. 161). Press #24, depicted in Exh. C-38, press number 19, depicted in Exh. C-39, and the press depicted in Exh. C-40 all have smooth pedals. The press depicted in Exh. C-41 press number 16 - This press did not have a slip resistant surface on the pedal.

COHarding testified that she determined if the presses where used in the condition that she observed them. (Tr. 708) She noted that the press depicted in Exh. C-41 was operated by employee Pablo Badillo. (Tr. 477)

**2. Employee Access to the Violative Condition**

CO Harding testified that she was told that the presses where used in the condition that she observed (Tr. 708). The hazard was that the operators would not have full control over their foot, thus, their foot could slide to one side or slip off, because the pedal covers were either missing or inadequate (Tr. 164). As such, employee using the presses could be exposed to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Penalty - Items 20a and 20b**

These items were grouped because they involved similar hazards that may increase the potential for injury resulting from an accident. CO Harding indicated the an uncovered pedal hazard presents the hazard of accidental activation should something fall onto the press pedal. In addition, if the press pedal cover was too large, she testified that the operator may move their foot away from the pedal, but still be inside the pedal cover. The operator may then trip the pedal accidentally. CO Harding assessed the severity of the violation as high, because an employee could amputate his or finger or parts of his or her hand. (Tr. 158, 164). CO Harding testified that the hazard of operating a machine without non-slip pads compounds the hazards created in instance 20a. She noted that if the operator's foot is not securely on the press pedal, the operator does not have full control over the pedal. The operator's foot could slide off the pedal, or slide to the side off or slide to the side, especially in light of the lack adequate of foot pedal covers. (Tr. 822-23)

CO Harding assessed the probability of the violations as greater, because there are many presses, and the majority of them are used during the work day (Tr. 164-65). The Secretary

assessed an adjusted proposed penalty of $4,500.00

**Citation 1, Item 21**

§1910.217(c)(2)(I)(a)(I) Every point of operation guard shall meet the following design, construction, application, and adjustment requirements:

(a) It shall prevent entry of hands or fingers into the point of operation by reaching through, over, under or around the guard.

(a) Press Area, where several mechanical power presses did not have adequate guarding to meet Table O of the mechanical power press standard, The presses include the Bliss #30, Toledo #12, Rousselle #20, Press #26 (no name), Loshbough Jordan #17, Consolidated Press & Tool Co. press, Press # 9 (No name) mfd. Attleboro, Mass., Toledo Press #10, Bliss # 10, Bliss #11, and Walsh # 31, on or about 5/15/95 and 5/23/95.

**1. Employer Noncompliance**

CO Harding testified that all of the presses in this department were mechanical powered presses (Tr. 166). In examining all of the cited presses, CO Harding indicated that she measured the presses and consulted Table O-10 of section 1910.217 to determined if the machine guards were sufficient to prevent the operator's hands from coming in contact with the point of operation - the area where the actual work was performed by the machine.[17] (Tr. 166-168, 827). CO Harding testified that Table O-10 shows the distances guards should be positioned from the point of operation in accordance with the width of the guard opening (Tr. 170-71, 710-11).

CO Harding testified that all of the presses cited in this instance had partial guarding. (Tr. 483, 490-91, See Exhs. C-33, C-35, C-36 and C-37). She stated that she determined that all of the cited presses were operable by asking which of the presses were out of service or unusable (Tr. 481-82).

CO Harding testified that the Loshbough Jordan press, #17, was only partially guarded. She indicated that the die - the point of operation of the press - was not completely guarded. The opening in the existing guard stretch across 17 inches across the machine, and is three inches high. The distance from the edge of this guard to the point of operation is 3 1/4 inches. She testified that this distance does not meet the requirements reflected in table O-10.

CO Harding testified that the Toledo press, #12, was only partially guarded. The guard

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[17] Table O-10 provides:

| Distance of opening from point of operation hazard | Maximum width of opening |
|---|---|
| 1/2 to 1 1/2 | 1/4 |
| 1 1/2 to 2 1/2 | 3/8 |
| 2 1/2 to 3 1/2 | 1/2 |
| 3 1/2 to 5 1/2 | 5/8 |
| 5 1/2 to 6 1/2 | 3/4 |
| 6 1/2 to 7 1/2 | 7/8 |
| 7 1/2 to 12 1/2 | 1 1/4 |
| 12 1/2 to 15 1/2 | 1 1/2 |
| 15 1/2 to 17 1/2 | 1 7/8 |
| 17 1/2 to 31 1/2 | 2 1/8 |

extends around the front and the top of the press. The top section of the guard is open. She indicated that the opening in the top of the guard is 16 inches wide by 17 inches deep. The guard measures 47 inches from the floor to the top of the guard. (Tr. 167) Using table O-10, CO Harding testified that according to Table O, the press requires a distance from the point of operation of 1 7/8 inches. The opening on the guard was 16" wide and 7" deep. (Tr. 171-72)

CO Harding testified that the Rouselle #20 press was included in her instance description because the dye is located only a couple of inches behind the opening, and does not conform with Table O-10. (Tr. 713). CO Harding also listed the Bliss #30 press in her instance description. The injury on this press occurred on 2/9/95. She indicated the this injury occurred within six months of her inspection. (Tr. 173-175, 711-12) However, at the time of her inspection, the press had a new guard. This guard was not in place at the time of the accident. (Tr. 826, 829, Exh. C-33).

**2. Employee Access to the Violative Condition**

CO Harding determined that the presses were used in the condition in which she observed them. As such, employees have access to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace. As noted in item 19, an employee was injured on the Bliss #30 power press in February of 1995. (Tr. 173-75, Exh. C-65) This injury put L & B on notice that they had a problem with unguarded presses.

**Penalty**

CO Harding determined that the severity of the violation was high, due to the nature of the possible injuries, the possible amputation of fingers or parts of hands. CO Harding assessed the probability of the violation as "greater," based on the fact that many presses were in use, and there had been a previous injury on one of the presses (Tr. 167). The Secretary's adjusted proposed penalty was $4,500.00.

**Citation 1, Item 22**

§1910.219(b)(2): Cranks and connecting rods. Cranks and connecting rods, when exposed to contact, shall be guarded in accordance with paragraphs (m) and (n) of this section, or by a guardrail as described in paragraph (o)(5) of this section.

(a) Polishing Room, Production machinery Co. Type 101 polishing machine, five vertical crank rods were not guarded, on or about, 6/23/95.

**1. Employer Noncompliance**

CO Harding testified that she observed the operation of a type 101 polishing machine by employee Ronald Hamm. (Tr. 177-78, 507, Exhs. C-44, C-45). The machine was used to polish the uprights for tables. The posts are fed through from the left side and pass through the entire machine. (Tr. 508) She observed that the machine had five unguarded vertical crank shafts with connecting rods that rotated as the operator walked along the side of the machine, guiding the stock (Tr. 177-78).

**2. Employee Access to the Violative Condition**

CO Harding observed employee Ronald Hamm operating the machine and work in proximity to the crank shafts. She testified that the machine had five vertical crank shafts with connecting rotating rods. She testified that the employee could strike against the rotating connecting rods which were "at arms length" (Tr. 176-177). Therefore, employees had access to

the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Penalty**

CO Harding classified the severity of the violation as low, because if an operator caught his or her finger in the machine, the resulting injury may be a lacerations or a broken finger. (Tr. 177-78). She assessed the probability as "lesser," based on the small size of the crank shafts and the amount of time that the machine is used. (Tr. 178). The Secretary's adjusted proposed penalty was $1,350.00.

**Citation 1, Item 23a**

§1910.219(c)(2)(I) All exposed parts of horizontal shafting seven (7) feet or less from floor or working platform, excepting runways used exclusively for oiling, or running adjustments, shall be protected by a stationary casing enclosing shafting completely or by a trough enclosing sides and top or sides and bottom of shafting as location requires.

(a) Polishing Department, horizontal shafting for the Airway Buffing wheel, mfd. by the Hammond Machinery Builders and PG Wheels were not protected, on or about 6/9/95.

**1. Employer Noncompliance**

CO Harding observed that the horizontal shafting of the buffing wheels were not protected- exposed and not enclosed. This was the area between the wheel itself and where the shafting leaves the motor house. (Tr. 178-79, 718-19, Exh. C-46, C-47, C-66). CO Harding testified that she observed six instances where this shaft was unguarded. (Tr. 181, 715). She further testified that she observed employees Ronald Hamm and General Davis operating some of these buffing wheels. (Tr. 521, 832-33).

**2. Employee Access to the Violative Condition**

CO Harding indicated that the location of the equipment warrants guarding. The hazard was an employee striking against or brushing up against the rotating shaft. As an employee is working a piece of stock, they moved their hands around the rotating wheel. She observed that their hands come within a few inches of the rotating part. (Tr. 523)

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Citation 1, Item 23b**

§1910.219(c)(4)(I) Projecting shaft ends shall present a smooth edge and end and shall not project more than one-half the diameter of the shaft unless guarded by nonrotating caps or safety sleeves.

(a) Polishing Department, projecting shaft end(s) for the Airway Buffing wheel, mfd. by the Hammond Machinery Builders and PG Wheels were not protected, on or about 6/9/95.

**1. Employer Noncompliance**

Citation 23b addressees the end of the buffing wheel shafts. CO Harding testified that diameter of the end of the shaft was 1 1/4 inches and was not smooth, and it extended 1 5/8 inches. (Tr. 181-82, Exh. C-47). The end of the shaft was not guarded by a non-rotating cap. (Tr.

528)

**2. Employee Access to the Violative Condition**

CO Harding testified that she observed employees Ronald Hamm and General Davis operating some of the buffing wheels. (Tr. 521, 832-33). The hazard was that the operator could brush up against the rotating part. Since the buffing wheels were in use, employees were exposed to the violative condition. She was told by the group leader in the department that ten employees operated this machinery (Tr. 721-22).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Penalty Items 23a and 23b**

CO Harding indicated that an employee could brush up against the shafting or the shafting end and received a burn from friction or a laceration (Tr. 523). She also indicated that the exposed area of the wheel could cause a laceration (Tr. 525). CO Harding noted that the end of the shaft was a screw, and was not a smooth surface (Tr. 182). She determined that the severity for both items was low, because the most likely injury would be lacerations of the fingers or hands. She determined that, based on the way the operator positioned their hands during operation, the probability was "lesser." (Tr. 182-83). The Secretary's proposed adjusted penalty was $1,350.00.

**Citation 1, Item 24a**

§1910.253(b)(1)(ii): Compressed gas cylinders shall be legibly marked, for the purpose of identifying the gas content, with either the chemical or the trade name of the gas. Such marking shall be by means of stenciling, stamping, or labeling, and shall not be readily removable. Whenever practical, the marking shall be located on the shoulder of the cylinder. This method conforms to the American National Standard Method for Marking Portable Compressed Gas Containers to Identify the Material Contained, ANSI Z 48.1-1954, which is incorporated by reference as specified in Sec. 1910.6.

(a) Press Area, five compressed gas cylinders in storage with other cylinders had unknown contents in them, on or about 5/23/95.

**1. Employer Noncompliance**

CO Harding observed five unidentified gas compression cylinders stored on the back wall of the press area, and no one knew what they contained (Tr. 183-84, Exh. C-48). Stored next to the containers were acetylene containers and one oxygen cylinder (Tr. 184). CO Harding testified that she did not attempt to move or rock the containers (Tr. 532).

**2. Employee Access to the Violative Condition**

CO Harding testified that employees entered this area. Exhs. C-48 and C-49 indicate a cart on the left side of the pictures. She indicated that employees may come into to the area to retrieve parts, to place carts, or to retrieve cylinders for use in welding (Tr. 187). The containers were located in the workplace. Therefore, employees had access to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Citation 1, Item 24b**

§1910.253(b)(2)(iv): Valve protection caps, where cylinder is designed to accept a cap, shall always be in place, hand-tight, except when cylinders are in use or connected for use.

(a) Press Area, four compressed gas cylinders with unknown contents, did not have caps on the cylinder while they were in storage, on or about 5/23/95.

**1. Employer Noncompliance**

CO Harding testified that she observed five uncapped cylinders designed to accept a cap (Tr. 184-85, Exh. C-48, C-49). The exhibits indicated that there is some form of top on the cylinders. CO Harding testified that these were valves to turn the cylinders on or off (Tr. 538). CO Harding indicated that she looked at the cylinders to see if they were marked, and no one in the area knew the contents of the cylinders. (Tr. 536-38)

**2. Employee Access to the Violative Condition**

CO Harding testified that employees entered this area. Exhs. C-48 and C-49 indicate a cart on the left side of the pictures. She indicated that employees may come into to the area to retrieve parts, to place carts, or to retrieve cylinders for use in welding (Tr. 187). The cylinders were located in the workplace. Therefore, employees had access to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Citation 1, Item 24c**

§1910.253(b)(4)(iii): Oxygen cylinders in storage shall be separated from fuel-gas cylinders or combustible materials (especially oil or grease), a minimum distance of 20 feet (6.1 m) or by a noncombustible barrier at least 5 feet (1.5 m) high having a fire-resistance rating of at least one-half hour.

(a) Press Area, one oxygen and one acetylene cylinder were in storage together, on or about 5/15/95.

**1. Employer Noncompliance**

CO Harding testified that she observed an oxygen cylinder stored next to an acetylene cylinder (Tr. 185, Exh. C-48 and C-49). Acetylene is a fuel gas cylinder that is used with oxygen to produce flames. The oxygen container was fitted with a blue collar, designed to protect the cylinder if it was accidently bumped. (Tr. 542-42)

**2. Employee Access to the Violative Condition**

The containers were stored in the work area, therefore employees were exposed to the violative condition. CO Harding testified that employees in the Welding Department entered this area on a fairly regular basis (Tr. 187). Exhs. C-48 and C-49 indicate a cart on the left side of the pictures. She indicated that employees may come into the area to retrieve parts, place that carts, or to retrieve cylinders for use in welding. (Tr. 187).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Penalty - Items 24a and 24b and 24c**

these items were grouped because they involved similar or related hazards. CO Harding assessed the severity was low, as the most likely injury would be first degree burns. Such a burn could occur if gasses from the two cylinders were to mix and a spark in the area ignited the gasses

(Tr. 186-87). She determined that the probability of an accident occurring was "lesser" because the cap on the oxygen cylinder was in place, and the cylinders were stored out of the way (Tr. 187). The Secretary's adjusted proposed penalty was $1,350.00.

**Citation 1, Item 25a**

§1910.303(e): Marking. Electrical equipment may not be used unless the manufacturer's name, trademark, or other descriptive marking by which the organization responsible for the product may be identified is placed on the equipment. Other markings shall be provided giving voltage, current, wattage, or other ratings as necessary. The marking shall be of sufficient durability to withstand the environment involved.

> (a) Polishing Department, north wall, bank of disconnects including 14 disconnects plus one addition [sic] disconnect on the side of this bank, did not have any ratings as is necessary, on or about 6/9/95. Lack of marking of circuit breakers did not insure that in the event of an emergency involving the machinery in this area, the proper disconnect would be locked out.

**1. Employer Noncompliance**

CO Harding observed a bank of 14 disconnects on the north wall of the polishing department that were not marked with any ratings (Tr. 188-89, 547, Exh. C-50). She testified that located immediately to the right was another unlabeled disconnect (Tr. 189). None of the disconnects had amperage or voltage markings (Tr. 545-46).

CO Harding indicated that such markings are necessary in case maintenance must be performed. She testified that in the event of an emergency, an employee would not know how high the voltage was, or what the amperage was is, in order to "approach the equipment in the right fashion" (Tr. 546-47).

CO Harding testified that she determined that the disconnects were related to machines in the polishing department by asking the group leader and the head of maintenance, Nate Morrison. Mr. Morrison told her that he did not know which machines the disconnects related to (Tr. 722, 837-38).

**2. Employee Access to the Violative Condition**

CO Harding indicated that without proper markings, employees were unable to determine the voltage or the amperage of equipment they may be repairing (Tr. 193-94). The disconnects were live, and used for unidentified equipment in the polishing department. As such, employees had access to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Citation 1, Item 25b**

§1910.303(f): Identification of disconnecting means and circuits. Each disconnecting means required by this subpart for motors and appliances shall be legibly marked to indicate its purpose, unless located and arranged so the purpose is evident. Each service, feeder, and branch circuit, at its disconnecting means or overcurrent device, shall be legibly marked to indicate its purpose, unless located and arranged so the purpose is evident. These markings shall be of sufficient durability to withstand the environment involved.

*Instance (a)*: Polishing Department, adjacent to the 101 machine, a bank of 14

disconnects, plus one addition disconnect to the right side of this bank were not labeled properly as to what equipment they related to, on or about 6/9/95.

**1. Employer Noncompliance**

CO Harding testified that this instance involves the same grouping of disconnects cited in item 25a. She noted that these disconnects were not labeled as to what equipment they related to (Tr. 190-91, Exh. C-50). See indicated that there was some labeling on the disconnects, such as "A-9 accumulating conveyer, D3-1 hinge discharge belt, B-1 picker conveyor." CO Harding testified that she asked Nate Morrison if the markings were related to any of the machinery in the room. She stated that he told her there was no such equipment in that room, although the disconnects were utilized for equipment in the polishing department (Tr. 190-91). She further testified that Nate Morrison told her the reason the disconnects were labeled for non-existent equipment was that the disconnects were purchased from another company and the marking probably had come from that company and related to their equipment when it was purchased (Tr. 191-92).

**2. Employee Access to the Violative Condition**

As with item 25a, CO Harding determined that the disconnected were live, and used for unidentified equipment in the polishing department. As such, employees had access to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

*Instance (b)*: Table Top, Center Wall (inside), two circuit breakers panels were not labeled as to their purpose, on or about 8/29/95.

**1. Employer Noncompliance**

CO Harding observed two unlabeled circuit breaker panels on the center was of the table top department (Tr. 192, 552-53, Exhs. C-51, C-52). She determined that the circuit breakers involved machinery in the table top department by discussing the breakers with the department supervisor (Tr. 722).

**2. Employee Access to the Violative Condition**

CO Harding determined that the circuit breakers involved live machinery. She testified that should an employee need to lock out a piece of machinery, the employee may not be able to determine do so if the breakers are unlabeled (Tr. 194).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Penalty - Items 25a and 25b**

These items were grouped because they involved similar hazards. CO Harding assess the severity of the violation as low. She indicated that the most likely injury would be lacerations if a piece of equipment started up accidently (Tr. 194). She classified the probability as "lesser," because most of the circuit breakers in the facility were labeled (Tr. 194). The Secretary' adjusted proposed penalty was $1,350.00.

**Citation 1, Item 26**

§910.304(a)(2): Polarity of connections. No grounded conductor may be attached to any terminal

or lead so as to reverse designated polarity.

*Instance (a):* Packing Department, 1st bench, center duplex outlet at specialty parts/stool packing, had reversed polarity, on or about 7/13/95.

**1. Employer Noncompliance**

CO Harding testified that she observed a center duplex outlet in the specialty parts packing area with reversed polarity (Tr. 195). CO Harding testified that reverse polarity means that the hot and the neutral wires on the outlet were reversed. She used an Etcon tester to determine the polarity of the outlets cited in the instance description (Tr. 724). CO Harding testified that she used the Etcon tester sporadically on outlets in every part of the facility (Tr. 838). Lights on the tester indicate whether there is a problem with the outlet (Tr. 196, 839-40). The test is displayed in Exh. C- 60 (Tr. 563). She indicated that the Etcon tester cannot be calibrated, but that she knew it was working properly because the tester showed outlets that were properly grounded, and outlets that were improperly grounded (Tr. 723). CO Harding testified that this outlet did not have anything plugged into it.

**2. Employee Access to the Violative Condition**

Although CO Harding testified that there was nothing plugged into the outlet, the record does not indicate that the outlet was somehow marked to prevent employee use.

**3. Employer Knowledge of the Violation**

L & B can be said to have constructive knowledge if, with the exercise of reasonable diligence, they could have known of the violative condition. L & B could have determined the polarity of the outlet with a simple test.

*Instance (b):* Wood Chair, Leg Bench for bent wood, job made duplex outlet which was used with drill (no name) to drill holes in chair legs had reversed polarity, on or about 7/13/95.

**1. Employer Noncompliance**

CO Harding testified that using the Etcon tester, she determined that a this "job made" duplex outlet had reverse polarity (Tr. 195, Exh. C-60). The outlet was meant for permanent installation, but was laying on the floor with a drill plugged into it (Tr. 563). The drill was operating when she first observed the plug (Tr. 564).

**2. Employee Access to the Violative Condition**

CO Harding testified that an employee was using the outlet at the time of her observation.

**3. Employer Knowledge of the Violation**

L & B can be said to have constructive knowledge if, with the exercise of reasonable diligence, they could have known of the violative condition. L & B could have determined the polarity of the outlet with a simple test.

*Instance (c)*: Upholstery Department, job made heat table which is plugged into an outlet with reversed polarity which is located under the work table where vinyl seats are made, on or about 8/3/95.

**1. Employer Noncompliance**

CO Harding determined using the Etcon tester that an outlet in the upholstery department had reverse polarity. Prior to testing the outlet, she observed a heat table plugged into the outlet (Tr. 195-96).

**2. Employee Access to the Violative Condition**

CO Harding determined that the outlet was used at the time of her observation. As such, employees are exposed to the violative condition.

**3. Employer Knowledge of the Violation**

L & B can be said to have constructive knowledge if, with the exercise of reasonable diligence, they could have known of the violative condition. L & B could have determined the polarity of the outlet with a simple test.

**Penalty**

CO Harding testified that the potential hazard form the outlet is electrical shock, resulting in burns. She indicated that if a tool is operated in an outlet with reversed polarity, the tool could become energized, and if the operator were to touch something else, the tool could "short out" and the operator could be burned (Tr. 196). CO Harding assessed the severity of the violation as low, as the most likely injury would by an electric shock. She testified that the outlets were all 110 volts, and in dry locations (Tr. 196-97). The Secretary's adjusted proposed penalty was $1,350.00.

**Citation 1, Item 27**

§1910.304(f)(4): Grounding path. The path to ground from circuits, equipment, and enclosures shall be permanent and continuous.

*Instance (a)*: Wood Chair Area, pad assembly line for wood chairs, two drills each with third wire for ground were utilized with drop pendants which were not grounded, on or about 7/13/95.

**1. Employer Noncompliance**

CO Harding testified that she observed employees using two drills with a three wire configuration meaning a hot, neutral, and a ground wire. The drills were connected to a drop pendant outlet, that hung from the ceiling. She indicated that she tested the outlets with the Etcon tester, and determined that they were not grounded (Tr. 197, 569-70). CO Harding stated that although the drill are double insulated, they do not have built in grounding (Tr. 576).

**2. Employee Access to the Violative Condition**

CO Harding testified that the ungrounded equipment was in use at the time of her inspection.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

*Instance (b)*: Packing Department, near 2nd stock bench, pedestal floor fan had missing found prong, on or about 7/13/95.

**1. Employer Noncompliance**

CO Harding testified that she observed a pedestal floor fan, in service, that was missing a ground prong (Tr. 198, 724-25, Exh. C-53). She stated that she requested that the employee unplug the fan until it was repaired (Tr. 198).

**2. Employee Access to the Violative Condition**

CO Harding testified that the fan was in use at the time her inspection. Therefore, employee had access to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain

view, and the record indicates that supervisors were present throughout the workplace. The missing prong was apparent through a visual inspection of the plug.

*Instance (c):* Upholstery, fabric cutting area, General Electric refrigerator which was used for employees lunches, was not grounded, on or about 8/3/95.

**1. Employer Noncompliance**

CO Harding checked the plug of a General Electric refrigerator, used by employees to store their lunches (Tr. 199, 574). The plug was not grounded. (Tr. 199)

**2. Employee Access to the Violative Condition**

The refrigerator was in use at the time of her inspection. As such, employee had access to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace. *American Airlines, Inc.*, 17 BNA OSHC 1553, 1555 (Nos. 93-1817 & 93-1965, 1996). The missing prong was apparent through a visual inspection of the plug.

*Instance (d)*: Shipping Department, Frigidaire refrigerator was not grounded, on or about 8/29/95.

**1. Employer Noncompliance**

CO Harding observed a ungrounded Frigidare refrigerator, used by employee in the shipping department to store their lunches (Tr. 199). CO Harding determined that the plug was ungrounded by observing that there was no third wire on the plug (Tr. 574-75). She also stated that labeling on the refrigerator did not indicate that it was permanently grounded (Tr. 575-76).

**2. Employee Access to the Violative Condition**

The refrigerator was in use at the time of CO Harding's inspection. Therefore, employees had access to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace. The missing third wire was determined through a visual inspection.

**Penalty**

CO Harding testified that the violation present a hazard of electric shock (Tr. 199, 199-200). She classified the severity as medium, because the resulting burns would most likely be second degree. (Tr. 199-200). She assessed the probability was "lesser," because there was a great deal of electrical equipment in the facility, and she observed only these three instances (Tr. 200). The Secretary's adjusted proposed penalty was $2,250.

**Citation 1, Item 28**

§1910.305(b)(2): Covers and canopies. All pull boxes, junction boxes, and fittings shall be provided with covers approved for the purpose. If metal covers are used they shall be grounded. In completed installations each outlet box shall have a cover, faceplate, or fixture canopy. Covers of outlet boxes having holes through which flexible cord pendants pass shall be provided with bushings designed for the purpose or shall have smooth, well-rounded surfaces on which the cords may bear.

*Instance (a)*: Wood Chair, special press area, 3rd duplex outlet from right side did not

have a faceplate, on or about 7/13/95.

**1. Employer Noncompliance**

CO Harding testified that in the wood chair department she observed that the third duplex outlet from the right side did not have a face plate (Tr. 200, Exh. C-54). She indicated that employees were working about a foot away from the outlet, and were using metal tools on a work table (Tr. 202). CO Harding determined that the outlet was live by checking it with the Etcon tester, and a "tic tracer." A tic tracer emits an audible sign when held near a live energy source (Tr. 579-81).

**2. Employee Access to the Violative Condition**

CO Harding testified that employees were working in proximity to the outlet. She indicated that the potential hazard is electric shock, should an employee touch the conductors at the terminal screw area with their hand or a tool (Tr. 201, 581).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

*Instance (b):* Wood Chair, junction box between spray booth #10 and #11 did not have a cover, on or about 7/13/95.

**1. Employer Noncompliance**

CO Harding testified that in the wood chair department, located between spray booth #10 and 11, she observed a junction box without a cover (Tr. 201, Exh. C-55). She stated that she determined the junction box was live by using the tic tracer (Tr. 582-83). CO Harding indicated that in addition to the hazard of electrical shock, employees were working with flammable stains in the area.

**2. Employee Access to the Violative Condition**

CO Harding observed employees working in the area of the violation. As such, employees had access to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The junction box was in plain view, and the record indicates that supervisors were present throughout the workplace..

**Penalty**

CO Harding assess the severity of the violations low. She indicated that the most likely injury would be first degree burns due to electric shock (Tr. 202). She determined that the probability was "lesser," as she observed a number of outlets and junction boxes that had appropriate covers (Tr. 202). The Secretary's proposed adjusted penalty was $1,350.00.

**Citation 1, Item 29**

§1910.307(b): Electrical installations. Equipment, wiring methods, and installations of equipment in hazardous (classified) locations shall be intrinsically safe, approved for the hazardous (classified) location, or safe or for the hazardous (classified) location. Requirements for each of these options are as follows:

(a) Wood Chair Area, where there are two dip tanks containing thinner which is a Class 1B flammable liquid, the area had not been designed electrically for the appropriate Class 1, Division 1 and Division 2, Group D in that there was a duplex outlet 1 foot form the top surface of the tanks and an electrical reset button 4 feet from the top of the dip

tank surface, on or about 7/13/95.

**1. Employer Noncompliance**

CO Harding observed two dip tanks that contained Class 1B flammable liquid. She determined that the liquid was flammable by observing the label on the tank, determining from the supervisor that the material was thinner, and checking the MSDS of the material (Tr. 203). She observed a duplex electrical outlet one foot from one of the tanks, and an electrical reset button four feet from one of the dip tanks (Tr. 203-04, Exh. C-56). CO Harding stated that she observed employees working in the spray booth near the area of the tanks (Tr. 204).

Although she indicate that she did not see the tank lids opened, CO Harding testified that an employee told her that they sometimes put chairs in the dip tank and leave the top of the tank open (Tr. 207-07).

CO Harding testified that this location was hazardous based on a definition determined the National Fire Protection Association ("NFPA"). NFPA defines a vapor source as a liquid exposed liquid used in the dipping process from which is possible to measure a vapor concentration which would exceed 25% of LF or LFL (lower flammable liquid) at a distance of one foot in any direction from the object. She further indicated that Section 34 of NFPA code indicates that a radial distance of 5 feet from the vapor source is considered a "class one, division one," and that would apply to any electrical equipment in the area. CO Harding testified that she measured the distance from the tank, and the and the electrical equipment are within the class one, division one location (Tr. 205-07).

**2. Employee Access to the Violative Condition**

CO Harding observed employees working near the violative condition. She testified that the electrical equipment could provide an ignition source for flammable vapors. She indicated that flammable vapors from the tank find an ignition source in either the outlet or the reset button (Tr. 205).

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. It was well known that the dip tanks contained flammable materials, and the outlet and reset button was in plain view. The record indicates that supervisors were present throughout the workplace.

**Penalty**

CO Harding testified the outlet or the reset button may ignite flammable vapors from the tanks (Tr. 204). She indicated that the resulting burns could be severe (Tr. 205, 207). She determined that the severity of the violation was high, based on the large tanks of flammable materials. CO Harding assessed the probability as "lesser," because there were only two dip tanks in the entire facility, and two electrical sources. In addition, sometimes the covers on the tanks were kept closed (Tr. 207). The Secretary adjusted proposed penalty was $2,250.

**SERIOUS CLASSIFICATION**

Section 17(k) of the Act, 29 U.S.C.. §666(k) of the Act, provides that a violation is "serious" if there is " a substantial probability that death of serious physical harm could result" from the violation. In order to establish that a violation should be characterized as serious, the Secretary need not establish that an accident is likely to occur, but must show that an accident is possible and it is probable that death or serious physical harm could occur. *Flintco Inc., 16 BNA*

*OSHA 1404, 1405 (No 92-1396, 1993).*

The undersigned finds that the serious nature of the aforementioned citations has been established by the Secretary.

**PENALTY**

Once a contested case is before the Review Commission, the amount of the penalty proposed by the Complainant in the Citation and Notification of Proposed Penalties is merely a proposal. What constitutes an appropriate penalty is a determination which the Review Commission as the final arbiter of penalties must make. In determining appropriate penalties "due consideration" must be give to the four criteria under Section 17(j) of the Act, 29 U.S.C., §666(j). These "penalty factors" are: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight. Generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *J.A. Jones, supra.*

CO Harding testified in recommending penalties for citation one she applied the aforementioned factors. All of the proposed penalties in Citation 1 reflect the ten percent reduction for history because Respondent had not been cited by OSHA for any serious, willful, or repeated violations in the past three years. CO Harding determined that the total number of employees controlled by Respondent was 350. She testified that Mr. Vander Schaaff provided her with this information (Tr. 27, 248). OSHA gives a reduction in penalty for size only if the employer employs under 250 people, and thus, no reduction was credited for size.[18] CO Harding also testified when considering a reduction for good faith, she takes into account the "comprehensive safety program in total," management commitment, employee involvement, hazard recognition, a prevention program, and if required programs, such as a lock-out tag-out program, are in place. She gave no reduction for good faith because she felt that L & B's programs were "minimally there" and that when a program was in place, it was not implemented. (Tr. 28-29). Therefore, none of the proposed penalties in Citation 1 were reduced for size or good faith.

After considering the above factors and the gravity of each violation the undersigned finds that the Secretary followed the procedures prescribed in Section 17(j) and that the proposed penalties are appropriate.

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[18] Respondent's counsel represents that the subject plant has a fluctuating workforce of 180 to 250 employees. (Respondent's Brief, p. 2). Review Commission precedent establishes that "[a]n employer's size for the purpose of a civil penalty assessment, may encompass the employer's 'total corporate structure'." *Valdak Corp. v. OSHRC ,* 73 F. 3d 1466 (8th Cir. 1996) [17 BNA OSHC 1492, 1495], citing *Hudson Stations, Inc. v. United States Envtl. Protection Agency,* 642 F.2d 261 (8th Cir. 1981).

**OTHER THAN SERIOUS VIOLATIONS**

CO Harding testified that these violations have an impact on safety and health in the workplace, however, she did not determine that the probability of death or serious injury existed, and thus, no penalties were assessed. The undersigned finds the record supports the nonserious nature of these citations.

**Citation 2, Item 1**

§1910.107(b)(5)(I): The spraying operations except electrostatic spraying operations shall be so designed, installed and maintained that the average air velocity over the open face of the booth (or booth cross section during spraying operations) shall be not less than 100 linear feet per minute. Electrostatic spraying operations may be conducted with an air velocity over the open face of the booth of not less than 60 linear feet per minute, or more, depending on the volume of the finishing material being applied and its flammability and explosion characteristics. Visible gauges or audible alarm or pressure activated devices shall be installed to indicate or insure that the required air velocity is maintained. Filter rolls shall be inspected to insure proper replacement of filter media.

(a) Wood Chair Division, spray booths in the area did not have alarms or gauges, on or about 7/13/95.

**1. Employer Noncompliance**

CO Harding observed that there were no gauges in the spray booths (Tr. 210, 590). She testified that she asked Mr. Vander Schaaff if there were any alarms or gauges in the booths, and he indicated that there were none (Tr. 210). CO Harding stated that the potential hazard is that without alarms, hazardous vapors could build up in the spray booths (Tr. 211, 591-93). CO Harding indicated that she did not cited this violation as serious, because an industrial hygienist sampled the vapors and did not determine any overexpose and employees told her that they regularly changed the filters (Tr. 211).

**2. Employee Access to the Violative Condition**

The spray booths were used without alarms or gauges during the inspection. Therefore, employee were exposed to the hazardous condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace. In addition, CO Harding determined that there were no gauges in the booths by asked Mr. Vander Schaaff.

**Citation 2, Item 2**

§1910.157(c)(4): The employer shall assure that portable fire extinguishers are maintained in a fully charged and operable condition and kept in their designated places at all times except during use.

(a) Polishing Department, east wall, fire extinguishers sign was posted and there was no fire extinguisher, on or about 6/9/95.

**1. Employer Noncompliance**

CO Harding observed a fire extinguisher sign of the east wall of the polishing department. There was not a fire extinguisher located in that area (Tr. 211, 595-96, Exh. C-57).

**2. Employee Access to the Violative Condition**

CO Harding observation was made in an area of the facility that was in use, therefore there

was employee exposure to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Citation 2, Item 3**

§1910.178(p)(1): (1) If at any time a powered industrial truck is found to be in need of repair, defective, or in any way unsafe, the truck shall be taken out of service until it has been restored to safe operating condition.

(a) Paint line, Clark propane fork lift which was labeled Building 4, the horn was inoperable, on or about 6/9/95.

**1. Employer Noncompliance**

CO Harding observed a Clark propane forklift truck in the paint line area. She questioned the operator, and determined that the horn was inoperable (Tr. 212). She testified that she did not cite the violation as serious because the remainder of the truck appeared to be in good working condition. (Tr. 212-13).

**2. Employee Access to the Violative Condition**

At the time CO Harding observed the condition, an employee was operating the forklift. Therefor, the employee had access to the violative condition.

**3. Employer Knowledge of the Violation**

L & B can be said to have constructive knowledge if, with the exercise of reasonable diligence, they could have known of the violative condition. The condition of the horn could have been determined by simply activating the horn to see if it was working properly.

**Citation 2, Item 4**

§1910.217(e)(3): Training of maintenance personnel. It shall be the responsibility of the employer to insure the original and continuing competence of personnel caring for, inspecting, and maintaining power presses.

(a) The power press area where an employee was charged with inspecting and maintaining the presses, adequate instruction was not provided, on or about 7/12/95.

**1. Employer Noncompliance**

CO Harding testified that during her inspection of the presses she asked to speak with the employee who maintained the presses. That employee, tool and dye maker Peter Coons, told her that although he does the best he can to maintain the presses, no one had actually given him any instruction in press maintenance (Tr. 213, 598-99). CO Harding testified that training is required so that the employee is aware of the regulations, and can ensure that the power presses meet those regulations (Tr. 600). The press maintenance records indicated that some maintenance was done on the presses (Tr. 601).

**2. Employee Access to the Violative Condition**

As indicated by the number of non-complying presses in the facility, employees had access the violative condition.

**3. Employer Knowledge of the Violation**

L & B can be said to have constructive knowledge if, with the exercise of reasonable diligence, they could have known of the violative condition. L & B should have been aware of the training level of its employees.

**Citation 2, Item 5**

§1910.217(g): Reports of injuries to employees operating mechanical power presses. (1) The employer shall, within 30 days of the occurrence, report to either the Director of the Directorate of Safety Standards Programs, OSHA, U.S. Department of Labor, Washington, D.C. 20210, or the State agency administering a plan approved by the Assistant Secretary of Labor for Occupational Safety and Health, all point of operation injuries to operators or other employees. The following information shall be included in the report:

(a) Press Area, accident occurred on Bliss press #30 resulting in an employee losing a finger; accident was not reported as is required above, on or about 2/9/95 (date of the accident) and within 30 days thereafter.

**1. Employer Noncompliance**

CO Harding determined that the accident on Bliss press #30 in February of 1995, discussed *supra*, was not reported to the Office of Standards Development. CO Harding testified that she asked Mr. Vander Schaaff if the accident had been reported, and he indicated that he had not reported it. (Tr. 214). CO Harding stated that Mr. Vander Schaaff corrected this when she brought it to his attention (Tr. 602-03).

**2. Employee Access to the Violative Condition**

the Act's record keeping requirements "play a crucial role in providing the information necessary to make workplaces safer and healthier" *General Motors Corp., Inland Div.*, 8 BNA OSHC 2036, 2040-41 (No. 76-5033). Since the accident was not reported, the employees can be considered to have access to the violative condition.

**3. Employer Knowledge of the Violation**

L & B can be said to have constructive knowledge if, with the exercise of reasonable diligence, they could have known of the violative condition. L & B should have known whether the accident was reported.

**Citation 2, Item 6**

§1910.219(b)(1): Flywheels. Flywheels located so that any part is seven (7) feet or less above floor or platform shall be guarded in accordance with the requirements of this subparagraph:

(a) Press Area, L & J Press Corp., press #16, the lower portion of the guard for the flywheel was off, on or about 5/15/95.

**1. Employer Noncompliance**

CO Harding observed that L&J press # 16 was missing the lower portion of the guard on the flywheel (Tr. 215, Exh. 58). CO Harding testified that the machine was operated by Pablo Badillo at the time of her inspection (Tr. 215, 603-04). The violation was corrected during her inspection. (Tr. 608).

**2. Employee Access to the Violative Condition**

CO Harding observed an employee operating the press, therefore the operator had access to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The press and missing guard were in plain view, and the record indicates that supervisors were present throughout the workplace.

**Citation 2, Item 7**

§1910.303(b)(2): Installation and use. Listed or labeled equipment shall be used or installed in accordance with any instructions included in the listing or labeling.

*Instance (a)*: Paint Booth with powder system, pedestal fan was utilized with metal duplex box which was fitted with electrical cord and was lying on the floor, on or about 7/13/95.

**1. Employer Noncompliance**

CO Harding observed a pedestal fan utilized with a metal duplex box, which was fitted with an electrical cord. CO Harding testified that there boxes were meant to be part of a permanent installation. (Tr. 216, Exh. C-59). The metal duplex boxes which were designed to be part of the building's permanent wiring were lying on the floor(Tr. 216-17,

**2. Employee Access to the Violative Condition**

The box was lying on the floor of the workplace, and was in use at the time of the inspection. Therefore, employees had access to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

*Instance (b)*: Wood Chair, Leg Bench for bent wood, job made metal duplex outlet was utilized as an extension cord which was utilized with a power drill (no name) to drill holes in chair legs, on or about 7/13/95.

**1. Employer Noncompliance**

CO Harding observed a metal duplex box in the wood chair department that was used with an extension cord. Attached to the extension cord was a power drill (Tr. 217, Exh. C-60). CO Harding testified during her description of this condition in citation 26, instance (b) that the outlet was meant for permanent installation (Tr. 563) .

**2. Employee Access to the Violative Condition**

The outlet was in use at the time of CO Harding observation, therefore employees had access to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Citation 2, Item 8**

§1910.303(g)(1)(ii): Clear spaces. Working space required by this subpart may not be used for storage. When normally enclosed live parts are exposed for inspection or servicing, the working space, if in a passageway or general open space, shall be suitably guarded.

(a) Table Top, Outside Wall, circuit breaker panel and disconnects, were blocked by tables which stored wood and table tops, on or about 8/29/95.

**1. Employer Noncompliance**

CO Harding observed a table with wood stored on it in front of two circuit breaker panels and a disconnect box (Tr. 218, 609, Exh. C-61). She was told by Mr. Vander Schaaff that the equipment was rated 600 volts or less.

**2. Employee Access to the Violative Condition**

The wood in front of the circuit breaker panels and disconnect box limited an employee's access to the electrical equipment for ready and safe operation and maintenance of the equipment.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Citation 2, Item 9**

§1910.305(a)(2)(I): (2)Temporary wiring. Temporary electrical power and lighting wiring methods may be of a class less than would be required for a permanent installation. Except as specifically modified in this paragraph, all other requirements of this subpart for permanent wiring shall apply to temporary wiring installations.

(I) Uses permitted, 600 volts, nominal, or less. Temporary electrical power and lighting installations 600 volts, nominal, or less may be used only:

(A) During and for remodeling, maintenance, repair, or demolition of buildings, structures, or equipment, and similar activities;

(B) For experimental or development work, and

(C) For a period not to exceed 90 days for Christmas decorative lighting, carnivals, and similar purposes.

*Instance (a)*: Press Area, pedestal floor fan which was adjacent to #17 press was utilized with a 50 foot extension cord, on or about 5/23/95.

**1. Employer Noncompliance**

The standard restricts the use of temporary electrical power rated less than 600 volts to those enumerated in the standard. CO Harding observed a pedestal floor fan in the adjacent to press #17. She testified that the fan appeared to have been located there for an extended period of time, and that the fan utilized a 50 foot extension cord (Tr. 219). An extension cord is considered temporary wiring (Tr. 220). She testified that the violation is the use of an extension cord in a permanent situation (Tr. 614-15). CO Harding stated that the cord was operating, and that the fan was not used for remodeling or maintenance. (Tr. 615-17)

**2. Employee Access to the Violative Condition**

The fan was in use at the time of the inspection, therefore, employees had access to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace. *A*

*Instance (b)* Paint Booth, powder system, pedestal floor fan was utilized with a 25 foot extension cord, which was lying on the floor across an aisle way, on or about 7/13/95.

**1. Employer Noncompliance**

CO Harding observed another pedestal floor fan used with an extension cord. She testified that it appeared that the fan had been there for some time (Tr. 219-20). She indicated that there was no remodeling or maintenance being performed (Tr. 618-19, 727).

**2. Employee Access to the Violative Condition**

The fan was in use at the time of her observation and it was lying across an active aisle way, therefore, employees had access to the violative condition (Tr. 220). .

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

*Instance (c)* Upholstery Department, by the first and second foam bench, fans and Wolf

pacer Cutter which is used to cut foam were all plugged into an extension cord, on or about 8/3/95.

**1. Employer Noncompliance**

CO Harding observed a couple of fans and a Wolf pace cutter, used to cut foam, plugged into an extension cord (Tr. 220, Exh. 62). She indicated that the used of the extension cord was in violation of the standard, but the condition also presented the hazard of overloading the circuit. (Tr. 221). CO Harding testified that she did not observed any maintenance or remodeling (Tr. 618).

**2. Employee Access to the Violative Condition**

The extension cord that CO Harding observed was in use at the time of her inspection. Therefore, employee were exposed to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Citation 2, Item 10**

§1910.305(b)(1): Conductors entering boxes, cabinets, or fittings. Conductors entering boxes, cabinets, or fittings shall also be protected from abrasion, and openings through which conductors enter shall be effectively closed. Unused openings in cabinets, boxes, and fittings shall be effectively closed.

*Instance (a)*: Upholstery, second work table/sewing machine, two knockouts missing in electrical box that sewing machine was plugged into, on or about 8/3/95.

*Instance (b):* Wood Chair, repair table opposite the touch up booth, middle outlet, two knockouts were missing, on or about 7/13/95.

*Instance (c)*:Wood Shop, horizontal edge sander, knockout missing from motor start fixture, on or about 8/3/95.

*Instance (d)*:Wood Shop, Greelee Bros., 606 drill press, three knockouts missing from the reset button, on or about 8/3/95.

*Instance (e):* Wood Shop, Band Saw #2, knockout missing from on/off switch, on or about 8/3/95.

*Instance (f):* Wood Shop, Bandsaw #5, Tannewitz Di-Saw, knockout missing, on or about 8/3/95.

**1. Employer Noncompliance**

The standard requires that unused openings in electrical boxes, cabinets, or fittings be effectively closed. CO Harding observed six violative instances of this standard. Instance (a) observed in the Upholstery Department involved an outlet box with two knock outs missing. CO Harding defined a "knock out" as a round metal disk which would be removed from a fitting in order to place another piece of conduit in the fitting. (Tr. 221-22, Exh. C-63). Instance (b) observed in the Wood Chair Department involved a repair table opposite the touch up booth, where there was an outlet at that location and there were two knock outs missing from that fitting (Tr. 221-222). Instance C observed in the Wood Shop involved another knock out missing from a motor start fixture on the horizontal edge sander (Tr. 222). Instance (d) was also in the Wood Shop- the Greenlee Brothers 606 drill press had three knock outs were missing from the reset button (Tr. 222-23). Instance (e) was also in the Wood Shop - the band saw number two had a

knock out missing from the on and off switch (Tr. 223). Instance (f) observed in the Wood Shop involved another band saw, band saw #5 had a knock out missing. The saw was the Tannewitz Di-saw (Tr. 223).

**2. Employee Access to the Violative Condition**

The failure to close these openings leaves the wires inside of the fixtures with potential exposure. if a person were to place their fingers or hand on the box and touch a wire or with a tool. CO Harding determined that the outlets were live using the tic tracer (Tr. 622). Therefore, employees were exposed to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Citation 2, Item 11**

§1910.305(j)(1)(I): Lighting fixtures, lampholders, lamps, and receptacles. (I) Fixtures, lampholders, lamps, rosettes, and receptacles may have no live parts normally exposed to employee contact. However, rosettes and cleat-type lampholders and receptacles located at least 8 feet above the floor may have exposed parts.

(a)Upholstery Department, cord for heat light was frayed at the plug terminal end, on or about 8/3/95.

**1. Employer Noncompliance**

CO Harding observed a cord for the heat light that was frayed on the end near the terminal near the plug on one of the fixtures addressed, *supra,* in Citation 2, item 10. (Tr. 224, Exh. 63). As shown in the Exhibit the plug was located within 8 feet of the floor.

**2. Employee Access to the Violative Condition**

This frayed condition presented a potential hazard to live wire to employees using the equipment. Therefore, employees in the area were exposed.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Citation 2, Item 12**

§1910.334(a)(1): Handling. Portable equipment shall be handled in a manner which will not cause damage. Flexible electric cords connected to equipment may not be used for raising or lowering the equipment. Flexible cords may not be fastened with staples or otherwise hung in such a fashion as could damage the outer jacket or insulation.

(a) Press Area, pedestal floor fan was utilized with a 50 ft. extension cord that ran across the floor of a main aisle way, on or about 5/23/95.

**1. Employer Noncompliance**

CO Harding observed a pedestal floor fan floor fan in the main press area utilized with a 50 foot extension cord. The cord of the fan and the extension cord ran across a main aisle way in the press area. She testified that forklifts travel along this aisle way (Tr. 225). The hazard created is the potential breakdown of the insulation covering the electrical wires, possibly resulting in electric shock (Tr. 225). CO Harding indicated that she did not recall if the cord was damaged (Tr. 629).

**2. Employee Access to the Violative Condition**

The cord ran across a main aisle way where forklifts traveled. This exposed employees to a hazard of a breakdown of the insulation of the electrical wire exposing employees to electrical shock. As such, employees had access to the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

**Citation 2, Item 13**

§1910.334(a)(2)(ii) (2): If there is a defect or evidence of damage that might expose an employee to injury, the defective or damaged item shall be removed from service, and no employee may use it until repairs and tests necessary to render the equipment safe have been made.

(a) Paint Booth - powder system, off-line, pedestal fan, outside insulation was broken down on the cord which was lying on the floor in the aisle way near the paint booth, on or about 7/13/95.

**1. Employer Noncompliance**

CO Harding testified that the insulation on the cord of this pedestal fan was broken down. The cord was lying on the floor in the aisle (Tr. 226, Exh. C-59). CO Harding testified that the hazard of a damaged cord is broken electrical wires and possible shock (Tr. 226) .

**2. Employee Access to the Violative Condition**

The cord was lying in a main aisle of the facility. As such, employees had access to the hazard of possible electrical shock from the violative condition.

**3. Employer Knowledge of the Violation**

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace. CO Harding stated that she pointed out the cord to Mr. Vander Schaaff, and he said he would have it removed (Tr. 633).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure.

**ORDER**

Based upon the foregoing decision, it is hereby ORDERED that:

1. Citation 1, Item 3 is VACATED.

2. Citation 1, Items 1, 2, 4a, 4b, 5, 6, 7, 8, 9a, 9b, 10, 11, 12a, 12b, 12c, 13, 14, 15, 16, 17, 18, 19, 20a, 20b, 21, 22, 23a, 23b, 24a, 24b, 24c, 25a, 25b, 26, 27, 28, and 29 alleging serious violations of the cited standards herein are AFFIRMED.

3. The Secretary's recommended penalties for the aforementioned affirmed citation items are AFFIRMED. A civil penalty in the amount of $55,350.00 is assessed for Citation 1.

4. Citation 2, Items 1, 2, 3, 4, 5, 6, 7, 8. 9, 10, 11, 12, and 13 alleging other than serious

violations of the cited standards herein are AFFIRMED.

5. A civil penalty in the amount of $0.00 is assessed for Citation 2.

Covette Rooney
Judge, OSHRC

Dated:

Washington, D.C.