

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street SW
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Gestamp Alabama, LLC,

Respondent.

OSHR Docket No. **15-0013**

Appearances:

LaTasha T. Thomas, Esquire, U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee
For the Secretary

John J. Coleman, III, Esquire, BURR FORMAN, LLP, Birmingham, Alabama
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651- 678 (2014) (the Act). Gestamp Alabama, LLC (hereinafter Gestamp) is an auto parts manufacturer. On August 5 - 6, 2014, Occupational Safety and Health Administration Compliance Officer (CSHO) Donald Bar Kirby conducted an inspection of Gestamp at 7000 Jefferson Metro Parkway in McCalla, Alabama. Based upon CSHO Kirby's inspection, the Secretary of Labor, on December 3, 2014, issued a Citation and Notification of Penalty with two items to Gestamp alleging serious violations of 29 C.F.R. §§ 1910.147(c)(4)(i) and 1910.303(c)(3)(i) for failure to utilize lock out/tag out procedures and for failure to properly splice an extension cord, respectively. The Secretary proposed \$9,550.00 for the Citation. Gestamp timely contested the Citation. At hearing the parties stipulated to resolution of Item 2 of the Citation alleging a

violation of 29 C.F.R. 1910.303(c)(3)(i).¹ Only Item 1 of the Citation is at issue.

At the hearing, the Secretary moved to amend Item 1 of the Citation to correct the date in the alleged violation description from October 5, 2014, to August 5, 2014. Gestamp did not object and the Court granted the motion.

A hearing was held in this matter on March 4, 2015, in Birmingham, Alabama. The proceedings were conducted pursuant to the Commission's Simplified Proceedings. 29 C.F.R. §§ 2200.200-211. Gestamp submitted a post-hearing brief to the Court at the close of the hearing. The Secretary filed his post-hearing brief on March 27, 2015. With leave of the Court, Gestamp filed a Reply Brief on April 10, 2015.

For the reasons that follow, Item 1 is vacated.

Jurisdiction

At the hearing, the parties stipulated that jurisdiction of this action is conferred upon the Commission pursuant to §10(c) of the Act (Tr. 9). Gestamp also admits that at all times relevant to this action, it was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5) (See Prehearing Order of March 2, 2015).

Background

The inspection in this matter was initiated upon receipt of a complaint by the Birmingham OSHA Area Office alleging lack of lock out/tag out procedures and fall hazards at Gestamp's McCalla facility (Tr. 12-13). The inspection was assigned to CSHO Kirby who began his inspection by visiting Gestamp's facility on August 5, 2014 (Tr. 12-14). Upon arriving at the facility, CSHO Kirby met with Richard Metcalf, the plant operations manager, Will Smith, the human resources manager, and the company safety manager (Tr. 14).

CSHO Kirby conducted a walk around inspection of the facility accompanied by various management officials (Tr. 14). Included in the inspection was the "blanking press" that was the subject of the complaint. While inspecting the blanking press, CSHO Kirby observed an employee open a gate to allow entry into the area in which scrap material is ejected in order to remove this scrap material. CSHO Kirby testified he observed the employee had not locked or

¹ By separate Order, the Court approved the parties' fully executed Stipulation and Partial Settlement resolving Item 2 of the Citation.

tagged out the press when doing so (Tr. 14). CHSO Kirby determined the employee was exposed to a rotating shaft during this operation (Tr. 14-19). CSHO Kirby photographed the operation, but did not enter the area (Tr. 16; Exh. C-3A). At that time, he notified the employee's supervisor who was in the area and stopped the activity (Tr. 19; Exh. C-3A).

There is little dispute regarding the operation of the blanking press at issue. The press is a Schuler 400-ton mechanical power press (Tr. 73). The press takes rolled coils of steel and cuts it into "blanks" used elsewhere in the facility (Tr. 21). While the press is operating, the press operator stands at a control panel, protected from the press by a door with windows (Exh. R-4A). The press operator inputs a program name and number, depending upon the size of blank needed (Tr. 75). He then feeds a coil of steel across a table to the press feeder (Tr. 75). The press operator next "inches" the steel into the press to make the cut (Tr. 75). A die cuts the steel into a blank of the prescribed size (Tr. 76). Once the blank is cut, the operator decides whether to send it to the "stacker table" (see Exh. R-4C) if it meets the specifications, or to the scrap area (see Exh. R-4B) if it does not (Tr. 21-22, 74-79). The blank is sent to one or the other area by a system of magnetic conveyors (Tr. 22, 74).

Upon occasion, a press operator must clear scrap material from the scrap area (Tr. 23). It is undisputed the press operator clears scrap five to ten times in the course of a shift (Tr. 30, 90). In order to remove scrap that has built up, the press operator powers down the press by pushing a button at the control panel depicted in Exhibit R-4A (Tr. 44, 67, 80). He then must walk approximately 20 yards around the press to pull a key (Tr. 44, 67, 81). According to Will Roberts, a press operator with 10 years of experience with Gestamp, this causes "some safety fingers" to come down (Tr. 67). The operator then takes that key to the gate blocking access to the scrap area. This gate is a 6-foot tall metal fence with a latch that can only be opened by inserting this key (Tr. 19-20, 44, 68-70, 81; Exh. C-3A). The latch is depicted in Exhibit C-3B. The key retrieved by the press operator is labeled G. After that key is inserted, the press operator removes the key labeled 4Z to open the gate (Tr. 45-46, 67, 70, 81). Plant Operations Manager Metcalf referred to this as a "double redundant check system." (Tr. 82). CSHO Kirby referred to the system as a "captive key system." (Tr. 19).²

² Gestamp has written lockout procedures for the Schuler press (Exh. R-2). These procedures call for verification of deactivation of electric, air, and water energy sources in six locations; placing of gravity controlling safety blocks;

According to CSHO Kirby, the employee had not used the captive key system on the latch to open the gate on the day of his inspection (Tr. 21). Rather, the employee had been able to enter the scarp area without either powering down the press or pulling the G key because the latch on the gate was broken (Tr. 30). CSHO Kirby testified the employee informed him the gate had been broken for the preceding two months (Tr. 30). CSHO Kirby also observed a coupling to a shaft above the employee's head was rotating while he was removing the scrap blank (Tr. 17). CSHO Kirby testified the shaft was partially guarded but the coupling at the end was exposed. Otherwise, the conveyor system is guarded (Tr. 55). CSHO Kirby estimated the coupling was located 5 feet from the floor (Tr. 17). Metcalf testified the shaft and coupling sit 1 foot back from where the press operator would stand (Tr. 83). Roberts testified no body part comes near this coupling during the scrap removal process (Tr. 67).³

Based upon his observation of the press operator engaged in removing scrap without first powering down the press, CSHO Kirby recommended a citation be issued alleging a violation of 29 C.F.R. § 1910.147(c)(4)(i) for failure to utilize energy control procedures during scrap clearing operations. Gestamp timely contested the citation, alleging the cited standard does not apply to the operation at issue.

The Citation

The Secretary has the burden of establishing the employer violated the cited standard. To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Group, Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

The standard at 29 C.F.R. § 1910.147(c)(4)(i) requires an employer to develop, document and utilize procedures “for the control of potentially hazardous energy when employees are

and ensuring all motion has stopped (Exh. R-2, p. 13). Gestamp does not dispute these procedures were not followed by press operators during the scrap clearing process, arguing they are not applicable because they apply to maintenance operations not at issue in this proceeding. The Secretary did not allege Gestamp should have followed these procedures.

³ The undersigned found Roberts to be a credible witness. He gave straightforward answers to all questions. Nothing in his demeanor suggested bias or lack of veracity.

engaged in the activities covered by this section.” In Item 1, Citation 1, as amended, the Secretary alleges Gestamp violated the standard as follows: “On or about 8/05/14 – Press Line, procedures were not utilized by employees clearing scrap drops on a Schuler 400 ton blanking press.” The Secretary contends Gestamp violated the standard when its employee was allowed to bypass the captive key system, thereby exposing the employee to the rotating shaft. Gestamp contends the standard does not apply.

Applicability of the Standard

The standards at 29 C.F.R. § 1910.147 apply to “[s]ervicing and maintenance of machines and equipment in which the *unexpected* energization or start up of the machines or equipment, or release of stored energy could cause injury to employees...” 29 C.F.R. § 1910.147(a)(i). Section 1910.147(b) defines *servicing and/or maintenance* as

Workplace activities such as constructing, installing, setting up, adjusting, inspecting, modifying, and maintaining and/or servicing machines or equipment. These activities include lubrication, *cleaning or unjamming* of machines or equipment and making adjustments or tool changes, where the employee may be exposed to the *unexpected* energization or startup of the equipment or release of hazardous energy.

(Emphasis added.) Here, the press operator must clear scrap material from the scrap area on occasion. The Court determines clearing scrap material is a cleaning activity, to which § 1910.147(c)(4)(i) applies because it constitutes maintenance on the blanking press. This does not end the inquiry regarding applicability of the standard, however.

In *General Motors Corp., Delco Chassis Div.*, 17 BNA OSHC 1217, 1218 (Nos. 91-2973, 91-3116 & 91-3117, 1995), the Commission held applicability of the standard is predicated on a showing “that unexpected energizing, start up or release of stored energy could occur and cause injury.” Although the Commission focused on the requirement that energization be “unexpected,” both the decision and the plain language of the standard make clear this energization must pose a risk of harm to employees. *Id.* at 1220. Recently, the D.C. Circuit, affirming the Commission’s decision in *Otis Elevator Co.*, 24 BNA OSHC 1081, 1084 (No. 09-1278, 2013), recognized two prongs to establishing applicability of the standard. *Otis Elevator Co., v. Secretary of Labor*, 762 F.3d 116 (D.C.Cir. 2014). First, that there be the potential for the unexpected energization, start up or release of stored energy. Second, this unexpected

energization, start up or release of stored energy “could cause injury to employees.” *Id.* at 121. The cited standard only applies if the record establishes an employee is exposed to the zone of danger created by the unexpected energization of the machine or equipment.

In order to establish the cited standard applies, therefore, the Secretary must show a reasonable person could foresee an employee could enter the zone of danger while engaged in the cited maintenance activity, which in this case is cleaning up the scrap material. *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995) (“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.”), *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (“[T]he inquiry is not simply into whether exposure is theoretically possible. Rather, the question is whether employee entry into the danger zone is reasonably predictable.”)

The court finds the preponderance of the evidence fails to establish a risk of harm to the press operator during the scrap clearing process. The Secretary has failed to meet his burden to establish the standard applies to the cited conditions.

Although the Citation is worded broadly, CSHO Kirby described the hazard as an exposed coupling at the end of an otherwise guarded rotating shaft. CSHO Kirby’s testimony failed to elucidate how a press operator would be exposed to this coupling. He testified:

Q: The part of the machine that was hazardous to the employee was the fact he was under the conveyor with rotating shafts and couplings above him.

Q: When you say he was under it, could you explain?

A: He stepped into the framework of the equipment under the conveyor itself to receive – to remove the scarp, so he ducked under to grab to it.

Q: And how would he be exposed to the hazard, being ducked under?

A: When he stood up or if for some reason his body moved into that area.

(Tr. 37).

CSHO Kirby’s testimony does not sufficiently describe how an employee could come into contact with the coupling for the court to find a reasonable person could foresee a press operator could enter the zone of danger while engaged in the scrap clearing operation. The shaft was estimated to be 1 foot in front of where the employee stood and was an estimated 5 feet off the ground. CSHO Kirby took no measurements of the distance of the press operator from the

shaft and never entered the area in which the press operator was working. Thus, he could not have observed whether contact with the coupling, or any other part of the conveyor,⁴ was foreseeable or even possible. His testimony regarding the potential for contact with the coupling is speculative. Nor does the Secretary's photographic evidence provide conclusive proof the press operator was, or could be, anywhere near any moving parts. In contrast, Roberts who worked in the area clearing scrap, testified no body part comes in proximity to the shaft during the scrap clearing operation. The Secretary has failed to establish the scrap clearing operation was an operation in which the unexpected energization of the press could cause injury to employees.⁵ The Secretary has failed to meet his burden to establish the cited standard applies. Item 1 of Citation 1 is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

Item 1, Citation 1, alleging a violation of 29 C.F.R. § 1910.147(c)(4)(i) is hereby vacated.

/s/ Heather Joys

Date: April 16, 2015

HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia

⁴ The court notes the quoted passage is the only time CSHO Kirby described the hazard as part of the conveyor other than the unguarded coupling. CSHO Kirby's inconsistent testimony on the hazard addressed in the Citation further undermines the Secretary's evidence.

⁵ The same analysis would apply equally to the Secretary's burden to establish employee exposure to a hazard. Therefore, even assuming applicability of the cited standard to the operation at issue, the court would vacate the citation on the ground the Secretary failed to establish employee exposure to a hazard.