

Secretary of Labor,
Complainant,
v
Turnbull Metal Products, Inc.,
Respondent.

OSHRC Docket No. **96-1463**

APPEARANCES

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For Complainant

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For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Turnbull Metal Products, Inc. (TMP), manufactures a variety of metal products, including shipboard furniture, for the U. S. Navy in Gulfport, Mississippi. After receiving an employee complaint alleging an unsafe press brake, Occupational Safety and Health Administration compliance officer Vivian Stevens inspected the TMP facility on August 8, 9, and September 18, 1996 (Tr. 578-579). As a result of the inspections, TMP received a serious citation.

The citation alleges violations of § 1910.23(c)(1) (item 1) for two sections of midrail missing from the railing on an elevated platform; § 1910.23(d)(1)(ii) (item 2) for a missing midrail from the stair railing to the elevated platform; § 1910.147(c)(4)(ii) (item 3) for failing to develop written procedures for the control of energy on equipment; § 1910.212(a)(3)(ii) (item 4) for failing to have point of operation guarding on press brakes; § 1910.212(a)(5) (item 5) for failing to guard the rotating blades of a fan; § 1910.217(b)(4)(i) (item 6) for failing to cover foot pedals on mechanical power presses; § 1910.217(c)(1)(i) (item 7) for failing to provide point of operation guarding on mechanical power presses; § 1910.217(e)(1)(i) (item 8a) for failing to have an inspection program for mechanical power presses; § 1910.217(e)(1)(ii) (item 8b) for failing to perform necessary maintenance or repair of mechanical power presses; § 1910.219(b)(1) (item 9)

for failing to enclose the flywheel on mechanical power presses; and § 1910.304(f)(4) (item 10) for failing to have a permanent and continuous path to ground for a fan and a receptacle inside the spray booth. The Secretary proposes penalties totaling \$12,025. TMP timely contested the citation.

The hearing was held May 6-10, 1997, in New Orleans, Louisiana. The parties stipulated jurisdiction and coverage and filed post hearing briefs (Tr. 4-5). TMP's principal argument against the technological feasibility of guarding the press brakes is rejected and the violation of § 1910.212(a)(3)(ii) (item 4) is affirmed.

Background

Since 1990 TMP has manufactured custom metal furniture at the Gulfport, Mississippi, facility (Tr. 548). The facility is 60,000 square feet and employs 120 employees (Tr. 592, 792). TMP produces a variety of metal products, including lockers, tables, berths, desks, file cabinets, galley equipment, commercial cabinetry, casino products and open shelving (Tr. 792, 808-809). According to TMP, it manufactures over 4,700 different products (Tr. 841). TMP's customers include shipyards, the casino industry and the Department of Defense (Tr. 549-550).

The Gulfport facility has manufactured metal products since the 1970's. In 1979, Turnbull Enterprises bought the facility and operated it until 1990 when TMP, a "spin-off corporation," assumed the operation (Tr. 299, 549).

To make the products, TMP uses aluminum, stainless steel and steel in thicknesses ranging from .080/1000 of an inch to ¼ of an inch (Tr. 809, 971). TMP manufactures a variety of products within each general category of metal furniture. For example, it produces 500 to 1,000 different types of lockers with variations in size, complexity, and type. The lockers range in size from 8 inches by 8 inches to 22 feet by 7 feet by 7 feet (Tr. 811). TMP manufactures at least 200 types of tables, 50 kinds of desks, and custom fabricates galley equipment (Tr. 812, 819). Each product contains an average of 30 - 35 component parts or pieces (Tr. 810, 843). Some products have 100 to 200 parts (Tr. 810, 825).

Since 1994 TMP started diversifying from exclusive defense contracts to commercial projects. Currently, the mix of business is "maybe 60 percent Navy or call it repeat business and

the other 40 percent we are bidding every day for a new product, some large and some small.” In the past, the product mix was approximately 90 percent Navy contracts (Tr. 814).

After receiving an anonymous employee complaint which alleged that “there were electrical wires that employees could trip on and that an employee had fingers amputated in a press brake,” compliance officer Vivian Stevens inspected the Gulfport facility (Tr. 578-579). Her inspection was limited to the matters alleged in the complaint, TMP’s safety programs and any hazards observed in plain view (Tr. 582).

Discussion

The Secretary has the burden of proving a violation.

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 (*i.e.*, the employer either knew or, with the exercise of reasonable diligence, could have known of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

ALLEGED VIOLATIONS

Item 1- Alleged Violation of § 1910.23(c)(1)

The Secretary alleges that, on the elevated platform to the entrance of TMP’s safety office, two sections of guard railing were missing midrails. Section 1910.23(c)(1) provides in part that:

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.

TMP does not dispute that two sections of midrail were missing along the platform leading to the safety office. The top railing was approximately 42 inches high and secure (Exh. C-2; Tr. 586, 588; TMP Brief, p. 55). The platform was 8 feet 10 inches above the concrete ground

floor (Tr. 590, 1049).¹ The width of the platform was approximately 4 feet (Tr. 586). The missing sections of midrail consisted of a four foot section located along the end of the platform and a two foot section at the corner next to the stairway (Exh. C-2; Tr. 769-771). The midrails were replaced by TMP prior to Stevens' return in September (Tr. 726, 1054).

On the platform, Stevens observed a small rubber mat in front of the safety office that tended to "get bunched up." Also, the door to the safety office opened out onto the platform (Tr. 586-587). Stevens assessed the severity of possible injury as "low" and the probability of an accident occurring as "lesser." Her assessment was based in part on the infrequent use of the platform (Tr. 591-592).

The record establishes a violation of § 1910.23(c)(1). A "platform" is defined as "a working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment." See definitions at § 1910.21(a)(4). Standard railing includes an "intermediate rail" which "shall be approximately halfway between the top rail and the floor." See § 1910.23(e). It is undisputed that the platform in front of the safety office was elevated and the guard railing protecting the open side was missing two sections of midrail. The platform was in excess of eight feet above a concrete floor.

TMP argues that the violation should be vacated as *de minimis* because of the minimal employee exposure in that the platform was surrounded by a full, secure top rail (Respondent's Brief, p. 55). TMP speculates that the midrails may have been moved to transport filing cabinets into the office. However, general manager Sessum was not sure why the midrails were missing (Tr. 1052-1053, 1172).

A *de minimis* violation is a violation that has no direct or immediate relationship to safety or health. *Holly Springs Brick & Tile Co.*, 16 BNA OSHC 1861, 1865 (No. 90-3312, 1994). It carries no penalty and requires no abatement. *Erie Coke Corp.*, 15 BNA OSHC 1561, 1571 (No. 91-3606, 1992) (*de minimis* violations are those where "the level of protection that the employer afforded employees was not significantly different from that required by technical compliance with the standard," where the employees' safety was not "appreciably diminished" by the technical

¹Compliance officer Stevens' estimate of 10 feet above the floor is not accepted (Tr. 590, 724-725).

deviation, and where the safety techniques used “provided protection as sufficient as” the standard violated).

TMP’s *de minimis* argument is rejected. There is no dispute that a fall in excess of eight feet to a concrete floor could result in serious injury. An employees’ risk of injury was not diminished. Also, employees regularly used the platform to access the safety office. Compliance officer Stevens observed a secretary carrying a stack of papers to the safety office (Tr. 588, 768). She observed “that people tended to walk close to the edge of the platform, holding onto the rail” (Tr. 587).

Morris Ladner, press brake setup operator, testified that he went to the safety office once or twice a month (Tr. 107-108). Eugene Carlisle, setup operator, testified that he went into the safety office once every two or three months or when he had a safety problem (Tr. 415, 442). Frank Creech, press brake setup operator, testified that he went to the safety office to have tools calibrated monthly (Tr. 490). General manager Donald Sessum testified that he periodically visited safety manager Douglas Caudill at his office. He estimated that Caudill made several trips up and down the stairs each day (Tr. 1050-1051).

Additionally, Stevens observed that the door to the safety office “opened back toward the wall [and that employees] would enter on the side where there is not a midrail” (Tr. 587). Such uncontradicted conditions made it more likely that employees might trip, lose their balance or accidentally fall while on the platform. Without the midrails, the potential for a fall to the cement floor below was enhanced. The risk of injury was not slight. TMP provided no alternative protection.

In order to establish a serious violation, the Secretary must show that the employer knew or should have known of the condition and, if an accident occurred, the injury would be serious or result in death. There is no dispute that TMP knew of the missing midrails. The condition was in front of its safety office and in plain view. Also, there is no dispute that a fall in excess of eight feet to a cement floor could result in a serious injury. “In determining whether a violation is serious, the issue is not whether an accident is likely to occur; it is, rather, whether the result would likely be death or serious harm if an accident should occur.” *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286, n.5, (No 91-862, 1993).

A serious violation of §1910.23(c)(1) is affirmed.

Item 2 - Alleged Violation of § 1910.23(d)(1)(iv)

The Secretary alleges that the stairs to the platform used to access the safety office also did not have a midrail. The Secretary's motion to amend the citation to allege a violation of § 1910.23(d)(1)(iv), instead of § 1910.23(d)(1)(ii), was granted (Tr. 534). Section 1910.23(d)(1)(iv) identifies the type of railing required as:

On stairways more than 44 inches wide but less than 88 inches wide, one handrail on each enclosed side and one stair railing on each open side.

It is undisputed that there was no midrail on the open side of the stairway accessing the platform and the safety office (Exh. C-2; Tr. 585, 589, 1053). Compliance officer Stevens measured the width of the stairs as four feet (Tr. 589-590). The top railing measured 40 inches in height (Tr. 588). TMP replaced the midrail by Stevens' return visit on September 18, 1998 (Tr. 711). Stevens testified that the severity of a hazard was low (Tr. 590).

TMP argues that the Secretary's motion to amend the citation should not have been granted. The original cited standard, addressing stairways less than 44 inches, is inapplicable to the four-foot wide stairway. TMP also argues that the stairs were used infrequently (TMP Brief, p. 57).

The Secretary's amendment to reflect the true width of the stairs does not prejudice TMP even though it changes the factual underpinning of the violation. *See Morrison-Knudsen Co./Yonkers Contracting Co., a Joint Venture*, 16 BNA OSHC 1105, 1112-14 (No. 88-572, 1993). Both § 1910.23(d)(1)(i) and § 1910.23(d)(1)(iv) require midrails. TMP does not dispute the lack of a midrail or that the stairs were four feet wide. The nature of the violation, a missing midrail on the open side, is the same with either standard. The difference between the standards based on the width of the stairs is the additional requirement of a handrail on the enclosed side for stairways in excess of 44 inches. The Secretary does not allege in this case that the handrail was missing.

Also, the Secretary's motion to amend was made prior to the compliance officer's testimony and before the Secretary rested her case. The hearing was five days; sufficient time for TMP to prepare a defense. Also, the court offered TMP additional time to prepare, if needed. TMP made no request for more time (Tr. 534). Therefore, TMP is unable to show prejudice by the amendment.

The standard requires that the stair railing consists of a top rail, posts and intermediate rails (midrail). *See* § 1910.23(e)(1). The midrail was missing. The stairs accessed TMP's safety office. The height of the stairway was eight feet, ten inches (Tr. 1049). Employees were observed walking near the stair railing carrying objects. TMP was aware of the missing midrail and employees were subject to a potential fall through the area protected by a midrail. Employee safety was not significantly diminished.

A serious violation of § 1910.23(d)(1)(iv) is affirmed.

Item 3 - Alleged Violation of § 1910.147(c)(4)(ii)

The Secretary alleges that TMP failed to develop written specific procedures for the control of energy on equipment such as mechanical power presses, press brakes, spray equipment and conveyors. Section 1910.147(c)(4)(ii) provides that:

Energy control procedure. . . (ii) The procedures shall clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy, and the means to enforce compliance including, but not limited to, the following:

- (A) A specific statement of the intended use of the procedure;
- (B) Specific procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy;
- (C) Specific procedural steps for the placement, removal and transfer of lockout devices or tagout devices and the responsibility for them; and
- (D) Specific requirements for testing a machine or equipment to determine and verify the effectiveness of lockout devices, tagout devices, and other energy control measures.

Compliance officer Stevens testified that she discussed TMP's lockout/ tagout program with safety manager Douglas Caudill (Tr. 597-599). She was shown a copy of a written program (Exh. R-5).

Under TMP's lockout procedure, when a machine problem is discovered, employees turn off the machine at the breaker and wait for maintenance man Robert Workman to tagout the machine (Tr. 288-289, 455). The maintenance man is the only person who can lockout or tagout equipment (Tr. 1054-1055). Morris Ladner, setup operator, testified that in Workman's absence, Bob Caudill is to be contacted (Tr. 342-343). Although general manager Sessum testified that even minor maintenance is performed only by the maintenance person, Ladner testified that he sometimes adjusts the clutch or brake tension on the presses (Tr. 344, 1066-1067).

TMP argues that its lockout program was sufficient in that employees knew and understood the requirements of the program. Maintenance man Bob Workman was the only employee authorized to perform lockout/tagout procedures (TMP Brief, p. 64). In the alternative, citing an OSHA Interpretive Guidance, TMP argues that the violation should be classified as other-than-serious. It states that "[p]aperwork deficiencies in lockout/tagout programs where effective lockout/tagout procedures are in place shall be cited as other-than-serious." OSHA Instruction STD 1.7.3 (TMP Brief, p. 65).

The lockout \ tagout standard applies to "the servicing 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." See § 1910.147(a)(1)(i). It is undisputed that TMP has spray finishing equipment, conveyor equipment, press brakes, mechanical power presses, and welders and that the machines and equipment are serviced and repaired (Tr. 597-598, 605-606). TMP's machinery and equipment operate by electrical energy and hydraulic energy (Tr. 601). Stevens testified that during servicing or maintenance, there could be an unexpected energization or release of energy without lockout procedures (Tr. 600-603). Based on her uncontradicted testimony, the Secretary has established that the requirements of § 1910.147 apply to TMP's facility. *General Motors Corporation*, 17 BNA OSHC 1217 (No. 91-2973, 91-3116 and 91-3117, 1995).

Also, the record establishes that TMP's written program lacks specific information. The program appears very generalized, a guide to what a program should contain, with little actual reference to TMP's facility (Exh. R-5). The program discusses the standard and notes that "[t]he regulations require certain minimum contents. Employers have some leeway to develop their own

plan tailored to their workplace, so long as the minimum contents are included.” The program gives examples of when and how to lockout, without any reference to TMP’s specific machinery, or types of machinery. TMP’s written program does not indicate the types and locations of machines or equipment, the method to control the energy, the shut down procedure, the energy isolating device and method, and the method to dissipate stored or residual energy (Exhs. R-5, R-6). *Drexel Chemical Co.*, 17 BNA OSHC 1908 (No. 94-1460, 1997) (“Because the purpose of the lockout procedure is to guide an employee through the lockout process, these general procedures are not acceptable.” The program must indicate the procedure for each type of machine).

Although the maintenance man Workman, under TMP’s program, was to do all servicing and maintenance work on TMP’s machines and equipment, the record is replete with instances of other employees doing service and maintenance work. “Servicing and/or maintenance” includes such activities as installing, setting up, adjusting, inspecting, modifying” and involve lubrication, cleaning or unjamming, and making adjustments or tool changes. *See* definitions § 1910.147(b). Ladner testified that he regularly performed adjustments to the brakes and clutches on the press brakes (Tr. 340-341). Leadmen also commonly performed such adjustments (Tr. 333). Employees routinely removed, adjusted, and installed dies in the machines while the machines were energized and without locking out the machine (Tr. 426-427, 445). TMP also did not have available maintenance manuals from manufacturers (Tr. 605). Such incidents show more than a paperwork deficiency in TMP’s lockout program. TMP’s program was not shown effective.

A serious violation of § 1910.147(c)(4)(ii) is affirmed.

Item 4 - Alleged Violation of §1910.212(a)(3)(ii)

The citation alleges that in the press department, the two Wysong press brakes (SN PB3-170, Model 55-6, and SN PB3-162, Model 55-6), the Chicago Dreis & Krump press brake, and the Cincinnati 3 press brake did not have point of operation guarding. Section 1910.212(a)(3)(ii) provides that:

The point of operation of machines whose operation exposes an employee to injury shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the

absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

TMP does not dispute the application of § 1910.212(a)(3)(ii) to its press brakes or that the press brakes did not have point of operation guarding (TMP Brief, p. 14; Tr. 1068-1069, 1201). The press brakes cited were in operation during the inspection period (Tr. 43). Typically, four or five press brakes were in operation during any given day (Tr. 45). Also, there is no dispute that operators of the press brakes were exposed to crushing or amputation of fingers or other parts of the body at the press brakes' points of operation and that TMP was aware of the hazard (Exh. R-4).

Frank Creech, Sr., amputated his index and middle fingers on both hands in June 1996 while operating the press brake designated "PB3-170."² Creech testified that the accident occurred unexpectedly when "he stepped on the brake and the machine shook" causing "a pretty strong vibration" and "the metal jumped the gauge on the back and allowed [his] fingers to be in the point of impact" (Exh. C-16; Tr. 470, 478). Another operator, James Webb, was also injured while operating a press brake. Webb testified that the injury occurred when he got his "thumbs caught between the metal and the die" (Tr. 508-512). His testimony indicates that his injury resulted from an inadvertent and instinctual reaction to adjust quickly the placement of the metal so that the bend would be proper. TMP was aware of these accidents (Tr. 553-555).

The press brake is primarily used to bend sheet metal. It is activated by depressing a foot pedal. To form the metal, the press brake uses a long narrow ram which extends several feet along the opening where the metal to be bent is inserted. A top die is attached directly below the ram and above the opening where the metal is inserted. A bottom die is attached below the opening and sits on top of the feed table. The metal piece is inserted into the opening and is formed by the pressure applied when the top and bottom dies come together (Exhs. C-1, C-2; Tr. 204, 206). The area between the upper and lower dies is the point of operation. The point of operation is

²Other press brakes were not cited by OSHA because, at the time of the inspection, large pieces of metal were being formed and Stevens considered it unlikely that the employee would be within close proximity to the point of operation.

“the area on the machine where the work is actually performed upon the material being processed.” See definition, § 1910.212(a)(1)(i).

The operator holds the metal while the ram makes its cycle. In order to use the press brake, the operator supports the metal with at least one hand (Tr. 50-53, 78). When the press brake is activated, the top ram descends. Ideally, the operator releases the foot pedal, stopping the ram just as it touches the metal. When he is satisfied the metal will bend at the desired location, the operator then re-activates the foot pedal, continuing the cycle and bending the metal. The ram cycles back up, ready to form the next part (Tr. 72, 472-473).

The process of stopping the ram before it strikes the metal is referred to as “inching down the ram” (Tr. 137, 305). This procedure keeps the metal from “whiplashing” up during the pressing process. It also protects the operators’ hands (Tr. 348-349). Inching the ram limits the impact on the metal, thus preventing damage to the part (Tr. 474-475). However, when inching the ram, there are no safety features (physical barriers) that would prevent an employee from accidentally passing the suggested stopping point.

TMP asserts that it is not feasible to guard the point of operation on the press brakes. TMP’s infeasibility defense is based on the (1) the complexity of its operations, (2) TMP’s efforts to find feasible methods of guarding its press brakes, and (3) its compliance with a safe distance method of guarding as recognized in OSHA Instruction CPL 2-1.25, issued February 14, 1997 (Exh. R-1) (TMP Brief, p. 19).

To establish the affirmative defense of infeasibility, an employer must show that (1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would have been technologically infeasible after its implementation, and (2) there would have been no feasible alternative means of protection. *Armstrong Steel Erectors*, 17 BNA OSHC 1385 (No. 92-262, 1995). The employer has the burden of establishing the defense. The fact that compliance is difficult or expensive is insufficient grounds to excuse compliance with the requirements of the standard. *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1160 (No. 90-1620, 1993). An employer is expected to exercise some creativity in seeking to achieve compliance. *Pitt Des Moines, Inc.*, 16 BNA OSHC 1429 (No. 90-1349, 1993). A “reasonable” alternative

requires limited compliance even if exact compliance is not possible. *Cleveland Consolidated, Inc. v. OSHRC*, 649 F.2d 1160, 1167 (5th Cir. 1981).

TMP's infeasibility defense is rejected. TMP fails to show that some method or combination of methods of point of operation guarding is not feasible, at least for the majority of TMP's press brake work. TMP does not assert economic infeasibility. General manager Sessum acknowledges that if TMP found guarding which permitted its operations to be conducted, the expense would not prevent TMP from purchasing and installing the guarding (Tr. 1082).

Complexity of Operations

There is no dispute that TMP produces a wide variety of metal products requiring complex and multiple bends by the brake presses. At least 95% of the products manufactured by TMP pass through its press brake operation (Exhs. R-2, R-3; Tr. 818, 840). Approximately 85% of the component parts of finished products have four or more bends (Tr. 1139-1140). Multiple bends on a component part make its fabrication more complex because multiple bends on more than one side of a part create more than one "flange"³ (Tr. 833-834). The presence of vertical flanges which may be six inches require an operator to be careful not to crush the flange as the die comes down to create another bend (Tr. 835). Thus, the record establishes that the press brakes are required to make a variety of bends on varying sizes of metal.

Feasible Methods

Even with the complexity of its work, TMP fails to show infeasibility in guarding the point of operation on the press brakes. TMP has received numerous proposals for the installation of various guarding methods from representatives of Rockford Systems, Inc., Manufacturing Solutions, Inc., and Link Systems, Inc. In preparing the proposals, the companies surveyed TMP's facility and its press brake operation (Exhs. C-5, C-14, C-15). Based on their proposals, a variety of guards and devices were considered acceptable point of operation guarding. The

³Flange is a part that is bent up on the sides, front or back (Tr. 837).

considered devices and guards included hand restraints, pullbacks, barrier guards, light curtains, and other devices.

Randolph Fast, of Rockford Systems, Inc., visited TMP and provided written recommendations for guarding the press brakes (Exh. C-5; Tr. 144-145). He observed employees operating the presses with their hands close to the point of operation (Tr. 158). He did not observe employees “inching” the ram (Tr. 161). Although Rockford manufactures restraints and pull-backs, Fast made detailed recommendations for sensors or light curtains on each press brake (Exh. C-5; Tr. 183-184). A light curtain shoots multiple light beams across the point of operation. The curtain detects any object $\frac{3}{4}$ inch or larger that breaks the beam (Tr. 222-223). Flanges on materials may necessitate blanking out sections of the light curtain (Tr. 189). He also stated that he has never seen a Wysong, Chicago Dries & Krump, or a Cincinnati 3 press brake that “could not be guarded” (Tr. 153-154). In some cases, the operator would need to place his hands through the curtain in order to hold a part. For this reason, the light curtain may not be ideal for all situations (Tr. 238-239). The more area that must be blanked on the light curtain, the farther back the operator must stand (Tr. 266-267). Fast was told that the Rockford proposal was expensive. He was not asked to return or make any modifications to his proposal (Tr. 156).

Kenneth Embrose of Manufacturing Solutions testified concerning recommendations presented to TMP for guarding the press brakes, including light curtains and two-hand controls (Exh. C-14; Tr. 364-365, 367). Manufacturing Solutions works heavily in the metal forming industry and manufactures press brake controls, light curtains and press gauges (Tr. 358). Pull-backs were not recommended⁴ (Exh. C-14; Tr. 362). Embrose was not at TMP’s facility, and the Manufacturing Solutions’ representative who originally prepared the quote was no longer with the company (Tr. 356, 360). Two-hand controls require that the operator place both hands on the controls as the ram begins its descent. The ram is programmed to stop $\frac{1}{4}$ inch from the material, allowing the operator to re-position or insert the material. The operator can then complete the cycle using the foot pedal controls (Tr. 219, 223-224). Often the operator can hold the material in place with a tool utilizing magnets or suction as the ram begins its initial descent (Tr. 269-270).

⁴Manufacturing Solutions does not sell or install pull-backs (Exh. C-14).

William Johnson of Link Systems presented a proposal also developed from information gathered by an employee who was no longer with the company (Exh. C-15; Tr. 384). The proposal advocated light curtains and updates to existing press brakes so that the light curtains could be effectively utilized (Tr. 388-389, 397).

In addition to representatives of machine guarding companies, other consultants also recommended point of operation guarding. Douglas Hinesley, professional safety engineer, testified that the presses, based on OSHA's video of TMP's operation, could be guarded with pull backs or hand restraints and possibly photo-electric light curtains (Tr. 209). Pull backs or restraints are used to keep an operator's hands out of the point of operation. While restraints prevent an operator's hands from extending into the point of operation, pull-backs withdraw the operator's hands when the ram begins its descent (Tr. 218-219, 228). Hinesley testified that he has investigated 20 to 30 accidents involving presses which resulted in "everything from mashed fingers to death." Most of the accidents resulted from employees "inadvertently having their hands in the machine to machine malfunctions" (Tr. 202). Hinesley testified that he has surveyed several press brakes used in various industries, some of which had operations and manufactured products with similar processes and complexities as TMP. He could not recall any operation or press brake for which a guard or safety device was not feasible (Tr. 217, 234).

Ronald Stephens, chairperson for the machine guarding course at the OSHA Institute, opined that point of operation guarding at TMP included a barrier guard, light curtain, two-hand controls or hand restraints (Tr. 1278-1279). Neither Hinesley or Stephens had visited TMP's facility (Tr. 257, 1291). Both Stephens and Hinesley acknowledged that, within the industry, it is more typical for a combination of guarding methods to be employed (Tr. 248, 1296-1297, 1299). These views were confirmed by Embrose of Manufacturing Solutions, Inc., (Tr. 373, 376) and Fast of Rockford Systems, Inc. (Tr. 192).

The record thus establishes that TMP's press brakes may be guarded at the point of operation using several recommended methods. TMP failed to show infeasibility. TMP's argument against guarding is limited to some unique or isolated operations which make the use of guards or devices inconvenient. Despite obtaining the numerous recommendations for point of operation guarding, there is no evidence that TMP attempted to implement the recommendations.

Instead, the recommendations were summarily rejected. According to TMP, none of the proposals “provided a method of abatement that the company considered feasible in light of all of its operations” (TMP Brief, p. 37). TMP’s position ignores its responsibility to achieve compliance. TMP has operated its press brakes for years without any point of operation guards or devices while its employees incurred amputations and scars (Tr. 553). Instead of action to prevent further accidents, TMP reiterated its safe distance procedure. Also, TMP’s management, which did not change after the facility was acquired from Turnbull Enterprises, Inc., knew that the OSHA standards required guards or devices to protect employees exposed to point of operation hazards. OSHA had previously inspected the Gulfport facility when it was operated by Turnbull Enterprises, Inc., and cited a violation of §1910.212 (Tr. 594, 597). It was not until after the current OSHA citation that TMP specifically had someone survey its press brakes for point of operation guarding (Tr. 565).

Also, the record reflects that previously at least some of TMP’s press brakes were equipped with hand restraints and two button controls, which were removed for no apparent reason. Operator Morris Ladner testified that both Wysong press brakes and the Cincinnati press brake had restraints at some time prior to 1996, but that these restraints were removed (Tr. 46-47, 81-82). TMP offered no explanation for the removal of the restraints and two-button controls. Ladner stated that employees also had used hand clamps and tools to insert small parts into the machines, but that these tools were not in use at the time of the inspection (Tr. 82).

Ladner did not like the restraint system. He testified that while using the restraints, he had difficulty reaching the parts sitting on nearby pallets and returning the finished parts to other pallets. Often, he had to take off the restraints. He did not, however, testify that he had problems actually forming the parts on the press brakes (Tr. 286-287, 295, 342). With the pullbacks, Ladner stated that employees “couldn’t reach items on the floor” (Tr. 286). Ladner’s problem may have been remedied by providing adjustable pallets or tables from which employees could reach and place items more easily.

TMP showed over 50 schematics for the production of components and completed products (Exhs. R-2, R-3). Following the explanation of each schematic, general manager Donald Sessum explained why the proposed guarding methods would be infeasible. In summary, Sessum

stated that light curtains would be ineffective because many of the pieces had flanges that would necessitate blocking out large portions of the light curtain. He stated that restraints or pull backs would be hazardous because employees could entangle the straps in the sharp, razor-like material, thus causing injury. Fixed guards were not usable in his opinion because of the wide variety of parts produced at the facility which could not be accommodated by the opening cut in the plexiglass to allow for flanges. Finally, he considered two-hand controls impractical because employees could not always insert the parts into the ¼ inch area left open after the initial descent of the ram.

In comparison to the testimony of the manufacturers' representatives and OSHA's experts, Sessum's testimony is given less weight. Clearly, Sessum knows the complexity of the metal parts produced on the press brakes. However, his testimony regarding the feasibility of point of operation guarding of the press brakes lacks background and knowledge. Sessum is not shown to be knowledgeable on machine guarding of press brakes. He is not an engineer and does not consider himself an expert in machine guarding (Tr. 1158). His concerns about various guarding methods were not based on personal experience or actual observation. There is no showing that TMP attempted to install any of the recommended guarding methods. Prior to the OSHA inspection, Sessum was not trained in the OSHA machine guarding standards (Tr. 1158). He had read the ANSI Standard B11.3 (Exh. C-7; Tr. 1159). Also, it is noted that Sessum agreed that some forms of point of operation guarding or devices were feasible for some TMP operations (Tr. 1151, 1213-1218).

The evidence presented by TMP is focused on the exceptions to its work and not its normal work. There is no evidence that TMP attempted compliance with point of operation guarding. Engineering controls are considered feasible even when full compliance cannot be achieved. *G&C Foundry Co.*, 17 BNA OSHC 2137 (No. 95-0869, 1997). The Secretary showed that point of operation guarding or a combination of guarding was feasible for most of TMP's press brake operations. Douglas Hinesley, safety engineer, testified that the use of proper guarding and hand tools could possibly increase production, as the presses could run continuously (Tr. 235). Hinesley testified that a combination of guarding with some presses equipped with pull

backs or hand restraints and other presses with light curtains might be used by TMP (Tr. 214-215).

Further, there is no showing that TMP considered designating presses exclusively for certain sized parts or bends in order to more conveniently make use of guarding. Although employees could not predict the number of operations or sizes of parts they were expected to work, the blueprint designs used in making the metal parts have been used by TMP for several years, some since the early 1980's (Exhs. R-2, R-3). TMP's operations and resources are sophisticated enough that it could use initiative to install guards or safety devices for its press brake operations.

TMP's infeasibility defense is rejected.

Safe Distance Method

Instead of point of operation guarding, TMP asserts that it uses a method of "safe distance" guarding. TMP incorporated the safe distance method in its press brake training manual (Exh. R-4). TMP's safe distance method requires the operator, based on training, warning, and discipline, to keep their hands away from the press brake's point of operation. TMP asserts that its method of safe distance guarding is based on American National Standard B11.3, 1982 ("ANSI B11.3"). If an employer cannot utilize point of operation guarding, the employee may hold the part, keeping their hands an unspecified "safe distance" from the point of operation. (Exh. C-7, pp. 74-80, §§ 6.1.4.2(1) and 6.1.4.3)

TMP notes further that its reliance on ANSI B11.3 was supplanted by OSHA CPL 2.125, issued on February 14, 1997 (Ex. R-1). The CPL also provides that when other methods are infeasible, an employer may employ the "safe distance" method of guarding. The CPL defines this distance as four inches from the point of operation, measured from "the exterior point of contact of the power press brake die closest to an employee" (R-1, p. 3).

TMP's safe distance method is rejected. The record fails to show that point of operation guarding methods are infeasible. Also, even if point of operation guarding is shown to be infeasible, TMP fails to show that it uses the safe distance method. Operator Morris Ladner testified that employees are instructed to never place their hands between the dies (Tr. 53). He

stated that work rules prohibit an employee's hands from being within one inch of the point of operation. However, Ladner indicated that this rule went into effect at TMP the day before his testimony (May 6, 1997) (Tr. 55). He also testified that in order to load small parts into the machine, he must put his fingers into the dies. He stated that "before yesterday," this was not a violation of the work rule (Tr. 55, 59-60).

"Safe distance" is not an alternative to point of operation guards or devices which, in this case, is not shown as infeasible. Also, the record indicates that the safe distance method is not enforced at TMP. Employees' hands were often within four inches of the point of operation, and employees did not use tools to hold small parts. The method was not in operation during the OSHA inspection (Tr. 1175).

The lack of a safe distance method is also shown by TMP's failure to mark presses so an employee can see the four-inch minimum safe distance. There are no measuring devices kept out to show the distance (Tr. 1163, 1165). Also, inching down was not enforced, and it depended on the operator's expertise (Tr. 306).

The guarding standard is intended to eliminate danger from unsafe operating procedures, poor training, or employee inadvertence. Guarding is provided by a "device" that does not allow reliance upon the skill or attentiveness of employees. *See American Luggage Works, Inc.*, 1982 CCH OSHD ¶ 26,072, p. 32,796 (No. 77-893, 1982).

A serious violation of § 1910.212(a)(3)(ii) is affirmed.

Item 5 - Alleged Violation of § 1910.212(a)(5)

The citation alleges that, in the northwest corner of the press department, a shopmade fan had no cover over the rotating blades. Section 1910.212(a)(5) provides that:

When the periphery of the blades of a fan is less than seven (7) feet above the floor or working level, the blades shall be guarded. The guard shall have openings no larger than one-half (½) inch.

Compliance officer Stevens observed a blower from a home air conditioning unit used as a fan by press operator James Webb. General manager Sessum described the blower as consisting of a "squirrel cage with some vary small fins" (Tr. 1097). Compliance officer Stevens estimated that the blower stood four feet above the floor at the end of the Cincinnati press where James

Webb worked (Tr. 609-610). There was a 10-inch round opening in the cage on one side of the blower (Tr. 609-10). The opening faced a walkway leading to an exit. The walkway was one to two feet wide, “there was just enough room to walk through to go out of the back door of the exit” (Tr. 610-611). Also, there were small parts used by employees on the floor near the blower (Tr. 613).

James Webb testified that the blower has been at his work station during his employment at TMP for at least two years (Tr. 500, 504). He estimated the height at six feet (Tr. 501-502). Sessum testified that it is TMP’s policy that all fans must be approved by the safety manager. He stated that TMP was not aware of the existence of the blower (Tr. 1097). The blower was removed during the course of the inspection (Tr. 612, 1098).

TMP argues that it was unaware of the blower and that it did not pose a hazard. TMP in part relied on the testimony of James Webb, who indicated that an employee could only intentionally place his hands into the opening, and that the blower was positioned too high to ensnare an employee’s clothing (TMP Brief, p. 66; Tr. 500-502). TMP cites *Turnbull Millwork Co.*, 6 BNA OSHC 1149 (Docket No. 15047, 1977) (an unguarded fan posed no hazard to employees who could place their hands into the rotating blades without causing injury).

TMP’s arguments are rejected. Employees commonly used fans at their workstations (Tr. 341, 504-505). There is no dispute that the blower was a fan within the meaning of the standard (Tr. 1097). The blower was used as a fan by the employee and it had rotating blades. It was used to produce a current of air. Webb used the blower to cool himself while working at the press brake (Tr. 500, 1099). TMP also does not dispute that the blades were not completely enclosed (TMP Brief, p. 66; Tr. 501, 1097). The blower was placed on a stand near a walkway.

It is uncontroverted that the blower was in plain view and was used as a fan by Webb for two years. Despite Sessum’s testimony, TMP knew or should have known about the unguarded fan blades. Also, whether the fan was four or six feet above the ground is immaterial for the purposes of establishing a violation. The standard requires guarding of blades if less than seven feet. Having placed the fan’s opening next to a narrow walkway, employees on the walkway were in a zone of danger. The test for determining an employee’s exposure to a hazard is whether it is “reasonably predictable” that employees would be in the zone of danger created by a

noncomplying condition. *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996). Employees walking to the exit were within two feet of the ten-inch opening in the blower's cage. The probability of an injury occurring, however, is low in that the opening was limited and in excess of four feet above the ground level.

An "other" than serious violation of § 1910.212(a)(5) is affirmed.

Item 6 - Alleged Violation of § 1910.217(b)(4)(i)

The citation alleges that in the press department, the mechanical power presses identified as Federal No. 6, Whitney Jensen, and Press Rite Notcher did not have a cover over the foot pedal to prevent unintended operation of the press. Section 1910.217(b)(4)(i) provides that:

The pedal mechanism shall be protected to prevent unintended operation from falling or moving objects or by accidental stepping onto the pedal.

Compliance officer Stevens testified that the mechanical power presses did not have covers over their foot pedals (Tr. 676-677, 699). General manager Donald Sessum testified that the Press Rite did have two parallel bars straddling the pedal which he considered sufficient protection for the pedal (Tr. 1100-1101). The two bars were parallel to the foot pedal, at the height of the foot pedal which in his opinion reduced the likelihood of an accidental operation. As Sessum stated, "you would actually have to get your foot right between these two bars to activate it" (Tr. 1100). Sessum's testimony was supported by Eugene Carlisle, setup operator (Tr. 432). With regard to the other presses (Federal No. 6 and Whitney Jensen), Sessum conceded some limited exposure (Tr. 1102). Pedal covers were installed during the course of the inspection (Tr. 1101, 1134).

TMP argues that because of the material used (aluminum and steel), there is insufficient weight to activate the presses (Tr. 1103). It takes eight or nine pounds of pressure to activate the foot pedal (Tr. 1259). Also, TMP argues that only press operators worked in the press department and the presses are run infrequently (Tr. 1102).

Mechanical power presses are used to punch holes and make notches in metal (Tr. 94, 204). The purpose of the standard is to prevent accidental operation of the presses, whether from the operator or objects. The bar at the side of the pedal was to stop an employee from tripping on

the pedal, not from inadvertently activating the press (Tr. 432). TMP concedes no pedal covers on two of the presses and an inadequate cover on the other press. The presses' pedals were not protected from accidental or inadvertent operation by the operator.

A serious violation of § 1910.217(b)(4)(i) is affirmed.

Item 7 - Alleged Violation of § 1910.217(c)(1)(i)

The citation alleges that in the press department, the Federal No. 6, Whitney Jensen, Federal Press, and the Press Rite mechanical power presses also did not have point of operation guarding. Section 1910.217(c)(1)(i) provides that:

It shall be the responsibility of the employer to provide and insure the usage of "point of operation guards" or properly applied and adjusted point of operation devices on every operation performed on a mechanical power press. See Table O-10.

Eugene Carlisle, setup operator, testified that he operated the Press-Rite and the Federal No. 6 during the OSHA inspection (Tr. 414, 420-421). He stated that when operating the presses his hands came within four to eight inches of the point of operation (Tr. 440, 665). He testified that the safe distance from the point of operation was discussed at the weekly safety meetings (Tr. 456). The Secretary stipulates that the four mechanical power presses have been abated (Tr. 1134).

General manager Donald Sessum testified that the Federal press and the Press-Rite were only using dies with a ¼ inch opening (Tr. 1103-1104, 1138). TMP argues that the Federal press and Press Rite press did not require point of operation guarding (TMP Brief, p. 72). An opening of ¼ inch needed no guard. *See Microform Precision Sheetmetal, Inc.*, 14 BNA OSHC 1215 (No. 88-2010, 1989) (a ½ inch opening was not wide enough to allow a finger to enter the point of operation); *Collator Corp.*, 3 BNA OSHC 2041 (No. 2004, 1976) (press brake opening between dies which never exceeded ¼ inch presented no hazard to operators). Also *see* § 1910.217(c)(ii), which provides that "[t]he requirement of paragraph (c)(1)(i) of this section shall not apply when the point of operation opening is one-fourth inch or less. *See* Table O-10." Further, TMP asserts that the Federal press has plexiglass guards that protected the point of operation (Tr. 1138).

The Secretary argues that the openings between the ram and die were more than three inches and that some dies have openings of greater than ¼ inch. The Secretary asserts that TMP used unitized tooling, and the dies were placed below the ram with gaps of several inches between the upper portion and the bottom portion of the ram (Secretary Brief, p. 27; Exh. C-18, Photo 9; Tr. 663-667).

Unitized tooling is “a type of die in which the upper and lower members are incorporated into a self-contained unit so arranged as to hold the die members in alignment” § 1910.211(d)(58). OSHA standards for mechanical power presses specify that in unitized tooling the “opening between the top of the punch holder and the face of the slide (or ram, *see* 29 CFR § 1910.211(d)(51)), or striking pad, shall be safeguarded” in accordance with § 1910.217(c).

TMP uses a variety of dies in their mechanical power presses. There is no dispute that the presses lacked point of operation guarding (Tr. 431, 440). The presses did not have guards at the area where metal is actually positioned and work is performed (*See* definition, § 1910.211(d)(45)). Also, the operator’s hands came within inches of the point of operation during press operations. Eugene Carlisle testified that some dies have a gap greater than ¼ inch to almost 5/16 inch (Tr. 457-458). The Secretary concedes that the standard does not require guarding if the opening is less than ¼ inch (Secretary Brief, p. 26).

The record in this case fails to show that the area between the dies exceeded 5/16 inch and presented a hazard to employees. The testimony of Sessum and Carlisle regarding the size of the opening between the dies is uncontroverted. Also, the area between the upper die and the ram, as identified by the Secretary, was not shown to be a hazard to employees. It is not the point of operation. The metal is placed between the upper and the lower dies. The upper die and the lower ram do not come in contact.

The Secretary’s argument that TMP used unitized tooling is not supported by the record. There is no showing as to the type of dies used by TMP. Also, TMP was not cited for violation of the standard applicable to unitized tooling, § 1910.217(d)(5). In this case, a sufficient opening remains between the die and ram, which prevents any amputation or pinching of the operator’s hands. *See Armour Food Co.*, 14 BNA OSHC 1817 (No. 86-247, 1990) (“the mere fact that it

may be physically possible for an employee to come into contact with the moving parts is not sufficient to establish a violation”).

A serious violation of § 1910.217(c)(1)(i) is vacated.

Items 8a and 8b - Alleged violations of §§ 1910.217(e)(1)(i) and 1910.217(e)(1)(ii)

The citation alleges that in the press department no inspection program was initiated, and no records were maintained concerning the operation of the mechanical power presses, including the Federals, Whitney Jensen, Press-Rite and Stripit. Sections 1910.217(e)(1)(i) and 1910.217(e)(1)(ii) provide that:

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

(ii) Each press shall be inspected and tested no less than weekly to determine the condition of the clutch/brake mechanism, antirepeat feature and single stroke mechanism. Necessary maintenance or repair or both shall be performed and completed before the press is operated. These requirements do not apply to those presses which comply with paragraphs (b) (13) and (14) of this section. The employer shall maintain a certification record of inspections, tests and maintenance work which includes the date of the inspection, test or maintenance; the signature of the person who performed the inspection, test, or maintenance; and the serial number or other identifier of the press that was inspected, tested or maintained.

Weekly inspections are addressed during TMP’s safety meetings (Tr. 121, 453-454, 510).

There is a written checklist for weekly inspections which is initialed upon completion of the inspection (Exh. C-4; Tr. 102). Employees are instructed in how to complete the inspection forms and the importance of the inspections (Tr. 121). Weekly press inspections are conducted every Monday morning and last between 5 and 30 minutes (Tr. 1110). The operators do the inspections (Tr. 1106-1108, 1111). According to Morris Ladner, leadman, employees do not check the clutch linkage, or the oil or hydraulic fuel levels (Tr. 119-120). Employees do check the brakes (Tr. 120-121).

General manager Donald Sessum testified that before initialing TMP's certification, operators check the function of the press, including the clutch and brake. He stated that operators make sure the guards are in place, check for loose nuts or bolts, and, if applicable, check the press' air system (Tr. 1106-1108).

James Webb described his inspection as checking the press to see if it was working properly. He checked the electrical system, fluids, rams, clutch, and brake mechanisms (Tr. 510). Eugene Carlisle, setup operator, on the other hand, testified that Dale Cupp inspected the presses. Although Carlisle never observed the actual inspection, he said that he saw Cupp looking at a press, then initialing the checklist (Tr. 450-451). Cupp did not testify.

The Secretary argues that the standard requires a detailed inspection list and a certification of the items on the presses (Tr. 693-694, 777). The Secretary asserts that TMP's inspection documentation was insufficient because "the documentation does not relate to the requirements of the standard . . . [in that it] was not for the purpose of checking and certifying that all parts, auxiliary equipment and safeguards were in a safe and operating condition" (Secretary's Brief, p. 35).

TMP argues that weekly inspections were performed, and, in the alternative, the violation should be classified as *de minimis*. TMP asserts that its records, as required by the standard, show the inspection date, the inspector's initials, and a description of the press inspected (Exh. C-4).

The lack of an adequate inspection program is shown by the items on the presses found in disrepair. On the Whitney Jensen press, there was no cover on the foot pedal, part of the guard was missing on the flywheel, and there was no point of operation guard (Tr. 689). The Federal No. 6 press lacked a point of operation guard, flywheel guards, and a cover over the foot pedal (Tr. 691-692). Stevens also testified that the anti-repeat mechanisms and palm buttons on the Federal presses, Whitney Jensen, and Press-Rite Notcher were inoperable (Tr. 697-698). Her testimony was uncontradicted. The anti-repeat mechanism prevents the press from cycling more than once following activation by the operator (Tr. 698).

Even if TMP performed detailed inspections, its records and certification provide only limited information, insufficient under the standard. TMP's inspection record merely identifies the

equipment, date of inspection and the inspector (Exh. R-4). It does not identify the items inspected or show if the item needed adjustment or repair.

The standard requires that an employer perform both operational checks as well as safety checks. Under § 1910.217 an employer must test working parts, auxiliary guards, and certify the inspection in writing (Tr. 686-687). Safety manager Douglas Caudill told Stevens that “they made the inspections to see if there was oil on the floor or if it was running properly” (Tr. 690-693, 696). TMP’s inspections were limited to the working condition of the press (Tr. 697). TMP’s checklist does not identify the items inspected or ensure that each item of operation and safety were inspected. The missing flywheel enclosures and foot pedal covers demonstrate the lack of focus of TMP’s inspection. This is also shown by the non-working, anti-repeat and single stroke mechanisms (Tr. 697). A single stroke mechanism “can be set so that once the press is cycled, that it won’t cycle again when it’s not expected by the employee” (Tr. 698). The lack of a complete inspection and repair program exposed the operators to unsafe conditions in operating the presses.

Serious violations of §§ 1910.1910.217(e)(1)(i) and 1910.217(e)(1)(ii) are affirmed.

Item 9 - Alleged Violation of § 1910.219(b)(1)

The citation alleges that in the press department, the flywheels were not completely enclosed on the Federal press, the Federal No. 6 press, the Whitney Jensen press, and the Press-Rite Radius Notcher. Section 1910.219(b)(1) provides that:

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:

(i) With an enclosure of sheet, perforated, or expanded metal, or woven wire;

Compliance officer Stevens testified that on the presses, the flywheels were unguarded during her inspection (Exh. C-2⁵; Tr. 679-683). The unguarded flywheels were less than seven

⁵ Exh. C-2 is the video of OSHA’s inspection. In the video, the Federal press is identified by label 1-7C and the word “Federal”; the Federal No. 6 is green with the word “Federal,” and a red box mounted to the right; the Whitney Jensen press is shown with an aluminum or silver box beneath the operating area; and the Press Rite

(continued...)

feet above the floor. Stevens stated that employees were exposed to the hazard of being caught in the rotating flywheels and receiving lacerations (Tr. 700-701). It is uncontradicted that an operator was unable to see an employee because the flywheel was located at the back of the press (Tr. 682). TMP completely guarded the flywheels during the inspection (Tr. 711, 1118, 1133).

General manager Donald Sessum testified that the presses were guarded on three sides. Sessum considered an employee's exposure remote because the unguarded area was relatively small and isolated. In Sessum's opinion, an employee would have to intentionally put his hand into the unguarded section (Tr. 1116). There was no employee traffic in the area (Tr. 1116). Also, he stated that no employee was injured as a result of the unguarded flywheels (Tr. 1117-1118).

To establish employee exposure, the Secretary must show that it was reasonably predictable that employees would have access to the conditions in their normal working routine, including ingress and egress from working areas. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1285 (1993). Also see *Miniature Nut and Screw Corp.*, 17 BNA OSHC 1557 (1996) (operator not closer than two feet and the area not shown accessible under normal circumstances).

Mechanical power presses derive power from a rotating crank shaft which obtains energy generated from rotating flywheels (Tr. 204). There is no dispute that the flywheels were less than seven feet above the floor and unguarded on at least one side (Exh. C-2; Tr. 680-681). The record also establishes employee's exposure. Sessum conceded that between the Federal and Whitney Jensen, there is a gap employees use "from time to time." It is a "shortcut" which employees use when the presses were operating (Tr. 1116-1117). The unguarded portion of the flywheel goes almost to the floor (Tr. 681-682). The operator is not able to see an employee standing next to the flywheel (Tr. 682).

A serious violation of § 1910.219(b)(1) is affirmed.

Item 10 - Alleged Violation of § 1910.304(f)(4)

⁵(...continued)
is shown with a red device above the point of operation.

The citation alleges that in the press department, there was no ground wire on the shopmade fan located on the aisle way next to the Cincinnati 3 press brake. Also, in the Formica work area, there was an open ground to the receptacle mounted inside the spray booth used for a saw, fan, and radio. Section 1910.304(f)(4) provides that:

The path to ground from circuits, equipment, and enclosures shall be permanent and continuous.

There is no dispute that there was a blower from an air conditioner used as a fan near the Cincinnati 3 press brake. The fan was plugged into the outlet on the side of the Cincinnati 3 press (Exh. C-5; Tr. 1167). The fan did not have a ground wire attached (Tr. 609, 611-612). The fan was located next to an aisle used by employees to access the dock area (Tr. 610-611). Stevens testified that the missing ground wire exposed employees to a potential electrical shock hazard if the fan electrically malfunctioned and employees touched the metal housing. Because of the hot temperature and the employees' wet hands from perspiration, she considered the potential shock hazard increased (Tr. 613).

Stevens also found that a wall receptacle in the paint booth had no ground. A radio and fan were plugged into the receptacle (Tr. 615-616). Without a ground, she considered the risk of an accident increased because of the chemicals used in the paint booth. Stevens observed an employee "spraying a glue substance or a paint substance" (Tr. 615).

TMP argues that the isolation transformer "appears" to have created a false reading on Stevens' test equipment, giving the appearance of an open ground when one did not exist. General manager Donald Sessum testified that he was informed by maintenance that the isolation transformer could cause a false reading (Tr. 1119-1120). An isolation transformer protects against electrical surges.

TMP was not cited for the transformer, and there is no evidence that the transformer actually had any effect on Stevens' testing equipment (Tr. 1265-1270). Stevens observed the lack of a ground wire (Tr. 612, 616, 715-716). The transformer "converts a higher form of electricity such as a 220 or a 440 . . . down to 110" (Tr. 1270). Other than speculation by Sessum, TMP offered no evidence that the transformer functioned as a ground or that it made a permanent and continuous ground unnecessary. Neither the maintenance man nor the safety manager Caudill

testified. TMP performed no tests, and Sessum admitted to limited electrical experience (Tr. 1119). Also, there is no evidence that TMP regularly checked its electrical systems.

A serious violation of § 1910.304(f)(4) is affirmed.

Penalty Consideration for Citation

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

TMP employs approximately 120 employees (Tr. 592). TMP is also entitled to credit for history and good faith because TMP has no history of violations⁶ and it immediately abated, for the most part, the violations cited during the inspection (Tr. 592-593). There is no evidence that TMP was uncooperative during the inspection.

A penalty of \$825 is reasonable for violation of § 1910.23(c)(1) (item 1). Two sections of midrails located on the platform used to access the safety office were missing. Employees regularly used the platform and were exposed to a fall hazard in excess of eight feet to a cement floor. The potential hazard was increased by a door opening out into the platform and a mat in front of the door. Despite the compliance officer's characterization of intermittent use, the record shows that the platform was used daily by the safety officer.

A penalty of \$825 is reasonable for violation of § 1910.23(d)(1)(iv) (item 2). The midrail was missing on the stairway accessing the safety office. Employees were exposed to a fall in excess of eight feet to a cement floor. The stairway was used to access the safety office.

A penalty of \$825 is reasonable for violation of § 1910.147(c)(4)(ii) (item 3). The written lockout / tagout program was inadequate. Employees were performing servicing and maintenance without locking out.

A penalty of \$3,500 is reasonable for violation of § 1910.213(a)(3)(ii) (item 4). The press brakes were not guarded to prevent point of operation injury. The record reflects that at least

⁶As discussed, Turnbull Enterprises, the predecessor company, did receive a prior citation, including an alleged violation of § 1910.212. The citation is not considered as part of TMP's history.

two employees were injured and the injuries included loss of fingers. TMP's alleged safe distance method was not shown as an acceptable alternative.

A penalty of \$1,000 is reasonable for violation of § 1910.217(b)(4)(i) (item 6). The foot pedals of the mechanical power presses were not covered to prevent accidental operation of the presses. Employees were exposed to serious injury, including possible amputation of fingers. However, the presses were only operated approximately fifteen percent of the time (Tr. 1102).

A grouped penalty of \$825 is reasonable for violations of §§ 1910.217(e)(1)(i) and 1910.217(e)(1)(ii) (items 8a and 8b). TMP's inspections were inadequate to assure that safety guards were properly maintained. Operators were exposed to unguarded points of operation; there were no enclosures for flywheels and no covers over foot pedals.

A penalty of \$825 is reasonable for violation of § 1910.219(b)(1) (item 9). Although the flywheels were partially guarded, employees did use the area near the unguarded portion of the flywheel as a "shortcut." Also, the operator's view of the unguarded portion of the flywheel was obstructed.

A penalty of \$825 is reasonable for violation of § 1910.304(f)(4) (item 10). There was no ground wires for a fan and a wall receptacle. Employees were exposed to electrical shock.

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:

1. Item 1, alleged violation of § 1910.23(c)(1), is affirmed and a penalty of \$825 is assessed.
2. Item 2, alleged violation of § 1910.23(d)(1)(ii), is affirmed and a penalty of \$825 is assessed.
3. Item 3, alleged violation of § 1910.147(c)(4)(ii), is affirmed and a penalty of \$825 is assessed.
4. Item 4, alleged violation of § 1910.212(a)(3)(ii), is affirmed and a penalty of \$3,500 is assessed.
5. Item 5, alleged violation of § 1910.212(a)(5), is affirmed as “other” than serious with no penalty.
6. Item 6, alleged violation of § 1910.217(b)(4)(i), is affirmed and a penalty of \$1,000 is assessed.
7. Item 7, alleged violation of § 1910.217(c)(1)(i), is vacated.
8. Item 8a, alleged violation of § 1910.217(e)(1)(i), and item 8b, alleged violation of § 1910.217(e)(1)(ii), are affirmed and a grouped penalty of \$825 is assessed.
9. Item 9, alleged violation of § 1910.219(b)(1), is affirmed and a penalty of \$825 is assessed.
10. Item 10, alleged violation of § 1910.304(f)(4), is affirmed and a penalty of \$825 is assessed.

KEN S. WELSCH
Judge

Date: September 14, 1998