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SECRETARY OF LABOR,	:
	:
Complainant,	:
	:
v.	:
	:
	:
QUALITY STAMPING PRODUCTS CO.,	:
	:
Respondent.	:

OSHRC Docket No. 91-414

DECISION

BEFORE: WEISBERG, Chairman; FOULKE and MONTROYA, Commissioners.

BY THE COMMISSION:

Quality Stamping Products Company (“Quality”) is a specialty metal stamping business in Cleveland, Ohio, employing from thirty to thirty-five employees. An Occupational Safety and Health Administration inspection in 1990 resulted in the issuance of three multiple-item citations. Administrative Law Judge Paul L. Brady affirmed the violations alleged in twenty-eight serious items (combined penalties amounting to \$17,350), one willful (\$8000), and one other-than-serious item (\$400). He assessed a total penalty of \$25,750.¹

Quality petitioned for review, claiming that the judge did not assess the penalties in accordance with section 17(j) of the Act, 29 U.S.C. § 666(j).² Specifically, Quality criticized

¹Penalties were proposed under the former section 17 of the Act, 29 U.S.C. § 666, when the maximum allowable penalty for a serious violation was \$1000, and for a willful, \$10,000.

²That section provides:

(continued...)

the judge for assessing penalties “despite the failure of the Secretary to present evidence as to the gravity of each of the violations.” More specifically, Quality focused on the Secretary’s failure to present evidence on the number of employees exposed, the duration of their exposure and the probability of an injury--evidence Quality argues the Secretary is required to introduce under Commission precedent, citing *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993); and *Kus-Tum Bldrs., Inc.*, 10 BNA OSHC 1128, 1132, 1981 CCH OSHD ¶ 25,738, p. 32,106 (No. 76-2644, 1981). Quality further argues that this failure “left [the judge] to assess a penalty based on speculations.” For the reasons that follow, we affirm the judge’s penalty assessments.

The Commission conducts a *de novo* review of a judge’s assessed penalties. See *Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828 (5th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976); *C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1977-78 CCH OSHD ¶ 22,481 (No. 14249, 1978). The Commission will generally review a judge’s penalty assessment on the basis of whether it is supported by adequate findings of fact which account for the statutory criteria. See *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD at p. 41,033. The Commission’s penalty assessments are reviewed by appellate courts for abuse of discretion. *Brennan v. OSHRC (Interstate Glass Co.)*, 487 F.2d 438, 442 (8th Cir. 1973).

In conducting its review, the Commission has held that the four statutory penalty criteria--size, gravity, good faith, and history--are not necessarily accorded equal weight, and that gravity is generally the principal factor in assessing penalties. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483, 1991-93 CCH OSHD ¶ 29,582, p. 40,033 (No. 88-2691, 1992); *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972). The Commission has also held that as to the gravity of the violation, the following elements

²(...continued)

The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

are to be considered: (1) the number of employees exposed, (2) the duration of exposure, (3) the precautions taken against injury, and (4) the degree of probability that any injury would occur.³ In *J.A. Jones*, the Commission stated that gravity “depends upon such matters as” number, duration, and probability of an injury. These cases do not hold that evidence on each individual gravity factor is a *sine qua non* for a valid penalty assessment. Nor have we held that the failure of the Secretary to elicit testimony on every single subpart of each section 17(j) criterion will require a remand or will result in the assessment of only a nominal penalty.⁴

Although we have carefully reviewed the evidence and argument with respect to each of the thirty-one items before us, we will not recite the details of that review here. Instead, a single example, representative of the state of the record, will suffice. Items 4, 5 and 6 of serious citation no. 1, for example, alleged violations of 29 C.F.R. § 1910.147(c)(4), (c)(7), and (d)(4) for failure to develop an energy control procedure or lockout/tagout program,

³This formulation was originally set forth in *National Realty and Constr. Co.*, 1 BNA OSHC 1049, 1051, 1971-73 CCH OSHD ¶ 15,188, p. 20,266 (No. 85, 1972), *rev'd on other grounds*, 489 F.2d 1257 (D.C.Cir. 1973), and was subsequently cited in *Turner Co.*, 4 BNA OSHC 1554, 1976-77 CCH OSHD ¶ 21,023 (No. 3635, 1976), *rev'd on other grounds*, 561 F.2d 82 (7th Cir. 1977), and *Kus-Tum Bldrs.* In *National Realty*, the Commission noted that “The Commission is aware that within the context of a given case other elements may enter into determination of the gravity of a violation. The elements set forth herein are not intended to be exclusive.” *Id.* at 1051 n.3, 1971-73 CCH OSHD at p. 20,266 n.3.

⁴Where this evidence is lacking, however, an employer will be given the benefit of the doubt on statutory factors for which little relevant evidence was adduced. *See Mosser Constr. Co.*, 15 BNA OSHC 1408, 1416, 1991-93 CCH OSHD ¶ 29,546, p. 39,907-08 (No. 89-1027, 1991). However, in that case, as here, the gravity evidence adequately supported the assessed penalty.

Chairman Weisberg would not rely on *Mosser Constr. Co.* In *Mosser*, the Commission, without explanation or analysis, found that “[b]ecause the record contains little relevant information concerning [size, good faith, and past history], we have given Mosser the benefit of the doubt on each of these three factors in determining an appropriate penalty.” *Id.* at 1416, 1991-93 CCH OSHD at p. 39,907. The Commission purportedly gave Mosser “substantial credit” for these three criteria in assessing the penalty. However, based on gravity, the fourth statutory penalty factor, the Commission assessed a penalty of \$300, significantly more than the \$175 penalty proposed by the Secretary for the citation item in question.

train its employees in the use of such a program, and enforce the use of such a program. The Secretary proposed penalties of \$500, \$700, and \$600, respectively. The judge stated that the hazard created by the failure to have a lockout procedure is that employees could work on the lathes or power presses without first locking them out and this could result in injuries including cuts, broken bones, and amputations. Based on the four statutory criteria, the judge assessed penalties of \$500, \$700, and \$600, respectively. Quality argues that the Secretary failed to introduce evidence in three areas: the specific number of maintenance employees who would be subject to receiving lockout/tagout training or required to follow the lockout/tagout procedure; the frequency or duration of maintenance work requiring employment of the procedure; and the probability or potential for accident because of the failure to develop such a procedure, provide training, or use such a device. Without such information, Quality argued, there is “little more than speculation” to support what it believed to be the finding of moderate to moderate-high gravity necessary to substantiate the penalties.

The record shows, however, that for item 5, Quality admitted both employee exposure and the seriousness of the violation.⁵ It also shows that management personnel acknowledged that “maintenance, foremen and set-up people” would need locks to work on the machines. “[A]t least . . . two individuals” (the shop foreman and the maintenance foreman) separately told the compliance officer that “numerous times” they had worked on presses without using lockout/tagout devices, having received no training in such procedures. The compliance officer testified that an accident could occur any number of ways: inadvertent energization of the press or lathe or the sudden drop of the weight of the dies and other suspended parts. One of the employees related an incident that took place two

⁵Evidence and admissions on the employee exposure element and the serious characterization of a violation may also serve to establish the gravity criterion of the penalty for that violation. *Dobson Bros. Constr. Co.*, 3 BNA OSHC 2035, 2036-37, 1975-76 CCH OSHD ¶ 20,429, p. 24,390 (No. 3847, 1976) (where an ALJ does not use the term “gravity,” but makes findings concerning the dimensions, nature, and seriousness of a hazard, those findings also reflect the “gravity” of the violation for purposes of section 17(j) of the Act).

years earlier when another employee attempted to turn on the machine while he was working on it.

The tenor of the evidence on the other violations, including the willful hazardous communication standard violation, is substantially similar to the evidence on the lockout/tagout items. Therefore, we find that the penalties the judge assessed are appropriate based on the evidence relevant to the statutory factors. We would add that despite Quality's contentions about the paucity of evidence, it introduced no mitigating evidence to show that any particular penalty was based on an erroneous gravity assessment.⁶

Moreover, while gravity is normally the primary factor in assessing appropriate penalties, an employer's substantial history of prior violations may skew the importance of gravity in the final penalty determination. Indeed, we find in this case that Quality's extensive prior history outweighs the gravity factor and supports the penalties we assess. The purpose of a penalty is to achieve a safe workplace, and penalty assessments, if they are not to become simply another cost of doing business, are keyed to the amount an employer appears to require before it will comply. *D & S Grading Co. v. Secretary*, 899 F.2d 1145 (11th Cir. 1990); *George Hyman Constr. Co. v. OSHRC*, 582 F.2d 834, 841 (4th Cir. 1978). Over half the standards cited here⁷ had been violated at least once by Quality or its sister

⁶Quality cites *Colorado Fuel & Iron Steel Corp.*, 2 BNA OSHC 1295, 1296, 1974-75 CCH OSHD ¶ 18,816, p. 22,649 (No. 4054, 1975) for the proposition that "[i]t is the Secretary's burden of proof to establish the appropriateness of the proposed penalty for each violation." Nothing in our decision today alters that initial allocation of the burden of proof. However, while the Act requires the Secretary's proposal and the Commission's assessment to give due consideration to the section 17(j) factors, nowhere is an employer barred from introducing evidence that would influence those factors in its favor. In fact, in *Dreher Pickle Co.*, 1 BNA OSHC 1132, 1133 n.2, 1971-73 CCH OSHD ¶ 15,470, p. 20,746 n.2 (No. 48, 1973), the Commission stated, "It would be contrary to the impartiality which the Commission is required to afford the parties, pursuant to Section 10(c) of the Act, to permit the evidence and argument on monetary penalties of one adverse party to have any special status or be allowed any greater weight than that of other parties to the action." Thus, any evidence of lower gravity that Quality had brought to our attention would have been taken into account in setting appropriate penalties.

⁷Citation No. 1, items 1, 2, 3, 8, 9, 12, 13, 16, 17, 22, 24, 25, 26; Citation No. 2, item 8; Citation No. 3, item 2.

company, All Stamping, and sometimes two or three times before. Were it not for the Secretary's 3-year rule,⁸ they probably would this time have been cited as "repeated" violations. As the Eleventh Circuit noted in a decision involving an employer who had a substantial history of prior violations:

D & S has, in the past, paid the rather nominal penalties and blithely continued to commit egregious violations in a most hazardous industry Standard operating procedure for D & S in the past has been to pay the penalty and ignore OSHA regulations until the next inspection. The stakes are too high to allow this company to operate in this manner. Perhaps payment of the maximum penalty will bring a new understanding to D & S of the vital importance of complying with OSHA regulations.

D & S Grading, 899 F. 2d at 1148.⁹

In conclusion, although Quality is a moderate-sized company, the gravity of the individual violations--which, as correctly discussed in the judge's decision, varies from quite low to high gravity--coupled with Quality's substantial previous history, fully supports the penalties as assessed by the judge. The penalties are unaffected by the equivocal evidence on good faith.

⁸OSHA's *Field Operations Manual*, Ch. IV.B.5.d.(1)(a), provides:

d. *Time limitations.* Although there are no statutory limitations upon the length of time that a citation may serve as a basis for a repeated violation, the following policy shall be used to ensure uniformity.

(1) A citation will be issued as repeated violation if:

(a) The citation is issued within 3 years of the final order of the previous citation

⁹According to Quality, "[a] review of many of these citations reveal[s] that the same or substantially similar item . . . may have been cited previously . . . and if any penalty was imposed, it was significantly less than that proposed in the instant action." Quality claims that this proves that the penalties in this case are excessive and unfounded. However, we conclude that it strongly suggests that the penalties in the earlier cases were ineffective.

ORDER

Accordingly, we affirm the judge's decision and assess a total penalty of \$27,750.

Stuart E. Weisberg

Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya

Velma Montoya
Commissioner

Dated: July 21, 1994

Docket No. 91-414

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QUALITY STAMPING PRODUCTS CO.
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OSHRC DOCKET
NO. 91-0414

NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on October 23, 1992. The decision of the Judge will become a final order of the Commission on November 23, 1992 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before November 12, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Review Commission
1825 K St. N.W., Room 401
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.
Ray H. Darling, Jr.
Executive Secretary

Date: October 23, 1992

DOCKET NO. 91-0414

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SECRETARY OF LABOR,

Complainant,

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QUALITY STAMPING PRODUCTS CO.,

Respondent.

OSHRC Docket No. 91-414

Appearances:

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U. S. Department of Labor
Cleveland, Ohio
For Complainant

F. Benjamin Riek, III, Esquire
Cleveland, Ohio
For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

Quality Stamping Products Company, Inc. (Quality), contests three citations issued by the Secretary alleging serious, willful and "other than serious" violations of the Occupational Safety and Health Act of 1970 (Act). Compliance officers for the Occupational Safety and Health Administration (OSHA) investigated Quality's facility in Cleveland, Ohio, beginning on July 11, 1990, and ending on December 17, 1990. The compliance officers visited the plant on five separate occasions during that time (Tr. 35-36). The citations were issued on December 27, 1990.

Quality operates a specialty metal stamping business (Tr. 907). Quality is owned and run by the Nayman family, who also own and run its division, All Stamping (Tr. 37). OSHA inspected Quality in 1975, 1977, 1980 and 1985. Citations were issued as a result of each of these inspections. These citations became final orders of the Commission. All Stamping was inspected in 1973, 1980, and 1988, and was issued citations after each inspection. These citations also became final orders of the Commission.

Citation No. 1: Alleged Serious Violations

Item 1: § 1910.23(d)(1)(iii)

Section 1910.23(d)(1)(iii) provides:

(d) *Stairway railings and guards.* (1) Every flight of stairs having four or more risers shall be equipped with standard stair railings or standard handrails as specified in paragraphs (d)(1)(i) through (v) of this section, the width of the stair to be measured clear of all obstructions except handrails (iii) On stairways less than 44 inches wide having both sides open, one stair railing on each side.

OSHA Compliance Officers Gus Georgiades and Andrew Pratin inspected Quality's facility. Georgiades observed a stairway leading from a miscellaneous storage area to a die storage area. The stairway contained at least six risers and measured less than 44 inches across (Exh. C-1, Tr. 50, 60). The stairway was equipped with a handrail on the left side descending the stairway, but had no handrail on the right side (Exh. C-1; Tr. 50).

In its answer, Quality admitted that it was in serious violation of § 1910.23(d)(1)(iii) with regard to the stairway (Complaint ¶ V; Answer ¶ V). The only aspect of item 1 that Quality contested was the Secretary's proposed penalty of \$400. At the hearing, counsel for Quality cross-examined Georgiades regarding item 1. The Secretary's counsel correctly pointed out that the violation was admitted in Quality's answer and that only the amount of the penalty was at issue (Tr. 429). In its post-hearing brief, Quality argues that it was not in violation of the standard and, that if it was in violation, then the violation should be classified as *de minimis*. Quality's arguments are in vain.

Quality specifically admitted that it violated § 1910.23(d)(1)(iii) [Complaint ¶ 5(c); Answer ¶ 5(c)], that employees were exposed to the violative condition [Complaint ¶ 5(d);

Answer ¶ 5(d)], that Quality had either actual or constructive knowledge of the violative condition [Complaint ¶ 5(c); Answer ¶ 5(c)], and that the violation was serious [Complaint ¶ 5(f); Answer ¶ 5(f)]. Quality is precluded from now arguing the substantive allegations of the item. Quality offers no reasons why this court should ignore its admissions concerning this item. The Secretary put in evidence what she believed was necessary to establish the penalty she proposed. Had the Secretary known that Quality was going to contest the substantive allegations of item 1, she may have prepared her case differently. It would be prejudicial to allow Quality to contest the merits of item 1 after having admitted all of the elements of the cited violation in its answer. Therefore, only the amount of the penalty in item 1 is at issue.

Section 17(j) specifies that the Commission is to give “due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.” The gravity of the offense is the principal factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972).

Quality employs from thirty to thirty-five employees (Tr. 915). Georgiades testified that the hazard created by the violation of the standard was that nothing would prevent an employee’s fall if he or she tripped on the stairway. Injuries could include “numerous sprains and strains You could also break bones and possibly hit your head” (Tr. 54). Quality demonstrated no bad faith regarding this item. Quality had been previously cited for violating this standard in June of 1985 (Exh. C-3; Tr. 68). Considering these factors, it is determined that a penalty of \$400 is appropriate.

Item 2: § 1910.30(a)(4)

Section 1910.30(a)(4) provides:

(a) *Dockboards (bridge plates)*. (4) Handholds, or other effective means, shall be provided on portable dockboards to permit safe handling.

Exhibit C-2 shows a dock plate located on the loading dock outside the shipping and receiving department. The dock plate was not equipped with handholds (Tr. 62). The dock plate had two metal blocks welded to one of its sides. The plate would rest on the blocks

so that the plate would not rest flush with the floor (Tr. 1156). Estimates of the dock plate's weight ranged from 60 to 100 pounds (Tr. 64, 1156).

Two of Quality's vice-presidents, Ken and Tom Nayman, told Georgiades that employees in the shipping and receiving department would lift the dock plate when its use was required (Tr. 65). Tom Nayman conceded that the dock plate had been equipped with handholds at one time but that it had been without them for several years (Tr. 81, 1157).

Tom Nayman testified on direct that when the dock plate was used, it was pushed into the back of a truck using a tow motor (Tr. 1155). On cross-examination, Nayman admitted that the shipping and receiving employees occasionally lifted the dock plate by hand (Tr. 1207). This fact is also evident from the dock plate's position in Exhibit C-2, where the dock plate is leaning up against a box. The dock plate was obviously placed there by hand.

Quality knew that the dock plate lacked handholds. The company was cited for a violation of § 1910.30(a)(4) in 1985 (Exh. C-3). In addition, the State of Ohio's OSHA consultation service had notified Quality of this violation following an inspection in 1984 (Exh. C-4, p. 6).

Quality argues that the dock plate presented no hazard to the employees handling it. Georgiades testified convincingly, however, that the condition of the dock plate posed several threats to employees' safety (Tr. 64-65). "[T]here could be a number of injuries, including twisting of the body, strains and sprains on the back, also trying to maneuver the dock plate, lifting it up, moving it, the dock plate could essentially fall on a hand or foot and cause a break or a severe strain."

The Secretary has established a serious violation of § 1910.30(a)(4). Upon due consideration of Quality's size, the gravity of the violation, Quality's good faith, and the fact that Quality had been previously cited for the same standard, it is determined that \$400 is an appropriate penalty for item 2.

Item 3: § 1910.37(q)(1)

Section 1910.37(q)(1) provides:

(q) *Exit marking.* (1) Exits shall be marked by a readily visible sign. Access to exits shall be marked by readily visible signs in all cases where the exit or way to reach it is not immediately visible to the occupants.

Georgiades observed an exit door located on the southeast wall of Quality's building which was not marked with an exit sign (Tr. 82). Quality admitted that it was in serious violation of § 1910.37(q)(1) in its answer (Complaint ¶ VII; Answer ¶ VII). Quality raises substantive arguments in its brief regarding item 3. These arguments are to no avail. Having admitted the violation in its answer, Quality is estopped from arguing the merits of item 3. The violation is established.

The hazard posed by the unmarked exit door was that employees trying to exit the building in the event of an emergency might not be able to determine that the exit is, in fact, an exit (Tr. 84). This hazard makes the gravity of the violation severe. Quality had been previously cited for the violation of § 1910.37(q)(1) (Exh. C-6; Tr. 88). Upon consideration of the gravity of the violation, the previous citation for the violation, and the other relevant factors, it is determined that a penalty of \$400 is appropriate.

Item 4: § 1910.147(c)(4)

In the citation and complaint, the Secretary quoted the correct language from the standard applicable to the alleged violative condition, § 1910.147(c)(4). As the result of a typographical error, however, the standard was cited as § 1910.147(b)(4). The Secretary moved to amend this error in her brief. The Secretary's motion is hereby granted.

Section 1910.147(c)(4) provides:

(4) *Energy control procedure.* (4) Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section.

Georgiades testified that he was told by Tom Nayman, Ken Nayman, Larry Leichliter, and Jim Halman that no lockout procedures had been developed (Tr. 92). Quality failed in its attempt to refute Georgiades' testimony.

Quality argues that it did have a lockout procedure. Tom Nayman stated that he provided Georgiades with a copy of Exhibit R-2, which he identifies as "an OSHA regulation

regarding lockout/tagout” (Tr. 1161). Nayman testified that he informed Georgiades that Exhibit R-2 was the “procedure that we follow for lockout and tagout of our press” (Tr. 1161).

Exhibit R-2 is not an OSHA regulation, nor is it a document used for lockout/tagout procedures for Quality’s power presses and lathes. Rather it is a copy of *On Guard! The Machine Safeguarding Newsletter* published by Rockford Systems, Inc. It is a general article which explains OSHA Instruction STD 1-7.3 on the lockout/tagout standard. The newsletter also includes a “Safety Evaluation Checklist for Mechanical Power Presses.” The document does not satisfy the requirement of § 1910.147(c)(4) for a lockout/tagout procedure.

Ken Nayman identified Exhibit R-36 as Quality’s lockout/tagout procedure, which he had developed in January, 1990, based on Exhibit R-10 (Tr. 1242-1243). This testimony is in direct contradiction with that of Tom Nayman, who testified that the newsletter, Exhibit R-2, was the only document Quality had relating to lockout procedures (Tr. 1208). As Ken Nayman and Tom Nayman are both vice-presidents in the company, this disparity in their testimony is puzzling. Ken Nayman’s testimony must also be viewed in light of that of Georgiades, who testified as follows (Tr. 99):

- Q. Did you determine whether the employer had any knowledge of the lockout requirements?
- A. Mr. Ken Nayman stated that he had some locks in the plant, although he also stated that he did not develop a program nor train or instruct employees nor enforce the procedures of any lockout or tagout.
- Q. Were you shown any type of written lockout program?
- A. No.
- Q. Did management present anything to you, other than the fact that they had some locks on the premises?
- A. That was all that they presented to me; the fact that they had some locks and these could be used.

Given Georgiades' testimony that Ken Nayman specifically denied that he had not developed a lockout program, as well as Tom Nayman's testimony that the machine guarding newsletter was the only "procedure" Quality used with regard to lockout, Ken Nayman's testimony that he had developed Exhibit R-36 in January, 1990, is questionable. Ken Nayman admitted that he failed to show the lockout procedure (Exh. R-36) that he had purportedly prepared before the inspection to Georgiades at the closing conference (Tr. 1351). Ken Nayman failed to do this despite being told by Georgiades that Quality would likely be cited for failing to have a written lockout procedure (Tr. 1352). In its brief, Quality asserts that Nayman was under no obligation to furnish the document to Georgiades during the closing conference (Quality's Brief, pp. 10-11).

Ken Nayman's own testimony is less than emphatic on this issue. When asked how he responded to Georgiades' inquiry as to whether Quality had a lockout procedure, instead of a simple "yes", Nayman stated, "I told him that we had locks for maintenance, foremen and set-up people" (Tr. 1360). Exhibit R-36 is accorded no weight in the determination of this issue.

The only other document that Quality relied on as a lockout procedure, Exhibit R-2, was not a lockout procedure. Quality was without a lockout procedure and was in violation of § 1910.147(c)(4). The hazard created by the failure to have a lockout procedure is that employees could work on the lathes or power presses without first locking them out. This could result in injuries including cuts, broken bones, and amputations (Tr. 95). The violation is serious.

Based upon the relevant factors, it is determined that a penalty of \$500 is appropriate.

Item 5: § 1910.147(c)(7)

Section 1910.147(c)(7) provides:

(7) *Training and communication.* The employer shall provide training to ensure that the purpose and function of the energy program are understood by employees and that the knowledge and skills required for the safe application, usage, and removal of energy controls are required by employees.

Georgiades was told by Vice-Presidents Tom Nayman and Ken Nayman and foremen Larry Lechliter and Jim Halman that Quality's employees had not been trained regarding the lockout standard (Tr. 92). In addition, Pamela Y. netta, a punch press operator for Quality, testified that she had received no lockout training (Tr. 1485, 1503). Girthel Holland, a press operator, had also not received lockout procedure training (Tr. 1434).

Ken Nayman testified that he had trained the maintenance men, foremen, and set-up men in the lockout procedure, relying on the discredited Exhibit R-36 as evidence (Tr. 1243).

Quality argues that proof of its training is established by the fact that it purchased lockout clamps and padlocks (Exhibit R-40). It is not explained how the purchase of materials translates into training of employees. Safety devices can be available despite the failure to train employees in their uses.

The Secretary has established that Quality failed to train its employees in the lockout procedure. The hazards and injuries presented by this violation are the same as in item 4. The violation is serious. Based upon a consideration of the relevant factors, it is determined that a penalty of \$700 is appropriate.

Item 6: § 1910.147(d)(4)

Section 1910.147(d)(4) provides:

(4) *Lockout or tagout device application.* (i) Lockout or tagout devices shall be affixed to each energy isolating device by authorized employees.

Tool and die shop foreman Michael Collins and maintenance foreman Jim Halman each told Georgiades that they had each worked on press #5 without using lockout or tagout devices (Tr. 93, 98).

Quality offers no real defense on this item. It only questions the Secretary's failure to call either Collins or Halman as witnesses, but it does not attempt to refute Georgiades' testimony. Girthel Holland testified that she had observed that Halman generally used a lockout device when he was working on a press (Tr. 1423-1424), but this does not contradict Halman's own statement to Georgiades regarding a single incident.

The Secretary established that Quality was in violation of § 1910.147(d)(4), thus exposing Halman and Collins to the possibility of cuts, broken bones, or amputations. The violation is serious and a penalty of \$600 is appropriate.

Item 7: § 1910.157(g)

Section 1910.157(g) provides:

(g) *Training and education.* (1) Where the employer has provided portable fire extinguisher 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 hazards involved with incipient stage fire fighting.

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

Twenty to twenty-five fire extinguishers were available throughout Quality's plant (Tr. 105-106). Quality's employees had not been trained either initially or annually in the use of fire extinguishers (Tr. 103). Georgiades explained the hazards created by the lack of training (Tr. 103-104):

One of the hazards would be if an employee picked up a fire extinguisher, not being trained, not knowing how to use it, nor with them being assured that they have the right type of fire extinguisher, using it wrongly could result in an injury It would be more important at least to know also when to stop using a fire extinguisher When it has gone beyond what is called the incipient stages of a fire, the employee should desist and exit the building. That would have to be known to the employees what that time would be. If the employees were not able to leave early or decide when to leave early, then it would be exposed to the hazards of being injured by a fire or smoke inhalation in delaying exiting the building.

Ken Nayman testified that Quality's policy regarding fire is that if a fire starts, then everyone is to get out of the building. Only the foreman is authorized to use the fire extinguisher. Other employees are not allowed to use the fire extinguisher (Tr. 1247-1248).

Ken Nayman's testimony was contradicted by that of Georgiades, who stated, "all [Quality's] officials told me, in particular Ken Nayman, that they didn't really have any rules, nor did they really have an enforcement policy in his plant. And, particularly, if anybody

wanted to pick up a fire extinguisher and use it, he could. He also told me if I wanted to pick it up and use it, he couldn't stop me either" (Tr. 105).

Between these two witnesses, Georgiades was the more credible. Furthermore, even if the employees were instructed not to use the fire extinguishers in the event of a fire, it is unrealistic to suppose that they would follow this instruction should a fire break out. If a fire occurs in the vicinity of an employee and that employee sees a fire extinguisher readily available, the employee's natural reaction would be to reach for the fire extinguisher.

Quality argues that § 1910.157(g) applies to "portable fire extinguishes for employee use," and that its portable fire extinguishes were only for foremen and not employee use. This is too narrow a reading of the standard. If employees had access to the fire extinguishers, then the fire extinguishers were available for employee use. The Secretary has established a serious violation of § 1910.157(g)(1).

The gravity of the violation is severe. Employees not trained in the use of fire extinguishers could suffer smoke inhalation or burns, which could result in serious injuries or death. Based upon the gravity of the violation and the other relevant factors, it is determined that a penalty of \$900 is appropriate.

Item 8: § 1910.176(c)

Section 1910.176(c) provides in pertinent part:

(c) *Housekeeping*. Storage areas shall be kept free from accumulation of materials that constitute hazards from tripping, fire, explosion, or pest harborage.

Georgiades found four instances of violations of § 1910.176(c), which were cited as follows:

(a) 2nd floor, die storage aisle, aisles were not properly maintained due to the accumulation of dies and other material which posed a hazard to employees.

(b) Upstairs, miscellaneous storage area, west side of building; the accumulation of materials posed a fire and a tripping hazard to employees.

(c) Press area next to metal stock storage, accumulation of old parts, boxes and miscellaneous storage posed a hazard to employees.

(d) Tool room area, accumulation of parts and material in front of the microwave oven posed a tripping hazard to employees.

Exhibits C-8 and C-9 depict instance (a), the second floor die storage aisle (Tr. 108). Exhibits C-10 and C-11 show instance (b), the miscellaneous storage area (Tr. 109). Exhibit C-12 depicts instance (c), the press area next to the metal stock storage (Tr. 109), and instance (d) is shown in Exhibit C-13 (Tr. 111). The photographs show that the four storage areas were not kept free from accumulation of materials that constitute tripping hazards, fire hazards, or pest harborage hazards.

All four areas posed tripping hazards, which could result in an employee cutting himself or herself, or breaking a bone. The boxes of materials posed a potential fire hazard (Tr. 111-112). In addition, “if a spark or something started on fire, it would not be able to be determined until it accumulated into a potential hazard of fire and smoke” (Tr. 112).

Quality argues that, because few employees ever venture into these storage areas, the violation of § 1910.176(c) “constitute[s] at best a minimal hazard” (Quality’s Brief, p. 17). It is undisputed, however, that employees did go into all four of the storage areas in order to retrieve materials (Tr. 113-114).

Quality also argues that the uprights or shelves located in the die storage area cited in instance (a) provided support for anyone walking through the aisles, thus minimizing the tripping hazard (Quality’s Brief, p. 18). This argument has no bearing on Quality’s noncompliance with § 1910.176(c). That standard requires that storage areas be kept free of accumulation of materials, regardless of the upright supports available in the area.

Quality was in violation of § 1910.176(c) in each of the four instances cited.

Quality was cited for violating the same standard in 1980 (Exh. C-14). The citation became a final order of the Commission (Tr. 117). Based upon Quality’s history of a previous violation and of the other relevant factors, a penalty of \$500 is deemed appropriate.

Item 9: § 1910.178(p)(1)

Section 1910.178(p)(1) provides:

(p) Operation of the truck. (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.

Quality admitted that it was in violation of § 1910.178(p)(1), disputing only the violation's classification as serious and the proposed \$600 penalty (Complaint ¶ XIII; Answer ¶ XIII). It is undisputed that a tow motor used in the shipping and receiving department had an inoperable horn (Tr. 120).

Quality argues that, because the tow motor is very loud when in operation, an operable horn was not required. This argument is rejected. The noise of the tow motor would only let employees know that the tow motor was turned on. After a period of time, the noise of the tow motor would become background noise, to which employees would pay little attention. Should the driver of the tow motor need to alert the employees of the tow motor's approach, he or she would be unable to do so without an operable horn. Georgiades testified that the horn would be particularly important when the tow motor turned a corner (Tr. 122). Such injuries constitute serious physical harm. Therefore, the violation is serious. The defective horn was pointed out to Quality by the State OSHA in 1989 (Exh. C-4; Tr. 125). Based upon this and the other relevant factors, it is determined that an appropriate penalty for the violation of § 1910.178(p)(1) is \$600.

Item 10: § 1910.212(a)(1)

Section 1910.212(a)(1) provides:

(a) Machine guarding--(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.

The Secretary alleged that Quality failed to guard the rotating chuck on four lathes in its toolroom (Tr. 126). Quality admitted that its employees were exposed to the rotating chucks and that Quality knew of their exposure [Complaint ¶ XIV(d)(e); Answer ¶ XIV(d)(e)]. Georgiades stated that the hazard presented by the unguarded rotating chucks is that of "[b]eing struck by the rotating chuck itself, also being struck by flying chips

that are thrown off by the machine while the lathe is turning, also oils, lubricating oils, that would be involved and thrown off there” (Tr. 134).

Quality argues that there is no hazard created by the unguarded lathe. Al Nayman testified that when the chips come off the lathe, they fall down into the guides of the lathe or onto the floor (Tr. 975). Chips generally come out in “a long curly confetti type of material . . . if you’re cutting a piece of material, it comes out as a string” (Tr. 976). The chips “go toward the center of the lathe and down in through the guides and to the floor” (Tr. 977). Mark Eros, a tool maker for Quality, also testified that the metal chips that come off the part fall into the bed of the lathe or onto the floor (Tr. 1452).

Georgiades did not view the lathe in operation and did not explain in what manner the rotating chucks presented a hazard (Tr. 509). His assessment of the hazard presented by the unguarded lathe is only speculation. Al Nayman and Eros, who are familiar with the operation of the lathes, testified without contradiction that the unguarded lathe presented no hazard.

The Secretary has failed to establish that the unguarded lathes presented a hazard. Item 10 will be vacated.

Item 11: § 1910.212(a)(3)(ii)

Section 1910.212(a)(3)(ii) provides:

(3) *Point of operation guarding.* (ii) 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.

The Secretary cited two instances of this alleged violation: instance (a), involving press No. 5, and instance (b), involving a hydraulic press. In her brief, the Secretary moved to vacate instance (a) [Secretary’s Brief, p. 2]. That motion is hereby granted.

Maintenance foreman Jim Halman was the main operator of the hydraulic press at issue. The press was used on a bi-weekly basis, including the six months prior to OSHA’s inspection (Tr. 152, 1168). The press had been guarded at one time but was now

unguarded. It had been in this unguarded condition for several years (Tr. 153). Georgiades stated that Tom Nayman, Ken Nayman, and Jim Halman knew that the press was unguarded and that Halman used it in that condition (Tr. 156-157).

Georgiades measured a 31-inch area of exposure on the front of the hydraulic press (Tr. 156). The hazard posed by the lack of guarding was the possibility of crushing injuries to the hands and fingers (Tr. 155).

At the hearing, Tom Nayman testified that the press was inoperable at the time of the inspection (Tr. 1169). This testimony is rejected as not credible. Georgiades convincingly testified that Halman used the press in its condition at the time of the inspection. Tom Nayman's testimony was vague (Tr. 1169).

Q. Was [the press] in use or available for use?

A. No.

Q. Why is that?

A. I don't recall, but I know that it was down at the time.

Q. Did you tell that to the compliance officer?

A. Yes.

Q. And, what did he say to you in response?

A. I don't recall.

The Secretary has established the violation of § 1910.212(a)(3)(ii) with regard to instance (b). The violation was serious, creating a hazard of crushing injuries. A penalty of \$350.00 is deemed appropriate.

Item 12: § 1910.212(a)(5)

Section 1910.212(a)(5) provides:

(a) *Machine guarding.* (5) When the periphery of the blades of a fan is less than seven feet above the floor or working level, the blades shall be guarded. The guard shall have openings no larger than one-half inch.

Georgiades observed two fans less than 7 feet above the floor whose blades were not guarded. Instance (a) involved a portable fan located above a filer in the tool room (Tr. 159). The fan was less than 7 feet above the floor (Tr. 160). Exhibit C-26 shows that

the fan's guard is broken. The openings in the guard are clearly larger than one-half inch. Georgiades measured the openings to be "[a]pproximately 10 inches by four and a half inches maximum" (Tr. 159).

Instance (b) involved a portable fan on the floor in the press room (Tr. 161). Georgiades measured the openings in this fan as being "approximately two inches by four inches" (Tr. 158).

Georgiades testified that the hazard posed by the openings in the fans' guards was that employees could come in contact with the fan's blades, possibly suffering cuts (Tr. 160).

Quality argues that the fans have plastic blades and operate on low horsepower (Tr. 991, 993). Al Nayman testified that he experimented with one of the fans by sticking his hand into the moving fan blades. The fan stopped when he made contact (Tr. 992-993). Nayman admitted that the fan with which he experimented was not one of the fans cited in item 12 (Tr. 993). Quality did not provide any evidence as to whether the fan had several speeds and what speed the fan was set on when Nayman stuck his hand in. Nayman did not testify as to what angle he inserted his hand or where on the blade he made contact. Such factors would have to be taken into consideration before this court would conclude that sticking one's hand into an operating fan was not hazardous.

The Secretary has established that Quality was in serious violation of § 1910.212(a)(5). All Stamping had been cited for a violation of this standard in 1980 (Exh. C-27). Based on all the relevant factors, it is determined that a penalty of \$700 is appropriate.

Item 13: § 1910.215(b)(9)

Section 1910.215(b)(9) provides:

(9) *Exposure adjustment.* Safety guards of the types described in subparagraphs (3) and (4) of this paragraph, where the operator stands in front of the opening, shall be constructed so that the peripheral protecting member can be adjusted to the constantly decreasing diameter of the wheel. The maximum angular exposure above the horizontal plane of the wheel spindle as specified in paragraphs (b) (3) and (4) of this section shall never be exceeded, and the distance between the wheel periphery and the adjustable

tongue or the end of the peripheral member at the top shall never exceed one-fourth inch. (See Figures O-18, O-19, O-20, O-21, O-22, and O-23).

The Secretary alleges that the condition of Quality's bench grinder in the tool room was in violation of this standard. The distance between the wheel periphery and each of the tongue guards exceeded one inch (Exh. C-28; Tr. 168). Ken Nayman and Jim Halman were with Georgiades when he made the measurements (Tr. 170-171). Foreman Michael Collins told Georgiades that he and his employees used the bench grinder in that condition (Tr. 172-173). The purpose of the tongue guards is to protect the employee in case the wheel breaks and the parts of the wheel scatter (Tr. 171). The tongue guards are to prevent the employee from being hit by the flying parts. Potential injuries to which the employees are exposed as a result of improperly adjusted tongue guards include "[v]arious cuts and also broken bones and also head injuries, various body injuries being struck by the grinding wheel as it was shattered and came flying out of there" (Tr. 172).

Quality argues that Collins' failure to adjust the tongue guards to the appropriate distance was an example of employee misconduct. "In order to establish the affirmative defense of unpreventable employee misconduct, an employer must show that the action of its employee was a departure from a uniformly and effectively communicated and enforced work rule." *H. B. Zachry Co.*, 7 BNA OSHC 2202, 2206, 1980 CCH OSHD ¶ 24,196 (No. 76-1393, 1980). Quality offered no evidence that it had a uniformly and effectively communicated and enforced work rule. The fact that Collins, one of Quality's foremen, violated § 1910.215(b)(9) demonstrates that any such work rule Quality had relating to tongue guards was not taken seriously.

Because the behavior of supervisory personnel sets an example at the workplace, an employer has--if anything--a *heightened* duty to ensure the proper conduct of such personnel. Second, the fact that a foreman would feel free to breach a company safety policy was lax.

National Realty & Construction Co. v. OSHRC, 489 F.2d 1257, 1267, fn. 38 (D.C. Cir. 1973) (Emphasis in original).

Quality's unpreventable employee misconduct defense must fail. The Secretary established that Quality was in serious violation of § 1910.215(b)(9). Quality was cited for

the violation of this or similar standards in 1973 and 1988 (Exhs. C-29, C-30, C-31). It is determined that the appropriate penalty for item 13 is \$600.

Item 14: § 1910.215(d)(1)

Section 1910.215(d)(1) provides:

(d) *Mounting--(1) Inspection.* Immediately before mounting, all wheels shall be closely inspected and sounded by the user (ring test) to make sure they have not been damaged in transit, storage, or otherwise. The spindle speed of the machine shall be checked before mounting of the wheel to be certain that it does not exceed the maximum operating speed marked on the wheel. Wheels should be tapped gently with a light nonmetallic implement, such as the handle of a screwdriver for light wheels, or a wooden mallet for heavier wheels. If they sound cracked (dead), they shall not be used. This is known as the "Ring Test."

Ken Nayman, Tom Nayman, Michael Collins and Jim Halman all informed Georgiades that the wheels of the bench grinder were not ring tested prior to being mounted (Tr. 185).

Quality argues that the testimony of Ken Nayman established that Quality did, in fact, conduct ring tests on new wheels when they arrived at the plant. Mark Eros also stated that he performed ring tests on the wheels. A careful reading of the cited standard discloses that it clearly states that in a ring test, "[W]heels should be tapped gently with a light *nonmetallic* implement." Nayman testified that he tapped the wheels with "a 5/8's bolt or piece of *steel*" (Tr. 1254) (Emphasis added). Eros explained his method for conducting a ring test (Tr. 1461): "You take, like, a piece of *metal*--basically I use a hard hammer--and give it a bong." (Emphasis added)

By their own words, Ken Nayman and Eros established that Quality was in violation of § 1910.215(d)(1). The hazard created by the failure to ring test a wheel is "if you mount it or had a wheel on there that you put on that was damaged, such as had a crack in it, mounted it on the bench grinder, the wheel could shatter, come out on an employee and strike him" (Tr. 186). Possible resulting injuries include cuts, broken bones, head injuries,

and eye damage (Tr. 187). Upon due consideration of the relevant factors, it is determined that an appropriate penalty is \$500.

Item 15: § 1910.217(d)(6)(i)

Section 1910.217(d)(6)(i) provides:

(6) All dies shall be:

(i) Stamped with the tonnage and stroke requirements, or have these characteristics recorded if these records are readily available to the die setter.

Quality had neither stamped its dies with the tonnage and stroke requirements nor recorded these characteristics (Tr. 190). When Georgiades asked why Quality had failed to comply with the standard, Al Nayman replied, “We have upwards of 26,000 dies, and we don’t see any reason we would have to mark the dies or have that information quoted. We’re not General Motors” (Tr. 191).

Quality argues that it does not need to comply with the standard because its dies are designed to fit only certain specific presses (Tr. 1178). Quality’s argument must be rejected.

The standard specifies two methods for keeping track of the tonnage and stroke requirements for each die. Quality is not at liberty to substitute a third alternative not found in the standard. The violation is established.

The hazard created by noncompliance with § 1910.217(d)(6)(i) is that the die would shatter, resulting in serious injuries to any exposed employees (Tr. 192). A penalty of \$700 is appropriate.

Item 16: § 1910.219(b)(1)

Section 1910.219(b)(1) provides:

(b) *Prime-mover guards--(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

The Secretary cited seventeen instances of flywheels on power presses which were not fully guarded (Exhs. C-32, C-34, C-47; Tr. 195). The lowest part of the presses was

approximately 4 feet from the ground (Tr. 196-197). Georgiades observed employees operating the presses (Tr. 200, 204-205, 214). One employee was operating the press so that the employee's position varied from less than 2 inches to 2 feet from the unguarded flywheel (Tr. 214). Exhibit C-49 shows a flywheel that is fully guarded in compliance with the standard. Quality was cited for the violation of this standard in 1973 and 1988 (Exh. C-52; Tr. 221-222).

Quality argues that the cited flywheels are guarded. This argument is refuted by the photographic evidence of Exhibits C-32 and C-34 through C-47. A comparison of the power presses depicted in these photographs with the properly guarded press shown in Exhibit C-49 demonstrates the difference.

Quality also argues that the Secretary should be estopped from citing the power presses at issue because a previous OSHA compliance officer, Renee Ritz, found the flywheel guards acceptable. Quality relies on the testimony of Ken Nayman to establish this point. Nayman's testimony, even if accepted without qualification, does not establish that Ritz found the guarding on the flywheels acceptable (Tr. 1255-1256):

Q. Did you discuss with her problems with flywheels and any of their hazards?

A. She had no complaints about any of the flywheels.

Q. Did you discuss with her what parts of flywheels needed to be guarded?

A. No.

All that Ken Nayman's testimony establishes is that Ritz did not recommend a citation for the failure to properly guard the flywheels. It does not establish that Ritz found the flywheel guards acceptable, or that she even looked at them. It may be that her inspection was a limited one that did not encompass the power presses. It is impossible to tell from Ken Nayman's testimony.

This situation is easily distinguishable from the one in *Miami Industries, Inc.*, 15 BNA OSHC 1258, 1991 CCH OSHD ¶ 29,465 (No. 86-671, 1991), on which Quality relies. In that case, the Commission found that the Secretary was estopped from bringing a citation for the

violation of the machine guarding standard. After a previous inspection, the employer did not contest a citation for a machine guarding violation. Instead, the employer sought to devise a method of abating the violation. OSHA's compliance officer gave express approval to the type of guard that the employer devised. Ten years later, OSHA again inspected the employer's plant and cited the employer for using the same guards the previous compliance officer had approved. The Commission ruled:

In the circumstances here, we conclude that the public interest in the effectuation of the Act's purpose to ensure safe working conditions is outweighed by the unacceptable unfairness to Miami that would result from holding it in violation of the Act for using a guarding design that had clearly and unequivocally been approved by OSHA.

Miami Industries, Inc., supra, at p. 39,744.

In the present case, there is no evidence that Ritz expressly approved of Quality's inadequate guarding of the flywheels. The Commission addresses this situation in the *Miami* decision: "We in no way retreat from our position that simple failure to issue a citation alleging a violation of a particular standard does not *in itself* establish that OSHA considers the employer to be in compliance with that standard." *Miami, supra*, at p. 39,742. (Emphasis in original).

Quality was in violation of § 1910.219(b)(1). The hazard created various pinch points on the power press. Potential injuries include twisting of the hands, cuts, broken bones, and having one's hair caught in the flywheel (Tr. 218-219). Upon due consideration of the relevant factors, it is determined that a penalty of \$700 is appropriate.

Item 17: § 1910.219(d)(1)

Section 1910.219(d)(1) provides:

(d) *Pulleys--(1) Guarding.* Pulleys, any parts of which are seven (7) feet or less from the floor or working platform, shall be guarded in accordance with the standards specified in paragraphs (m) and (o) of this section. Pulleys serving as balance wheels (e.g., punch presses) on which the point of contact between belt and pulley is more than six feet six inches (6 ft. 6 in.) from the floor or platform may be guarded with a disk covering the spokes.

The Secretary alleged that Quality failed to guard the belts and pulleys on two machines in the tool room. Instance (a) involves a Runsole drill press (Exh. C-53; Tr. 224). Instance (b) involves a filer machine (Exh. C-54; Tr. 225). The operator of the drill press would be within a few inches of the belt and pulley (Tr. 228). The operator of the filer could be as close as one foot from the hazard (Tr. 228-229). The hazard presented was possible contact with the pinch point between the pulley and the belt, as well as being exposed to belt breaking. Possible injuries include cuts and crushing injuries (Tr. 229). Foreman Collins acknowledged to Georgiades that the Runsole drill press lacked a pulley guard on one side (Tr. 230). Quality had been previously cited for the violation of § 1910.219(d)(1) (Exh. C-56).

Quality was in violation of the cited standard. A penalty of \$500 is deemed appropriate.

Item 18: § 1910.242(b)

Section 1910.242(b) provides:

(b) *Compressed air used for cleaning.* Compressed air shall not be used for cleaning purposes except where reduced to less than 30 p.s.i. and then only with effective chip guarding and personal protective equipment.

Quality admits the Secretary's charge that it violated this standard with two instances where compressed air used for cleaning measured at least 55 p.s.i. (Complaint ¶ XXII; Answer ¶ XXII). Quality only contests the violation's classification as serious and the proposed \$600 penalty.

The hazard of using compressed air above the 30 p.s.i. limit "could include air embolisms, eye damage, serious cuts, blowing parts onto them, and various other injuries as such, up to and including death" (Tr. 238). The violation of § 1910.242(b) is serious. A penalty of \$600 is appropriate.

Item 19: § 1910.253(b)(2)(ii)

Section 1910.253(b)(2)(ii) provides:

(2) Storage of cylinders--general. (ii) Inside of buildings, cylinders shall be stored in a well-protected, well-ventilated, dry location, at least 20 feet (6.1 m) from highly combustible materials such as oil or excelsior. Cylinders should be stored in definitely assigned places away from elevators, stairs, or gangways. Assigned storage spaces shall be located where cylinders will not be knocked over or damaged by passing or falling objects, or subject to tampering by unauthorized persons. Cylinders shall not be kept in unventilated enclosures such as lockers and cupboards.

Exhibit C-58 is a photograph showing an oxygen cylinder standing in Quality's miscellaneous storage area. It is not secured so as to prevent it from being knocked over (Tr. 267). Ken Nayman and Michael Collins acknowledged that they knew that the cylinder was there (Tr. 269).

Georgiades stated that the hazard presented by the unsecured cylinder was twofold (Tr. 268):

One, the cylinder being knocked over would damage the cylinder, such as a compressed gas cylinder, the contents were under pressure. The cylinder could either burst or be ruptured or be damaged, causing an employee to be struck by the cylinder as the contents of the cylinder would expel from it. Also, just by tipping it over or knocking it over, it could fall and injure an employee by just falling on them; the weight of the cylinder itself.

The violation is serious. A penalty of \$400 is appropriate.

Item 20: § 1910.303(b)(2)

Section 1910.303(b)(2) provides:

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

Compliance Officer Andrew Pratis observed an electrical outlet box lying on the floor of the press room (Exh. C-87). The plug of a portable fan was plugged into its socket (Tr. 710). The box was intended to be mounted on a wall or fixture, as evidenced by its pre-drilled holes for screws or nails (Tr. 709). The box had several pre-formed, perforated knockout provisions (Tr. 751).

The hazards presented by the electrical outlet box are “[a] shock hazard or an electrical burn hazard to employees from metal chips falling into the box, either from the

knockout provisions or from the mounting holes The box was lying in an oil-saturated area. Possible arcing within that receptacle box could cause a fire [I]t also poses as a tripping hazard for employees” (Tr. 710).

The Secretary has established that Quality was in serious violation of § 1910.303(b)(2). Upon due consideration of the relevant factors, it is determined that a penalty of \$600 is appropriate.

Item 21: § 1910.303(c)

Section 1910.303(c) provides:

(c) *Splices.* Conductors shall be spliced or joined with splicing devices suitable for the use or by brazing, welding, or soldering with a fusible metal or alloy. Soldered splices shall first be so spliced or joined as to be mechanically and electrically secure without solder and then soldered. All splices and joints and the free ends of conductors shall be covered with an insulation equivalent to that of the conductors or with an insulating device suitable for the purpose.

The Secretary alleged three instances of improperly spliced power cords where the wires were twisted together with electrical tape around them (Tr. 712). Exhibit C-88 depicts instance (b). The cord of a Delta bench grinder in the machine shop was improperly spliced. Black electrical tape was wrapped around the cord at three different points to join or splice the cord together (Tr. 712-713). Exhibit C-89 depicts instance (c). The power cord of a portable hand lamp located on the Snow tapping machine was improperly spliced. “[T]he wires were twisted and electrician’s tape was just wrapped around it” (Tr. 713). The Secretary offered no evidence to support instance (a), which alleged that the power cord of a demagnetizer in the machine shop was improperly spliced.

Pratins testified as to the serious nature of hazards presented by the improperly spliced cords (Tr. 714):

Employees are exposed to shock hazards or electrical burns, the reason being that any time you twist wires together, you impose an additional resistance to the wire at that point.

Electrical current running through there produced more heat. Any type of electrical wire will eventually, because of the heat, deteriorate.

And, as in item (c), where you can see it -- this was on the exhibit C-89--you can actually see the wire or the electrical material, the electrical tape coming off.

And it will become brittle, and it will come off, and people, in other words, employees, are exposed to shock hazards because of that.

The Secretary has established a serious violation of § 1910.303(c) with respect to instances (b) and (c). Upon due consideration of the relevant factors, it is determined that a penalty of \$500 is appropriate.

Item 22: § 1910.303(g)(1)(ii)

Section 1910.303(g)(1)(ii) provides:

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 circuit breaker panel in the press room was blocked by stored materials and a ladder near press #1 (Exh. C-91; Tr. 716). Pratins testified as to the hazard posed by the violation: "Employees are subject to tripping hazards if they are trying to get near the panel, there could be a fire hazard involved if an employee could no[t] get [to] the panel fast enough to shut off a circuit breaker in case some equipment was having a problem, a fire or something like that related" (Tr. 717). Potential injuries include broken bones from tripping, electrical burns, and shock (Tr. 717-718).

Quality admits that it violated § 1910.303(g)(1)(ii) (Complaint ¶ XXVI; Answer ¶ XXVI). Quality only disputes that the violation is serious and that the proposed penalty of \$600 is appropriate.

Pratins' testimony established that the hazards created by the violation of § 1910.303(g)(1)(ii) are serious. Upon due consideration of the relevant factors, including a previous citation issued to All Stamping in 1988 for a violation of the same standard, it is determined that a penalty of \$600 is appropriate.

Item 23: § 1910.303(g)(2)(i)

Section § 1910.303(g)(2)(i):

(2) *Guarding of live parts.* (i) Except as required or permitted elsewhere in this subpart, live parts of electric equipment operating at 50 volts or more shall be guarded against accidental contact by approved cabinets or other forms of approved enclosures. . .

Pratins observed two instances where covers were missing from electrical boxes. In instance (a), a cover was missing from an electrical box on press #7 (Exh. C-93; Tr. 720-721). In stance (b), a cover was missing off of a limit switch electrical box on press #10 (Tr. 720).

Quality contested only the appropriateness of the Secretary's proposed \$700 penalty. Pratins explained the gravity of the violation (Tr. 722): "Employees are exposed to electrical hazards, shock hazards. Also, the exposed electrical contacts, if some metal objects or scraps of metal came in contact, it may cause unintended machine operation, therefore, exposing employees to other hazards." Upon consideration of the gravity of the violation and the other relevant factors, it is determined that a penalty of \$700 is appropriate.

Item 24: § 1910.304(a)(2)

Section 1910.304(a)(2) provides:

No grounded conductor may be attached to any terminal or lead so as to reverse designated polarity.

Pratins observed a microwave oven plugged into an electrical outlet that had reverse polarity (Exh. C-13; Tr. 723-724). Pratins testified that the hazard presented was that of an electric shock to employees who used the electrical outlets; "[n]ot only the microwave, but there's a free receptacle that an employee may plug something else into; a hand lamp, a radio, or whatever" (Tr. 724).

Quality argues in its brief that the Secretary failed to establish that Quality knew of the hazardous condition. This argument must fail because Quality specifically admitted that it had knowledge of the violative condition [Answer ¶ XXVIII(e)]. The only issue to be resolved is the amount of the penalty. Given the potential for serious injuries that the

hazard creates, as well as All Stamping's previous history of violating this standard (Exh. C-95), a penalty of \$800 is appropriate.

Item 25: § 1910.304(f)(4)

Section 1910.304(f)(4) provides:

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

The Secretary alleged five instances where ground prongs were missing on five electrical cords:

- (a) Press room, the power cord to the coil cradle, located between presses 24 and 25, had a missing ground prong.
- (b) Electrical extension cord providing power to a 120 vac incandescent lamp on the Lodge & Shipley lathe had a missing ground prong.
- (c) Portable fan above the filer, in the machine shop had a missing ground prong.
- (d) Electrical extension cord located on workbench along the north wall, had a missing ground prong.
- (e) Press room, near press #10, the electrical extension cord used for powering a portable fan had a missing ground plug.

The Secretary presented evidence at the hearing establishing the violation (Exhs. C-97 thru C-99; Tr. 726).

Quality admitted that it violated the standard as alleged, contesting only the violation's classification as serious and the proposed penalty of \$900 (Complaint ¶ XXIX; Answer ¶ XXIX).

The hazards posed by the violative condition were those of electrical shocks and electrical burns (Tr. 730). As such, the violative condition could cause serious physical harm and was a serious violation. All Stamping was previously cited for the violation of § 1910.304(f)(4) in 1988 (Exh. C-100). Based upon this and the other relevant factors, an appropriate penalty for Item 25 is \$900.

Item 26: § 1910.305(b)(2)

Section 1910.305(b)(2) provides:

(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 each 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.

The enclosures for the electrical control boxes were missing on four boxes (Tr. 732). In instance (a), a cover was missing for the electrical control box on press #20 (Exh. C-101; Tr. 732-733). In instance (b), a cover was missing on the control box for press #23, and the box's electrical wires were exposed (Exh. C-102, C-103; Tr. 733). In instance (c), a cover was missing from the electrical junction box above press #11. In instance (d), a cover was missing from the electrical junction box on the back of an electric arc welder near press #1 (Exh. C-104; Tr. 733).

The hazard created by the missing covers is that, "[e]mployees are exposed to electrical hazards and also hazards from unintentional operation of the machine if some scrap metal were to come in contact with anything within those control boxes and initiate a stroke of a machine or an operation of a machine" (Tr. 734).

Quality admits that it violated this standard, arguing only that the violation is not serious and that the proposed penalty of \$900 is too high (Complaint ¶ XXX; Answer ¶ XXX).

The electrical hazard created by the missing covers is a serious hazard. All Stamping was issued a citation in 1988 for a violation of § 1910.305(b)(2) (Exh. C-105; Tr. 735). Based upon these and the other relevant factors, a penalty of \$900 is deemed appropriate.

Item 27: § 1910.305(g)(1)(ii)

Section 1910.305(g)(1)(ii) provides:

(ii) If used as permitted in paragraphs (g)(1)(i)(c), (g)(1)(i)(f), or (g)(1)(i)(h) of this section, the flexible cord shall be equipped with an attachment plug and shall be energized from an approved receptacle outlet.

An extension cord used for the portable fan had no attachment plug (Tr. 735). The wires of the cord were stripped and inserted directly into the receptacle (Tr. 736).

Quality admitted the violation and contested the violation's classification as serious and also the Secretary's proposed penalty (Complaint ¶ XXXI; Answer ¶ XXXI).

The hazard posed by the violation is serious. The violative condition would result in electric shock and electrical burns (Tr. 736). A penalty of \$800 is appropriate.

Item 28: § 1910.305(j)(1)(ii)

Section 1910.305(j)(1)(ii) provides:

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.

Quality had three portable hand lamps which did not have a substantial guard attached to the lamp holder or handle (Tr. 737). The portable handlamp in instance (a) was located over press #2 and lacked a guard around the bulb (Exh. C-106; Tr. 737). The portable hand lamp in instance (b) was hanging from the ceiling under the stairs located between the machine shop and the press room (Exh. C-107; Tr. 738). The portable hand lamp in instance (c) was located at the employee's time clock (Exh. 108; Tr. 738).

The hand lamps were located in areas where employees worked or passed through (Tr. 739-740). The hazards posed are "of the lamp breaking an[d] exposing employees to cuts, and the electrical hazards such as shocks and burns" (Tr. 739). The violation is serious. Upon consideration of the relevant factors, it is determined that a penalty of \$900 is appropriate.

Item 29: § 1910.1200(f)(5)

Section 1910.1200(f)(5) provides:

Except as provided in paragraphs (f)(6) and (f)(7) the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with the following information:

- (i) Identity of the hazardous chemical(s) contained therein; and

(ii) Appropriate hazard warnings.

Quality had two containers of hazardous substances that were not labeled with appropriate hazard warnings. In instance (a), a five-gallon plastic container of Spindraulic was not labeled (Exh. C-63; Tr. 271-272). Quality argues that Spindraulic is not a hazardous chemical. This argument is belied by the material safety data sheets (MSDS) for Spindraulic (Exh. C-62), which states that Spindraulic may cause dizziness, nausea, and difficulty in breathing. Instance (b) involved a metal container of Monarch Compressor oil that was also not labeled (Tr. 276). The MSDS for the oil indicated it could cause eye and skin irritation (Tr. 275).

Quality's management personnel were aware that the containers of Spindraulic and oil were unlabeled (Tr. 277). Employees used the two substances (Tr. 276-277).

Quality argued that the container of Monarch Compressor oil was empty. This argument is refuted by the testimony of Pratins. When asked how he determined that the container held the oil, Pratins stated, "I was with Ken Nayman and Jim Halman at the time. Jim Halman came over. He kind of shook it, opened it up, sniffed it, looked at it, and made a determination that he thought it was Monarch Compressor oil" (Tr. 276).

The hazards posed by the failure to label the containers are those hazards listed in the substances of MSDSs: dizziness, nausea, and difficulty breathing for Spindraulic, and skin and eye irritation for the oil (Tr. 280). The violation is serious. A penalty of \$600 is appropriate.

Citation No. 2

Item 1: § 1910.212(a)(1)

Section 1910.212(a)(1) provides:

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

The Secretary alleged that Quality committed a willful violation of § 1910.212(a)(1), by failing to guard the unused portion of the blade on the horizontal bandsaw. Exhibit C-65 depicts the bandsaw in question (Tr. 281). During the operation of the saw, the operator would be only a few inches away from the point of operation (Tr. 283).

Quality President Al Nayman testified that Quality first became aware that the saw needed guarding during an OSHA inspection of All Stamping (Tr. 1018). Compliance Officer Renee Ritz inspected a bandsaw at All Stamping that was newer than the bandsaw at issue here. Nayman purchased two guards, one for each bandsaw. The guard fit the bandsaw used by All Stamping but Nayman testified, "When we tried to adapt the second guard to [Quality's] machine, it would not fit the machine. It could not be used" (Tr. 1019). The problem with Quality's bandsaw was that its cover was not designed so as to allow the guard to slide inside (Exh. C-65; Tr. 1020).

Quality made its own guard for the saw blade (Exh. R-5; Tr. 1021-1022). This guard could only be used for cuts that were 10 inches or less. For cuts that are greater than 20 inches, the guard must be removed and the saw is operated without any guarding. When the guard is removed, it is placed on a stand next to the machine (Tr. 1024).

The Secretary has established a violation of § 1910.212(a)(1). By the admission of its own president, Quality does not guard the machine while making cuts longer than 10 inches. Section 1910.212(a)(1) does not allow for such exceptions. The point of operation must be guarded every time the saw is operated.

The Secretary argues that the violation of § 1910.212(a)(1) is willful. The Commission in *E. L. Jones and Sons, Inc.*, 14 BNA OSHC 2129, 2133, 1991 CCH OSHD ¶ 29,264 (No. 87-7, 1991), set forth the following requirements essential to finding a willful violation:

A violation of the Act is willful if "it was committed voluntarily with either an intentional disregard for the requirements of the Act or plain indifference to employee safety." *Simpler Time Recorder Co.*, 12 BNA OSHC 1591, 1595, 1984-85 CCH OSHD ¶ 27,456, p. 35,571 (No. 82-12, 1985). Trial of the issue of willfulness focuses on the employer's state of mind and general attitude toward employee safety to a greater extent than would trial of a non-willful violation. *Seward Freight*, 13 BNA OSHC 2230, 2234, 1989 CCH OSHD ¶ 28,509, p. 37,787 (No. 86-1691, 1989). In *Williams Enterprises, Inc.*, 13 BNA

OSHC 1249, 1986-87 CCH OSHD ¶ 27,893 (No. 85-355), the Commission held:

It is not enough to show that an employer was aware of conduct or conditions constituting a violation; such evidence is necessary to establish any violation, serious or nonserious. . . A willful violation is differentiated by a heightened awareness--of the illegality of the conduct or conditions and by a state of mind--conscious disregard or plain indifference. . . It is therefore not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation. *Williams*, 13 BNA OSHC at 1256-1257, 1986-87 CCH OSHD at p. 36,589.

In *Calang Corp.*, 14 BNA OSHC 1793, 1991 CCH OSHD ¶ 29,080, p. 38,870 (No. 85-319, 1990), the Commission reiterated the standard of review for deciding allegations of willful misconduct (citations omitted):

A finding of willfulness is not justified if an employer has made a good faith effort to comply with a standard, even though the employer's efforts are not entirely effective or complete Also, a violation is not willful if the employer had a good faith opinion that the violative conditions conformed to the requirements of the cited standard. However, the test of good faith for these purposes is an objective one--whether the employer's belief concerning the interpretation of a standard was reasonable under the circumstances.

Using the standard of review set forth in *Calang, supra*, it must be concluded that Quality's violation of § 1910.212(a)(1) was not willful. Although Quality's attempts at complying with the standard were not adequate, Quality neither acted with intentional disregard for the standard nor demonstrated plain indifference to employee safety. When the Naymans were informed by Compliance Officer Ritz that All Stamping's bandsaw was in violation of § 1910.212(a)(1), they purchased guards for the bandsaw at All Stamping and the bandsaw at Quality. When Quality could not adapt the guard to the saw, the company constructed its own guard. Even though the guard was not fully effective in guarding the saw, it is evidence of a good faith effort on Quality's part to comply with the standard. The Secretary has failed to show that Quality had a "heightened awareness" of its noncompliance with the standard. The violation was not willful.

“[W]here a violation has been established but is not of a willful nature as alleged, the violation will ordinarily be classified as other than serious.” A serious violation may be found “if it has been shown on the record and if there has been trial by consent of the issues presented by such violation.” *Graven Brothers and Company*, 4 BNA OSHC 1045, 1046, 1975-76 CCH OSHD ¶ 20,544 (No. 2538, 1976). There has been no trial by consent in this case as to whether Quality’s violation of § 1910.212(a)(1) is serious. Therefore, the violation will be classified as other than serious. A penalty of \$500 is appropriate.

Item 2: § 1910.212(a)(4)

Section 1910.212(a)(4) provides:

Revolving drums barrels, and containers shall be guarded by an enclosure which is interlocked with the drive mechanism, so that the barrel, drum, or container cannot revolve unless the guard enclosure is in place.

Georgiades observed a dry parts tumbler located near press #9 which did not have a guard as required by the standard (Exh. C-68; Tr. 295).

There was a good deal of contradictory testimony regarding whether the tumbler had been operated without a guard. According to Georgiades, “Mr. Tom Nayman said to me that, in fact, there had been no guard for at least a year to a year and a half. Mr. Jim Halman also made similar statements” (Tr. 300). During that time, the tumbler was used on an as-needed basis. “They could use it on a daily basis; they could use it a few times a week” (Tr. 300).

Tom Nayman testified that the tumbler was inoperable at the time of the inspection: “It was down for repairs. The interlock was not functioning properly, plus the gears were overloaded” (Tr. 1198). Tom Nayman stated that the guard had been removed by Quality’s maintenance man (Tr. 1200). Nayman thought that the tumbler malfunctioned several days prior to the inspection (Tr. 1201). He stated that the tumbler had been out of service for “[p]ossibly two or three days” (Tr. 1219). Tom Nayman denied ever telling Georgiades that the tumbler had been used without a guard for approximately a year (Tr. 1220).

Ken Nayman also testified that the guard for the tumbler had been removed by the maintenance man (Tr. 1330). Ken Nayman stated that the tumbler had been down for repairs for two or three weeks at the time of the inspection (Tr. 1401).

Constance Yvonne Cole, a finisher/sander for Quality, testified that the tumbler was inoperable at the time of the inspection and that it had been so “[m]aybe about a week” (Tr. 1440). She stated that the tumbler was guarded when it was operable and that she never operated the tumbler without the guards in place (Tr. 1442). Cole stated, “The guards were taken down so the maintenance man could fix the tumbler because he couldn’t get around it, you know, very well with the guards up” (Tr. 1444).

Steven Dickey was formerly employed at Quality as a press operator (Tr. 657). He responded “No” when asked whether the tumbler was guarded “during the period prior to the OSHA inspection” (Tr. 669). It is unclear from this testimony whether Dickey meant that the tumbler was not guarded in the period of time when it was inoperable or that the tumbler was operated without guards.

It is the Secretary’s burden to establish that the employer violated a standard. Based upon this record, the Secretary has failed to meet this burden with regard to § 1910.212(a)(4). Tom Nayman and Cole, two credible witnesses, testified that the tumbler’s guard was removed by the maintenance man after the tumbler became inoperable shortly before the inspection. The only proof that the Secretary adduced that the tumbler was operated without its guard was Georgiades’ statement that Tom Nayman and Jim Halman told him that the tumbler had been without a guard for at least a year. While Georgiades is a credible witness, the conflict in the evidence on this issue must be resolved in favor of Quality. There is enough doubt as to whether or not the tumbler’s guard was only recently removed after the tumbler malfunctioned to defeat the Secretary’s case. The citation for Item 2 will be vacated.

Item 3: § 1910.217(b)(8)(i)

Section 1910.217(b)(8)(i) provides:

A main power disconnect switch capable of being locked only in the Off position shall be provided with every power press control system.

The Secretary alleges that Quality willfully violated this section by failing to provide, in eighteen instances, power presses with main disconnect switches that could be located in the “off” position (Tr. 304-305). Georgiades testified that a disconnect box should have a switch or a lever than can be on or off. In the “off” position, a lock can be installed so that power cannot go through the presses without removing the lock (Tr. 305-306). The purpose of this type of switch is to insure that power cannot go to the presses during maintenance operations (Tr. 312). The disconnect switch is designed to control the flow of electricity to the presses (Tr. 621).

Although Quality does not deny that it failed to provide the presses with main power disconnect switches, it argues that it had an alternative method of preventing the presses from being energized during maintenance operations. Quality placed start/stop buttons on its presses that can be locked out during maintenance procedures (Exhs. R-8, R-10; Tr. 1302-1303). Quality also requires that if a press is equipped with a plug, the plug must be removed from the outlet, looped around the machine, and secured with a hasp and lock during maintenance procedures (Tr. 1303-1304). The start/stop button is not a disconnect switch (Tr. 635).

The language of § 1910.217(b)(8)(i) clearly states that “[a] main power disconnect switch capable of being locked only in the Off position shall be provided with every press control system.” The standard says nothing about start/stop buttons or unplugging electric cords. Quality is not free to substitute its own methods of protection. The standard requires a specific device, a disconnect switch. Quality did not have disconnect switches on its presses and, therefore, was in violation of the standard.

The Secretary alleged that Quality’s violation of § 1910.217(b)(8)(i) was willful. The record does not establish, however, that Quality acted with a heightened awareness of the illegality of its violation. Plain indifference to employee safety is not evident in Quality’s alternative procedure for preventing energization of the presses during maintenance operations. The violation is not willful.

There was no trial by consent of the violation as serious. Therefore, under *Graven*, the violation must be affirmed as “other than serious.” A penalty of \$500 is assessed.

Item 4: § 1910.217(c)(1)(i)

Section 1910.217(c)(1)(i) provides:

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.

The Secretary alleged that Quality willfully violated this standard by failing to ensure that its employees used point of operation guards while operating the power presses. The alleged violation occurred during the “blanking and forming” operations on the presses (Tr. 328). It is undisputed that the presses were equipped with pullback devices which, if used, complied with the standard (Tr. 334-335).

The Secretary’s allegation is based on statements made by two employees, Stephen Dickey and Marcia Jeffrey (Tr. 330). Jeffrey testified as follows regarding the blanking operations (Tr. 659-660):

Q. Where you are doing that, is there any type of guard on the press to keep your hand out of the point of operation?

A. No, not when I used it.

Q. Did you where (sic) any type of devices or restraints to keep your hands out of the point of operation during that procedure?

A. No.

Q. Was there anything while you were performing that procedure to keep your hands out of the point of operation?

A. Yes, I kept my hands away from the die itself.

Q. How was that?

A. I kept my hand further away back and I would feed it a little at a time.

...

A. I would only go so far as to where my hand was going. Then, I would go back and I would feed more material through with my hand.

Q. Was there anything physically present to keep your hand out?

A. No.

Q. Why was it that you would not use pullbacks or restraints for coil feeding operations?

A. I have no idea. I was never told to use any type of restraints on that kind of operation.

Dickey's testimony is somewhat questionable. He had been fired by Quality for absenteeism (Tr. 676). After Dickey was fired, he saw another Quality employee, Pam Yanetta, outside of a video store (Tr. 1497). Yanetta testified as to the conversation she had with Dickey at that time (Tr. 1499-1501):

Q. Did you say anything to Steve?

A. He started the conversation.

Q. Do you recall what he said to you, Ma'am?

A. Yes. He asked what was happening down at work, and I said that another employee who had quit was coming back.

Q. What did Mr. Dickey say when you told him that?

A. He said that it wasn't fair because this other employee missed more time than he did, and he should have been terminated too.

Q. Now, did Mr. Dickey say anything else to you?

A. He said he was going to pay back the company.

Q. Did he say why he was going to pay back the company?

A. Because it wasn't fair in firing him.

Q. Did he make any mention to you about the OSHA talk?

A. He just said, "It's payback time. Don't forget Al has to go to court."

Q. Did he say anything else to you?

A. No, sir. I was trying to get away from the man.

Yanetta's testimony went un rebutted. While Yanetta's testimony does not discredit Dickey, it does demonstrate that he had a bias against Quality.

Quality argues that if Dickey was telling the truth regarding his failure to use the pullback devices, then it was an example of unpreventable employee misconduct. As stated, *supra*, Quality must show that it had a uniformly and effectively communicated and enforced work rule from which Dickey departed.

Girthel Holland testified that she and the other press operators had been using the pullback devices "ever since we have had guards there" (Tr. 1413). Holland stated that Quality personnel checks the guard use "every time you are put on a job" (Tr. 1419). Foremen Jim Halman and Larry Leichliter and President Al Nayman monitor the use of the pullback devices during operation of the presses (Tr. 1419-1420). When asked what happens if an operator is caught not using the pullback devices, Holland responded, "You are made to put them on" (Tr. 1410). Holland has also never performed coil feeding blanking operations without using pullbacks and had never seen any other employees not using them (Tr. 1432).

Yanetta corroborated Holland's testimony regarding the checking of the pullback devices: "Each time you are put on a job, they check the leads to make sure your hand can't get under the press if the press is tripped" (Tr. 1486). Yanetta stated that it was her belief that all the press operators used the pullback devices (Tr. 1490).

All Nayman testified that Quality has a work rule requiring press operators to use the pullback devices. He stated that the foreman is responsible for ensuring that the guards are used and that he frequently walks through the press room and checks to make sure the safety devices are in place (Tr. 1056). Quality fired one employee for not using the guard (Tr. 1056-1057). When Nayman sees an employee not using the guards, he calls it to the foreman's attention and it is corrected immediately (Tr. 1057).

Quality has established that it has effectively communicated and enforced work rules requiring the use of the pullback devices during the operation of the presses. If Dickey and Jeffrey did not use the devices, then they were acting in an isolated incident of employee misconduct. No violation was established. The item will be vacated.

Item 5: § 1910.217(c)(3)(iv)(d)

Section 1910.217(c)(3)(iv)(d) provides:

Each pull-out device in use shall be visually inspected and checked for proper adjustment at the start of each operator shift, following a new die set-up, and when operators are changed. Necessary maintenance or repair or both shall be performed and completed before the press is operated. Records of inspections and maintenance shall be kept in accordance with paragraph (e) of this section.

Georgiades asked Al, Tom and Ken Nayman, as well as Larry Leichliter and Jim Halman, to provide him with the inspection and maintenance records required to be kept by § 1910.217(c)(3)(iv)(d) (Tr. 340). Georgiades was told by all of them that Quality did not keep such records (Tr. 340-341). Ken Nayman told Georgiades that Quality did not maintain the required records because they were “a pain in the ass” (Tr. 341).

Quality concedes that it did not achieve full compliance with the standard. Quality argues that it was in “partial compliance” with the standard and “met the spirit of” § 1910.217(c)(3)(iv)(d). This argument is without merit.

Quality produced Exhibits R-28 and R-29 at the hearing. These documents are production records kept by the press operators (Tr. 1060). They are not records of visual inspections, which Quality concedes (Quality’s Brief, pp. 90-91). Quality argues that it has a strict company rule that no one is allowed to operate the presses without the presses being inspected first. This may be true, but it has no bearing on the issue of whether records of the inspections are kept. The Secretary established that Quality violated § 1910.217(c)(3)(iv)(d).

Quality had been cited previously for this violation on two different occasions (Exh. C-82; Tr. 343-344). State OSHA also pointed out this requirement to Quality (Exh. C-4; Tr. 346-347). Yet Quality failed to comply with the standard. Nayman’s cavalier dismissal of the standard’s requirements as “a pain in the ass” manifests an intentional disregard for the requirements of the Act. Quality knew that it was not complying with the standard but decided to continue its noncompliance as a matter of convenience. The Secretary has established that Quality’s violation of § 1910.217(c)(3)(iv)(d) was willful. The Secretary’s proposed penalty of \$1,000 is deemed appropriate.

Item 6: § 1910.217(e)(1)(ii)

Section 1910.217(e)(1)(ii) provides:

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.

Georgiades inquired of the Naymans, Leichliter and Halman whether they kept the required records of inspections and maintenance for the presses. They all replied, “No” (Tr. 350).

At the hearing, Quality averred that it did have the required records but that they were incomplete (Tr. 1071, 1318-1319). Exhibits R-12 and R-13 are the documents that Quality submitted as evidence of its recordkeeping. The standard requires that each press be inspected and tested at least weekly. The clutch/brake mechanism, the anti-repeat feature, and the single stroke mechanism are specifically required to be checked. When repairs are done, the signature of the person who made the repairs and the serial number of the press must be provided. Exhibits R-12 and R-14 do not show this information or indicate regular weekly inspections.

Quality makes the novel argument that the Secretary failed to prove a violation of § 1910.217(e)(1)(ii) because she failed to prove that Quality not only failed to inspect its presses but also failed to maintain inspection records. Because Quality presented testimony that it did conduct weekly inspections, the argument goes, then the item must be vacated because “the Secretary has failed to establish a violation of both parts of this standard” (Quality’s Brief, p. 95). Quality’s argument indicates that, if an employer complies with one element of a standard, then it is free to violate the other element. The Secretary alleged

that Quality was in violation of only part of § 1910.217(e)(1)(ii) that deals with recordkeeping. The Secretary proved that violation. Quality's argument that the Secretary also needed to prove that the company failed to make the required inspection is without merit.

The Nayman family's business was previously cited for failing to maintain the inspection records in 1975, 1985, and 1988. The 1988 violation at All Stamping was affirmed as willful (Exh. C-83; Tr. 351-352). State OSHA also pointed out this requirement to Quality (Exh. C-4; Tr. 353). Quality was aware of the standard's requirements, yet continued to violate the standard. This reflects an intentional disregard of the Act's requirements. The violation is willful. A penalty of \$1,000 is appropriate.

Item 7: § 1910.217(g)

Section 1910.217(g) provides:

Enclosing the point of operation before a press stroke can be initiated, so as to prevent an operator from reaching into the point of operation prior to die closure or prior to cessation of slide motion during the downward stroke.

Georgiades discovered three instances of injuries that occurred but were not reported to OSHA (Tr. 355). Quality admitted that it violated this section but argues that the violation was not willful and that the proposed \$1,000 penalty is excessive (Complaint ¶ XL; Answer ¶ XL).

It was Ken Nayman's responsibility to report accidents to OSHA. His excuse for not reporting them was "I just forgot" (Tr. 1320). Quality was cited in 1980 for failure to report injuries to OSHA. Ken Nayman's forgetfulness reflects a general attitude with which Quality has approached any OSHA standard that imposes recordkeeping or reporting requirements. That attitude is characterized by intentional disregard of the Act's requirement. The Secretary has established a willful violation of § 1910.217(g). A penalty of \$1,000 is appropriate.

Item 8: § 1910.1200(h)

Section 1910.1200(h) provides:

Employers shall provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area.

Quality admits that it did not train its employees with respect to the hazards associated with Tuff Draw vanishing compound, Klensol solvent, and Ebonite tapping compound (Tr. 360). Quality argues in its defense that it did not believe that these substances were hazardous. This belief is belied by the MSDSs that Quality had for these substances (Exhs. C-116, C-117, C-118). The MSDSs unequivocally show that these substances cause health hazards, including irritation to the eyes, skin and respiratory tract. Ken Nayman testified that all three substances were used by employees (Tr. 1323). The Secretary has established a violation of § 1910.1200(h).

All Stamping was cited for the violation of this standard in 1988 (Exh. C-85; Tr. 365). Quality manifested both an intentional disregard for the requirements of the Act and plain indifference to its employees' safety, as evidenced by the conversation which Georgiades relates between himself and Ken Nayman (Tr. 364-366):

Mr. Ken Nayman told me that the employees in the plant knew about "as much of training as I do," stating that -- he went on to say that, "I don't know how to train them."

Then he said that the employees could get the information themselves. I asked him how he planned on doing that; providing the information and training through the employees themselves.

He said, "Well, they can look at the material safety data sheets."

I said, "First of all, that would not meet the requirements of the standard; second of all, did you ever tell employees in the plant that you had material safety data sheets?"

He, [Sic] "No," that he hadn't.

I also stated, "Did you ever train employees on how to read a material safety data sheet?"

He said, "Well, that wouldn't have done any good."

I asked him, "Why?"

He said, "Because most of them don't know how to read anyway."

So, I asked him, "In fact, did you ever read the material safety data sheets, at least, to the employees?"

He stated, "No," that he hadn't.

Mr. Nayman's attitude toward the requirements of the Act was also evidenced when he was cross-examined concerning the hazards on the MSDSs. Mr. Nayman stated (Tr. 1381):

The Witness: We don't have two and three-year-old children working there.

Q. I'm not alleging that you do.

A. I don't expect anyone to pick it up and drink it.

What the MSDSs make clear is that an employee would not have to pick up and drink any of the substances at issue to suffer health hazards from them. The MSDSs of the Ebonite tapping compound and the Klensol solvent both caution that "Oil mist inhalation may cause dizziness, nausea, and difficulty breathing" (Exh. C-117, C-118). The warning on the MSDSs for Tuff Draw vanishing compound is even more dire: "Excessive inhalation or ingestion may produce symptoms of central nervous system depression ranging from lightheadedness to unconsciousness and death." Nayman stated that he reviewed these MSDSs and concluded that these substances did not pose health hazards to Quality's employees. This demonstrates a complete and callous indifference on the part of Quality towards the health of its employees. Quality willfully violated § 1910.1200(h). A penalty of \$8,000 is appropriate.

Citation No. 3

Item 1: § 1903.2(a)(1)

Section 1903.2(a)(1) provides:

Each employer shall post and keep posted a notice or notices, to be furnished by the Occupational Safety and Health Administration, U. S. Department of Labor, informing employees of the protections and obligations provided for in the Act, and that for assistance and information, including copies of the Act and of specific safety and health standards, employees should contact the employer or the nearest office of the Department of Labor. Such notice or notices shall be posted by the employer in each establishment in a conspicuous place or places where notices to employees are customarily posted. Each employer shall take steps to insure that such notices are not altered, defaced, or covered by other material.

Quality had no OSHA notice posted on the site (Tr. 375). Quality admits the violation but contests the Secretary's proposed penalty of \$100 (Complaint ¶ XLII; Answer ¶ XLII). The proposed penalty is fair.

Quality was in violation of § 1903.2(a)(1), and a penalty of \$100 is appropriate.

Item 2: § 1904.4

Section 1904.4 provides:

In addition to the log of occupational injuries and illnesses provided for under § 1904.2, each employer shall have available for inspection at each establishment within 6 working days after receiving information that a recordable case has occurred, a supplementary record for each occupational injury or illness for that establishment. The record shall be completed in the detail prescribed in the instructions accompanying Occupational Safety and Health Administration Form OSHA No. 101. Workmen's compensation, insurance, or other reports are acceptable alternative records if they contain the information required by Form OSHA No. 101. If no acceptable alternative record is maintained for other purposes, Form OSHA No. 101 shall be used or the necessary information shall be otherwise maintained.

Georgiades inspected Quality's OSHA 200 logs and found that on eight occasions Quality did not create a supplementary record or did not create a complete supplementary record for injuries sustained by employees. Those eight instances are:

- (a) 1985, injury to employee on 3/15/85, only date and time of accident recorded.
- (b) 1986, injury to employee on 10/29/86, no 101 form.
- (c) 1986, injury to employee on 12/1/86, no 101 form.

- (d) 1986, injury to employee on 12/12/86, no 101 form.
- (e) 1986, injury to employee on 3/13/87, no 101 form.
- (f) 1987, injury to employee on 6/8/87, no 101 form.
- (g) 1987, injury to employee on 9/1/87, no 101 form.
- (h) 1987, injury to employee on 10/16/87, no 101 form.
- (i) 1987, injury to employee on 12/28/88, no 101 form.

All Stamping was issued a citation for the violation of this standard in 1988 (Exh. C-105). The Secretary has established the violation. Considering Quality's previous history of violating the standard, a penalty of \$400 is appropriate.

Item 3: § 1910.22(a)(1)

Section 1910.22(a)(1) provides:

All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition.

Quality did not have a floor load capacity plate in its upstairs miscellaneous storage area (Tr. 379-380). Quality admitted that it violated § 1910.22(a)(1) (Complaint ¶ XLV; Answer ¶ XLV). The violation is established. No penalty is assessed.

Item 4: § 1910.303(b)(1)(iii)

Section 1910.303(b)(1)(iii) provides:

(b) *Examination, installation, and use of equipment--(1) Examination.* Electrical equipment shall be free from recognized hazards that are likely to cause death or serious physical harm to employees. Safety of equipment shall be determined using the following considerations. . . . (iii) Electrical insulation.

There were three instances where the insulating jackets were missing from power cords at Quality's plant (Exh. C-109; Tr. 746). The violation is established. No penalty is assessed.

Item 5: § 1910.303(f)

Section 1910.303(f) provides:

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.

The Secretary alleges that Quality failed to label the circuit breakers in the electrical circuit breaker panel next to press #1. Quality admits all aspects of this allegation (Complaint ¶ XLVI; Answer ¶ XLVI).

Item 6: § 1910.305(g)(1)(ii)

Section 1910.305(g)(1)(ii) provides:

If used as permitted in paragraphs (g)(1)(i)(c), (g)(1)(i)(f), or (g)(1)(i)(h) of this section, the flexible cord shall be equipped with an attachment plug and shall be energized from an approved receptacle outlet.

The Secretary alleges two instances where electrical cords were (a) wrapped around ceiling trusses and (b) draped around ceiling trusses. Quality admitted violating this standard (Complaint ¶ XLVII; Answer ¶ XLVII).

The violation is established. No penalty is assessed.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

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

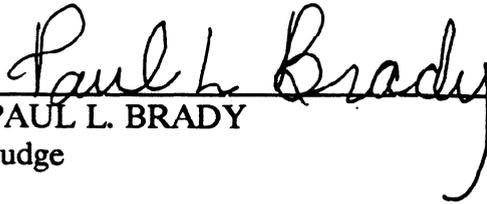
ORDER

Based upon the foregoing decision, it is hereby ordered that the cited items be disposed of as follows:

<u>Citation</u>	<u>Item</u>	<u>Standard</u>	<u>Disposition</u>	<u>Penalty</u>
1	1	1910.23(d)(1)(iii)	Affirmed	\$400
	2	1910.30(a)(4)	Affirmed	400
	3	1910.37(q)(1)	Affirmed	400
	4	1910.147(c)(4)	Affirmed	500
	5	1910.147(c)(7)	Affirmed	700
	6	1910.147(d)(4)	Affirmed	600
	7	1910.157(g)	Affirmed	900
	8	1910.176(c)	Affirmed	500
	9	1910.178(p)(1)	Affirmed	600
	10	1910.212(a)(1)	Vacated	-0-
	11	1910.212(a)(3)(ii)	Affirmed	350
	12	1910.212(a)(5)	Affirmed	700
	13	1910.215(b)(9)	Affirmed	600
	14	1910.215(d)(1)	Affirmed	500
	15	1910.217(d)(6)(i)	Affirmed	700
	16	1910.219(b)(1)	Affirmed	700
	17	1910.219(d)(1)	Affirmed	500
	18	1910.242(b)	Affirmed	600
	19	1910.253(b)(2)(ii)	Affirmed	400
	20	1910.303(b)(2)	Affirmed	600
	21	1910.303(c)	Affirmed	500
	22	1910.303(g)(1)(ii)	Affirmed	600
	23	1910.303(g)(2)(i)	Affirmed	700
	24	1910.304(a)(2)	Affirmed	800
	25	1910.304(f)(4)	Affirmed	900
	26	1910.305(b)(2)	Affirmed	900
	27	1910.305(g)(1)(ii)	Affirmed	800
	28	1910.305(j)(1)(ii)	Affirmed	900
	29	1910.1200(f)(5)	Affirmed	600

<u>Citation</u>	<u>Item</u>	<u>Standard</u>	<u>Disposition</u>	<u>Penalty</u>
2	1	1910.212(a)(1)	Affirmed as Other	500
	2	1910.212(a)(4)	Vacated	-0-
	3	1910.217(b)(8)(i)	Affirmed as Other	500
	4	1910.217(c)(1)(i)	Vacated	-0-
	5	1910.217(c)(3)(iv)(d)	Affirmed	1,000
	6	1910.217(e)(1)(ii)	Affirmed	1,000
	7	1910.217(g)	Affirmed	1,000
	8	1910.1200(h)	Affirmed	8,000

<u>Citation</u>	<u>Item</u>	<u>Standard</u>	<u>Disposition</u>	<u>Penalty</u>
3	1	1903.2(a)(1)	Affirmed	100
	2	1904.4	Affirmed	400
	3	1910.22(d)(1)	Affirmed	-0-
	4	1910.303(b)(1)(iii)	Affirmed	-0-
	5	1910.303(f)	Affirmed	-0-
	6	1910.305(g)(1)(ii)	Affirmed	-0-



 PAUL L. BRADY
 Judge

Date: October 15, 1992